

Human rights law and freedom of association: Development through ILO supervision

Lee SWEPSTON *

There were two striking developments in 1948 in the nascent field of international human rights law. The first in time was the adoption by the ILO of the Freedom of Association and Protection of the Right to Organise Convention (No. 87); the second was the adoption by the United Nations of the Universal Declaration of Human Rights a few months later.¹ The close relation between some aspects of the two at the time has been maintained through the ILO's supervisory process ever since.

The Universal Declaration is, of course, of great importance to the ILO in its work for the promotion and defence of human rights. As the ILO's Committee of Experts on the Application of Conventions and Recommendations stated in the report of its 1997 Session:

The Universal Declaration ... is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organizations since then. ... The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration, ... [T]he ILO's standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document.²

* Chief, Equality and Human Rights Coordination Branch, International Labour Standards and Human Rights Department, International Labour Office. As concerns the development of principles contained in Convention No. 87, this article draws on Héctor Bartolomei de la Cruz, Geraldo von Potobsky and Lee Swepston: *The International Labour Organization: The international standards system and basic human rights*, Boulder, CO, Westview Press, 1996 (particularly Chapter 21).

¹ The complete texts of both Convention No. 87 and the Universal Declaration of Human Rights are appended to this issue of the *International Labour Review*.

² ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 86th Session, 1998, Geneva, pp. 16-17, paras. 56-58. The full text of this section of the Committee of Experts' Report (paras. 41-60) is appended to this issue of the *Review* (see Appendix III).

It is of particular interest to the ILO that the Universal Declaration of Human Rights proclaims in its Article 23, paragraph 4, that: “Everyone has the right to form and to join trade unions for the protection of his interests.” This is a more specific manifestation of the right laid down in article 20 of the Universal Declaration to “the right of freedom of peaceful assembly and association”.

The inclusion of this principle in the Universal Declaration had been preceded by its inclusion in three important ILO instruments. The first of these is the ILO’s Constitution, which in its original version as Part XIII of the Treaty of Versailles proclaimed that the High Contracting Parties considered that the right of association “for all lawful purposes” is of “special and urgent importance”, both for workers and employers.³ The Preamble to the Constitution explicitly cites trade union rights among the measures that could improve working conditions and thus assure peace. When in 1944 the ILO adopted the Declaration of Philadelphia, the second of these fundamental texts, and in 1946 incorporated it into the Constitution, it reaffirmed freedom of association as one of the fundamental principles on which the Organization was based, and characterized it as “essential to sustained progress”. It also referred to “the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures”.

The third of these fundamental texts was the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). The adoption of a specific Convention on this subject in the ILO was not easy, as is outlined in Harold Dunning’s article in this issue of the *International Labour Review*. It was put off many times as being too difficult to agree on, and its lack began to be felt early. In 1921, the ILO adopted the Right of Association (Agriculture) Convention (No. 11), which recognized in very general terms that workers in agriculture have the same rights of association as workers in industry — but at the time the ILO had not yet defined the freedom of association rights of industrial workers.

When the time did come, events moved fairly quickly. In the ILO itself, the 1944 Declaration of Philadelphia contained the provision mentioned above. In addition, the Third Conference of American States Members of the ILO adopted in 1946 a resolution on freedom of association that spelt out the basic principles which would be included in Convention No. 87. In 1947, the International Labour Conference adopted the Right of Association (Non-Metropolitan Territories) Convention (No. 84), which refers not only to the right of employers and workers to associate for any legal purpose, but also to collective agreements, consultations and the solution of labour conflicts.

³ Following its amendment in 1946, the ILO’s Constitution no longer includes the phrase “for all lawful purposes”.

Though ratified by only four countries,⁴ this Convention had an important effect on the development of international law on the subject.

The same year, the Economic and Social Council of the United Nations (ECOSOC) examined reports on freedom of association from the World Federation of Trade Unions (WFTU)⁵ and the American Federation of Labor (AFL), and decided to ask the ILO to include these subjects on the agenda of its Conference. The ILO did so in 1947, and adopted a resolution which prepared the ground for the adoption of Convention No. 87 in 1948, before the adoption of the Universal Declaration, and of Convention No. 98 shortly thereafter, in 1949.

The adoption of international human rights law in a “legislative” process — in international Conventions adopted by the ILO and the United Nations — really began only in 1948, with that of Convention No. 87 and the Universal Declaration. Before the ILO was established, there had been some early attempts to adopt international agreements on workers’ rights by negotiation between States, but they had not been terribly successful. At the end of the First World War, in 1919, the League of Nations and the International Labour Organization were established, and the ILO set about adopting international Conventions on conditions of work. The only instruments which really amounted to what are called “human rights” treaties today were the Slavery Convention adopted by the League of Nations in 1926, and the Forced Labour Convention (No. 29) adopted by the ILO in 1930 to develop the coverage of labour aspects of slavery. But no other human rights instruments were adopted until after the Second World War.

Since 1948, the ILO and the United Nations have developed along parallel lines as far as freedom of association issues are concerned — and other human rights questions as well — and regional organizations have also developed both standards and supervisory capacity. But consideration will first be given to how the United Nations and other organizations developed the concepts, and then to the development of these principles by the ILO through its Conventions and supervisory process.

The development of freedom of association outside the ILO

The United Nations

Article 23(4) of the Universal Declaration on Human Rights, quoted above, is couched in language deriving directly from Convention No. 87, and is a general statement of the same philosophy. Article 2 of Convention No. 87 reads:

⁴ Belgium, France, New Zealand and the United Kingdom. Note that it was not applicable to countries which had no non-metropolitan territories.

⁵ This was before the split in its membership which led to the establishment of the International Confederation of Free Trade Unions (ICFTU).

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without any previous authorisation.

The main difference between this text and that of the Universal Declaration is that the latter omits any reference to employers. Also, of course, it stops at the general expression of the principle, as is its vocation.

In 1966, the United Nations codified the principles laid down in the Declaration in two seminal texts: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Both Covenants came into force ten years later once they had received a sufficient number of ratifications; they are the most influential international human rights instruments of broad coverage. They also followed the earlier ILO provisions on freedom of association.

Article 22 of the *International Covenant on Civil and Political Rights* is its only detailed article on freedom of association. The first paragraph of that Article is an almost exact restatement of Article 23(4) of the Universal Declaration. The second paragraph states that no restrictions may be placed on the exercise of this right “other than those which are prescribed by law and which are necessary in a democratic society” and allows “lawful restrictions on members of the armed forces and of the police in their exercise of this right”, as does Convention No. 87. The third paragraph reads as follows:

Nothing in this article shall authorise the States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

Entire legislative conformity is guaranteed with Convention No. 87 in this remarkable provision, which was incorporated in the other Covenant as well.

