

# **The Scope of Collective Bargaining in Public Administration**

Miguel F. Canessa-Montejo

**International Labour Office**  
**Geneva**

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## Preface

Social dialogue, including collective bargaining, is one of the core enabling principles of the ILO's decent work agenda. It should form part and parcel of the regulation of labour relations in the public sector. Dialogue and bargaining can and should be key contributors to public sector efficiency, performance and equity. However, because competing interests can be involved, neither dialogue nor collective bargaining is conflict-free. If governments and public sector unions are to be encouraged to bring these dynamics into public sector work, where industrial peace carries a special premium in the public mind, then considerations of conflict management must be uppermost. This is more relevant than ever in times of fiscal consolidation and austerity measures.

The *Manual on Collective Bargaining and Dispute Resolution in the Public Service* (2011), published by the ILO's Sectoral Policies Department (SECTOR), sought to offer a compilation of good practices in dispute prevention and dispute resolution in public services. The Manual has been received warmly among ILO constituents and beyond, and it has been translated into 13 language versions so far.

The Global Dialogue Forum on Challenges to Collective Bargaining in the Public Service, held in Geneva on 2-4 April 2014, concluded with a recommendation that the Office carry out research on the scope of topics which may be subject to collective bargaining in the public service, with a view to fostering further dialogue by constituents. As first steps towards meeting these recommendations the Sectoral Policies Department published in 2015 a supplement to the Manual based on collective agreements and a Working Paper on social dialogue practices in the public service in Europe.

Building upon this foundation and marking the ILO's Centenary, the Sectoral Policies Department is pleased to present a comparative analysis of practices in collective bargaining in the public service, written by Professor Miguel Canessa of the Pontifical Catholic University of Perú. This analysis shows how the principles of Convention No. 151 have been implemented through legislation and/or collective bargaining. I hope that these pages will contribute to a constructive engagement of worker organizations and government employers in this regard.

Alette van Leur  
Director, Sectoral Policies Department



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## Introduction

The rejection of the statutory model and its labourisation is one of the most important social phenomena taking place in the public sector. The bilateral relationship of the State with its workers is replacing the previously prevalent unilateral relationship. The recognition of the right to collective bargaining in public administration is one of the pillars in this new labour democracy.<sup>1</sup>

The general objective of this study is to analyze the global changes and challenges of collective bargaining in public administration, within the framework of the enforcement of the international labour standards and in the context of transformations in the world of public work.

To attain such general objective, this study focusses on the relevant international labour standards, the statements of the ILO supervisory bodies (hereinafter, the ILO) –the Committee of Experts (hereinafter, the Committee) and the Committee of Freedom of Association (hereinafter, the CFA) – and the documents prepared by the International Labour Office on this matter. Likewise, it also includes a review of the latest legal, regulatory, judicial and administrative changes in the countries selected for the study, as well as collective agreements that illustrate the existing global trend on collective bargaining in public administration. The countries were selected based on relevant changes that took place in their industrial relations systems in the public sector, where collective bargaining plays a key role within the process.

This report contains five sections. First, it defines the scope of international labour standards, emphasizing the existing relationship of complementarity among them. Second, it indicates the matters subject to collective bargaining in public administration within the framework of the international labour standards. Third, based on the selection of the countries under study, it highlights the regulatory changes that contribute to collective bargaining in public administration. Fourth, it discusses the latest collective agreements that set trends in this matter. Finally, and fifth, it presents the conclusions of the study, emphasizing the future challenges of collective bargaining in public administration.

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<sup>1</sup> The sustained increase of ratification of the Labour Relations (Public Service) Convention No. 151 (1978) by ILO Member States is an example of this transformation. One-third of ratifications of the international labour standard takes place in this century.

# **1. The scope of application of international labour standards on collective bargaining in public administration**

We will divide this discussion in two sections. First, we will describe the scope of collective bargaining rights in public administration in accordance with the international labour standards. Second, we identify the bargaining rights of public workers based on the comments made by the ILO supervisory bodies.

## **1.1. The scope of the right to collective bargaining in public administration**

The effective recognition of the right to collective bargaining in public administration by the ILO is based on its own Constitution and the Declaration of Philadelphia, as highlighted by the 1998 ILO Declaration on Fundamental Principles and Rights at Work (hereinafter, the 1998 Declaration).

In fact, the Preamble of the ILO Constitution – Part XIII of the Treaty of Versailles (1919) – recognizes the principle of freedom of association, and the Declaration of Philadelphia (1944) establishes the solemn obligation of the international organization to further the effective recognition of the right to collective bargaining among member States. Likewise, supervisory bodies have repeatedly expressed that the collective bargaining right is part of the principle of freedom of association.<sup>2</sup>

This explains why the 1998 Declaration recalls, “that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances.” Furthermore, the 1998 Declaration declares: “that all Members, even if they have not ratified the Conventions in question<sup>3</sup>, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”

ILO member States have, therefore, the obligation to respect, promote and realize the principle of freedom of association – which includes the right to collective bargaining – within national regulations, even if they have not ratified the two fundamental conventions on this matter: Convention No. 87 concerning the freedom of association and protection of

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<sup>2</sup> ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Organization. Sixth (revised) edition, 2018, paragraph 1232.

<sup>3</sup> The 1998 Declaration refers to the eight ILO fundamental conventions.

the right to organise and Convention No. 98 concerning the right to organise and collective bargaining.<sup>4</sup>

The International labour standards regarding the right to collective bargaining define the content and scope of the principle of freedom of association in this matter.

The right to collective bargaining was first explicitly formulated as such in an international labour standard in Article 3 of Convention No. 4 concerning the right of association (non-metropolitan territories)<sup>5</sup> when pointing out that: “All practicable measures shall be taken to assure to trade unions which are representative of the workers concerned *the right to conclude collective agreements* with employers or employers' organisations (my emphasis).”

Later, the Convention on the right to organise and collective bargaining, 1949 (No. 98) established in its Article 4: “Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the *full development and utilisation of machinery for voluntary negotiation* between employers or employers' organisations and workers' organisations, *with a view to the regulation of terms and conditions of employment by means of collective agreements* (my emphasis).”

The same Convention establishes, in its Article 6, a framework for its application within public administration in the following terms: “This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way.”

As a general rule, Convention No. 98 does not apply to public servants engaged in the administration of the State. Therefore, the Convention does not bar national regulations that recognize their right to collective bargaining.

Likewise, the Convention only refers to public servants and, therefore, the exclusion of Convention No. 98 is not taken to refer to all public employees. This interpretation is based on the preparatory work done for drafting the international standard, thus:

The exclusion solely of public servants engaged in the administration of the State from the application of the regulation should imply that, by contrast, all workers, including laborers and employees engaged in the administration of the state that do not enjoy the status of public servants, should benefit from the international regulation.<sup>6</sup>

Based on this interpretation of Article 6 of Convention No. 98, the Committee of Experts notes that:

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<sup>4</sup> Currently, Convention No. 87 has been ratified by 155 member States, and Convention No. 98 by 167 member States, out of 187 current Member States.

<sup>5</sup> Convention No. 84 has been ratified by nine member States.

<sup>6</sup> ILO. *Application of the Principles of the Right to Organise and to Bargain Collectively. Report IV (2)*. Geneva: International Labour Office, 1949, p. 31.

In contrast with Convention No. 87, Convention No. 98 excludes from its scope certain categories of public servants. However, this restriction leaves intact the rights guaranteed to public servants by Convention No. 87. Under the terms of Article 6, Convention No. 98 does not deal with the position of public servants, nor shall it be construed as prejudicing their rights or status in any way. Nevertheless, observing the diversity of interpretations of the concept of “public servant” at the national level, the Committee decided to adopt a restrictive approach, basing itself in particular on the English text of this provision, which uses the terms “public servants engaged in the administration of the State” (in French, *fonctionnaires publics*, and in Spanish *los funcionarios públicos empleados en la administración del Estado*). Accordingly, the Committee considers that only public servants engaged in the administration of the State may be excluded from the scope of the Convention and that the determination of this category of workers is to be made on a case-by-case basis, in light of criteria relating to the prerogatives of the public authorities (and particularly the authority to impose and enforce rules and obligations, and to penalize non-compliance). Consequently, the establishment of simple consultation procedures for public servants who are not engaged in the administration of the State, instead of real collective bargaining procedures, is not sufficient.

In other words, a distinction must therefore be drawn between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants in government ministries and other comparable bodies, and ancillary staff), who may be excluded from the scope of the Convention and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention. This second category of public employees includes, for instance, employees in public enterprises, municipal employees and those in decentralized entities, public sector teachers, as well as air transport personnel, whether or not they are considered in national law as belonging to the category of public servants. Other examples can be found in paragraphs 894 et seq. of the Digest of decisions and principles of the Freedom of Association Committee, (fifth (revised) edition), 2006. The Committee could not accept large categories of workers employed by the State being excluded from the benefits of the Convention merely on the grounds that they are formally placed on the same footing as certain public officials engaged in the administration of the State. Furthermore, the mere fact that public servants are in the category of so-called “white-collar” employees is not in itself conclusive of their qualification as employees “engaged in the administration of the State”; if this were the case, the Convention would be deprived of much of its scope<sup>7</sup>

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<sup>7</sup> ILO. *Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008. Geneva: ILO, 2012, paragraphs 171-172. Also, see ILO, *Freedom of Association and Collective Bargaining. General survey on the application of the conventions on freedom of association, the right to organise and collective bargaining and*

The supervisory body recognizes that the national laws define public servants in diverse manners and due to this gap, the Committee is compelled to restrict the definition of public servant so as not to arbitrarily exclude public employees. According to the criterion set out, public servants are engaged in activities pertaining to the administration of the State. Thus, the exclusion of public servants' auxiliary staff, employees in public undertakings, employees in independent institutions, etc. contravenes the Convention.

Conversely, Article 5 of Convention No. 98, paragraph 1, confers national laws the power to define the extent to which the guarantees provided for shall apply to the armed forces and the police. This regulation is in line with Article 9, paragraph 1 of Convention No. 87 concerning freedom of association and protection of the right to organize, which also confers national laws the power to define whether guarantees provided for in the international standard shall apply to them.

Whereas most of ILO members exclude the armed forces and the police from the right to collective bargaining, there is a trend among countries to recognize this right, mainly to the police<sup>8</sup>. Exceptions for other categories of employees are, however, unfounded. As indicated by the Committee, such exceptions shall be construed narrowly.<sup>9</sup>

In conclusion, Convention 98 excludes from its application public servants engaged in the administration of the State, granting national laws the power to establish the regulatory treatment for the armed forces and the police. This exclusion shall be interpreted restrictively and, therefore, the other public employees enjoy the right to collective bargaining within the framework of Convention No. 98.

To face the challenges to the exercise of freedom of association in public administration, the ILO adopted the Labour Relations (Public Service) Convention, 1978 (No. 151), in order to bridge the gap in Convention No. 98 regarding this sector. In its Preamble, it states:

Taking into account the particular problems arising as to the scope of, and definitions for the purpose of, any international instrument, owing to the differences in many countries between private and public employment, as well as the difficulties of interpretation which have arisen in respect of the application of relevant provisions of the Right to Organise and Collective Bargaining Convention, 1949, to public servants, and the observations of the supervisory bodies of the ILO on a number of

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*the convention and recommendation concerning rural workers' organisations*. Geneva: International Labour Office, 1983, paragraph 255.

<sup>8</sup> For instance, Estonia recognizes that the members of both the armed forces and the police have the right to collective bargaining. Conversely, Australia only recognizes the right to the police and excludes the members of the armed forces. Cf. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 252.

<sup>9</sup> Cf. ILO. *Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008. Geneva: ILO, 2012, paragraph 67.

occasions that some governments have applied these provisions in a manner which excludes large groups of public employees from coverage by that Convention.

Thus, Convention No. 151 addresses the definition of public employees in its regulation. Article one, paragraph 2, indicates that: “The extent to which the guarantees provided for in this Convention shall apply to high-level employees whose functions are normally considered as policy-making or managerial, or to employees whose duties are of a highly confidential nature, shall be determined by national laws or regulations.” According to its Articles 1 and 2, public employees include all persons employed by public authorities.

A joint reading of the references to public employee and public servant in Conventions No. 98 and 151 indicates that the former Convention refer to all persons engaged in the State, and the latter refers only to those who play a special role in the administration of the State. In other words, public employee is the general term and public servant is a type of public employee. Within the latter, only high-level public servants can be excluded from this right, while it is recognized for others. To support this interpretation, we refer to the above-mentioned Article 1, paragraph 2 of Convention No. 151, when it points out that a public employee whose duties are of a highly confidential nature is considered a high-level employee.

Thus, under Convention No. 151, national law can exclude only high-level public servants from the right to join unions. Convention No. 151 identifies three types of high-level public servants that may be excluded from its application:

- a) Public servants with policy-making duties;
- b) Public servants with managerial duties;
- c) Public servants whose duties are of a highly confidential nature.

We should add in this list the above-mentioned members of the armed forces and the police, as established in Convention No. 98 and reiterated in Article 1 paragraph 3 of Convention No. 151.

We should bear in mind that Convention No. 151 does not modify the right to collective bargaining of public employees established by Convention No. 98. It expressly establishes in Article 1, paragraph 1 that: “This Convention applies to all persons employed by public authorities, *to the extent that more favourable provisions in other international labour Conventions are not applicable to them* (my emphasis).” For that reason, Convention No. 98 prevails over Convention No. 151 when it affords stronger guarantees to workers.

In conclusion, public employees that do not exercise authority in the name of the State enjoy the right to join unions by means of Convention No. 98, while those who do exercise such authority may enjoy this right under Convention No. 151, except for high-level public servants that may be excluded from the right by the national law.

Later, the ILO adopted the Convention concerning collective bargaining, 1981 (No. 154) which applies to all branches of economic activity, including public administration. However, it granted governments the power to establish, by national laws or regulations or national practice, special modalities for the application of this Convention for this sector and to define to what extent guarantees provided for in this Convention apply to the armed forces and the police (Article 1).

The power to establish modalities for the application of Convention No. 154 in public administration is in line with the exception established in Convention No. 151 concerning the exclusion of high-level public servants from the right to collective bargaining. As pointed out by the Committee:

[A]s Convention No. 151 applies specifically to public employees, the exclusion of these categories from the right to collective bargaining does not constitute a violation of Convention No. 154, which is general in scope and explicitly recognizes, in Article 1(3), that special modalities for its application may be fixed by national laws or regulations or national practice with regard to the public service.<sup>10</sup>

In short, according to the international labour standards, public employees enjoy the right to collective bargaining, with the exception of high-level public servants – as stipulated by Convention No. 151 – and the members of the armed forces and the police, who could be validly excluded by national laws or regulations.

## **1.2. Collective bargaining as a right of public employees**

The ILO supervisory bodies permanently take a stand on the proper application of the international labour standards to prevent the undue exclusion of public employees. An open list of cases can be prepared based on these statements.

### **1.2.1. Elected or appointed public authorities in political positions**

The legal situation of elected or appointed members of public authorities within the framework of the international standard was discussed during the preparatory works for the adoption of Convention No. 151, both in the Committee on the Public Service and in the debate of the ILO's Conference.

The drafters concluded that members of parliament, the judiciary and other elected or appointed members of public authorities fall within the category of high-level public servants

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<sup>10</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 246.

and, may, therefore be validly excluded from the right to collective bargaining, although the judiciary enjoys the right to organize, as established in Convention No. 87.<sup>11</sup>

This exclusion is based on the statement made above concerning the three types of public servants established by Convention No. 151, i.e. high-level employees with managerial duties. According to this criterion, ministers, junior ministers, directors-general and other trusted staff could also be included in this list,<sup>12</sup> as well as elected regional, provincial and local authorities.

