Information supplied by governments on the application of ratified Conventions

Brazil Convention No. 98

Brazil

Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

Brazil (ratification: 1952). The Government has provided the following written information.

In its report to the 107th Session (May–June) of the International Labour Convention, issued last February, the Committee of Experts on the Application of Conventions and Recommendations (CEACR), commenting out of the regular reporting cycle, referred to Articles 611-A (prevalence of collective bargaining over legislation), 442-B (self-employment) and 444, single paragraph (relationship between individual contracts and collective agreements) of the Labour Code as amended by Law 13467 (2017).

Labour reform in Brazil: Context and objectives

– The previous Brazilian labour legislation, which dated back to 1943, went through some changes over the years, but needed to be updated in order to address requirements of the economy of the twenty-first century.

– The intervention of labour courts cancelling clauses agreed in collective bargaining led to frequent complaints by trade unions. In this context, ABC metalworkers' unions, which are the cradle of the Brazilian trade union movement, proposed in 2011 the adoption of the Collective Bargaining Agreement with Specific Purpose (ACE), aiming at the prevalence of the collective bargaining over the law, having as the only limitation the rights enshrined in article 7 of the Federal Constitution, precisely the aspect that the labour reform has implemented.

– Labour reform (Law 13467; entry into force in November 2017) stems from many years of discussions regarding challenges of the Brazilian labour market, shortcomings of the labour legislation and concerns about the functioning of the labour justice system.

– Such issues became particularly pressing in a context of deep economic recession: In 2016 unemployment rose to 11.3 per cent – the highest since modern records commenced in 1992 – an increase of 82 per cent since 2012. Other relevant factors

impacting the labour market include: 44 per cent of participation of informal jobs in the total amount of jobs, while 60 per cent among unskilled workers; high degree of judicialization; lowest labour productivity since the seventies (near 1 per cent per year); high turnover of labour; underuse of collective bargaining and lack of legal certainty for its implementation.

– Inclusive, comprehensive and extensive consultation with social partners is a key feature of labour reform in Brazil. The proposal of modernizing labour legislation was elaborated after a series of debates organized by the Ministry of Labour and by the Chief of Staff of the Presidency in December 2016, with the participation of representatives of trade unions and employers.

– Subsequently, during the legislative process in 2017, 17 public hearings, seven regional seminars and over 40 meetings with interested stakeholders took place in Parliament and in different states, leading to the approval of the Bill by a significant majority at the Chamber of Representatives and at the Federal Senate.

– Labour reform seeks to provide more flexibility, increased labour productivity, legal certainty and rationality to both labour market and legal system, with enhanced safeguards against breaches of the law and full respect of fundamental principles and rights at work.

– A central aspect of labour reform in Brazil is the strengthening of Conventions and collective agreements between unions and employers, aiming at the possibility for each category to negotiate, collectively, the best terms to reconcile employment quality and increase of productivity, without affecting the rights of workers.

CEACR – Mandate and reporting cycles

– As consistently stated in CEACR reports, the mandate of the Committee refers to the application of Conventions "in law and practice" through an impartial analysis.

– The assessment of the Brazilian case by the CEACR fails to meet that mandate, and minimal fairness requirements, on many accounts.

– The CEACR offered no explanation for the exceptional measure of breaking the cycle and prematurely commenting on the reform before the Government's due report on the application of Convention No. 98; moreover, the wider context of Brazil's reform has not been taken into account at all.

– Clearly, there has not been sufficient time for an evaluation of all relevant aspects of the implementation of the new Brazilian legislation. At the time the Committee met in November 2017, Law 13467 had entered into force a few days earlier.

– Additional time would have been required to allow for an adequate and balanced understanding of the effective legal framework, including high court decisions, and its impact on the labour market.

– Respecting regular reporting cycles would have facilitated a comprehensive evaluation, in 2019–20, of the reform's application of Convention No. 98 principles. Brazil presented its last report on Convention No. 98 in 2016 and its subsequent reporting obligation would normally fall on 1 September 2019. The CEACR would thus publish comments in February 2020 and any possible CAS discussion would only take place at the 109th Session of the ILC (2020).

Relationship between Labour Law and Collective Agreements (Article 611-A of Law 13467)

- According to the experts, Article 611-A, despite safeguards contained in Article 611-B of the Labour Code, breaches "the general objective of Conventions Nos 98 and 154 and the Labour Relations (Public Service) Convention, 1978 (No. 151)", which "is to promote collective bargaining with a view to agreeing on terms and conditions of employment that are more favourable than those already established by law" [.].