The *International Covenant on Economic, Social and Cultural Rights* contains a more detailed treatment of the same subject, in Article 8:

1. The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

- (d) The right to strike, provided that it is exercised in conformity with the laws of a particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorise the States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

In comparing this provision with ILO standards, Valticos and von Potobsky point out the relative merits of the two approaches:

This provision is not as detailed as Convention No. 87. Moreover, the restrictions which it authorizes might reduce considerably the extent of the protection which it affords. This applies to the limitations which, contrary to Convention No. 87, are permitted as regards the members of the administration of the State. This is also the case as regards the limitations “which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”, for which there is no equivalent in Convention No. 87. However, the obligations arising from that Convention are expressly reserved by the saving clause contained in Article 8, para. 3, of the Covenant. On the other hand, this Article recognizes the right to strike, but it leaves the conditions of its exercise to the discretion of national legislations.⁶

Thus, while there are some differences, the ILO and United Nations texts are almost completely consistent one with the other; certainly they have not been developed by the supervisory bodies of the two organizations in a way which gives rise to any difficulties.

Regional instruments

Protection on the regional level is most thorough in Europe, where it is contained in two instruments. The *European Convention on Human Rights* (1950) provides for freedom of association and protection of the right to organize in terms adopted later (1966) in the International Covenant on Economic, Social and Cultural Rights, in its Article 11. The *European Social Charter* (1961) takes an approach much more similar to that of the ILO standards, in its Articles 5 (the right to organize) and 6 (the right to bargain collectively). Article 6, para. 4, of the Charter contains the first express authorization in an international instrument of the right to strike. This Article was supplemented by the following provision from the Appendix to the Charter:

⁶ Nicolas Valticos and Geraldo von Potobsky: *International labour law*, 2nd revised edition, Deventer, Kluwer, 1995, p. 105.

It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31.

Article 31 (1) of the Charter, in turn, provides that:

The rights and principles set forth ... and their effective exercise ... shall not be subject to any restrictions or limitations not specified ... except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

In the Americas, the *American Convention on Human Rights* (Pact of San José, 1969) provides for freedom of association in its Article 16. The *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (Protocol of San José, 1988) develops this in Article 8, which closely resembles the provisions of the International Covenant on Economic, Social and Cultural Rights. It contains one provision not found in any of the other standards examined here, affirming that no one may be compelled to belong to a trade union. This makes trade union security clauses or practices contrary to the Protocol.

In Africa, the *African Charter on Human and Peoples' Rights* (1981) contains no provision directly on freedom of association for employers or workers. It does contain, at Article 10, a general assertion for everyone of the "right to free association provided that he abides by the law"; and, at Article 11, the right to freedom of assembly.

International law is thus fairly clear and remarkably consistent on the question of freedom of association and protection of the right to organize and to bargain collectively. It is also clear that all these provisions emerge more or less directly from Convention No. 87 and the closely related text of the Universal Declaration.

ILO supervisory mechanisms

Before examining how the supervisory bodies have perceived the obligations under the ILO's Constitution and standards, it may be helpful to review the kinds of supervision that operate.

All ratified ILO Conventions are dealt with by the ILO's Committee of Experts on the Application of Conventions and Recommendations. Governments report at regular intervals, and the Committee of Experts makes any comments that may be called for. In more difficult cases, the situation is referred to the tripartite Conference Committee on the Application of Standards in the annual session of the International Labour Conference, where the government concerned may be invited to come and discuss its situation in a public forum, as with other ILO Conventions.

It is also possible to invoke the constitutional complaints procedures for freedom of association Conventions, as for all other Conventions. *Representations* under article 24 of the Constitution are generally referred to

the Committee on Freedom of Association (see below). *Complaints* under article 26 of the Constitution may also be filed, and are examined by a Commission of Inquiry convened by the Governing Body. (As this article is being written, a complaint is pending concerning Convention No. 87 in Nigeria.)

The arrangements described above apply to all ratified Conventions. In the case of freedom of association and the right to collective bargaining, however, the ILO has made additional provisions. The Governing Body decided in January 1950 to create the Fact-Finding and Conciliation Commission on Freedom of Association,⁷ following discussions with ECOSOC. In November 1951, the Governing Body created a special committee from among its own members to carry out prior examination of the cases submitted to that Commission; this was the Committee on Freedom of Association.

The Fact-Finding and Conciliation Commission on Freedom of Association may examine cases only if the government against which a complaint was filed agrees to the examination.⁸ The first governments against which the procedure was invoked refused this consent, and the Commission was thus blocked from any action until 1964. Because of this blockage, the Committee on Freedom of Association, which required no such agreement, evolved from a body whose role was originally conceived as a filtering mechanism for the Commission into an independent body which was able to examine complaints; to date it has examined nearly 2,000 such complaints. The Committee is composed of nine titular and nine substitute members, drawn on a tripartite basis from the ILO Governing Body; it meets three times a year. Complaints may be submitted by governments or by employers' or workers' organizations, alleging that the right of freedom of association has been infringed.

The distinguishing characteristic of the Commission and of the Committee is that they may examine complaints *whether or not the country concerned has ratified any ILO Convention* on the subject — their authority derives directly from the Constitution, and complaints may thus be filed against any member State of the ILO. If the government concerned has not ratified the relevant ILO Conventions, the Committee on Freedom of Association itself follows up the effect given to complaints; if it has, the Committee of Experts on the Application of Conventions and Recommendations is charged with the follow-up.

The principles contained in the Conventions and in the Constitution have thus been subject to intense scrutiny over the past 50 years. With 122

⁷ ILO: *Record of proceedings*, International Labour Conference, 33rd Session, 1950, Geneva, Appendix XII.

⁸ Consent is not required, however, if the State concerned has ratified ILO Conventions on freedom of association, as in this case the complaint could be dealt with under the article 26 complaint procedure.

ratifications of Convention No. 87,⁹ and reports from ratifying States at two-yearly intervals or less, the Committee of Experts has continuously had to evaluate whether given situations were in compliance with the Convention. And the Committee on Freedom of Association has been employed in a similarly intense manner deciding on the 2,000 cases arising from complaints.