### **1.2.2. Workers in public education**

Workers of the British public education filed a complaint before the Committee on Freedom of Association because their Government submitted a Bill to the Parliament to restrict the collective bargaining of this group. According to the government's argument, such exclusion was allowed by the regulation of Convention No. 151.

The CFA considered that restricting the right to collective bargaining of workers in public education was opposed to Convention No. 98, although ratified in Convention No. 151:

The Committee, for its part, considers that Article 1, paragraph 1, of Convention No. 151 implies that the rights guaranteed in Convention No. 98 cannot be denied or restricted merely by referring to Convention No. 151. In the case of a country such as the United Kingdom, which has ratified both Conventions, and a branch of activity such as that of public education, where both Conventions are applicable, it therefore has to determine whether Article 4 of Convention No. 98 offers more favourable provisions to workers than Article 7 of Convention No. 151. It offers more favourable provisions since it includes the concept of voluntary negotiation and the independence of the negotiating parties; it should therefore be applicable in preference to Article 7, which calls upon the public authorities to promote collective bargaining either by means of procedures that make such bargaining possible, or by such other methods as will allow public servants to participate in the determination of their terms and conditions of employment.<sup>13</sup>

In other words, when Article 4 of Convention No. 98 and Article 7 of Convention No. 151 may be applied, the one more favorable to workers will prevail. This statement of the CFA does not only apply to workers in public education, but also to other public employees. As mentioned above, public employees that benefit from Convention No. 98 enjoy the right to collective bargaining without prejudice of their right by ratification of Convention No. 151.

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<sup>11</sup> ILO. *Record of Proceedings, 63rd Session*. Geneva: International Labour Office, 1977, p. 660. ILO. *Report of the Committee on the Public Service*. Geneva: International Labour Office, 1977, paragraph 37.

<sup>12</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 66.

<sup>13</sup> Committee on Freedom of Association. *Report 256°, Case No. 1391, June 1988*. Geneva: International Labour Office, 1988, paragraph 85.



In the specific case of teachers in public education, the Committee of Experts repeatedly expresses that they enjoy the right to collective bargaining and that their exclusion contravenes Convention No. 98. For instance, in their Observations on Ethiopia, the Committee explicitly points out:

Noting that the reform has not been achieved yet, the Committee firmly expects that the Government will increase its efforts and take the necessary steps *to ensure that the right to bargain collectively is granted to public servants not engaged in the administration of the State – including teachers in public schools* (my emphasis).<sup>14</sup>

According to the ILO supervisory bodies, there is no controversy concerning the right to collective bargaining of workers in public education, regardless of the ratification of Convention No. 98 or No. 151, or both.

### **1.2.3. Public health workers**

The right of public health workers to bargain collectively was discussed in *Case 1882* before the Committee on Freedom of Association when the Danish Nurses' Organization filed a complaint against their Government for the Law concerning the extension of existing collective agreements without any prior consultation with the trade union organizations.

In addition, the CFA indicated that any restriction on the right to collective bargaining should be accompanied by guarantees to protect the adequate level of affected workers and that workers in public hospitals are different from high-level public servants:

[T]hat Article 6 of Convention No. 98 permits the exclusion from this basic right of “public servants engaged in the administration of the State”, a term which the Committee has looked at in the light of the distinction to be drawn between civil servants employed in various capacities in government ministries or comparable bodies and other persons employed by the government, *by public undertakings – such as public hospitals in this case* – or by independent public organizations (my emphasis).<sup>15</sup>

The argument is similar to the case of teachers: public health workers cannot be considered public servants in the administration of the State, as stated by the exclusion of Article 6 of Convention No. 98 and specified by Article 1 paragraph 2 of Convention No. 151. In other words, public health workers enjoy the right of collective bargaining.

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<sup>14</sup> ILO. *Application of International Labour Standards, 2017 (1). Report of the Committee of Experts on the Application of Conventions and Recommendations*. Geneva: ILO, 2017, p. 124.

<sup>15</sup> Committee on Freedom of Association. *Report 304°, Case No. 1882, March 1997*. Geneva: International Labour Office, 1988, paragraph 433.

#### **1.2.4. Municipal employees**

The right of municipal employees to bargain collectively is presented in one Observation of the Committee of Experts to Panama. The communication sent by the Panamanian Government in the reporting system indicated that according to their regulations, municipal employees do not enjoy the right of collective bargaining because public servants' organizations were not considered trade unions, and therefore the right was not extended to them.

The Committee recalled the Government that it could exclude only persons engaged in the administration of the State, the police and the armed forces from these rights and guarantees, including the right of collective bargaining, and, therefore, all other officials and public employees should enjoy the right to bargain collectively. Thus, the Committee requested the Government to modify the law in accordance with the Convention.<sup>16</sup>

#### **1.2.5. Employees in public undertakings and independent public institutions**

The Committee on Freedom of Association has repeatedly addressed trade union complaints where the right of collective bargaining has been denied to state workers engaged in public undertakings or independent public institutions because they were considered public servants. This section presents some paradigmatic statements that represent the arguments presented by the supervisory bodies to reject the denial of the right of collective bargaining for this group of public employees.

A union filed a complaint against Colombia for denying workers engaged in the state-owned Colombian National Radio Television Institute the right to bargain collectively. According to the CFA, the staff could not be deprived of this right because their roles did not correspond to those of public servants, as established by Convention No. 98.<sup>17</sup>

A similar situation took place with Jordanian post and telecommunication employees, where the Committee on Freedom of Association recalled that the duty of promoting collective bargaining encompasses all State workers who do not act as agents in the public authority,<sup>18</sup> and, therefore, these workers are entitled to enjoy this right.

The Colombian railway workers' union submitted another complaint stating that the management of the state-owned company had re-qualified official workers as public employees, with prejudice of their job security and benefits enshrined in collective agreements. The Committee on Freedom of Association announced that they are not

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<sup>16</sup> ILO. *Application of International Labour Standards, 2011 (1). Report of the Committee of Experts on the Application of Conventions and Recommendations*. Geneva: ILO, 2011, p. 149.

<sup>17</sup> Committee on Freedom of Association. *Report 143°, Case No 764, year 1974*. Geneva: International Labour Office, 1988, paragraph 87.

<sup>18</sup> Committee on Freedom of Association. *Report 139°, Case No 725, year 1974*. Geneva: International Labour Office, 1988, paragraph 278.

authorized to determine whether the requalification was lawful or unlawful, but “they would like to emphasize that within the framework of Conventions No. 87 and 98, the legal status of “public employees” is not satisfactory, since workers in state-owned commercial or industrial enterprises should have the right to negotiate collective agreements”.<sup>19</sup>

In another similar case, workers in the public sector in Hong Kong (Special Administrative Region of China) filed a complaint against the unilateral reduction of their wages and the denial of access to bargaining with public service unions. Once again, the CFA reiterated in their statement on the right of state workers to bargain collectively:

With regard to public servants in particular, the Committee recalls that a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the Government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98. Consequently, all public service workers other than those engaged in the administration of the State should enjoy collective bargaining rights, and priority should be given to collective bargaining as the means to settle disputes arising in connection with the determination of terms and conditions of employment in the public service [...]. Legislation should therefore contain specific provisions clearly and explicitly recognizing the right of organizations of public employees and officials who are not acting in the capacity of agents of the state administration to conclude collective agreements.<sup>20</sup>

We must highlight two key aspects. First, the CFA establishes a distinction between public servants engaged in activities belonging to the administration of the State and public servants performing supporting tasks. Only the former group can be excluded from the right of collective bargaining under certain circumstances. The exclusion should be construed in a narrow sense and may be justified only because the high-level public servant performs decision-making duties or duties of a highly confidential nature. Second, public employees engaged in public or state-owned enterprises and autonomous public institutions cannot be considered high-level public servants.

Employees in public administration, with either permanent or temporary contract, or those working under civil or administrative contracts for the provision of services or under

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<sup>19</sup> Committee on Freedom of Association. *Report 259°, Case No 1429, November 1998*. Geneva: International Labour Office, 1988, paragraph 677.

<sup>20</sup> Committee on Freedom of Association. *Report 338°, Case No 2253, November 2005*. Geneva: International Labour Office, 1988, paragraph 84.

outsourcing or part-time contracts should also be taken into account. Workers in all these cases enjoy union rights.<sup>21</sup>

#### **1.2.6. Prison service staff**

The Botswana Public Service Act excluded the prison service from union rights, because it considers it a security service, equivalent to the police. In its Observation of 2013, the Committee reminds the Government that “under Article 1 of Convention No. 151, only the police, the armed forces and high-level employees whose functions are normally considered as policy-making or managerial, and employees whose duties are of a highly confidential nature may be excluded from the scope of application of the Convention”.<sup>22</sup> Therefore, the Committee request the amendment of the Law to ensure that the prison service enjoys the rights enshrined in the Convention. In other words, the Law wrongfully equated the prison service staff with the police.

With this statement, the Commission of Experts applies the restrictive interpretation of the exclusion from the right to join unions. In conclusion, prison workers have the right to engage in union activities.

#### **1.2.7. Civilian personnel in the armed forces and the police**

The argument to grant the national legislation the power to exclude the members of the armed forces and the police from the right of collective bargaining in Convention No. 151 comes from their role as law enforcement forces. This argument, however, should not be extended to the civilian personnel in the armed forces and the police, as they do not play such role. As indicated by the Committee of Experts, Convention No. 151<sup>23</sup> applies to this civilian staff and, therefore, they are covered by the ILO standards.

The case of aviation technicians providing services under the jurisdiction of the armed forces is another example. As indicated by the CFA, they cannot be considered as belonging to the armed forces due to the nature of their functions.<sup>24</sup>

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<sup>21</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 585.

<sup>22</sup> ILO. *Application of International Labour Standards, 2013 (1). Report of the Committee of Experts on the Application of Conventions and Recommendations*. Geneva: ILO, 2013, p. 71.

<sup>23</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 70.

<sup>24</sup> ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO.*, Sixth (revised) edition, 2006. Geneva: ILO, paragraph 1272.

### **1.2.8. The competence of the ILO supervisory bodies**

These comments made by the ILO supervisory bodies illustrate specific cases of public employees that should not be excluded from union rights. The restrictive interpretation is emphasized because it is an exclusion from a fundamental right and comments are, therefore, accurate in this regard.

Likewise, as highlighted by the ILO supervisory bodies, this should be assessed on a case-by-case basis; which means that these are neither the only examples nor a closed list, and the supervisory bodies should assess every case in line with the criteria embodied in the international labour standards:

The Committee of Experts and the Committee on Freedom of Association must determine on a case-by-case basis whether too broad a use has been made of the notion of confidentiality or the classification of duties as being of a managerial nature or as relating to the decision-making. In order to do this, the supervisory bodies base themselves on criteria such as the authority that the public employees in question have to impose penalties, and the extent to which their job duties and responsibilities include a capacity to issue standards and administrative decisions, to represent the State, to oversee public accounts (for example, auditors or sometimes public accountants), etc. These criteria are therefore based on the nature of the activity, as well as on the position in the hierarchy of the public employees concerned who, according to the Committee, must have a high degree of autonomy.<sup>25</sup>

These interpretative criteria, based on the distinction between high-level public servants and the rest of the public servants and employees, may determine the exercise of the right of collective bargaining in public administration.

## **2. The subjects of collective bargaining in public administration**

Three aspects arise from the analysis of the matters subject to collective bargaining in public administration, taking into consideration their specific characteristics and the framework of the international labour standards. First, the procedure between the competent public authorities and public employees' organizations to establish labour conditions. Second, the subjects that the parties may address in such procedure. Third, the budgetary restriction that determines the result of such procedure. This section addresses these three aspects.

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<sup>25</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 65.

## 2.1. The collective bargaining and consultation procedure in public administration

According to the international labour standards, collective bargaining is the prevailing procedure, but other methods are also acceptable in the case of public administration as long as they allow public employees' organizations to participate in determining working conditions.

As stated by the aforementioned Article 4 of Convention No. 98, seeks to encourage and promote the full development and utilization of machinery for voluntary negotiation, with a view to regulating terms and conditions of employment. Likewise, Article 6 establishes that these procedures may exclude public servants engaged in the administration of the State. As the previous section concludes, based on the comments made by the supervisory bodies, ILO member states that ratify Convention No. 98 may only exclude public servants engaged in the administration of the State, without disregarding that public employees should enjoy the right to use machinery for voluntary bargaining.

Then, Convention No. 151 introduces in its Article 7, together with collective bargaining, other methods to define the terms and conditions of employment of public servants engaged in the administration of the State: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, *or of such other methods as will allow representatives of public employees to participate in the determination of these matters* (my emphasis.)"

In their analysis of Article 7 of Convention No. 151, the Committee of Experts maintains in this respect that:

This formulation mainly builds on the principle of Article 4 of Convention No. 98, with the addition of public servants being granted permission to use methods other than collective bargaining. In this way, the International Labour Conference enabled the rights recognized by Convention No. 98 to be extended to public employees by officially giving them the right to participate in determining their working conditions, with collective bargaining being specifically mentioned as one of the possible modalities.<sup>26</sup>

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<sup>26</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 47.

In other words, Convention No. 151 allows determining the terms and conditions of employment for public servants engaged in the administration of the State by means of methods other than collective bargaining.

The Labour Relations (Public Service) Recommendation No. 159 (1978) in its paragraph 2, section 2, indicates that: “Where methods other than negotiation are followed to allow representatives of public employees to participate in the determination of terms and conditions of employment, the procedure for such participation and for final determination of these matters *should be determined* by national laws or regulations or other appropriate means (my emphasis).” Under this Convention, the national law or practice should explicitly address such methods to prevent any doubt related to its application.

The ILO supervisory bodies have played a key role in defining the contents of methods other than direct negotiation to define the terms and conditions of employment of public servants.

First, they have explained that these methods other than bargaining are consultation procedures. As stated by the Committee of Experts: “With regard to the use of *methods other than collective bargaining* to determine the terms and conditions of employment of public employees, these consist primarily of consultation procedures exclusively between the parties and of consultation machinery involving the intervention of bodies to reconcile points of view or make recommendations to decision-making bodies, with the assistance of experts or independent persons.”<sup>27</sup>

These consultation procedures may be established through direct meetings between the parties, or within a more institutionalized consultation system composed of permanent bipartite or tripartite bodies, or organizations made of independent people. Each State should adopt the most appropriate consultation model.<sup>28</sup>

Second, the content of consultation procedures should cover the different topics related to the terms and conditions of employment of public servants, and it should allow extending its coverage to issues of common concern for the parties. Thus, according to the Committee of Experts:

In this regard, the Committee considers that it should be possible for consultations to be held on any administrative or legislative measure concerning the terms and conditions of employment of public employees. This means in particular that relevant draft legislation should be subject to consultations. However, the Committee wishes to observe that it is in the mutual interest of both the authorities and public employees’ organizations not to limit consultation to terms and conditions of employment and to extend the subjects covered by consultation to include issues of mutual interest, including the establishment of personnel policies in the public

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<sup>27</sup> Idem. paragraph 162.