- The analysis by the experts is seriously flawed by the complete absence of efforts to refer to the ordinary meaning of the text of the relevant Convention No. 98, as required in international law.

- In this respect, it should be stressed that nothing in the text of Article 4 of Convention No. 98 or any other agreed language by tripartite bodies indicates that collective bargaining is limited to more favourable conditions than "those already established by the law": Article 4: "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements."

- On the contrary, the spirit of Article 4 and the Convention as a whole, according to recommendations of the Committee on Freedom of Association, censors limitation of the scope of negotiations and invalidation of collective agreements' by courts and executive authorities.

- In that same vein, the ILO Policy Guide on Collective Bargaining (2015) states: "The collective bargaining framework needs to give the negotiating parties full latitude to decide the subjects they wish to include on their bargaining agenda. Measures taken to restrict the scope of negotiable issues are generally considered by the ILO's supervisory bodies to be incompatible with international labour standards and principles on the right to collective bargaining."

- In addition, the first part of the text of Article 4 expressly relates measures to promote voluntary negotiations to "appropriate national conditions" – a term with both legal and practical connotations, requiring due considerations of the complexity of the situation on the ground before any conclusion is drawn (once again, the CEACR report is completely silent in an essential aspect for the correct interpretation of the relevant obligations under Convention No. 98).

- In this line of thought, it would be paramount to assess the context of the Brazilian reform and the wider framework of fundamental principles and rights at work enshrined in the Brazilian Constitution of 1988 (the breadth and detail of constitutional labour rights are unique features of our legal system). Relevant constitutional provisions, Article 611-B of the new legislation (excluding about 30 fundamental workers' rights from negotiation) and all legal remedies available in Brazil ensure thus a system of safeguards that ought to be considered in any thorough examination of the application of Convention No. 98 in law and practice (an examination that is completely absent in the CEACR report).

- In robust and well developed systems of labour rights, such as the Brazilian one, the Committee's interpretation of Article 4 would amount to a severe, erroneous limitation of the scope of collective bargaining, against the text and the spirit of Convention No. 98.

– The reference to the *"travaux préparatoires"* of Convention No. 154 (of 1981) is another serious legal flaw in the analysis undertaken by CEACR. In no way would the *"travaux"* be an appropriate ground for restricting the outcome of collective bargaining:

(i) As a subsequent Convention, it cannot determine the meaning intended by the members who participated in the setting of Convention No. 98 (of 1949) nor those who later ratified it (Brazil ratified Convention No. 98 in 1952, 29 years before the adoption of Convention No. 154).

(ii) According to the Vienna Convention on the Law of Treaties recourse to the *"travaux"* consists in a supplementary form of interpretation, subordinate to the ordinary meaning, and to be used either to confirm the text of the very treaty under interpretation (i.e. Convention No. 154, and not another one, let alone a pre-existent one, such as Convention No. 98) or in cases of ambiguity and obscurity of that text.

(iii) If, for the sake of argument, one were to consider Convention No. 154, one should give precedence to the text of Article 9 of that instrument, rather than its *"travaux préparatoires"*: "This Convention does not revise any existing Convention or Recommendation."

(iv) Even when considering such "travaux" one should read its full text (Report IV(1) of the 67th Session of the ILC – 1981), particularly paragraphs 58 and 65. One shall note that the discussion was more nuanced: a prohibition of outcomes that could derogate from provisions of the law was not even considered and, in any case, no party envisioned the specific legal clause contained in the Brazilian legislation.

Relationship between individual contracts and collective agreements (Article 444, single paragraph, Law 13467)

– The Committee also "recalls that legislative provisions which allow individual contracts of employment to contain clauses contrary to those contained in the applicable collective agreements (although it is always possible for individual contracts of employment to contain clauses that are more favourable to the workers) are contrary to the obligation to promote collective bargaining, as set out in Article 4 of the Convention".

– It should be recalled that Article 4 of Convention No. 98 does not refer to individual contracts of employment.

– The possibility established in Article 444 (not 442, as wrongly recorded at the report) of the amended labour legislation is only applicable to a small proportion of the Brazilian population (0.25 per cent) at the very top layer of income, and with a higher level degree, who are generally employed in positions of management.