There are two principal sources for examining the opinions of the ILO supervisory bodies. The primary source for the Committee of Experts is its own comments on individual country situations. Each year the Committee of Experts also carries out a General Survey on one or more ILO Convention(s) and Recommendation(s) reviewing the situation around the world as regards ratification and difficulties encountered in their application by governments. It uses this opportunity to review the meaning and development of the international law contained in the Conventions concerned. The last General Survey to be concerned with freedom of association was published in 1994.¹⁰

The Committee on Freedom of Association also collects its own decisions, in a *Digest of decisions*, which is issued from time to time.¹¹ This reviews the questions, principle by principle, and provides detailed guidance on what has been decided over the years. The two together provide detailed information on ILO law and practice on freedom of association and protection of the right to organize. What follows here is a quick review of a highly complex subject, which may be explored in much greater depth through primary sources.

Freedom of association and civil liberties as developed by the ILO supervisory bodies

This subject is of overarching importance in the field of freedom of association, and bears a special relationship to the principles laid down in the Universal Declaration of Human Rights. There is a general consensus that respect for civil and political rights is necessary for the exercise of trade union rights. In the preparatory report prepared for the adoption of Convention No. 87, the Office stated that “freedom of industrial association is but one aspect of freedom of association in general, which must itself form part

⁹ As at 15 July 1998.

¹⁰ ILO: *Freedom of association and collective bargaining: General Survey of the reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948, and the Right to Organise and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4B), International Labour Conference, 81st Session, 1994, Geneva. Hereinafter cited as *General Survey*, + year of publication.

¹¹ ILO: *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 4th (revised) edition, Geneva, 1996 (hereinafter cited as *Digest*).

of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly and of meeting, freedom of speech and opinion, freedom of expression and of the press, and so forth".¹²

The supervisory bodies have always insisted on the importance of civil liberties. The Committee on Freedom of Association in particular has stated that a "genuinely free and independent trade union movement can only develop where fundamental human rights are respected".¹³ In 1992 the Director-General stated in his report *Democratisation and the ILO* that: "The ILO takes a keen interest in civil and political rights, for, without them, there can be no normal exercise of trade union rights and no protection of the workers".¹⁴ In its 1994 General Survey, the Committee of Experts stated:

The Committee considers that the guarantees set out in the international labour Conventions, in particular those relating to freedom of association, can only be effective if the civil and political rights enshrined in the Universal Declaration of Human Rights and other international instruments, notably the International Covenant on Civil and Political Rights, are genuinely recognized and protected. These intangible and universal principles, the importance of which the Committee wishes to emphasize particularly on the occasion of the 75th anniversary of the creation of the ILO and the 50th anniversary of the Declaration of Philadelphia, should constitute the common ideal to which all peoples and all nations aspire.¹⁵

According to a Resolution concerning trade union rights and their relation to civil liberties, adopted by the Conference in 1970, the civil liberties essential for the normal exercise of trade union rights include: "(a) the right to freedom and security of person and freedom from arbitrary arrest and detention; (b) freedom of opinion and expression and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; (c) freedom of assembly; (d) the right to a fair trial by an independent and impartial tribunal; (e) the right to protection of the property of trade union organizations."¹⁶

Right to personal security

There are several aspects to this principle. As regards physical integrity, the complaints received by the Committee on Freedom of Association refer principally to loss of life, injury, torture or other ill treatment, and "disap-

¹² ILO: *Freedom of association and industrial relations*, Report VII, International Labour Conference, 30th Session, 1947, Geneva, pp. 11 and 12.

¹³ *Digest*, para. 35.

¹⁴ ILO: *Democratisation and the ILO*, Report of the Director-General (Part 1), International Labour Conference, 79th Session, 1992, p. 24.

¹⁵ *General Survey*, 1994, para. 43.

¹⁶ ILO: *Record of proceedings*, International Labour Conference, 54th Session, Geneva, 1970, pp. 733-736.

pearance” of trade unionists. The Committee has placed special emphasis on the importance of setting up an independent judicial inquiry in such cases.¹⁷

As regards torture, cruelty and ill-treatment in particular, the Committee has pointed out that during their detention trade unionists, like all other individuals, should enjoy the safeguards provided by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.¹⁸

The Committee frequently invokes the right to be tried promptly under normal judicial procedures.¹⁹ During a state of emergency the same safeguards of a speedy trial of trade unionists, with the guarantees of a regular judicial procedure, must be applied.²⁰

The Committee has often stated that the forced exile of trade unionists is not only contrary to human rights, but also particularly serious since it deprives them of the possibility of working in their countries and separates them from their families. It also constitutes a violation of freedom of association, since it weakens trade union organizations by depriving them of their leaders and key activists.²¹

Freedom of opinion and expression

The Committee on Freedom of Association considers that the full exercise of trade union rights calls for a free flow of information, opinions and ideas, and that workers, employers and their organizations should enjoy freedom of opinion and expression at their meetings, in their publications, and in the course of their other activities.²²

A question of particular interest for the ILO is the freedom of speech of delegates to the International Labour Conference. The functioning of the Conference would be considerably hampered and the freedom of speech of the workers' and employers' delegates paralysed, if they were to be threatened with prosecution based, directly or indirectly, on the contents of their speeches at the Conference. Article 40 of the ILO Constitution provides that delegates to the Conference shall enjoy “such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization”. The arrest and sentencing of a delegate as a result of his or her speech to the Conference, or by reason of information given on the

¹⁷ *Digest*, paras. 51 and 52; *General Survey*, 1994, para. 29. In the case of disappearances, the CFA has asked the government concerned to carry out investigations to determine the fate of the disappeared persons, and to initiate an investigation to clarify the facts, assign responsibility and punish those found guilty.

¹⁸ *Digest*, paras. 58, 59 and 60; *General Survey*, 1994, para. 30.

¹⁹ *Digest*, paras. 96, 102 and 109; *General Survey*, 1994, para. 32.

²⁰ *Digest*, paras. 99 and 101; *General Survey*, 1994, para. 32.

²¹ *Digest*, paras. 122-127; *General Survey*, 1994, para. 33.