<sup>28</sup> There is a series of examples presented by the Committee of Experts. Vid. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraphs 177-219.

administration and managerial and human resource problems that may arise following a new form of organization of work or restructuring.<sup>29</sup>

Third, the public servants' representation in consultation procedures is broader than in collective bargaining. This comes from the formulation of Article 7 of Convention No. 151. While the text points to public employees' organizations for cases of collective bargaining, it points to public employees' representatives for methods other than collective bargaining. As stated by the Committee:

Under the terms of Article 7, it is public employees' organizations, that is organizations the purpose of which is to promote and defend the interests of public employees, that intervene in negotiations, while in cases in which other methods are used, the term is broader, as it is representatives of public employees who participate in the determination of terms and conditions of employment. In other words, bargaining has to be conducted by the representatives of public employees' organizations, while consultations may be held either with such organizations, or with elected representatives.<sup>30</sup>

Fourth, the Committee on Freedom of Association has outlined some general principles that shall guide the consultation procedure. It should take place "in good faith, confidence and mutual respect, allowing the parties to express their views and discuss them in order to reach acceptable solutions for all the parties." This should be done without discrimination of any kind against the organizations' representatives and relevant information on the matter subject to consultation should be made available. It is important that public authorities seek the views of workers' organizations for the preparation and implementation of laws and regulations affecting their interests. To this end, the CFA highlights that the consultation "should take place before the Government submits a draft to the Parliament or establishes a labour, social or economic policy."<sup>31</sup>

Fifth, the consultation procedure does not confer veto rights to public servants' representatives because public authorities always retain the responsibility for decision-making.<sup>32</sup>

It is important to remember that consultation procedures are valid in the countries where the right to collective bargaining has been recognized for public servants. Replacing the right of collective bargaining with consultation is, however, invalid when the former right is recognized. A good example is found in the rationale of the ruling issued by the Peruvian

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<sup>29</sup> Idem, paragraphs 222-223.

<sup>30</sup> Idem, paragraph 220.

<sup>31</sup> Vid. ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Office, Fifth (revised) edition, 2006, paragraphs 1065-1071.

<sup>32</sup> Cf. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 170.



Constitutional Court when it gave preference to collective bargaining, and not to consultation procedures, based on the state's duty to promote it:

According to this Constitutional Court, collective bargaining is the adequate and preferred mechanism to discuss the working conditions and terms of employment in the context of a labour relation. Therefore, the preference of the provision that obliges the promotion of collective bargaining in the public sector against the provision that allows using a method other than collective bargaining, does not only guarantee in the most effective and extensive possible manner the right of collective bargaining in the public administration, but it also allows to adequately comply with the mandate contained in Article 28 of the Constitution that expressly establishes the State's duty to promote it.<sup>33</sup>

Under Article 1 of Convention No. 154, the Convention applies in public administration with no exceptions in its regulation. Its Article 5, paragraph 1, requires that States adopt measures according to national conditions to promote collective bargaining.

The promotion of the right of collective bargaining in all the branches of the economic activity by Convention No. 154 modifies the legal situation for ILO members implementing the consultation procedure under Convention No. 151. The application of both Conventions makes consultations insufficient to comply with the mandate of Convention No. 154. In other words, Convention No. 154 requires the ratifying State to replace the consultation procedure with collective bargaining in the case of public servants engaged in the administration of the State.

As stated by the Committee of Experts:

Although recognition of the right to collective bargaining of public servants significantly improved with the adoption of Convention No. 151, States could still avoid resorting to it by establishing conditions of employment by other means. For this reason, in order to enable the broader recognition of collective bargaining, the Collective Bargaining Convention, 1981 (No. 154), and the Collective Bargaining Recommendation, 1981 (No. 163), are unique in that they cover both the private sector and the public sector (except the armed forces and the police). As regards the public sector, Convention No. 154 only provides that special modalities of application of the Convention may be fixed by national laws or regulations or national practice (Article 1, paragraph 3). Therefore, a member State that has ratified it can no longer limit itself to the consultation method, as was the case with Convention No. 151. It must promote collective bargaining for determining working conditions and terms of employment (Articles 2 and 5, paragraph 1). Thus, with the adoption of Convention No. 154, the international community recognized that

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<sup>33</sup> Constitutional Court of Peru. *Case of the Civil Service Statute*. Decision of 26 April 2016. Files No. 0025-2013-PI/TC, 0003-2014-PI/TC, 008-2014-PI/TC y 0017-2014-PI/TC, Legal basis no. 158.

collective bargaining constitutes the preferred method of regulating working conditions for both the public and private sectors.<sup>34</sup>

The supervisory body highlights that any legislation or national practice instituting specific modalities for the application of Convention No. 154 cannot be construed as preserving the consultation procedures. A member State that has ratified Convention No. 154 recognizes collective bargaining as the only procedure to establish working conditions and terms of employment between public authorities and public employees' organizations.

In conclusion, public employees' organizations establish their terms and conditions of employment with public authorities through collective bargaining. In the case of public servants engaged in the administration of the State, this could be done through collective bargaining or other consultation methods, unless Convention No. 154, which determines collective bargaining, has been ratified by their State as the only procedure.

## **2.2. Subjects of collective bargaining in the framework of the international labour standards**

These three Conventions establish a general framework on the matters subject to collective bargaining. According to Article 4 of Convention No. 98, collective bargaining procedures are aimed at regulating the terms and conditions of employment through collective agreements. Then, Article 7 of Convention No. 151 establishes that competent public authorities and public employees' organizations, or their representatives, may determine the terms and conditions of employment by means of bargaining procedures or any other method (consultation procedures). Later, Article 2 of Convention No. 154 points out that all negotiations aim at establishing the working conditions and terms of employment between employers and their organizations and one or several workers' organizations, or addressing all at once.

The regulation of the terms and conditions of employment established in the first two Conventions is broadened with Convention No. 154 to cover also conditions of work and employment, besides the inter-party and intra-party relations. In principle, the Conventions may be construed as distinguishing between both conditions – employment and work – but they are then integrated. Actually, from the beginning both conditions were understood as regulated by collective agreements. This is evidenced in Recommendation No. 91 concerning collective agreements (1951), adopted two years after Convention No. 98, which defines the expression of collective agreements as “all agreements in writing regarding working conditions and terms of employment (...)”, i.e. both conditions may be agreed through a

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<sup>34</sup> ILO. Op. Cit., 2013, paragraph 50.

collective bargaining. According to this, both conditions are used interchangeably as matters subject to collective bargaining.

The rationale for this interpretation originates in the Report of the 1951 International Labour Conference, where the delegates define working conditions as equal to terms of employment. Convention No. 154 later formulates this: “the parties are entirely free to determine, within the limits of law and public order, the content of their agreements and consequently also to agree to clauses dealing with all conditions of work and of life, including social measures of any kind”.<sup>35</sup>

The ILO supervisory bodies also took this stand, capitalizing on the above-mentioned report:

The determination of matters subject to negotiation and of their scope and content is not a simple matter, because it depends on what is meant by terms and conditions of work and employment and the relations between the parties. During the preparatory work for Convention No. 154, within the Committee on Collective Bargaining, the worker members subamended an amendment which they had submitted concerning the aim of collective bargaining by removing the reference to “conditions of life” and “social measures of all kinds” and replacing it with the words “determining working conditions and terms of employment”. They asked, however, that the Committee confirm the interpretation of the term “working conditions and terms of employment” which had already been given in 1951 (...). The amendment, as subamended, was adopted and the Committee agreed to confirm the above interpretation (...). The concept of working conditions used by the supervisory bodies, which is in keeping with this interpretation, encompasses not only traditional working conditions (working day, overtime, rest, wages, etc.), but also includes other matters (for example, “those that are normally included in the field of terms and conditions of employment”, such as promotion, transfer, dismissal without notice, etc.).<sup>36</sup>

Based on this interpretation, the ILO supervisory bodies have been clarifying the content of the working conditions and terms of employment as a matter subject to collective bargaining, mainly in public administration.

According to the Committee of Experts, the denial of free negotiation of wages and terms and conditions of employment contravenes Article 4 of Convention No. 98:

In the Committee's view, the right to negotiate wages and conditions of employment freely with the employers and their organisations is a fundamental aspect of freedom of association. Trade unions must have the opportunity to exercise this right without being unduly hampered by legal restrictions. The adoption of restrictive measures violates the principle whereby organisations of workers and employers have the right

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<sup>35</sup> ILO: *Industrial Relations, Report V(2), International Labour Conference*. Geneva, International Labour Office, 1951, p. 53-54.

<sup>36</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 314.

to organise their activity and formulate their programme of action; it is also incompatible with the principle that collective bargaining should be promoted. Hence, the exclusion from bargaining of certain matters relating to conditions of employment, the submission of collective agreements for prior approval before they can be applied, or enabling them to be declared void because they run counter to the government's economic policy, are all incompatible with Article 4 of Convention No. 98. The Committee would point out that a system of official approval is acceptable in so far as the approval can only be refused on grounds of form and where the clauses of a collective agreement do not conform to the minimum standards set out in the labour law.<sup>37</sup>

In addition, the Committee of Freedom of Association has stated the following, based on the Fact-Finding and Conciliation Commission on Freedom of Association concerning Japan of 1966:

With regard to allegations concerning the refusal to bargain collectively on certain matters in the public sector, the Committee has recalled the view of the Fact-Finding and Conciliation Commission on Freedom of Association that “there are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation”. It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment and that such matters should not be regarded as falling outside the scope of collective bargaining conducted in an atmosphere of mutual good faith and trust.<sup>38</sup>

With regards to Article 7 of Convention No. 151, the Committee highlights that salaries or economic compensations are included within the terms and conditions of employment. For instance, in its Observation to Peru, where a law prohibited the wage negotiation in the public service: “it notes with **concern** that the legislative provisions referred to above exclude any machinery for participation, including collective bargaining, in the determination of matters relating to wages or with financial implications throughout the public sector, which is in violation of *Article 7* of the Convention which, by referring to negotiation or the participation of public employees’ organizations in the determination of terms and conditions of employment, includes their financial aspects.”<sup>39</sup>

In this regard, the Committee on Freedom of Association has made similar remarks:

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<sup>37</sup> ILO. *Freedom of association and collective bargaining. General survey on the application of the conventions on freedom of association, the right to organise and collective bargaining and the convention and recommendation concerning rural workers’ organisations*. Geneva: International Labour Office, 1983, paragraph 311.

<sup>38</sup> ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Sixth (revised) edition. Geneva: ILO, 2018, paragraph 1300.

<sup>39</sup> ILO. *Application of International Labour Standards 2015 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations*. Geneva: ILO, 2015, p. 136.

Matters which might be subject to collective bargaining include the type of agreement to be offered to employees or the type of industrial instrument to be negotiated in the future, as well as wages, benefits and allowances, working time, annual leave, selection criteria in case of redundancy, the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation etc.; these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non-implementation of the Code and Guidelines.<sup>40</sup>

Working conditions and terms of employment cover a wide range of matters of labour relations: wages, economic compensation, working day, holidays, occupational health and safety, facilities for unions and their representatives, etc.

The special characteristics of the public employment, however, also entail limiting or restricting the matters subject to collective bargaining in public administration. The Fact-Finding and Conciliation Commission became the pillar on the subject:

There are certain matters which clearly appertain primarily or essentially to the management and operation of government business; these can reasonably be regarded as outside the scope of negotiation. It is equally clear that certain other matters are primarily or essentially questions relating to conditions of employment. It must be recognised, however, that there are many questions which affect both management and operation and conditions of employment.<sup>41</sup>

This restriction is based on the function of the State as employer. The negotiation shall not undermine the employer's prerogative in the decision-making process, i.e. the managerial prerogative. Likewise, matters affecting the public order are also restricted, as discriminatory clauses. The ILO supervisory bodies address these restricted matters in the collective bargaining. For example, the Committee states that:

The supervisory bodies have acknowledged certain restrictions on the subjects which may be covered by collective bargaining. They have considered, for example, that the employer's management prerogatives (such as the allocation of tasks and recruitment) could be excluded from negotiable issues. Moreover, certain subjects could be prohibited for reasons of public order, such as discriminatory clauses, trade

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<sup>40</sup> ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Office, Sixth (revised) edition, 2018, paragraph 1291.

<sup>41</sup> ILO. *Freedom of Association in the public sector in Japan. Report of the Fact-Finding and Conciliation Commission on Freedom of Association concerning Persons employed in the Public Sector in Japan*. Geneva: International Labour Office, 1966, paragraph 2229.

union security clauses and clauses contrary to the minimum level of protection envisaged in the legislation.<sup>42</sup>

In conclusion, the working conditions and terms of employment and the clauses on the relations between the parties and within the parties are matters subject to collective bargaining in public administration. Later, we will analyze the clauses of collective agreements addressing these matters.

### **2.3. The budget restriction in collective bargaining in public administration**

The state budget organizes public revenue and expenditure in order to ensure the balance and prevent the deficit. Therefore, the budgetary balance ensures that expenditures are backed by a budget allocation with resources allocated for such purpose; otherwise, they cannot be borne by the State. The budget is usually approved by the parliament of States, but the Government plays the main role in its preparation.

The Government – as the employer – is subject to the budget established to cover public expenditures related to labour costs of the payroll of public employees. Any increase in that expenditure should come with a budget resource. Therefore, regulations usually restrict wage increases or economic compensations depending on the existing budget allocation. In other words, the conclusion of collective agreements in public services is dependent upon budgetary laws. Therefore, collective bargaining in the public services should preferably take place before the budget is prepared, so that it can be incorporated into it.

The ILO supervisory bodies have repeatedly provided insights on the budget restriction and collective bargaining in the public sector and, therefore, we can have an accurate idea of their position in this regard.

Based on the special characteristics of collective bargaining covering public employees and the budget restriction, the Committee of Experts proposes a series of alternatives to ensure that there is harmony between the exercise of the fundamental right and the budget:

While the principle of autonomy of the parties to collective bargaining is valid as regards public servants covered by the Convention, the special characteristics of the public service described above require some flexibility in its application. Thus, in the view of the Committee, legislative provisions which allow Parliament or the competent budgetary authority to set upper and lower limits for wage negotiations or to establish an overall “budgetary package” within which the parties may negotiate

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<sup>42</sup> ILO. *Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008. Geneva: ILO, 2012, paragraph 216.

monetary or standard-setting clauses (for example: reduction of working hours or other arrangements, varying wage increases according to levels of remuneration, fixing a timetable for readjustment provisions) or those which give the financial authorities the right to participate in collective bargaining alongside the direct employer are compatible with the Convention, provided they leave a *significant* role to collective bargaining. It is essential, however, that workers and their organizations be able to participate fully and meaningfully in designing this overall bargaining framework, which implies in particular that they must have access to all the financial, budgetary and other data enabling them to assess the situation on the basis of the facts.<sup>43</sup>

The ILO supervisory body recognizes that collective bargaining in the public administration has important differences compared to the one that takes place in the private undertaking, but this does not mean that their special characteristics remove or prohibit the collective autonomy, but that they define limits. The state budget is one of those natural limits of the collective bargaining in the public sector, because the modern State designs its public action depending on the economic resources available, so that expenditures – including public servants' remunerations – should be previously established to ensure their allocation.

Thus, collective bargaining in the public administration should take place depending on the state budget.<sup>44</sup> Therefore, the Committee on Freedom of Association also explicitly recognizes the budgetary regulation as a ceiling to establish state workers' wages, but which is broad enough so as not to prevent it:

In so far as the income of public enterprises and bodies depends on state budgets, it would not be objectionable – after wide discussion and consultation between the concerned employers' and employees' organizations in a system having the confidence of the parties – for wage ceilings to be fixed in state budgetary laws, and neither would it be a matter for criticism that the Ministry of Finance prepare a report prior to the commencement of collective bargaining with a view to ensuring respect of such ceilings.<sup>45</sup>

The public Budget is a valid restriction of the right of collective bargaining in public services, but it shall not be construed as a prohibition. In other words, the budgetary laws are the framework in which the bargaining between public authorities and representatives of public employees' organizations takes place, which is broad enough as to allow for agreement. This explains why the ILO supervisory bodies emphasize that the collective bargaining should take place prior to the approval of the budget, as this facilitates the agreement, and not later,

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<sup>43</sup> ILO. *Freedom of Association and Collective Bargaining. General Survey of the Reports on the Freedom of Association and the Right to Organize Convention, and the Right to Organize and Collective Bargaining Convention*. Geneva: International Labour Office, 1994, paragraph 263.

<sup>44</sup> ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Sixth (revised) edition. Geneva: ILO, 2018, paragraph 1485.

<sup>45</sup> Idem, paragraph 1036.

as it would fix ceilings that are difficult to overcome.