Independent contractors (Article 442-B of Law 13467)

– The Committee also states that "the Convention applies to all workers, with the sole possible exception of the police and the armed forces (Article 5) and public servants engaged in the administration of the State (Article 6)".

– The new text of Article 442-B (not 444-B, as wrongly recorded at the report) simply clarifies the legal status of the independent contractor (*"autônomo"*, in Portuguese).

– Contrary to what the experts conclude, nothing in that provision contradicts Convention No. 98: if the contractor does not hold a subordinate position vis-à-vis his or her contracting party, he or she will not be deemed an employee. Moreover, Article 511 has not been amended by the new legislation and thus independent contractors (*"trabalhadores autônomos"*, in Portuguese) can still be organized in trade unions.

Committee on the Application of Standards (CAS)

– According to the CEACR's own comments, Brazil has until 1 September 2018, to submit its full report on the application of Convention No. 98, so as to respond to the social partners' and the Committee's observations.

> As we have advocated, the limited time and resources of CAS should be devoted to serious cases. Thus, Brazil's inclusion on the "short list" of the CAS amounts to passing judgment on the Brazilian situation before hearing the Government, in breach of the most basic standards of due process.

– In comparative analysis of other cases and comparable situations, the CEACR has not used incisive language in relation to Brazil. While expressions such as "deep concern", "deep regret", "urges" and "firmly urges [various courses of action]", "persistence and gravity of allegations" are relatively widespread in the report, none of them have been applied to the Brazilian case. These expressions indicate a clear sense of seriousness and/or urgency, which should be duly taken into consideration by the social partners in drafting the long and short lists.

Conclusions

– **By failing to take into account the application of Conventions in practice and in the national context, the observations of the experts, at best, are premature, and contradict the Committee's own mandate. In addition, they propose a legally flawed interpretation of Convention No. 98 that departs from the ordinary meaning of the text of the instrument.**

– **It also departs from consistent recommendations of the Committee on Freedom of Association and technical texts of the ILO itself.**

– **There is no reason whatsoever to assume, as suggested by the experts, that the new labour legislation in Brazil would discourage collective bargaining. Workers retain the ability and option, in a voluntary negotiation, to prefer legal provisions wherever they are deemed more favourable than the terms proposed by the other party.**

– **Conversely, revising relevant articles of the Labour Code with the modifications introduced by the labour reform (or law 13467/2017), as the Committee suggests, would discourage negotiations, as it would allow the judiciary to review and annul collective agreements, as has happened recently, and significantly reduce the scope of what can be negotiated, which would have negative effects on the labour market.**

- **In fact, labour reform has consecrated a formula that reconciles free and voluntary negotiations with the protection of workers' rights (many of them enshrined in our Constitution). It is worth noting that the very same principle (prevalence of negotiation over legislation), as introduced in the Labour Code, had also been a claim by metalworkers' unions in the state of São Paulo in 2011, in proposing the Collective Bargaining Agreement with Specific Purpose (ACE).**

- **By providing legal certainty and reliability to collective bargaining, without unprotecting workers, the labour reform effectively abides by and promotes Convention No. 98, in line with our international obligations.**

- **It is important to emphasize that in no way are workers unprotected under Brazilian new legislation. Labour unions can freely negotiate the issues that interest them and still remain covered by the provisions of the Labour Code in all other issues not negotiated or agreed to in collective bargaining. Brazil's legal protection system and constitutional guarantees ensure a high level of protection in any scenario. Besides, the collective negotiation process itself ensures that the workers' best interest is reflected on the final agreements: first, by the bargaining power of its union, which must be representative; by the legal requirement that the collective agreement be approved by a general assembly of the category and, finally, by the system of judicial control exercised by the Labour Prosecutor's Office and the Labour Courts.**

- **Brazil has shown continuous willingness to foster social dialogue throughout and beyond the process leading to the adoption of the labour reform. In June 2017, the Ministry of Labour created the National Labour Council to discuss all pressing issues of the world of work, and from October onwards the standing orders of the Council were agreed to by tripartite constituency, rendering them fully operational.**

- **Finally, it is important to note that since the entry into force of the Brazilian labour reform, there have been a number of legal actions filed in the Supreme Court claiming the unconstitutionality of the new provisions, but none of them are related to the issues brought to the attention of the CEACR. Instead, most of them had to do with the end of trade union's compulsory contribution.**

- **Brazil is ready to continue in conversation with social partners and civil society on all aspects of our legislation.**