²² *Digest*, paras. 152 and 153; *General Survey*, 1994, para. 38.

debates thereof, jeopardize freedom of speech for delegates as well as the immunities that they should enjoy in this regard.²³

Freedom of assembly

The Committee has pointed out many times that freedom of assembly constitutes a fundamental aspect of trade union rights. The authorities should refrain from any interference which would restrict this right or impede its lawful exercise, provided that the exercise of these rights does not cause a serious and imminent threat to public order.²⁴

Protection of trade union premises

The Committee has often stated that trade union premises are inviolable. They should only be searched when a warrant has been issued by the regular judicial authority, when that authority has good reason to believe that evidence for criminal proceedings under the ordinary law will be found on the premises, and on condition that the search is restricted to the purpose for which the warrant was issued.²⁵

Special situation during states of emergency

The Committee of Experts has noted that a state of emergency is frequently invoked to justify exemptions from the obligations arising under the Conventions on freedom of association, but that such a pretext cannot be used to justify restrictions on the civil liberties that are essential to the proper exercise of trade union rights, except in cases of extreme gravity. Any such restrictions must be limited in scope and duration to what is strictly necessary to deal with the situation in question. While it is conceivable that the exercise of some civil liberties, such as the right to public assembly or the right to hold street demonstrations, might be limited, suspended and even prohibited, it is not permissible that the guarantees relating to the security of the person should be limited, suspended or abolished.²⁶

Persons covered

Article 2 of Convention No. 87 provides that “Workers and employers, without distinction whatsoever, shall have the right to establish and ... to join organizations of their own choosing”. Only the members of the armed forces and of the police may be excluded (see below), and the Convention covers both wage-earners and other workers. In adopting the term “without distinction whatsoever”, the Conference emphasized that the right to organize

²³ *Digest*, para. 170; *General Survey*, 1994, para. 39.

²⁴ *Digest*, paras. 130 and 131; *General Survey*, 1994, para. 35.

²⁵ *Digest*, paras. 175 and 180; *General Survey*, 1994, para. 40.

²⁶ *Digest*, paras. 186 to 199; *General Survey*, 1994, para. 41.

should be guaranteed without distinction or discrimination of any kind as to occupation, sex, colour, race, creed, nationality or political opinion.²⁷

Public employees are covered along with other workers. The Committee of Experts has emphasized this means that “all public servants and officials should have the right to establish occupational organizations, irrespective of whether they are engaged in the state administration at the central, regional or local level, are officials of bodies which provide important public services or are employed in state-owned economic undertakings”.²⁸

As concerns *nationality*, in principle ILO standards apply to all workers. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111) does not list nationality among prohibited grounds of discrimination, but various ILO instruments provide that equal treatment should be given to migrant workers, and some provide specifically for this to be the case for freedom of association. For instance, the Migrant Workers (Revised) Convention, 1949 (No. 97), refers to equality on the basis of nationality with respect to membership of a trade union and the enjoyment of the benefits of collective agreements (Article 6, para. 1(a)(ii)). The later Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), included trade union rights in its requirements for equality of opportunity and treatment (Article 10).

There are special problems concerning the coverage of *agricultural workers*, and the fact that these workers have special difficulties has also been recognized by the adoption of the Rural Workers’ Organisations Convention (No. 141) and Recommendation (No. 149), 1975, which recognize their special status. Nevertheless, they continue to benefit from the guarantees provided for in other freedom of association Conventions, in particular Conventions Nos. 87 and 98.

Political opinion, including political activities, should not be a basis for discrimination concerning the right to join a trade union. Furthermore, conviction for a political offence should in no case constitute a valid ground for withdrawal of the right to trade union membership.²⁹

Employers should enjoy the same right to organize as workers. This principle applies in particular to countries in which private enterprise does not exist or where it has only a marginal importance under the existing political system — a decreasing number of countries now, but until recently there was a significant number of them. The Committee of Experts has emphasized that employers, including managerial staff and executive staff in state-run enterprises, are covered by Convention No. 87 and that their right to organize should be fully protected.³⁰

²⁷ *General Survey*, 1994, para. 45; ILO: *Record of proceedings*, International Labour Conference, 30th Session, 1947, Geneva, p. 570.

²⁸ *General Survey*, 1994, para. 49.

²⁹ *General Survey*, 1994, para. 65.

³⁰ *General Survey*, 1994, paras. 66 and 67.

There is only one category of exception allowed by Convention No. 87, in Article 9 (1): “The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.” This provision permits either the total exclusion of this category of workers from the coverage of the Convention, or the recognition of some limited rights of freedom of association. The Committee on Freedom of Association, in particular, has made it clear that “this is a matter which has been left to the discretion of the States Members of the ILO”.³¹

Aspects of freedom of association developed through ILO supervision

Establishment of organizations without previous authorization

Article 2 of the Convention lays down the right of workers and employers to establish their organizations “without previous authorization”. This principle often comes into play when occupational organizations request “legal personality”, as required by the legislation of some countries. The Convention refers explicitly to this question in Article 7, providing that “[t]he acquisition of legal personality by workers’ and employers’ organizations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application” of the various guarantees provided in the Convention.

The supervisory bodies have repeatedly spoken against provisions that allow excessive discretionary powers to the national authorities. The Committee on Freedom of Association has stated, for example, that where the authority competent to register a union has the discretionary power to refuse registration this is not very different from cases in which prior authorization is required.³² The Committee of Experts considers that genuinely discretionary power to grant or reject a registration request is tantamount to a requirement for prior authorization, which is not compatible with Article 2 of the Convention.³³ In addition, the possibility of appealing to the courts against an administrative decision rejecting registration has been considered an especially important safeguard.

³¹ *Digest*, para. 221; see also *General Survey*, 1994, para. 55. It should be noted that paragraph 2 of Article 9 provides: “In accordance with the principle set forth in paragraph 8 of article 9 of the Constitution of the International Labour Organization the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any rights guaranteed by this Convention.”

³² *Digest*, para. 244.

³³ *General Survey*, 1994, para. 74.

Right to establish and join organizations of their own choosing

The requirement of Article 2 that workers and employers “shall have the right to establish and ... to join organizations of their own choosing” is one of the most important aspects of the ILO’s concept of freedom of association, and has been vigorously defended by the supervisory bodies. The questions of trade union pluralism and unity are examined on the basis of this provision, as are other questions relating to the structure and composition of occupational organizations. For instance, the supervisory bodies have stated that a requirement for a minimum number of workers or of a certain proportion of workers for the creation of a trade union may be incompatible with the Convention. The Committee of Experts has therefore said that this number or proportion should be kept at a reasonable level so as not to constitute an obstacle to the creation of organizations.³⁴ The Committee on Freedom of Association has been more concrete, saying that a requirement for 50 founding members of a trade union is “obviously too high a figure”, while a legal requirement that there be a “minimum number of 20 members to form a union does not seem excessive”.³⁵ Limitation of the geographical region within which a trade union can be established has also been found by the supervisory bodies to be contrary to Article 2, and restriction of the right to organize to workers in the same occupation or branch of activity can also cause a problem, both in the private and in the public sectors.