### **3. Comparative law of collective bargaining in public administration**

In the last several years, national law has evolved towards recognizing collective bargaining rights in public administration, overcoming legal arguments to prohibit or excessively restrict its use, or abandoning the statutory view of the relation between the public employee and the State. This process is evidenced through the observations made by the Committee of Experts regarding the considerable number of countries that apply the Conventions through legislation and other legal mechanisms, regardless of whether they have ratified the Conventions, which denotes global progress.<sup>46</sup>

Eight countries were selected for this study, based on their geographical location and the relevance of their regulatory framework on collective bargaining in public administration: Colombia, Uruguay, Spain, Denmark, Japan, Philippines, Kenya and South Africa. The examples seek to illustrate their contribution to the subject and do not necessarily imply that their collective bargaining systems comply with the Conventions, which is a task for the supervisory bodies.

#### **3.1. Colombia<sup>47</sup>**

This South American country is a good example of the evolution of the right to collective bargaining in public administration; it transitioned from an initial stage where it was prohibited to the current stage where it is promoted. Thus, this section will explore this case with more detail than the other countries selected, as it should be considered as a reference.

The right to collective bargaining is enshrined in Article 55 of the Constitution: “The right to collective bargaining in regulating industrial relations shall be guaranteed except as otherwise provided by the law. It is the duty of the State to promote agreement and other measures for the peaceful solution of collective labor conflicts.” The Constitution recognizes this right, but it grants the legislator the power to define exceptions in his practice through a legal reserve. However, such exceptions should not infringe the essential content of the fundamental right. Similarly, the constitutional regulation stipulates that it is the duty of the State to promote collective bargaining, and other measures for the peaceful solution of labour conflicts, as conciliation.

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<sup>46</sup> Vid. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 551.

<sup>47</sup> Colombia has ratified ILO Conventions No. 87, 98, 151 and 154.



## *Representation*

The Colombian Constitutional Court, interpreting Article 4 of Convention No. 98, concluded that both social partners – employers and workers – should enjoy the right to collective bargaining and it is, therefore, wrong to consider that only one of the parties is the right-holder.<sup>48</sup> Therefore, according to this, the right to collective bargaining has no restrictions in Colombia, as maintained by the Court itself. However, section 416 of the Substantive Labour Code (hereinafter, CST) does restrict it for public employees, as they are not entitled to submit lists of demands or conclude collective agreements: “trade unions of public employees are not entitled to submit claims or conclude collective agreements; but unions of other official employees enjoy all the rights of other trade unions and their claims shall be studied in the same light as those of other trade unions even if they may neither declare nor hold strikes.”

Initially, the jurisprudence interpreted that this article validly restricted the right of public employees to bargain collectively, based on its own interpretation of Article 55 of the Constitution.<sup>49</sup> Thus, the interpretation was that the exception established by the constitutional article was in line with the restriction of collective bargaining of public employees pursuant to the Code. Article 416, however, restricts the submission of claims and the conclusion of collective agreements, but it does not prohibit collective bargaining. Regardless of the fact that the exercise of the right to collective bargaining entails the submission of claims, it can be exercised through other mechanisms – in the Colombian case, it can be realized by means of “respectful notes” established in Article 414 4a) of the CST – thus, overcoming this limitation. Likewise, collective bargaining can conclude in a collective agreement, even when this right does not entail the obligation to reach an agreement. In other words, limitations established in Article 416 of the CST do not imply the prohibition of the right of collective bargaining for public employees, although it does establish serious limitations in its exercise.

The Colombian Constitution expressly establishes that the Congress of the Republic (Articles 124, 125 and 150, subparagraphs 1 and 19), the President of the Republic (Art. 189, subparagraphs 11 and 14), and the Assemblies, governors and councils, mayors (Art. 300 subparagraph 7, Art. 305, subparagraph 7, Art. 313, subparagraph 6 and Art. 315, subparagraph 7) are the relevant public authorities to legally define the wages and terms and conditions of work of public employees. Thus, such matters cannot be regulated by means of

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<sup>48</sup> Constitutional Court of Colombia. Court decision C-1050 of 2001. Rapporteur: Manuel José Cepeda.

<sup>49</sup> For a long time in the nineties and early in this century, the ILO Committee of Experts criticized that the right of public employees to bargain collectively should be recognized under ILO Convention No. 98, referring mainly to those who are not engaged in the administration of the State. Cf. ILO. *Application of International Labour Standards 2002 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 90<sup>th</sup> Session of the International Labour Conference, 2002, p. 388.

a collective agreement signed between the public authority and the public employees' trade union, because that would contravene the Constitution.

The ratification by Colombia of Conventions No. 151 and 154 modified the above-described interpretation. In its competence to define the constitutionality of international treaties (Article 241, paragraph 10), the Court decided on the constitutionality of both Conventions, evaluating also the above-mentioned Article 416 of the CST.

In the first case, the Court decision C-377 of 1998, assessing the constitutionality of Articles 7 and 8 of ILO Convention No. 151, concluded that:

[N]othing in the judgement prevents public employees from petitioning the authorities on their employment conditions and entering into discussions with them to come to an agreement on the subject, which implies that the right to collective bargaining should not be considered negated. However, unlike public officials, who have a right to comprehensive bargaining, the search for mutually acceptable negotiated solutions cannot affect the competence conferred upon the authorities by the judgement to fix employment conditions unilaterally. The creation of mechanisms allowing public employees, or their representatives, to participate in determining their employment conditions is valid, provided it is understood that the final decision lies with the authorities specified in the Constitution, namely, Congress and the President at national level, and the assemblies, councils, governors and mayors working independently at the various territorial levels.<sup>50</sup>

The second case is with Court decision C-161 of 2000, where the Court reiterated the same argument reviewed when assessing Article 1 of ILO Convention No. 154, considering that public employees enjoy the right to bargain collectively.<sup>51</sup>

Later, the Constitutional Court expressed itself on the constitutionality of Article 416 of the CST and on the right to collective bargaining of unions of public employees in other court decisions, displaying an evolution that allowed them to exercise their rights more fully. In court decision C-201 of 2002, the Court maintained that by constitutionally guaranteeing the right to collective bargaining in all modes of labour relations, including the public service, the legislator could allow such employees to submit lists of demands.<sup>52</sup> This entails overcoming one of the restrictions of Article 416 of CST. In court decision C-1234 of 2005, the Court established the conditional constitutionality of Article 416 of the CST, under the assumption that for the realization of the right to collective bargaining envisaged in Article 55 of the Constitution and ILO Conventions No. 151 and 154, trade unions of public employees may have recourse to other means of agreement regarding their conditions of

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<sup>50</sup> Constitutional Court of Colombia. Court decision C-377 of 1998. Rapporteur: Alejandro Martínez Caballero.

<sup>51</sup> Constitutional Court of Colombia. Court decision C-161 of 2000. Rapporteur: Alejandro Martínez Caballero.

<sup>52</sup> Constitutional Court of Colombia. Court decision C-201 of 2002. Rapporteur: Jaime Araujo Rentería.

work, on the basis of the claim made in this respect by these trade unions. Finally, the Court requested the Congress of the Republic to introduce legislation on the matter.<sup>53</sup>

This development in constitutional case law was supplemented by the comments made by the ILO supervisory bodies, mainly the reports prepared by the Committee of Experts, which alerted to the violation of Convention No. 98.<sup>54</sup>

#### *Regulation according to the international labour standards*

The impact of the constitutional decision, the comments made by the Committee of Experts and the international debate on the serious violations of freedom of association compelled the Government to adopt Decree No. 535 of 2009. The Decree regulated Article 416 of the CST, establishing an agreement of labour conditions between trade union organizations of public employees and public sector bodies. According to the Decree, trade unions could submit their claims every two years, and include wage aspects, always respecting the ceilings established by the national Government, the body's budget and the guidelines established by CONPES. Critics argued that the Decree's regulatory design was unilateral, according to which, the State exclusively made the decision on the trade unions' demands. Added to this, the narrowness of the regulation showed that the government merely sought to prevent international sanctions. Its serious deficiencies caused its abrogation.

Decree No. 1092 of 2012 replaced the previous one, with significant amendments. The most important aspects are mentioned here. First, it sought to regulate terms and procedures for bargaining between public employee organizations and public bodies to determine the terms and conditions of employment. With this, the right to negotiate replaced the term "consultation" (concertación), which was the main subject of the controversy. Second, the decree excluded high-level employees-- those discharging functions of management, direction and institutional guidance--, besides the members of the armed forces and the police. Third, duly registered trade unions enjoyed the right to collective bargaining: workers' coalitions could not submit lists of solutions. Fourth, the content of collective bargaining aimed to fix terms and conditions of employment and relations between the public administration and its trade union organizations. Terms and conditions of employment included wages. Fifth, lists of solutions were to be submitted on an annual basis during the first quarter of the year, replacing the previous biannual submission. Sixth, trade union representatives participating in the collective bargaining enjoyed the right to trade union immunity and union leave, in accordance with the national regulation. Seventh, it established a procedure for implementing the bargaining process, from the submission of the list of claims to the signing of a final record indicating the points of agreement and disagreement. Mediation was included for those cases where direct negotiation failed. Eighth, the relevant

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<sup>53</sup> Constitutional Court of Colombia. Court decision C-1234 of 2005. Rapporteur: Alfredo Beltrán Sierra.

<sup>54</sup> ILO. *Application of International Labour Standards 2007 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 96<sup>th</sup> Session of the International Labour Conference, 2007.

body would issue an administrative decision that formalized the agreement or responded to the denial of the claims formulated by the trade union. Decree No. 1092 introduced a bargaining stage with the trade union of public employees which would take place before the public authority established the new terms and conditions of employment by, thus recognizing the right of public employees to bargain collectively without breaching the constitutional provisions. Decree No.1092 was a considerable progress, but some controversial points on collective bargaining, covered by the Conventions, remained.

Decree No. 160 of 2014 replaced Decree No. 1092. The new regulation also represented progress towards meeting the requirements of ILO Convention No. 151.<sup>55</sup> Under Decree No. 160, the bargaining parties include one or many public bodies or authorities and one or many trade union organizations, which removes any restriction on the right to collective bargaining. This is specified in the regulation, stating that “in the case of plurality of trade unions of public employees, they should implement prior coordination activities to combine their claims, in order to conclude in a single list of claims and with integrated bargaining and advisory committees” (Article 8, paragraph 1). The Decree defines the level of trade union representation and the membership of the bargaining committee, where the number of members is an objective criterion, although it does not exclude the representation of minority unions. Likewise, two levels are established for bargaining purposes. The first level is general or of common content, where the bargaining takes place between trade union confederations or federations of public employees and the representatives of competent public authorities. The second level is specific or of specific content for each body or district, department or municipality. Thus, public sector collective bargaining is formalized in an articulated manner among the different levels of bargaining. It is a modernizing regulation of labour relations that meets the complexity of public employment and a parameter that can be used as a collective bargaining model in other countries. The content of the collective agreement is another aspect to be highlighted in Decree No. 160, mainly the establishment of the twenty-day limit after its conclusion to issue the administrative decision that complies with the agreement.

The Committee of Experts valued positively the issuance of Decree No. 160 of 2014, mainly because it was formulated with the involvement of trade unions. However, it noted that the Decree excluded pensions as a subject of bargaining and did not allow the recourse to voluntary arbitration as a dispute resolution mechanism.<sup>56</sup> We need to bear in mind that Article 48 of the Constitution on the right to social security was reformed, adding in Paragraph 2 the prohibition to establish pension arrangements other than those set out in the regulations of the general pension system, by means of agreements, pacts, labour collective agreements, awards or other legal acts of any kind.

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<sup>55</sup> The Single Labour Regulatory Decree, No. 1072 of 2015, incorporates Decree No. 160 without changes.

<sup>56</sup> ILO. *Application of International Labour Standards 2015 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 104<sup>th</sup>. Session of the International Labour Conference, 2015, p. 65-67.

This new regulation on the right of public employees to collective bargaining eliminated some restrictions in the exercise of the right in Colombia, becoming more in line with the duties enshrined in the ratified ILO Conventions. The proposed legal solution, however, only addressed the situation partially because the formalization of the collective agreement remained subject to administrative decision. Actually, the Colombian Constitution would be contravening the provision of the Conventions that favors bilateral agreements because it grants certain public authorities the power to make unilateral decisions on the terms and conditions of employment of this group of workers.

### *Practice of collective bargaining*

The Colombian Government and representatives of public employees' organizations of the country have signed several agreements since the promulgation of Decree No. 160. This section will focus on the last general agreement signed on June 29, 2017, highlighting the most relevant aspects for an international reading.

As a sign of good faith, the Ministry of Labour and the Department of Public Administration issued a Joint Circular on May 25, 2017, calling on the entities and public authorities "to guarantee the rights of the representatives of the labour organizations to union protection and leave, in order to facilitate their presence and participation in the consultation tables during the term of the negotiation."

The agreement has 23 chapters and 152 clauses,<sup>57</sup> which shows the extent and complexity of its text, also showing that the centralized collective bargaining described by Decree No. 160 requires an agreement on these terms, since it lays the foundations for the conventional regulation of the Colombian public services. The "Final Record of collective bargaining agreement for the demands made by organizations of public employees", signed on May 24, 2019, incorporated 133 partial agreements, most of them addressing issues related to specific occupational groups.

The Colombian General Agreement covers all public servants, regardless of their membership of a trade union or their participation in the bargaining process (Clause no. 89). It covers all persons engaged in the state services, regardless of their trade union membership and it can, therefore, be applied in general terms.

To ensure its compliance, the Agreement forms a bipartite committee of verification and monitoring composed of trade union organizations and the signatory National Government's representatives. This Committee will adopt a regulation for its operation and a timetable to assess compliance with the agreement. Likewise, according to the agreement, the Justice, Education and Health sectors must establish a body plays this role. This may be explained by the significant number of public servants in those sectors and the distinct characteristics

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<sup>57</sup> Whereas a significant number of clauses indicate the disagreement of the parties, it reflects that the matter was discussed during the collective bargaining sessions.

of their tasks. Similarly, all administrative decisions to be issued and bills to be submitted to comply with the Agreement shall be agreed with public servant organizations (Clause no. 151).

Also, according to the Agreement, based on the principle of progressiveness, individual or general agreements signed between different public bodies or the National Government and the trade union organizations, where better terms and conditions for public employees have been agreed, cannot be modified (Clause no. 151). This regulation allows for articulating collective bargaining levels in public administration, under the principle that the most favorable standard to the workers should apply. Thus, the General Agreement is the regulatory platform for the Colombian public servants' rights and benefits.

The Agreement is valid for two years, between January 1, 2017 and December 31, 2018, without prejudice to the agreement on the wage increase (Clause no. 152). The "Final Record" of May 24, 2019, extended its validity until December 31, 2020.

The Agreement is designed to lay the foundations of a permanent bargaining in the state services by means of bipartite bodies, to address a specific matter – such as employment, freedom of association, gender, occupational health and safety, etc. – or its different areas – health, education, justice, etc. Therefore, the agreement is proposed as procedural rules to formalize the bargaining processes in these bipartite bodies with certain terms and agendas. It is different from a collective agreement that regulates the working conditions and terms of employment, except for the wage increase.

### **Box 3.1 Significant aspects of the Colombian General Agreement for public administration**

According to the terms and conditions of employment, public bodies should review the service provision agreements signed and identify those which perform permanent functions. This will allow assessing whether the staff should be strengthened in order to create jobs within the framework of the Colombian law (Clause no. 1). Likewise, it strengthens the opportunities for social dialogue (the National Civil Service Commission) to discuss the standards regulating the public employment (Clause no. 4).

In the terms and conditions of work, the most important aspects include the commitment to modify the regulation to extend the social benefits of workers' older children (Clause no. 38); the constitution of a bipartite Table to analyze overtime pay (Clause no. 45); and the provision of transportation for servants in public bodies with budget resources (Clause no. 53). Likewise, regarding occupational health and safety, it establishes the promotion of the management system on the matter to ensure its compliance (Clause no. 144).

The agreement includes a percentage-based retroactive wage increase in terms for 2017 and another for 2018 according to annual inflation of 2017, with an additional percentage point (Clause no. 25); the 2019 Final Record (Clause 32), in turn, extended a retroactive salary increase of 4.5% for 2019 and an increase for 2020 based on 2019 annual inflation with an additional 1.32%.. The Agreement

seeks to couple wage increases to the consumer price index, but adding an advantage to improve the purchasing power. Likewise, salary scales are reviewed through the implementation of a technical study to be delivered to trade union organizations to open a dialogue for discussion and implementation (Clause no. 12).

With regards to the regulation, the Agreement proposes a discussion on the content of the National Pact for decent work submitted by trade union organizations within the Public Sector Sub-commission (Clause no. 9), as well as the discussion on the Government and Legislative Power proposals regarding the Labour Statute (Clause no. 9). It should be noted that the Agreement highlights the Government commitment to adopt the standards jointly with trade union representatives for the application of Conventions No. 149, 156 and 183 (Clause no. 119).

Another important contribution of the Agreement is the preparation of the National Pact against Administrative Corruption, indicating that the Public Sector Sub-commission is committed to submit the policy initiatives related to integrity and citizen participation to prevent corruption.

The Agreement emphasizes the need to regulate the exercise of trade unions' rights in public services. For instance, the promotion of trade unionism by field is established in the public sector (Clause no. 59); the creation of bodies or committees for dialogue in public institutions for discussing wage and labour-related matters (Clause no. 60); the setup of email accounts for trade unions (Clause no. 62); the voluntary contribution of non-unionized workers (Clause no. 63); the discussion of the trade union proposal with the Government on the regulation of trade unions' leaves (Clause no. 69); the discussion to modify the regulation of trade union immunity in the Substantive Labour Code (Clause no. 11).

An additional comment is made regarding the violence suffered by trade union leaders in the country, which cannot be disregarded by the Agreement. The Government is committed to continue with the actions to protect trade union representatives (Clause no. 83); the obligation of the Government to protect workers that enjoy trade union immunity (Clause no. 7); the responsibility of the Colombian State to comply with the recommendations made by the ILO and human rights organizations.

It is also important to highlight that the Agreement has also a chapter focused on gender, emphasizing its importance in the state and trade union agenda. For example, public bodies are invited to have rest rooms for women working long or night hours (Clause no. 114), the flexibility of the working time for workers with family responsibilities (Clause no. 115); paid leave in case of medical appointments, special care for worker's relatives or people with disabilities under his/her responsibility (Clause no. 116). The Agreement emphasizes the need to prevent and sanction violence and bullying at work in its different forms, as well as to protect workers against discrimination practices.

This list of claims, in the Collective Bargaining Agreement, submitted by the trade union organizations of public employees in Colombia shows a model that emphasizes the creation of settings for bipartite social dialogue within the State, for public authorities and representatives of public employees' organizations in these fields to regulate the matters under the framework established by the General Agreement. The Agreement regulates these

key subjects – as wages and trade union rights, but collective bargaining processes can always take place in the different public sectors to improve it. Likewise, the Agreement incorporates new matters in the collective bargaining process: the fight against administrative corruption and gender protection clauses.

In addition, the Colombian state adopted a new administrative career law, No. 1960 of June 27 2019, as a result of the agreements signed on May 24 of the same year (agreement no. 2). In this agreement, the government also agreed to expand the subjects of consultation to include the modifications to staff structure and manuals, within the limits imposed by the Constitution (agreement no. 17), as well as establishing a joint work table to discuss performance evaluation (agreement No. 13).

Colombia shows a positive progress, which starts with the modification of its regulation on the right of collective bargaining in public administration and evolves towards the direct negotiation between public authorities and trade union organizations with the conclusion of national and sectoral agreements. As we will see in the fourth section, the Colombian government has fulfilled many of the commitments it made to issue decrees, circulars and promote ratification of ILO Conventions. The ILO contribution should be highlighted here, which provided technical assistance during the legislative reform process.

### **3.2. Uruguay<sup>58</sup>**

This South American country is characterized by a system of labour relations mainly regulated by the social partners themselves, with a regulation that supports its exercise. It is, therefore, an important benchmark to study the praxis of the collective bargaining in public administration.

#### *Representation*

The Uruguayan Constitution acknowledges freedom of association without explicitly mentioning the right to collective bargaining in its Article 57: “The law shall promote the organization of trade unions, granting them privileges and issuing standards to recognize their legal personality. It will also encourage the setting up of conciliation and arbitration tribunals. Striking is a union right. The exercise and effectiveness thereof shall be regulated on this basis.”

The lack of this explicit mention has not prevented the interpretation that the duty of promoting trade unionism includes the right to collective bargaining, both in the private and public sectors. Thus, despite the lack of a relevant legislation, trade unions of public servants concluded collective agreements with the competent public authorities for a long time.

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<sup>58</sup> Uruguay has ratified ILO Conventions No. 87, 98, 151 and 154.



In March 2005, the Uruguayan Government invited the organizations of public servants to agree on a regulation for collective bargaining in the public administration. Such bargaining resulted in the conclusion of the Public Sector's Framework Agreement of Collective Bargaining (July 22, 2005) that regulated the exercise of the right for a four-year period. According to the Agreement, a collective bargaining process was established in three levels: general, sectoral or by branch and public body. Likewise, the public authority is compelled to provide all the information required for the bargaining and ensure that it is implemented in good faith.

### *Scope*

Act No. 18.508 on Collective Bargaining was adopted on 16 June 2009 within the framework of labour relations in the public sector. Article 3 explicitly recognizes the right to collective bargaining for all public servants,<sup>59</sup> excluding high-level employees and members of the armed forces and the police, pursuant to Article 1 of Convention No. 151.

Collective agreements may address a wide variety of subjects under the Uruguayan law: terms and conditions of work; occupational health and safety; design and planning of professional training for public employees; the structure of the professional career; the reform system of the State management; criteria for efficiency, effectiveness, quality and professionalization of the public service; relations among public employers and servants; relations between one or several public bodies and the corresponding public servants' organizations and everything agreed upon by the parties in the bargaining agenda (Article 4). This regulation is based on Article 2 of Convention No. 154.

Uruguayan laws since the Framework Agreement of 2005 incorporate the duty to bargain in good faith, the right to information and the bargaining levels within public services. Likewise, it clearly points out that the scope of application of the standard covers the Executive Power, the Judiciary, the Court of Administrative Litigation, the Court of Accounts, the Electoral Court, the autonomous bodies, decentralized services and Departmental Governments (Municipal Offices, Departmental Boards and elective autonomous local councils).

### *Structure*

According to Act No. 18.508, the State is compelled to promote and guarantee that collective bargaining processes take place at all levels of public administration. To this end, it shall adopt appropriate measures to facilitate and promote bargaining processes between the administration and the representative organizations of public officials (Article 3).

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<sup>59</sup> The Uruguayan public servant is the person engaged under a permanent contract with the State or whose job post is considered within the budget, being ruled by the Public Servant's Statute that is part of the Administrative Law.

Likewise, the Act established the bipartite Higher Council for collective bargaining for public sector workers, in charge of the general collective bargaining or at the highest level, acting on a consensual basis and at the request of any party integrating it (Article 11). It established negotiation tables at the sectoral, branch, entity and organization levels, which followed the same terms as in the Higher Council. The law does not establish an exclusive competence for the negotiation and, therefore, agreements may be concluded at every level. In practice, the conventional regulation floor is established by the high-level collective bargaining and the other levels may conclude agreements, which should not be lower than such floor.

Law No. 18.508 is framed within a procedural regulation of collective bargaining in public administration, establishing basic rules for the action of public authorities and public servants' representatives. The next paragraphs will analyze some collective agreements of the Uruguayan public sector.

#### *Practice of collective bargaining*

The Framework Agreement signed between the representatives of the Executive Branch and the Confederation of State Officers Organizations (COFE) on December 30, 2010, establishes annual wage increases in the public administration for a three-year period, using the variation of the consumer price index as reference. It also establishes that every public body (bargaining at the third level) may negotiate wages within its scope. A clause on dispute prevention is also agreed upon, for parties to guarantee industrial peace during the validity of the Framework Agreement.

The Central Administrative Agreement of December 23, 2015, signed by the representatives of the Executive Branch and the Confederation of State Officers Organizations (COFE) and extended through a pre-agreement signed on 28 December 2018, establishes the guidelines on the general wage adjustment for the Central Administration during its validity since January 1 2016 until December 31 2019. According to this collective agreement, employees receive wage adjustments under the terms set forth in Article 4 of Law No. 18.719,<sup>60</sup> in order to preserve the purchasing power of workers' wages. To this end, the inflation criterion is taken into account, as in the Framework Agreement of 2010.

The collective agreement also adds a safeguard clause should inflation accumulated during its validity exceed 10 per cent. If so, the Table of the branch of activity will be convened to adopt the corresponding measures. Likewise, an amount of annual diligence allowance is established for civil servants of the Public Administration.

The parties have committed to continue addressing subjects related to the Public Servant's Statute (administrative career and other conditions of work) within a dedicated committee of the Higher Council for Collective Bargaining for Public Sector Workers. This specific

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<sup>60</sup> According to Article 4 of Law No. 18.179 (National Budget Law 2010-2014), the Executive Branch will adjust servant's wages on an annual basis to preserve the public worker's purchasing power.

agreement shows the Uruguayan Government's commitment to social dialogue for the reform of the Public Servant's Statute.

The Uruguayan model is based in a three-level pyramidal structure of collective bargaining (national, regional and local) distributed into two modules-- a) Executive branch, autonomous entities and decentralized services and b) Autonomous bodies-- which are composed of different Tables in every bargaining unit. Thus, collective bargaining processes can take place in all state services accordingly and in agreement with Law No. 18.508 and the Central Administrative Agreement as pillars of such regulating framework.

### **3.3. Denmark<sup>61</sup>**

Denmark is an example worth examining, since Scandinavian countries are characterized by their wide-ranging coverage of public employees in the collective bargaining processes. According to the Danish State, 98 per cent of public servants are covered by a collective agreement.<sup>62</sup> Denmark is, however, a country that lacks a labour legislation on the matter, but this has not prevented it from fully implementing collective bargaining processes in the state services.

The Danish Constitution does not explicitly regulate the right to collective bargaining. It has solely one provision in its Article No. 78 on the right of association for all lawful purposes. Likewise, there is no legal regulation on how social partners implement their bargaining. The Law of Conciliation of Labour Disputes (1997) provides regulatory support if direct negotiation, or the renewal of collective agreements, fail.

#### *Structure*

A centralized collective bargaining is formalized at the central level between public authorities and large groups of trade union organizations of public employees. the Governmental Employment Authority (*Personalestyrelsen*), a public body of the Ministry of Finances negotiates and signs the Danish central collective agreement of public services. The collective agreement covers wages, pensions, working day, dismissal regime, workers' representation and participation, professional training, maternity leave, childcare, among the most relevant topics. In other words, the conventional regulation covers the working conditions and terms of employment widely. This shows that the social partners regulate the Danish model directly through collective bargaining, and the model is therefore characterized by a loose labour legislation.

The agreement is incorporated into the national budget prior to its approval in order to harmonize them. The Ministry of Finances participated through the Governmental Employment Authority, in order to accomplish this objective.

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<sup>61</sup> Denmark has ratified ILO Conventions No. 87, 98 and 151.

<sup>62</sup> Cf. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 400.

Besides the central level, there are two other bargaining levels: regional and municipal. These levels are subject to the central agreement and, therefore, their bargaining processes are developed in the most special and detailed conditions.

The Danish wage system changed in the mid-nineties with the formulation of the “New Wage” in the central collective agreements. It refers to a payment system for the public sector composed of the aggregated elements from each bargaining level: a) a basic wage established at the central level; b) a supplementary amount negotiated at decentralized and/or centralized level based on the nature of the work (special work areas, responsibility, etc.); c) a training allowance (education, further training, experience, etc.); d) a performance/results-based component (efficiency) agreed upon at decentralized level. Thus, qualification-based salaries replace seniority-based increments. Its outcomes are, however, ambiguous, because the central agreement remains the source for an important part of the wage.<sup>63</sup>

According to the Danish model, the central collective agreement plays the role of establishing a floor for basic wage increase, and the sectoral and municipal collective agreements play the main role of complementing the wage increase and establishing the working conditions and terms of employment. The collective bargaining in the public sector may be functional in its articulation at levels, because it covers nearly all public employees. This ensures that the complementarity of sectoral and municipal agreements has an effective impact on wages and labour conditions of Danish public employees.

### *Practice of collective bargaining*

The recent 2016 collective agreement of public health workers is a good example of such articulation. The conventional text establishes a basic wage for the different categories of workers (Clause no. 4) and then fixes a functional wage (tasks and responsibilities), which is different from the basic wage and the qualification-based remuneration. Such functions shall have special characteristics that go beyond the responsibilities coming from the basic pay (Clause no. 5). This is complemented by the qualification-based remuneration, which is based on the qualification of each public employee according to objective conditions (education and experience) (Clause no. 6). Finally, results-based wages are established, based on the achievement of quantitative and qualitative targets (Clause no. 7).

This conventional regulation of health workers’ wages is reproduced in the rest of collective agreements of the Danish public sector concluded in 2016: cleaning workers, day-care workers, education assistants, technical services, etc. The collective agreements reached in 2018 incorporated a commitment to ensure that pay developments fully in line with the private sector, while in the past they had only guaranteed part of those increases.<sup>64</sup>

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<sup>63</sup> Cf. JØRGENSEN, Carsten. *Denmark: Wage Formation*. Brussels: Eurofound, 2009.

<sup>64</sup> European Public Service Union, “Public sector unions clinch final deal to complete negotiations”, 30 April 2018.

### 3.4. Spain<sup>65</sup>

The Spanish Constitution recognizes the right to collective bargaining in its Article No. 37, paragraph 1, as follows: “The law shall guarantee the right to collective bargaining between the workers and employers’ representatives, including the binding nature of agreements.”

However, public employees are not mentioned, and collective bargaining is a legal right for this group of workers by virtue of constitutional jurisprudence.<sup>66</sup> This is explained because there are two types of public employees in Spain: the public servant regulated by the Basic Public Employee Statute (hereinafter the Basic Statute) and the staff under civil labour contracts, which are regulated by the Workers’ Statute. In the latter case, the right to collective bargaining enjoys constitutional backing, whereas the Basic Statute grants the right to civil servants.

#### *Representation*

According to Article 31, paragraph 1, of the Basic Statute: “Public servants have the right to collective bargaining, representation and institutional involvement in the establishment of their working conditions.” Article 33, paragraph 1, specifically refers to public servants: “Collective bargaining on the working conditions of public servants, which shall respect the principles of legality, budgetary resources, a legally binding outcome, good faith in bargaining, openness and transparency, shall be conducted through the exercise of the union’s representative power (...).” According to the constitutional jurisprudence, once the law recognizes this right, it incorporates it into the *additional provision* of the fundamental right to freedom of association of public servants.<sup>67</sup>

#### *Scope*

The law, not the parties, establish the collective bargaining units in the Spanish public sector. This is its main difference with the Danish model. The Basic Statute specifies a complex list of bargaining units in its articles 34, 35 and 36:

- A General Bargaining Table in the State General Administration, as well as in each Autonomous Community, the cities of Ceuta and Melilla, and Local Bodies, where the terms and conditions of work of such servants are negotiated.
- Sectoral Tables (agreed upon by the General Bargaining Table) to address specific conditions of work of affected administrative organizations or specific characteristics of some sectors of public servants and their number, where terms and conditions of

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<sup>65</sup> Spain has ratified ILO Conventions No. 87, 98, 151 and 154.