When trade union unity is imposed by law, this kind of unity does not correspond to the principle of free choice which is laid down in Article 2 of the Convention. This does not, however, prevent a voluntary decision by workers or employers to choose to have a single organization to represent them, to avoid the problem of having parallel organizations at the general, sectoral or enterprise levels. Article 2 of the Convention favours neither unity or diversity for trade unions. Nor does it make trade union diversity an obligation, but it does require that at the very least diversity should always remain possible.³⁶ Both the Committee of Experts and the Committee on Freedom of Association consider that there is a fundamental difference between cases in which a trade union monopoly is imposed or maintained by law, and situations in some countries in which the workers or their unions voluntarily combine into one organization, independently of legislation. In the latter case, the laws should not institutionalize a factual monopoly; even in a situation where at some point all workers have preferred to unify the trade union movement, they should still remain free to choose to set up unions outside the established structures should they so wish.

³⁴ *General Survey*, 1994, paras. 81 and 82.

³⁵ *Digest*, paras. 255 and 256.

³⁶ *Digest*, para. 291.

Examples of cases which the supervisory bodies have considered contrary to Article 2 of the Convention are the legal registration of only one first-level organization for all the workers in an undertaking, or by occupation or branch of activity;³⁷ the requirement that at least 50 per cent of the workers join in order to establish or register an organization;³⁸ and the power to impose an obligation on all workers in the category to pay contributions to the single national trade union, the establishment of which is permitted by branch of industry and by region, as this represents a consecration and strengthening of a trade union monopoly.³⁹ Both the Committee on Freedom of Association and the Committee of Experts have insisted that the principle of free choice should allow the continued existence of minority organizations as an alternative in the future to the union which presently is recognized for the exclusive exercise of certain rights of representation. This does not imply equal representation for all the organizations that may coexist, but it does require that some of these rights remain in force. The definition of “organization” in Article 10 of the Convention is important here: “any organization of workers or of employers for furthering and defending the interests of workers or of employers”. If a law allows the existence of a minority trade union organization, but deprives it of trade union functions to the point that it no longer corresponds to this definition, the implicit result is the prohibition of the existence of another union than the majority, “recognized” one, and this would be contrary to Article 2 of the Convention. In practical terms, the Committee of Experts considers that laws which distinguish between the most representative trade union and others are not in themselves contrary to the principle of freedom of association, so long as the distinction is limited to recognizing certain rights (particularly for such purposes as collective bargaining, consultation by the authorities or the designation of delegates to international organizations) for the most representative union, determined under objective and previously established criteria.

Freedom to refrain from joining and union security clauses (the “closed shop”) are a distinct issue. The Conventions on freedom of association, the right to organize and collective bargaining protect the positive right to organize, and do not deal with the right *not* to join an occupational organization. While Article 2 of Convention No. 87 thus recognizes only the positive right to associate, the Committee of Experts has found that Article 2 of that Convention leaves it to the practice and regulations of each State to decide whether it is appropriate to guarantee the right of workers not to join an occupational organization or, on the other hand, to authorize and, where necessary, to regulate the use of union security clauses in practice.⁴⁰ In other words, under Convention No. 87 it is acceptable either to adopt the

³⁷ *General Survey*, 1994, para. 92.

³⁸ *General Survey*, 1994, paras. 82 and 83.

³⁹ *Digest*, para. 293.

⁴⁰ *General Survey*, 1994, para. 99.

prohibition of trade union security clauses in order to guarantee the right not to associate, or to authorize and regulate practices which restrict or cancel this negative right.

Administration and activities of organizations

The first two Articles of Convention No. 87 deal with the individual's right to join an organization and the rights deriving from its exercise, especially as concerns the formalities of constitution of organizations, their composition and structure, and the problems of trade union unity or pluralism. Article 3 of that Convention introduces the collective rights of organizations of employers and of workers, beginning with their internal autonomy and their "right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration". It continues with their right to organize their "activities and to formulate their programmes", thus protecting the exercise of the socio-economic functions of these organizations. The Article reaffirms the general principle of the autonomy of these organizations by stipulating that: "The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof."

This field has called for a great deal of discussion by the supervisory bodies, and for the examination of many different situations. They have said, for instance, that the fact that legislation imposes certain requirements regarding constitutions does not infringe the principle of freedom of association, so long as the legislation contains formal requirements and constitutions are not subject to prior approval at the discretion of the public authorities. The legislation may therefore list particular points which must appear in an organization's constitution, so long as the development of these rules is left up to the members of the organization.⁴¹

The Committee on Freedom of Association has not accepted provisions which appear to imply subordination of trade unions to the economic policy of the government, which minutely regulate the internal election procedures of a trade union, or which provide for the maximum number of votes for each organization within a federation. This kind of question must be freely decided upon by each organization. On the other hand, the Committee has accepted that the law may require that the majority of the members of a trade union must decide on certain questions which affect the very existence or structure of a union (adoption and amendment of the constitution, dissolution, etc.), if this is intended to guarantee the members' right to participate democratically in the organization.⁴²

The free *election of representatives* of employers' and workers' organizations can be seen from different points of view, and this has given rise to problems concerning the principles laid down in the Convention. This con-

⁴¹ *General Survey*, 1994, para. 109.

⁴² *Digest*, paras. 343 and 361.

cerns in particular the procedures for trade union elections, eligibility conditions, re-election, and dismissal of leaders.⁴³ The autonomy of organizations can be assured only if the organizations themselves regulate these questions in their constitutions. The supervisory bodies have repeatedly ruled against close control over elections by the authorities. This may constitute interference that violates the Convention, and carries the risk of arbitrary interference. If supervision is deemed necessary, it should be exercised by a judicial authority in order to guarantee an impartial procedure.⁴⁴

The access of trade union leaders to the workplace has also been subject to comment. The Committee of Experts considers that the rights arising from Articles 2 and 3 of the Convention imply that the leaders of a trade union must be able to remain in contact with the members of the union, and *vice versa*. When the union is organized on a wider basis than the undertaking, the leaders should be able to have access to the workplaces if necessary, as an essential condition for the promotion and defence of the interests of their members.⁴⁵ This question is also covered in the Workers' Representatives Recommendation, 1971 (No. 143), and, for rural workers, in the Rural Workers' Organisations Convention (No. 141) and Recommendation (No. 149), 1975.

Concerning *financial administration*, the Committee on Freedom of Association has stated that, in accordance with the principle of trade union autonomy, provisions which give the authorities the right to restrict the freedom of a trade union to administer and use its funds as it wishes for normal and lawful trade union purposes, are incompatible with the principles of freedom of association, which presuppose financial independence. Workers' organizations should not be financed in such a way as to allow the public authorities to enjoy discretionary powers over them.⁴⁶

On *financial control over internal activities*, the Committee on Freedom of Association has stated repeatedly that the rights laid down in Article 3 of the Convention do not prevent the supervision of the internal activities of a trade union if those activities violate legal provisions or rules. Nevertheless, it is important that such control and the power to take measures for the suspension or dissolution of the union should be exercised by the judicial authorities, to avoid the risk that measures taken by the administrative authorities should appear to be arbitrary. The Committee of Experts considers that there is no infringement of the right of organizations to organize their administrations if, for example, the supervision is limited to the obligation to submit periodic financial reports or if there are serious grounds for believing

⁴³ See Bernard Gernigon: *Tenure of trade union office*, Geneva, ILO, 1977.