<sup>66</sup> Constitutional Court of Spain. *STC 57/1982 of July 27*.

<sup>67</sup> Constitutional Court of Spain. *STC 80/2000 of March 27*.

work are negotiated for those servants of the sector that were not subject to decision by the General Table.

- A General Bargaining Table for the Public Administrations, where terms and conditions of work that may be regulated by the State, as a basic standard, are negotiated, mainly the global increase of wages for the staff engaged in the Public Administrations that should be included in the Bill of Budget Law of the State every year.
- A General Bargaining Table in the State General Administration and in every Autonomous Community and local Bodies, where the terms and conditions of work are negotiated for public servants and labour staff of every targeted Public Administration.

Pacts and agreements can be concluded in the Bargaining Tables for determining the terms and conditions of work of servants of those Administrations. Pacts address matters strictly related to the area of competence of the administrative body signing it, and are directly applied to the staff of the corresponding area. Agreements address matters under the competence of the government bodies of the Public Administration, and should be explicitly and formally approved by these bodies.

### *Structure*

The multiplicity of bargaining units in the Spanish Public Administration leads to a large number of collective agreements in the public sector, organized according to the agreement signed in the General Bargaining Table. Therefore, Article 38, paragraph 9, establishes that: “Pacts and agreements, in their corresponding spheres and in relation to the competences of every Public Administration, may establish the collective bargaining structure, as well as establish the rules to settle conflicts arising between negotiations of different areas and criteria of rule of law and complementarity among the different bargaining units.”

The Basic Statute also establishes the matters that are subject to bargaining and those that shall be excluded (Article 37). For example, matters subject to negotiation include pay increases for the staff of public administrations, as stipulated by the Budget Act of the State and Autonomous Communities; matters affecting the officials’ working conditions and remuneration, the regulation of which requires a provision having the force of law; officials’ supplementary compensation; proposals concerning trade union rights and participation; the prevention of occupational risks. The Committee of Experts valued positively the scope of the bargaining matters incorporated by the Basic Public Employee Statute.<sup>68</sup> Conversely, matters subject to bargaining do not include, for example, the organizational powers of Public Administrations; the regulation of the exercise of the rights of citizens and of users of public

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<sup>68</sup> ILO. *Op. Cit.*, 2013, paragraph 323.

services; the working conditions of managerial staff; and the powers of direction and supervision characteristic of the hierarchical relationship.

### *Practice of collective bargaining*

Four Single General State Administration agreements have been signed in Spain: first, in 2002, updated in 2003; second, in 2006, updated in 2008; third, in 2009, modified in 2014; and the fourth, signed in 2019. The latter was signed after an economic crisis that led to the reduction and freezing of Spanish public wages.

The single collective agreement is a complete text that covers the widest range of matters: scope of application; interpretation and procedural rules of the conventional standard; working arrangements; professional classification; changes in working conditions; functional and geographical mobility; vacancies and promotions; working hours and leave; professional training; suspension and termination of the labour contract; occupational health; wage structure; disciplinary rules; regime of the staff representation; and supplementary law. This is one more difference to the Danish model, because its coverage reduces the scope of bargaining at the lower levels of the collective bargaining in the public sector when it is not explicitly granted.

The third single agreement (2009) extended its coverage to the staff under civil labour contracts in the General State Administration and its autonomous bodies. This agreement defines public employees that are excluded from its regulation, mainly those that enjoy a collective agreement in their public body, for instance, the staff of the State Tax Administration Agency. Thus, Article 1 of this single agreement defines its scope of application and establishes the competence of the Sectoral Tables for the other public bodies. The IV Single Agreement, meanwhile, unfroze the wages and incorporated a new job classification system adjusted to the National System of Professional Qualifications, new professional mobility measures and a mechanism for early partial retirement. The latter can be initiated after 60 years of age and simultaneously with a part-time employment contract.

The Joint Committee for follow-up is one more contribution of the Spanish model (Article 38.5 of the Basic Statute). Therefore, the single agreement establishes the bipartite Committee on Interpretation, Surveillance, Study and Application (*Comisión de Interpretación, Vigilancia, Estudio y Aplicación, CIVEA*), which interprets the text of the agreement and monitors its application. Unlike the Colombian model, where the collective agreement is open and the parties can continue negotiating in bipartite bodies regarding some matters, the Spanish agreement grants CIVEA the power to ensure its compliance. The parties have used this space to conclude agreements to adjust the application of the agreement.

As well as the Danish agreement, the Spanish conventional text establishes a wage structure: basic wage, additional payments, personal compensation (seniority), pay-related benefits,

etc., but unlike the Scandinavian model, the Spanish agreement establishes an amount for each of them in an appendix according to a salary scale.

The structure of collective agreements signed by Sectoral Bargaining Tables is similar to the structure of the single agreement, but they are more specific in relation to the public body's working conditions and terms of employment, mainly in relation to its improvement. Likewise, they incorporate the component of a standing committee for the conventional standard. For instance, the Collective Agreement for teachers of Public Universities of Andalucía establishes a bipartite committee that plays the same role as CIVEA.

The standing committees of Spanish collective agreements play a key role because they maintain the agreement in force and updated. Under the Basic Statute, the parties do not need to establish the duration of the collective agreement, but it automatically extends it yearly, unless the parties agree otherwise or either party explicitly denounces it (Article 38.11). This regulation enables bipartite committees to update the regulation of some articles and clauses in the agreement, to ensure that its validity is further extended for the parties without initiating a new bargaining process.

### **3.5. Philippines<sup>69</sup>**

Despite the legal restrictions for exercising the right to collective bargaining, the parties have concluded a significant number of collective agreements at different levels in the Asian country, as compared to other countries in the continent.

The 1987 Philippine Constitution in its single article on labour rights (Article XIII, section 3) recognizes the right to collective bargaining pursuant to the law. Executive Order No. 180 of 1987 established the rules and regulations governing the right of public employees to organize (Articles XII and XIII). According to the Executive Order, collective bargaining can only cover terms and conditions of employment that are not otherwise fixed by law (Article XII, Section 1). It also establishes a strict list of matters that may be addressed through collective bargaining: schedule of vacation and other leaves, personal growth and development, communication system (internal and external), work assignment and reassignment, distribution of workload, protection and safety, etc. (Section 2). According to it, wage subjects are excluded from collective bargaining because they are regulated by the law (Section 3). Besides, the collective agreement will entry into force with the signature by the parties and the approval of the absolute majority of workers in the bargaining unit (Section 4).

The Committee of Experts has stated that these restrictions contravene the principle of free and voluntary negotiation of Article 4 of Convention No. 98:

The Committee noted that the areas that may be subject to collective negotiation do not include such important aspects of conditions of work as wages, benefits and

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<sup>69</sup> Philippines has ratified ILO Conventions No. 87, 98 and 151.



allowances, and working time, and requested the Government to expand the subjects covered by collective bargaining, in order to ensure that public sector employees not engaged in the administration of the State fully enjoy the right to negotiate their terms and the conditions of employment.<sup>70</sup>

### *Representation*

The Philippine legislation also requires trade unions to obtain accreditation from the Civil Service Commission to engage in collective bargaining. The accreditation involves securing the support of the majority of the employees of the bargaining unit, which is verified by means of a petition for accreditation signed by the employees.<sup>71</sup> The accreditation recognizes the union as exclusive representative to bargain collectively within the above-mentioned framework. The public authority and the trade union may initiate the bargaining process and reach an agreement on the conditions and terms of employment only after accreditation has been granted.

Regarding the absolute majority required as representation in the collective bargaining, the Committee of Experts has noted that:

In practice, the legislation in many countries provides that a trade union must receive the support of 50 per cent of the members of a bargaining unit to be recognized as a bargaining agent. In the view of the Committee, such a system may however raise problems of compatibility with the Convention, as it means that a representative union which fails to secure the absolute majority may thus be denied the possibility of bargaining. It therefore considers that under a system of the designation of an exclusive bargaining agent, if no union represents the required percentage of workers to be declared the exclusive bargaining agent, collective bargaining rights should be granted to all the unions in the unit, at least on behalf of their own members.<sup>72</sup>

A recent study on Philippine labour relations gathered 81 collective agreements in the public sector,<sup>73</sup> which shows that it is widely applied among public employees in the country, despite legal restrictions.

### *Structure*

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<sup>70</sup> ILO. *Application of International Labour Standards 2016 (I) Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 105<sup>th</sup> Session of the International Labour Conference, 2016, p. 77.

<sup>71</sup> Implementing Rules of Executive Order 180, Rule I, Section 1 (a).

<sup>72</sup> ILO. *Giving globalization a human face. General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*. Geneva: ILO, 2012, paragraph 234.

<sup>73</sup> Vid. ALLISON, Adela G. *Comparative Analysis of selected CNAs and CBAs of Unions in the Philippine public services*. Manila: PSI, 2011.

Collective bargaining is implemented in a decentralized manner, in every bargaining unit of the public sector where the trade union organization secures the support of the absolute majority of public employees for its representation. This illustrates the dispersion of collective agreements along state services.

Likewise, most of collective agreements focus on promotional and declarative aspects, such as codes of conduct and ethics or declaration of principles. Regarding the terms and conditions of employment, matters subject to bargaining include overtime, vacation, rest, shifts, birthday or anniversary bonus, less workload for pregnant women. No collective agreement included wages.<sup>74</sup>

### *Practice of collective bargaining*

The collective agreement covering workers of the water service management (2015-2017) reproduces the subjects of bargaining identified by the above-mentioned research. The agreement opens with a Declaration of Principles aimed at ensuring that there is room for social dialogue within the state-owned company. It continues with a list of trade union rights: exclusive recognition as bargaining agent, prohibition of discrimination against the trade union members, support for trade union activities, union leave, etc. It also includes a list of dates for paid leave for workers (birthday, anniversary, etc.). Occupational health and safety has an important section, but there is no text regarding wages.

Another relevant collective agreement was concluded between the local Government of Bislig and the employees' trade union. The parties recognize each other as legitimate bargaining partners, and the trade union acknowledges the local Government's authority to implement laws, policies and regulations on the terms and conditions of work and the workers' wellbeing; and the local Government, in turn, enables the trade union to participate in the policy-setting process related to employees' career development, wellbeing, rights and benefits.

## **3.6. Japan<sup>75</sup>**

The Asian country implements mainly the consultation procedure through an organization composed of independent experts that submit recommendations on the terms and conditions of work of public employees. Collective bargaining has been progressively gaining space between public authorities and public employees' trade unions, although legal restrictions prevent its application.

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<sup>74</sup> Idem, p. 17.

<sup>75</sup> Japan has ratified ILO Conventions No. 87 and 98.

## *Representation*

Article 28 of the Japanese Constitution recognizes the right to collective bargaining: “The workers’ right to organize, bargain wages and act collectively is guaranteed.” Article 85 of the Constitution, which establishes budget restrictions, should also be considered: “No expenditure will be done and the State will not assume obligations without prior approval of the Diet”.

In Japan, there are two types of regulations on collective relations in the public sector. On the one hand, the Public Corporation Labour Relations Law; and, on the other, the National Public Service Act.

The Public Corporation Labour Relations Law guarantees the right to collective bargaining for public employees of state companies and hired workers of independent administrative institutions. Pursuant to Article 8 of the Law, collective agreements may be concluded regarding wages, working time, compulsory leave, holidays, terms and conditions of employment, as promotions, transfers, dismissals and occupational health and safety. The Law explicitly excludes from bargaining subjects relating to the administration and management of public enterprises. This Law has allowed the conclusion of the great majority of collective agreements in the Japanese public sector.

Conversely, according to the National Public Service Act, the Japanese congress (the Diet) is in charge of regulating the labour conditions for the staff engaged in the public administration, including remuneration, working hours and other terms and conditions of work established pursuant to this Act (Article 28). Thus, the Japanese regulation excludes this group of public employees from the right to collective bargaining. The National Public Service Act, however, allows implementing a consultation procedure with trade union organizations of the public sector through the mechanisms applied by the National Personnel Authority.

Article 3 of the Act establishes such National Personnel Authority, subordinated to the Cabinet. It is in charge of preparing recommendations regarding the improvement of working conditions for the staff administration, as well as remuneration, terms and conditions of work, position classification, examination, appointment and dismissal; professional training; change in employment status; disciplinary action; processing of complaints; etc. The Authority is composed of Commissioners who are independent persons appointed by the Cabinet, with prior consent of the Diet (Article 5).

The National Personnel Authority is responsible for making recommendations to the Diet, on annual basis, on the improvement of wages and terms and conditions of work for the public administration staff. The consultation procedure is implemented under this responsibility, because studies and recommendations sent to the Diet are consulted with organizations of public officials before being submitted.

Under the Local Public Service Act, local administrations reproduce this model of consultation: the local administrations decides on the wage increases and the improvements of the terms and conditions of work for their staff, with the support of staff committees composed of independent persons who engage in consultations with trade unions.

The ILO supervisory bodies have stated that this model is contrary to the Convention No. 98, because it prevents public employees that are not engaged in the administration of the state from exercising the right to collective bargaining.

According to the 2015 Report of the Committee of Experts:

The Committee recalls that its previous comments concerned the need for measures to ensure the promotion of collective bargaining for public employees who are not engaged in the administration of the State in the framework of ongoing consultations on the reform of the civil service. (...) The Committee notes with *regret* that the package of reform bills, which was the fruit of long and detailed consultations with the social partners and civil society in Japan over many years, was ultimately not adopted and as a result, a number of public servants not engaged in the administration of the State remain deprived of their collective bargaining rights.<sup>76</sup>

The Committee on Freedom of Association analyzed in 2016 the exclusion of public employees not engaged in the administration of the state, in *Cases no. 2177 and 2183*. According to the CFA:

The Committee deeply regrets that, given the time that has elapsed since the complaint was filed and despite the long and intensive dialogue in which the Government and the social partners have been engaged, no concrete measures have yet been taken to provide basic labour rights to the public service in order to ensure full respect for the freedom of association principles embodied in Conventions Nos 87 and 98, ratified by Japan. The Committee cannot but once again urge the Government to expedite its consultation with the social partners concerned to ensure, without further delay, basic labour rights for public service employees in line with its previous recommendations. The Committee expects that the necessary legislative amendments will be submitted to the Diet without delay and requests the Government to keep it informed of developments in this regard.<sup>77</sup>

As stated by the supervisory bodies, the consultation procedure is not in line with Article 4 of Convention No. 98, as public employees not engaged in the Administration of the State

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<sup>76</sup> ILO. *Application of International Labour Standards 2015 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 104<sup>th</sup> Session of the International Labour Conference, 2015, p. 103.

<sup>77</sup> Committee on Freedom of Association. *Report 378°, Case No. 2183*. Geneva: International Labour Office, 2016, paragraph 460.

are not entitled to enjoy the right to collective bargaining. This also means that such procedure is valid for public employees engaged in the Administration of the State.

### *Practice of collective bargaining*

Regulatory difficulties have not prevented the conclusion of collective agreements in the public sector, although with serious limitations to address wages and working conditions.

For instance, the collective agreement for cleaning workers in Tokyo focuses on the exercise of trade union rights within the public body, including only substantive clauses on the number of working days and work during holidays in the New Year's Eve. Conversely, the collective agreement of employees' union of the Chōfu city establishes wage gains for workers in their different contractual arrangements (regular, temporary, part-time), economic benefits at retirement, reduction of average working hours and overtime, employment guarantee for ageing workers, gender equality in the workplace, etc.

## **3.7. Kenya<sup>78</sup>**

This African country made important progress regarding the right to collective bargaining of public employees, which the Committee of Experts recognized in the last country observation that assesses the application of Convention No. 98.<sup>79</sup>

The recent Constitution of Kenya of 2010 recognizes the right to collective bargaining in Article 41, paragraph 5: "Every trade union, employers' organization and employer has the right to engage in collective bargaining." Likewise, Article 248, paragraph 2 h) establishes the creation of a Salaries and Remuneration Commission, which, according to the Government, will be in charge of standardizing the terms and conditions of work of public employees.