⁴⁴ *General Survey*, 1994, para. 115; *Digest*, paras. 400 and 401.

⁴⁵ See the Committee's observations regarding the Federal Republic of Germany, in ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 4A), International Labour Conference, 69th Session, 1983, Geneva, p. 130.

⁴⁶ *Digest*, paras. 428 and 438.

that the actions of an organization are contrary to its rules or to the law (which should not violate the principles of freedom of association). Similarly, there is no violation of the Convention if such verification is limited to exceptional cases, for example in order to investigate a complaint, or if there have been allegations of embezzlement. Both the substance and the procedure of such verifications should always be the subject of review by the competent judicial authority, affording every guarantee of impartiality and objectivity.⁴⁷

The question of *political activities* ranks among the problems most frequently raised under Article 3 of the Convention. The difficulty here lies in defining the scope of trade union action “for furthering and defending the interests of workers”, which is the purpose of a workers’ organization according to Article 10 of the Convention. This function of these organizations cannot be pursued strictly within the limits of worker-employer relations. Their activities naturally extend into the wider area of economic and social policy because of the repercussions of these policies on the situation and the interests of workers.

The Committee of Experts considers that legislative provisions which establish a close relationship between trade union organizations and political parties, as well as those which prohibit *all* political activities for trade unions, give rise to serious difficulties with regard to the principles of the Convention.⁴⁸ At the same time, it is only in so far as trade unions do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities.⁴⁹

In recent years the Committee of Experts has noted a significant change in this respect. Until recently, legislation in several countries had established a close relationship between trade union organizations and the single authorized political party. Although this type of subordination still exists in some countries, the Committee has noted with satisfaction in recent years — and in particular since the fall of the Berlin Wall in 1989 — a clear trend towards its abolition.⁵⁰

*The right to strike*⁵¹

Although the right to strike is expressly recognized in instruments such as the International Covenant on Economic, Social and Cultural Rights (1966), the Inter-American Charter of Social Guarantees (1948) and the European

⁴⁷ *General Survey*, 1994, para. 125; *Digest*, paras. 443-445.

⁴⁸ *General Survey*, 1994, para. 133.

⁴⁹ *Digest*, paras. 454 and 457.

⁵⁰ *General Survey*, 1994, para. 130.

⁵¹ See also Jane Hodges-Aeberhard and Alberto Otero de Dios, “Principles of the Committee on Freedom of Association concerning strikes”, in *International Labour Review* (Geneva), Vol. 126 (1987), No. 5 (Sep.-Oct.), pp. 543-563.

Social Charter (1961), it is not provided for in any ILO Convention or Recommendation.⁵² Nevertheless, the ILO's supervisory bodies have had to deal with this question more often than any other subject in labour relations, and it is through this supervisory process that the ILO's principles have developed.

The general principle is that "the right to strike is an intrinsic corollary of the right of association protected by Convention No. 87",⁵³ and strike action therefore cannot be seen in isolation from industrial relations as a whole. The provisions of Convention No. 87 which give a legal basis for this principle are Articles 3, 8 and 10.

The general principle was recognized very early by the ILO's supervisory bodies, in spite of the absence of an explicit provision in the Convention. As early as its second meeting in 1952, the Committee on Freedom of Association affirmed the principle of the right to strike, stating that it is one of the "essential elements of trade union rights";⁵⁴ and stressed shortly afterwards that "in most countries strikes are recognised as a legitimate weapon of trade unions in furtherance of their members' interests".⁵⁵

The Committee of Experts stated in 1959 that the prohibition of strikes by workers other than public officials acting in the name of the public powers "may sometimes constitute a considerable restriction of the potential activities of trade unions ... [T]here is a possibility that this prohibition may run counter to Article 8, paragraph 2 of Convention No. 87".⁵⁶ In its 1973 General Survey, it further stated that a "general prohibition of strikes constitutes a considerable restriction of the opportunities open to trade unions for furthering and defending the interest of their members (Article 10 of Convention No. 87) and of the right of trade unions to organize their activities" (Article 3).⁵⁷

The supervisory bodies also consider that the right to strike is not an absolute right, and can be exercised only under certain conditions.

Who has the right to strike? Both workers and their organizations enjoy this right. Nevertheless, the juridical basis of recognition of the right rests fundamentally on Articles 3 and 10 of the Convention, which refer to the rights and objectives of workers' organizations. In any case, the Committee on Freedom of Association has accepted that under Convention No. 87 the right to call a strike is the sole preserve of trade union organizations.⁵⁸

⁵² Except Paragraph 7 of the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), which states that none of its provisions "may be interpreted as limiting, in any way whatsoever, the right to strike".

⁵³ *General Survey*, 1994, para. 179.

⁵⁴ CFA: Second Report (1952), Case No. 28 (Jamaica), in *Sixth Report of the International Labour Organisation to the United Nations* (Geneva), Appendix 5, p. 210, para. 68.

⁵⁵ CFA: Fourth Report (1953), Case No. 5 (India), in *Seventh Report of the International Labour Organisation to the United Nations* (Geneva), Appendix 5, p. 181, para. 27.

⁵⁶ *General Survey*, 1959, para. 68.

⁵⁷ *General Survey*, 1973, para. 107.

⁵⁸ *Digest*, para. 477.

The *general prohibition of the right to strike* is normally not acceptable. It may be justified in a situation of acute national crisis, but only for a limited period and to the extent necessary to meet the requirements of the situation. This means genuine crisis situations, such as those arising as a result of serious conflict, insurrection or natural disaster in which the normal conditions for the functioning of the society are absent.⁵⁹

It is acceptable to prohibit strikes for certain categories of workers, that is for certain public officials and for workers in essential services. For the former, the origin of the exception is found in the preparatory work for the Convention.⁶⁰ The supervisory bodies have interpreted public service and essential services in a restrictive way as concerns strikes. The prohibition should be limited to officials exercising authority in the name of the State, and essential services are “those the interruption of which would endanger the life, personal safety or health of the whole or part of the population”. The Committee of Experts has stated that it would not be desirable — or even possible — to attempt to draw up a complete and fixed list of services which have been considered as essential. However, the Committee on Freedom of Association has accepted as essential services the hospital sector, the furnishing of water and electricity, and the telephone service and air traffic control; but it has not accepted governments’ claims that banks, ports, petroleum, agricultural activities, teaching, or transport in general are essential services in the strict sense of the term.⁶¹ Nevertheless, there are sometimes special circumstances under which non-essential services might become essential if a strike affecting them exceeds a certain duration or extent so that the life, personal safety or health of the population are endangered.⁶²

As a condition for accepting the restriction or prohibition of strikes in these cases, compensatory guarantees should be provided to workers who are deprived of this essential means of defending their socio-economic and occupational interests. These guarantees include conciliation and mediation procedures leading, in the event of deadlock, to arbitration machinery perceived to be reliable by the parties concerned. The workers should be able to participate in determining and implementing the procedure, which should provide sufficient guarantees of impartiality and rapidity; arbitration awards should be binding on both parties and, once issued, should be implemented rapidly and completely.⁶³ It is essential that all the members of the bodies entrusted with mediation and arbitration should not only be strictly impartial, but should also appear to be impartial both to the employers and to the workers concerned, in order to gain the confidence of both sides.⁶⁴

⁵⁹ *General Survey*, 1994, para. 152.

⁶⁰ ILO: *Freedom of association and protection of the right to organise*, Report VII, International Labour Conference, 31st Session, 1948, San Francisco, p. 87.

⁶¹ *General Survey*, 1994, para. 159; *Digest*, paras. 540 to 545.

⁶² *General Survey*, 1994, para. 160.

⁶³ *General Survey*, 1994, para. 164; *Digest*, paras. 546 and 547.

⁶⁴ *Digest*, paras. 548 and 549.

Subject to the guarantees mentioned above, the prohibition of strikes in State undertakings is accepted by the Committee on Freedom of Association only when the undertaking is an essential service; it is not acceptable in others, to which the general principles on the right to strike apply.⁶⁵ These principles on prohibition of strikes in essential services apply to both public-sector and private-sector undertakings.

In many cases the applicable legislation requires that certain *conditions* must be met before being able to declare a strike. These may include, for example, the exhaustion of conciliation or mediation procedures, a waiting period and advance notice; compliance with a collective agreement; or prior approval by a certain percentage of workers in a secret strike ballot. The Committee on Freedom of Association considers these requirements to be compatible with freedom of association. However, the conditions laid down should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade unions. This could be the case when an absolute majority is required for the calling of a strike, or a quorum of two-thirds of the members, in particular where unions have a large number of members covering a large area.⁶⁶

As concerns *the objectives of a strike*, the supervisory bodies have said that the right to strike should not be limited to conflicts arising from collective bargaining. Although strikes that are purely political in character do not fall within the scope of freedom of association, trade unions should be able to have recourse to (peaceful) protest strikes, in particular to criticize the economic and social policy of the government.⁶⁷

The Committee of Experts pointed out in its 1994 General Survey that *sympathy strikes*, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres. It considers that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.⁶⁸

The supervisory bodies have accepted that various forms of strike action are valid, and have said that limitations imposed by governments on such actions as a slow-down in work (go-slow strike), work rules being applied to the letter (work-to-rule), and occupation of the work place, would only be justified if the strike ceased to be peaceful.⁶⁹

Special problems are created by the requisition or mobilization of workers who are on strike, and by the establishment of minimum services. The supervisory bodies have said that requisitioning may be justified by the need to

⁶⁵ *Digest*, para. 543.

⁶⁶ *Digest*, paras. 498 and 508-511.

⁶⁷ *General Survey*, 1994, para. 165.

⁶⁸ *General Survey*, 1994, para. 168.

⁶⁹ *General Survey*, 1994, para. 173; *Digest*, para. 496.

ensure the operation of essential services in the strict sense of the term, in circumstances of the utmost gravity during an acute national emergency.⁷⁰ The imposition of minimum service may be justified in the event of a strike the extent and duration of which might result in an acute national crisis endangering the normal living conditions of the population. This kind of service should meet two conditions: it must be limited to the operations which are strictly necessary to meet the basic needs of the population in terms of life, safety and health; and workers' organizations should be able to participate in defining such a service, along with employers and the public authorities. A system of minimum service may also be appropriate in strikes in essential services, as an alternative to a total prohibition of a strike.⁷¹

The supervisory bodies consider that *picketing* is acceptable so long as it is in accordance with the law, remains peaceful and does not disturb public order.⁷²

Finally, as concerns *sanctions for strike action*, the ILO supervisory bodies take into account their effect on labour relations, which may be endangered if the authorities apply severe sanctions in an inflexible way, especially penal sanctions. Arrests and dismissals of strikers on a large scale involve serious risks of abuse, and place freedom of association in grave jeopardy; and generally, the authorities should not have recourse to imprisonment for the mere fact of organizing or participating in a peaceful strike.⁷³

Dissolution and suspension of organizations

Article 4 of Convention No. 87 states that: "Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority." In other words, if it is necessary for the authorities to take such an extreme measure, it should be done by a judicial proceeding which provides all legal guarantees to the organization concerned.

Other measures which would have similar effects to the suspension or dissolution of an organization would also violate the Convention if they are the kinds of measure covered by Article 4. These might include cancellation of the registration of the organization or annulment or suspension of its legal personality, resulting in the loss of advantages essential to carrying out its activities.⁷⁴

For Article 4 to be correctly applied, the right to appeal to the courts against an administrative decision is not sufficient; it is also necessary that the decision should not take effect until a final decision is handed down. In addition, the supervisory bodies have considered that the right of recourse to the

⁷⁰ *General Survey*, 1994, para. 163; *Digest*, para. 573.

⁷¹ *General Survey*, 1994, paras. 161 and 162.

⁷² *General Survey*, 1994, para. 174; *Digest*, paras. 583-587.

⁷³ *General Survey*, 1994, paras. 176-178; *Digest*, paras. 590-600.

⁷⁴ *General Survey*, 1994, para. 184.

courts does not always constitute a sufficient guarantee, since if the authorities have a discretionary right to take a decision, the judges may only ensure that the legislation has been correctly applied. The judges should therefore be able also to deal with the substance of the case.⁷⁵ The supervisory bodies hold the same position in relation to registration of organizations in order that they may acquire legal existence. Recourse to the courts has also been upheld by the Committee on Freedom of Association regarding the suspension or dissolution of organizations in situations when a state of national emergency has been declared.⁷⁶

Federations, confederations and international affiliation

Article 5 of the Convention provides that: “Workers’ and employers’ organisations shall have the right to establish and join federations and confederations”. Article 6 goes on to stipulate that “[t]he provisions of Articles 2, 3 and 4 [of the Convention] apply to federations and confederations”. In other words, the rights concerning the establishment of organizations, their administration and their activities, as well as concerning their suspension and dissolution, apply to bodies operating at a higher level as well as to first-level organizations.