### *Representation*

According to the Kenyan legislation, there are two types of public employees in the public sector: those who are engaged in the administration of the State and those who are not. The Labour Relations Act is applied to the latter, which recognizes the right to organize and bargain collectively under the same terms applied to workers engaged in private companies.

Thus, according to Article 54, paragraph 2 of the Labour Relations Act: "A group of employers, or an employers' organization, including an *organization of employers in the public sector*, shall recognize a trade union for the purposes of collective bargaining if the

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<sup>78</sup> Kenya has ratified only ILO Convention No. 98.

<sup>79</sup> Cf. ILO. *Application of International Labour Standards 2011 (I). Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III. Part 1A)*. Geneva, International Labour Office, 100<sup>th</sup> Session of the International Labour Conference, 2011, p. 105.

trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers' organization within a sector (my emphasis)." It refers to the explicit recognition of the right of public employees' trade unions to bargain collectively with the conclusion of a collective agreement.

### *Scope*

Likewise, Article 57, paragraph 1, of the Labour Relations Act establishes the framework for collective bargaining: "An employer, group of employers or an employers' organization that has recognized a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognized trade union setting out terms and conditions of service for all unionisable employees covered by the recognition of the agreement." Thus, this group of public employees may conclude a collective agreement on working conditions and terms of employment with sufficient depth and breadth of coverage so as not to prejudice their right.

Finally, the Act addresses the labour situation of public employees engaged in the Administration of the State. Thus, its Article 61, which regulates the terms and conditions of work in the public sector where there is no collective bargaining, establishes that the Ministry of Labour may, prior consultations with the tripartite National Labour Board, establish the machinery for determining terms and conditions of employment for any category of employees in the public sector. These terms and conditions of employment shall have the same effect as a registered collective agreement and may be enforced as such. The Minister may determine different terms and conditions for different categories of public employees, or decide not to exercise these powers when there is a trade union entitled to bargain collectively in such bargaining unit.

This brief summary of the Kenyan legislation explains why the Committee of Experts notes with satisfaction the current regulation, without prejudice to the remarks that may arise as a result of the monitoring of its application.

### *Practice of collective bargaining*

The collective agreement of Kenyan local governments (2010) shows the scope of the matters that may be subject to a collective bargaining, comparable to those that are agreed upon in European countries. Its 58 clauses address: the framework of application, wage scales, increases in remuneration, workers' promotion, system of engagement, housing allowance, overtime, medical examinations, healthcare, maternity leave, uniforms, transport, etc.

A similar situation is found in the collective agreement of health services (2016), the collective agreement on social security (2015-2017) and the collective agreement of the public drinking water company (2016), where conventional texts regulate the different terms and conditions of work and employment of labour relations in their public bodies.

### 3.8 South Africa<sup>80</sup>

South Africa changed its labour relations with the fall of *apartheid*, establishing a legal system that recognizes the fundamental rights, including labour rights.

Its 1996 Constitution recognizes the right to collective bargaining in Article 23, paragraph 5: “Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).”

#### *Scope*

The scope of application of the Labour Relations Act (1995) covers all workers engaged both in the private and in the public sector; only members of the national defense force, national intelligence agency and secret service are excluded. One of the objectives of the Act is to provide a framework where employees and their unions, employers and employers’ organizations may bargain collectively to determine wages, terms and conditions of employment, and other topics of common interest; as well as to promote regulated collective bargaining and collective bargaining at the sectoral level.

#### *Structure*

The Law establishes a Public Service Co-ordinating Bargaining Council, which is in charge of the whole public sector. The Council has power on matters regulated by state standards that apply to the whole public sector, terms and conditions of work that apply to two or more sectors, among others (Article 35). According to the South African regulation, the collective bargaining process should be structured within this Council, in order to ensure a centralized bargaining.

The Law grants the Co-ordination Council the power to appoint a public sector to establish a bargaining council and change or modify an existing one (Article 37). This means that a public body decides how to implement bargaining outcomes, rather than a competent public authority and the public employees’ union on a voluntary basis. Thus, the State continues to control the collective bargaining of public services.

This established bargaining council has exclusive jurisdiction on specific matters of this sector and in respect of which the State, as the employer, has the required authority to conclude collective agreements and settle labour disputes. Besides, the South African Law establishes a dispute resolution mechanism to settle any dispute that may arise among the bargaining councils.

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<sup>80</sup> South Africa has ratified ILO Conventions No. 87 and 98.

The Co-ordination Council is composed of 35 state representatives and the representatives of trade unions with a minimum threshold requirement of 50,000 members, allowing the participation of eight trade union organizations or federations.<sup>81</sup> By resolution of June 27, 2017, the Council allowed other unions that meet 75% of this requirement (alone or jointly), the right to access work centers, collect representation fees and enjoy union licenses.

### *Practice of collective bargaining*

By 2013, four sectoral bargaining councils had been established: the Education Labour Relations Council, the Public Health and Welfare Sectoral Bargaining Council and the Safety and Security Sectoral Bargaining Council. Besides, there is a specific council for local governments.<sup>82</sup>

Here, we take as example the June 25, 1999 resolution of the Co-ordination Council to establish the Public Health Bargaining Council that initiated an analysis of the exercise of collective bargaining. According to such resolution, the parties to the Council agreed to negotiate matters that are relevant to the sector according to the regulation. The negotiation covers employers and workers engaged in the State and within the scope of the Co-ordination Council. The agreement enters into force for the parties and non-parties on the date that the Council issues the resolution.

According to such resolution, the bargaining council covers the whole public health sector, whether all trade union organizations are represented or not, because its application is extended to the whole sector. It is the general extension of collective bargaining. The agreement may address remunerations, conditions of services and other matters for the benefit of the parties, as stipulated by the legislation.

Next, we will analyze a resolution of the Council approving the collective agreement, taking into account that such approval is required for it to entry into force: the resolution on the agreement of wage adjustment and improvement of the terms and conditions of work in public administration (2012-2015). This agreement covers a wide range of matters: annual staggered wage adjustments based on the consumer price index, compensation for the years of provision of services for prolonged service, night shift allowance, results-based bonuses, regulation of trade union leave, restriction of outsourcing, regulation on occupational health and safety, leave for family responsibility, prenatal leave, implementation of a study on decent work in public employment, etc.

On June 8, 2018, the Council issued a resolution that renews these commitments and is valid indefinitely, although the parties may terminate it by mutual agreement. On October 22,

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<sup>81</sup> Cf. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 359.

<sup>82</sup> Ibid.



2019, the parties agreed on the government prerogatives and employee rights during the reorganization process of the executive branch.

### **3.9. Legislative balance**

As expected, this brief review of eight national regulation systems of collective bargaining in public administration shows common aspects and significant differences.

In general, there are two bargaining models: centralized and decentralized. In the former model, the collective bargaining is mainly pyramidal based on the bargaining at the national level, either within a bipartite institution, as in Uruguay, or as direct bargaining, as in Colombia. This bargaining level establishes the floor which allows the other levels (either regional or local, or by public bodies) to regulate the working conditions and terms of employment in a more accurate way and according to the specific characteristics of their tasks. The second model favors collective bargaining that takes place in every public body, in order to have multiple bargaining processes within public administration, without bargaining levels or coordination among them, except for the public body that ensures the observance of the budget restriction when the collective agreement is concluded.

In principle, centralized collective bargaining should take place in the framework of public services, because it presents a homogeneous standpoint of labour relations in the State. Due to the scope of public administration in the national territory, a centralized bargaining facilitates general agreements subject to budget resources and allows the regulation of basic working conditions and terms of employment in a general manner in public administration. The centralized collective bargaining does not prevent other levels from concluding agreements. The national collective agreement may take different forms. For instance, it may establish minimum wages and working conditions, granting power in other levels to improve on them or to adjust them according to the specific characteristics of employment in each public body; or establish only procedural bargaining rules in the other levels, through which collective bargaining processes define wage increases and the improvement of terms and conditions of work.

A centralized collective bargaining system requires legal regulation and previous discussions with the public employees' representative organizations, or mutually agreed regulations for the articulation between the bargaining levels and the matters addressed among the different negotiations. The Recommendation concerning the promotion of collective bargaining, 1981 (No. 163) provides guidelines to articulate collective bargaining processes at different levels.

In general, the matters subject to collective bargaining in public administration that we have studied meet the stipulations of the Conventions, except for the Philippine case, which excludes wages. This shows that there is a pattern for regulating public employees' wages through collective bargaining processes. The evolution of the Colombian regulation is a

valuable example. It changes from a general prohibition to a wide wage negotiation, despite having a constitutional regulatory framework that could be construed in a narrow sense.

Most national regulations also stipulate that public employees shall enjoy the right to bargain collectively, with limitations only for public servants engaged in the Administration of the State, if the country has not ratified Conventions No. 151 and 154.

The Japanese case is a good example where the consultation procedure is insufficient. Conversely, the Kenyan regulation differentiates between both legal situations, recognizing the right to collective bargaining for the former group.

Besides the laws we have studied, the conclusion of collective agreements complements the analysis of the application of each statute. Examples include a series of innovative clauses that expand the traditional clauses on wages and terms and conditions of work, which is the subject of the last item of the study.

## **4. New trends in the clauses of collective agreements**

Collective bargaining processes in public administration have been evolving during the past years. As mentioned above, an increasing number of States recognize the right of public employees to collective bargaining, abandoning its prohibition.

The traditional collective bargaining in public administration is characterized by the conclusion of agreements related to wages and terms and conditions of work, which is maintained in the great majority of collective agreements. However, we observe changes in the collective agreements which suggest new global trends, including additional bargaining subjects.<sup>83</sup> This section focuses on these conventional clauses as examples to be considered in future collective bargaining processes of public administration.

### **4.1. Collective bargaining processes in the national police**

The first section of the study focused on the Conventions granting power to the national legislation to define whether rights guaranteed by its regulation should exclude or include members of the armed forces and the police. It also highlighted that most national regulations exclude them.

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<sup>83</sup> The ILO has studied a significant number of collective agreements concluded in different countries of the world, showing a global overview of current changes in the collective bargaining processes of public employees. Vid. ILO. *Promoting constructive approaches to labour relations in the public service. Examples from collective agreements. A Supplement to the Manual on Collective Bargaining and Dispute Resolution in the Public Service*. Geneva: ILO, 2015, 103p.

Notwithstanding the above, in some countries, trade unions of members of the local, regional or national police forces have concluded collective agreements with their respective employers. This abates the impact of excluding this group of public employees from the right to collective bargaining.

The Committee of Experts noted with interest that an important number of countries recognized the right to collective bargaining of the police: Belgium, Brazil, New Zealand, South Africa and some federated states in the United States.<sup>84</sup> Other countries not included in this list also have concluded collective agreements covering police.

For example, a collective agreement was concluded in Canada on March 31, 2015 between the Commissioner of the police forces and the national trade union, regulating their terms and conditions of work. Under the agreement, no clauses shall undermine the authority of the police to manage the force. This is noteworthy, because one of the arguments challenging the recognition of the collective bargaining right of the police is that it could call into question the command and discipline that should guide the police action.

The 34 clauses of the agreement address the right to information, the prohibition of the right to strike during the life of the agreement (labour peace clause), several specific labour rights, vacation, holidays leave, sick leave, occupational health and safety, working hours, compulsory leave, etc.

The comprehensive Macedonian collective agreement between its national police and the Ministry of Interior should also be highlighted. Its clauses focus on the operation of the trade union in the context of their police tasks. Regarding the facilities for trade union activities, union representatives are allowed to use police vehicles provided by the Ministry and enjoy the right to use special protocols applied to higher state delegations. With regards to labour conditions, union representatives participate in the regulation of classified activities and in the career development of police agents. Likewise, the collective agreement regulates wages, and despite some divergences related to the Macedonian budget standard, courts usually decide in favor of police members.

## **4.2. Access to information and collective bargaining**

According to the Workers' Representatives Recommendation No. 143 (1971), a series of facilities should be afforded to workers' representatives for their functions, including the information they need to represent the employees. Access to information is one of the mechanisms that facilitates collective bargaining. As pointed out by the Committee on Freedom of Association, information concerning the economic position of their bargaining unit, wages and working conditions in closely related units and the general economic

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<sup>84</sup> Cf. ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 69.

situation, all facilitate collective bargaining.<sup>85</sup> Besides, public servant organizations enjoy the right of information in the collective bargaining process in a remarkable number of countries.<sup>86</sup>

The General Framework Agreement for informing and consulting civil servants and employees of the central government administrations (December 21<sup>st</sup>, 2015) signed between the European Union Public Administration Employers (EUPAE) and the Trade Unions' National and European Administration Delegation (TUNED) was maybe the most important agreement addressing this matter. According to the agreement, the objective was to define a general framework to establish common minimum requirements for the rights of information and consultation of public employees through their representatives in the central government. The requirements that were defined in the agreement do not prevent the application of more favorable national laws or information and rights of public employees to consultative services, including bargaining rights.

This Agreement could have a significant impact among Member States of the European Union because it generalized the right to information and consultation in its national settings, even when their regulation did not include such right. However, the European Commission decided not to submit to the Council a proposal for a decision implementing the Agreement at EU level, stating that it was better for the Agreement to be implemented by the social partners at national level. The European Court of Justice upheld that decision.<sup>87</sup>

The Argentinian general collective agreement for the national public service also illustrates the right of information obtained through bargaining. According to Article 112, the Argentinian State is committed to provide all information, including budget aspects, if required, for meaningful negotiations concerning the different matters, according to ILO Recommendation No. 163.

The agreement between the local Government of Bislig (Philippines) and the Bislig City Employees Association establishes that the employer should provide information to new workers on the trade union organization, guaranteeing freedom of association and promoting a change of mindset at the workplace, is an innovative regulation. Whereas the agreement does not refer to the right of the worker's organization to information for bargaining, it is recognized for the relations between the worker and the trade union.

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<sup>85</sup> Cf. ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Office, Sixth (revised) edition, 2018, paragraph 1326.

<sup>86</sup> Directive 2002/14/CE of the European Parliament and the Council (March 11, 2002), establishing the general framework concerning information and consultation of the European Community's workers, is a good example of this.

<sup>87</sup> Judgment of The General Court (Ninth Chamber, Extended Composition), 24 October 2019.

### 4.3. Consultation as a dispute resolution mechanism

The Committee on Freedom of Association has emphasized the importance of promoting dialogue and consultations on matters of mutual interest between the public authorities and the organizations of public employees.<sup>88</sup>

The Recommendation concerning consultation (industrial and national levels), 1960 (No. 113) fosters the adoption of appropriate measures to effectively promote consultations and the collaboration at the national level between public authorities and workers' and employees' organizations without distinction whatsoever. Public authorities should seek the views, advice and assistance of organizations in an appropriate manner, in respect of matters such as drafting and applying laws and regulations affecting their interests.

Collective agreements have transcended the framework promoted by ILO Recommendation No. 113, establishing consultation as a privileged dispute resolution mechanism for public authorities and trade unions of public employees.

In Sweden, the Agreement between local authorities and the trade union of Sweden municipal workers includes a clause to promote collaboration as a common approach to address and settle issues related to work organization, health, working environment, rehabilitation, gender equality and diversity in working life. To implement this collaboration, the parties concerned have developed an institutionalized collaboration system.

The collective agreement between the Treasury Board of Canada and the Association of Canadian Financial Officers, establishing a consultation clause, is another example. The agreement requires consultations to discuss any change considered in the working conditions that is not included in the Agreement. Both parties may request these consultations and define the matters to be addressed by the provisions of the collective agreement and the subjects to be discussed in consultations. Besides, these settings and tools to initiate the consultations, promoted under this clause, may influence the formulation of career development policies.