Article 5 also provides that any “organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers”. This lays down the legal basis for international solidarity of occupational organizations, and is very important for the functioning of the ILO because of the consultative status held by the major organizations of employers and workers.

The problems encountered in practice concerning federations and confederations are related principally to the constitution and activities of these organizations. The supervisory bodies have stated that the following constitute a violation of Article 5: prohibition on establishing federations or confederations; authorization to establish only one such organization for an occupation or region, or for the whole country; requirement of an excessively large minimum number of member organizations; prohibition on grouping organizations from different branches of activity or occupations; prohibition on establishing federations of organizations in different regions of the country; and more generally, any excessive conditions or requirement for prior authorization concerning their establishment.⁷⁷

The general principle is that under Article 2 of the Convention, to which Article 6 refers, first-level organizations have the right to establish and join, without prior authorization, the federations and confederations of their own choosing, subject only to their own statutes. In application of this principle, it would also be incompatible with Article 5 to prohibit the creation of a national

⁷⁵ *General Survey*, 1994, para. 185; *Digest*, paras. 681 and 683.

⁷⁶ *Digest*, paras. 679 and 680.

⁷⁷ *General Survey*, 1994, para. 191; *Digest*, paras. 609, 612, 613, 616, 617 and 618.

confederation which would group organizations representing different economic sectors or regions of a country.

More specifically, the supervisory bodies have said that public-sector organizations should have the right to join federations and confederations which include organizations from the private sector, so long as this does not include an obligation to join strikes.⁷⁸ As concerns unions of agricultural workers, a government's refusal to allow them to affiliate with a national centre of workers' organizations including industrial unions is incompatible with Article 5 of the Convention.⁷⁹

Any restriction on the activities of federations and confederations concerning their rights to strike or to bargain collectively, also violate Article 5.⁸⁰

As concerns international affiliation, there are two aspects to this question: the right of a national organization freely to associate with an international one, and the consequences of this affiliation. The Convention is violated if affiliation is made subject to prior authorization by the government, as this is not compatible with the principle of free and voluntary affiliation with such organizations.⁸¹ This principle also implies the right of national trade unions to receive assistance as a result of affiliation, including financial assistance and subsidies, remaining in contact and exchanging trade union publications, and sending representatives to meetings.⁸² Visits by representatives of international organizations to their national affiliates and participation in their meetings are considered to be normal activities, subject to national legislation on the admission of foreign nationals. However, the formalities to which foreign trade unionists and trade union leaders are subject, and those applicable to national trade unionists when they travel abroad, should be based on objective criteria and be free from anti-union discrimination.⁸³

Legality and the Convention's guarantees

The original text of the Constitution referred to the right of association for "all lawful purposes", and therefore the first proposals made in 1927 for a Convention on the subject included a mention of "legal formalities" for the exercise of this right. The negative reaction of the workers, who feared the restrictions which could arise from this formula at the national level, was one of the reasons for the very difficult discussions on that occasion.

⁷⁸ *General Survey*, 1994, para. 193; *Digest*, para. 615.

⁷⁹ *Digest*, para. 620.

⁸⁰ *General Survey*, 1994, para. 195.

⁸¹ *General Survey*, 1994, para. 197.

⁸² *General Survey*, 1994, para. 197; *Digest*, paras. 627-636.

⁸³ *Digest*, paras. 638, 639 and 642.

In 1948, when the Conference adopted Convention No. 87, it again examined the problem on the basis of a formula included in the preamble of the draft Convention prepared by the Office, under which workers, employers and their organisations, like any other person or body, were required to respect the law in the exercise of their rights. The workers, with the support of a number of government members, would not accept a formula which made the international right of freedom of association subject to national legislation. After discussions, the present text of Article 8 was adopted:

1. In exercising the rights provided in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.
2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Definition of “organization”

Under Article 10 of the Convention provides: “In this Convention, the term ‘organisation’ means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.” The promotion and defence of the interests of its members are what distinguish and characterize an organization of workers or of employers, whatever it may be called.

In some cases the supervisory bodies have based themselves on this definition in formulating their conclusions. As already seen, in dealing with the question of the most representative organizations, a minority organization which by law does not have certain representation rights which are given preferentially or exclusively to the majority organization should still be able to exercise some functions in order to remain covered by this definition. The supervisory bodies have considered that a general prohibition on strikes considerably limits the functions of a trade union as recognized in this definition, and is incompatible with freedom of association.

Concluding remarks

This brief survey of the provisions of Convention No. 87, its place in general international human rights law and the ways in which its principles have been developed by the supervisory bodies of the ILO and by reference to the practice of member States, illustrates both the vitality of this supervisory process, and the changing nature of the exercise of the right to freedom of association. A static application of this seminal instrument would leave the concepts it embodies trapped in a time-frame of 50 years ago, when the Convention was adopted. Instead, as with the Universal Declaration itself, a dynamic process of supervision has allowed Convention No. 87 to remain valid for a changing world.

In concluding, it may be worth citing some of the reflections of the Committee of Experts on the occasion of the 50th anniversary of the adoption of Convention No. 87, under the heading “Progress achieved”. Bearing in mind that ratification is but the first step in the process of applying a Convention, the Committee stated that many cases of progress had been noted over the years, and that this tendency had accelerated recently.

The suppression of a legally imposed trade union monopoly and the abolition of the directing role of the party under the government rule represent without doubt the most frequent cases of progress regarding the application of the Convention during these last years. Other improvements achieved relate to the re-establishment of freedom of association following the lifting of a state of emergency and the return to the rule of law and democracy in countries that had been under dictatorships. There has also been an expansion of the right of association in a number of countries: public employees, nurses, teachers, employees of religious or charitable institutions, fire-fighters, homeworkers, domestic workers, rural workers, seafarers, workers in the informal sector and foreign workers have been granted the right of association that had long been denied them.⁸⁴

These are but examples of the progress noted by the Committee of Experts, which complements the achievements of the Committee on Freedom of Association and the whole panoply of ILO supervisory mechanisms. Can the ILO claim sole credit for these achievements? Of course not. But the path set by Convention No. 87 and reinforced by the ILO’s supervisory work has guided a great many countries for the past 50 years and continues to show the way forward.

⁸⁴ ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observations concerning particular countries*, Report III (Part 1A), International Labour Conference, 86th Session, 1998, Geneva, p. 14, para. 44. See Appendix III to this issue of the *International Labour Review*.