Collective agreements can institutionalize consultations by establishing permanent units within the public body to perform such an important role.

In Brazil, the Agreement of the Permanent Negotiating System of the Municipality of São Paulo (SINP, by its Portuguese acronym) is a mechanism to settle disputes and improve labour relations and the professional value of public servants. In Argentina, the collective agreement of the national public sector establishes a bipartite committee that interprets the agreement by request of either party; supervises that sectoral agreements comply with the general agreement; and intervenes in disputes that arise in bargaining, at the request of either

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<sup>88</sup> Cf. ILO. *Freedom of association - Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*. Geneva: International Labour Office, Sixth (revised) edition, 2018, paragraph. 1273.

party to a sectoral agreement. Whereas it is similar to the Spanish CIVEA model, in the Argentinian case, it has the power to settle disputes that affect large groups of workers.

The collective agreement for the French branch for social assistance, guidance, care and home services should be highlighted among the European agreements that institutionalize a consultation body for dispute resolution. For them, labour relations are based on a policy of joint problem solving and collaboration. To this end, several joint commissions have been established between both parties to address problems related to labour relations and the implementation of the agreement. For instance, the National Joint Negotiating Committee and the National Mixed Joint Negotiating Committee, of bipartite membership, are expected to discuss and modify any change, if needed, in the collective agreement. Likewise, a National Joint Monitoring Committee, represented by both parties, is responsible for the monitoring of the application of conventional texts. The National Joint Conciliation and Interpretation Committee is in charge of the evaluation of disputes – individual or collective – arising from the interpretation and application of conventional texts, and a Regional Joint Committee on Employment and Professional Training (CPREFP, by its Spanish acronym) is established in every region, according to their priorities.

Similarly, the above-mentioned Philippine collective agreement of the City of Bislig establishes a Labour Management Consultative Council with representation of both parties for communication, consultation and dialogue purposes. Its main function is to settle disputes related to the interpretation and application of the agreement. Besides, the Council is also a complaint mechanism to facilitate dispute resolution and improve relations between workers and the management. Likewise, it advises the local authority on any matter related to the working conditions of employees

#### **4.4. Facilities afforded to trade unions for their activities**

Part III of Convention No. 151 regulates the facilities that shall be afforded to public employees' organizations. Specifically, Article 6 refers to affording appropriate facilities to enable public employees' trade unions to carry out their functions promptly and efficiently, both during and outside their hours of work. Section IV of Recommendation concerning workers' representatives, 1971 (No. 43) provides examples of such facilities, mainly the necessary time off from work without loss of pay or social and fringe benefits for carrying out their representation functions in the undertaking (trade union leave); collection of trade union dues; granted access to all workplaces; access to the management of the undertaking – the competent public authority, in our case –; trade union notices; and distribution of trade union notices and documents.

The Committee of Experts describes a general framework as follows:

In view of the flexibility allowed in methods of implementation of the Convention, the Committee encourages governments to provide for the grant of facilities through legislation or collective bargaining, on the understanding that it is desirable for tripartite consultations to be held prior to the adoption of legislation on facilities, and for negotiations to take place in good faith, in order to ensure harmonious development of labour relations. If a State opts to apply Convention No. 151 by means of collective agreements, such agreements should apply to a large number of workers and ensure in practice a substantial number of facilities. In any case, it is important for the parties concerned to subscribe to the principles laid down so that the measures adopted are sustainable and not contingent on successive changes of government or administration.<sup>89</sup>

In addition, the size of the undertaking and the type of service on the agreement influences the choice of measures.<sup>90</sup>

In general, most of the collective agreements include a section for the exercise of trade union rights at the workplace or in public administration. This document only focuses on clauses that transcend the usual subjects.

Once more, the Philippine collective agreement of Bislig provides a good example, where the local Government supports union members to broaden their capacities in union matters, enabling them to attend official negotiations, conferences, meetings, symposiums and other trade union activities, including meetings with other trade union organizations of the country.

The collective agreement of the National University of Costa Rica, which provides paid time off for workers, is another example. The National University committed to promote and support workers in gaining knowledge and training in union-related matters. The University also committed to grant paid leave (up to six months as single leave) for workers to attend courses, conferences, congresses, etc. on union-related matters.

The collective agreement of the Peruvian Ministry of Culture grants the union the use of meeting rooms within its facilities four times a year, without charge, to deliver training regarding the list of demands for the staff of the Ministry.

The general labour collective agreement of the Argentinian public sector has a complete regulation on the facilities afforded to the trade union leadership in the exercise of their functions within the state services. First, access and freedom of movement in the workplaces, without impairing the normal operation of the corresponding administrative units, within normal working hours, except for areas with restricted access. Second, the free distribution of publications on professional and union-related matters. The use of posters located in visible places to which the workers have easy access. Third, authorities of the different Jurisdictions or Decentralized Bodies should facilitate the organization of information

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<sup>89</sup> ILO. *Collective bargaining in the public service: a way forward. General Survey concerning labour relations and collective bargaining in the public service*. Geneva: ILO, 2013, paragraph 572.

<sup>90</sup> ILO. *Promoting constructive approaches to labour relations in the public service. Examples from collective agreements. A Supplement to the Manual on Collective Bargaining and Dispute Resolution in the Public Service*. Geneva: ILO, 2015, p. 27.

assemblies and meetings by signatory trade unions to the Collective Agreements in the working places and hours. Fourth, the parties should exercise their rights without impairing the hours in which the facilities are open to the public or any other aspect related to the normal operation of the body. Fifth, a credit of daily cumulative hours on a monthly basis for union representatives to use within working hours and paid as effective work. Sixth, the State, as the employer, will grant a place for staff representatives to carry out their tasks.

## **4.5. Gender**

The principle of equality in labour relations is one of the fundamental pillars of the ILO, which cannot be disregarded in public administration. The ILO Manual on collective bargaining and dispute resolution in public administration (2011) emphasizes this topic and the supplementary study of conventions (2015) highlights two modalities: equal treatment and equal opportunity.

For the former, the agreement of the Quebec health sector (Canada) notes the prohibition of the issuance of bulletins or posters with sexist contents. The protocol of the agreement of the Chilean public sector includes investing in childcare infrastructure. In the second modality, the Philippine collective agreement of the Sultan Kudarat State University demands greater gender sensitivity and understanding of gender issues among employees. The basic agreement for the Swedish civil service seeks to ensure equal opportunities for women, compared to men.<sup>91</sup>

This type of clauses continues to be negotiated in the collective agreements of the public sector over the past years. However, the recently signed Colombian collective agreement should be specially highlighted. It fully addresses a series of regulations on the topic.

Chapter XVI of the agreement, titled “Woman and Gender”, includes 20 clauses on the matter, which demonstrates its importance in the labour relations framework of the Colombian public sector and becomes a parameter that other countries can follow.

The Colombian government, likewise, is committed to regulate the obligation to provide rooms for the care of public servants’ under five-year old children, as stipulated by Law No. 1843 of 2017. Likewise, the Ministries of Health and Public Function will encourage entities to provide resting rooms for women who work long hours or at night, to the maximum extent possible according to the infrastructure and budget conditions of every public body. These and 11 other commitments were met through the External Circular No. 11 of 2017, issued by the Administrative Department for Public Administration.

The Colombian government also undertook to issue a standard with the guidelines for public bodies to adopt flexible schedules, mainly for women with young children, which has been

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<sup>91</sup> Idem, 56-57.



accomplished through administrative orders in at least 121 public entities by December 2017.<sup>92</sup> Likewise, paid leave should be granted to workers in case of medical appointments, caregivers of children with special needs or caregivers of people with disabilities.

The Colombian government has committed to implement the National Gender Equity Program and simultaneously develop the project on sexual and reproductive rights, in order to promote and prevent violence in labour settings. It is also committed to the Regulation for the prevention of bullying at work and improved surveillance, control and sanction by labour inspections, under Law No. 1010 of 2006.

The Colombian State agreed to support a bill to ratification of ILO Conventions No. 149, 156 and 183 on nursing personnel, workers with family responsibilities and maternity protection. In fact, all three Conventions were under final consideration by the Colombian Senate in September 2019.<sup>93</sup>

The Colombian State also committed to implement activities for health promotion and prevention of common diseases in women. It is also committed to incorporate the gender approach in institutional training plans and induction and re-induction programs. Likewise, a circular would be issued addressed to public bodies recalling the content of constitutional and legal standards on non-discrimination in public administration. It is also committed to identify and define actions to strengthen the existing gender teams of public bodies and create them in the bodies where they have not been organized. Finally, it is committed to issue a resolution for public bodies, including guidelines on inclusive and non-sexist language that takes into account the presence, situation, contribution and role of women in official documents prepared and disseminated as decrees, resolutions, concepts, circulars, documents, in all public events and mass media of public bodies.

The Colombian State will issue a circular addressed to public bodies to prevent sexual harassment against pregnant workers or mothers, providing breastfeeding areas during their maternity period in public administration. Likewise, the establishment of special working hours for pregnant women so that they can finish their work thirty minutes earlier and the preparation of an awareness-raising plan for labour inspectors to detect actions involving violence at the workplace. Besides, it will implement awareness-raising workshops on the importance of the workload of women in public bodies.

The Colombian State is also committed to issue a circular for public bodies to ensure in their budgets the supply of items for female hygiene and daily care. It will also issue a circular against discrimination of HIV positive workers and promptly manage the complaints submitted on this matter, which was later done through Joint Circular No. 100-001 of 2018

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<sup>92</sup> “Asciende a 121 el Número de Entidades Públicas con Horarios Flexibles”, *Periodismo Público*, 14 December 2017, <https://periodismopublico.com/asciende-a-121-el-numero-de-entidades-publicas-con-horarios-flexibles>.

<sup>93</sup> *Gaceta del Congreso*, 9 de septiembre de 2019; *Agenda Legislativa de la semana del 23 al 27 de septiembre de 2019*.

issued by the Labour Ministry. Likewise, it will prepare a working plan for a diagnosis and adopt a comprehensive care roadmap against bullying and sexual harassment at work, among other types of violence typified in the labour regulation. This should be complemented by an awareness-raising campaign to promote a culture of work focused on women's human rights.

Finally, the Colombian State will provide the bodies with guidelines to grant female workers the necessary time off to submit and monitor their claims on bullying and sexual harassment at work. The Ministry of Labour will grant the Sub-committee on Gender the competence to know the different topics developed and appointed in this agreement.

These collective agreements show the evolution in the gender topic within the collective bargaining processes in public administration. Initially, clauses focused on the protection of the female worker – pre and postnatal leave, reduced working hours during pregnancy, etc. – and then, there was a trend of empowerment of women at work – the prohibition of gender discrimination, equal treatment at work between men and women, etc. – and including, as in the Colombian case, the gender mainstreaming approach in conventional regulations.

#### **4.6. Decent work**

The impact of the ILO work on the global promotion of decent work at the workplace has influenced the incorporation into collective agreements of promising measures which seek to broaden the scope of bargaining beyond traditional subjects.

For instance, the collective agreement on wage adjustment and improvement of terms and conditions of work in the South African public service included a clause where the State is committed to implement a study on the principle of decent work. The ILO has provided technical assistance for these purposes, and the parties agreed on a series of rules for interest-based negotiations through a Council resolution dated June 27, 2017.

Also, the 2017 Colombian general agreement also establishes that the State is committed to discuss the proposed content of the National Plan for Decent Work submitted by the trade union organizations in the Sub-committee of the Public Sector.

## 5. Concluding remarks

The first section of the study addresses the regulatory treatment of the right to collective bargaining in public administration. According to Convention No. 98, public employees enjoy the right to bargain collectively, with the exception of public servants engaged in the administration of the State. Convention No. 151 extends the coverage of this right and includes public servants engaged in the administration of the State, with the exception of high-level officials (with decision-making, managerial or highly confidential duties). Members of the armed forces and the police are a special category, and the national regulation should define the scope of the guarantees established by the Conventions.

The ILO supervisory bodies have played a significant role in outlining a definition of public servants engaged in the administration of the State that prevents the arbitrary exclusion of public employees from union rights. Their observations result from an assessment on a case-by-case basis, leading to an open list. Members of parliament, the judiciary and other elected or appointed public authorities fall within the category of high-level public servants. Conversely, teachers of public establishments, public health workers, municipal workers, employees in state-owned companies and independent public institutions, prison service staff, civilian personnel in the armed forces and the police, enjoy the right to participate in the determination of their working conditions through their collective organizations.

The second section refers to Convention No. 151, which establishes negotiations as the prevailing procedure to establish working conditions, but allowing other methods (consultations) in the case of public servants engaged in the administration of the State, which enable public employees' organizations to participate in the establishment of the terms and conditions of employment. In the case of public employees, consultations procedures do not apply, under Convention No. 98. Likewise, the ratification of Convention No. 154 results in the replacement of the consultation procedure with the collective bargaining process for public servants engaged in the administration of the State.

According to the Conventions, the regulation of working conditions and terms of employment, including wages and economic compensation, is subject to negotiation. Matters affecting the managerial prerogatives of the State, as the employer, and the norms of public order cannot, however, be addressed through collective bargaining. Likewise, the budget restriction is a valid limit in the exercise of the right to collective bargaining in public administration.

In the third section, eight national systems were analyzed, which regulate collective bargaining in public administration. This showed the regulatory treatment adopted by the States globally, mentioned only as examples. In general, national laws usually follow two bargaining models: centralized and decentralized.

In the centralized model, there is a central collective bargaining at the national level that establishes the main working conditions and terms of employment or, at times, it only

prescribes the procedural rules of other bargaining levels. In any event, regional and local bargaining processes, or by public bodies, should determine the working conditions and terms of employment in their bargaining units. This model requires state or conventional standards establishing the distribution of matters or competences among the different bargaining levels to prevent disputes or overlapping among collective agreements.

In the decentralized model, the collective bargaining process is rather implemented in every public body or organization in an independent manner in relation to the others and, therefore, there are no bargaining or coordination levels among them.

The centralized model is the regulatory trend, because it ensures that the State will coordinate the collective bargaining processes in the whole public service, making sure that the budget restriction is observed.

Likewise, in general, national regulations recognize that wages and economic compensations are matters subject to collective bargaining in public administration, in accordance with Conventions. Therefore, increasingly fewer countries prohibit it.

The fourth section identifies new trends in the clauses of collective agreements globally, highlighting new matters accompanying the traditional clauses on wages and terms and conditions of work, regardless of their regulation in the legislation.

States that recognize collective bargaining with representatives of members of the national or local police are gradually increasing. These collective agreements are established under the understanding that the police authorities enjoys the powers of direction and instruction and, therefore, the conventional regulation does not call into question the command and discipline that guide their action. This allows overcoming the arguments against granting them the right to collective bargaining.

Innovative matters in the conventional clauses include the recognition of the disclosure of information as a right of trade union organizations; the institutionalization of the consultation with trade unions as dispute resolution mechanism within the public body and the establishment of bipartite bodies for playing this important role; facilities afforded for trade union activities (union leave, collection of union dues, access to the workplace, access to the management of the undertaking, trade union notices, etc.); the gender regulation to prohibit discrimination against women at the workplace, people with family responsibilities, persons living with HIV, people with disabilities, etc.; the incorporation of decent work as main objective in labour relations of public services.

This study is a clear sign of the gradual rejection of the statutory unilateralism of relations between the State, as the employer, and public employees, replacing it with bilateral labour relations backed by the exercise of collective bargaining. This transforming process does not call into question the role of the State in society or the uniqueness of public employment, but it rather illustrates the democratization within the State through the direct involvement of public employees by means of collective bargaining.

The future of collective bargaining in public administration will continue this legal path, where a growing number of ILO Member States remove prohibitions or restrictions from its exercise, weighing the benefits that the consensual regulation of labour relations with employees brings to public administration.

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