Labour Justice and alternative dispute resolution of collective and individual labour conflicts

Jorge Sappia
REGIONAL OFFICE FOR THE AMERICAS
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Working Paper Nº 146

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Labour Justice and alternative dispute resolution of collective and individual labour conflicts

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In this paper, the experienced jurist Jorge Sappia refers to the labor justice issue and alternative solution mechanisms for individual and collective controversies. Being this a crucial aspect to look into, in the fulfillment of labor rights.

Labor Justice has been considered of extreme importance in the debates carried out at XI Conference and Viña del Mar’s Declaration, just as it had been considered and, therefore, incorporated in to the Action Plans of Buenos Aires’ Declaration.

Numerous international entities have emphasized the need that all judicial organs and procedures, specially labor ones, must grant an effective protection against all infringements of labor rights with in a reasonable time span, with a guaranteed access and respect for fundamental procedural principles.

Said principles could be fulfilled by modernizing Labor Judicature and also by developing alternative conflict solving mechanisms.

In his presentation, the author of this paper analyses the different aspects of conflict and the alternatives that there are for each aspect. He sums up the relevant experiences of the Region, along with a thorough analysis of the mediation, conciliation and arbitration institutions.

This report was introduced and discussed at the Working Group II Meeting of the XI Conference of Labor Ministers held in San José, Costa Rica during the 5th and 6th of April, 2001. All valuable contributions that came from the meeting were summed up and put forth in the author’s final report.

Cecilia Huneeus assisted in the Project and María Inés Opazo collaborated in the publishing process. The compiling and editing of the papers was carried out by consultants Mario Velásquez and Pablo Lazo.

Agustín Muñoz
ILO’s Regional Director for The Americas

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Executive Summary

Presentation. This article discusses the Declarations of Buenos Aires and Viña del Mar issued by the Inter-American Conference of Labour Ministers and their respective Plans of Action. In these Declarations, Labour Administrations throughout the region expressed their political will to modernize the Labour Justice System and implement alternative means of resolving individual and collective labour conflicts. The analysis distinguishes between the diagnostic and the objectives of Viña del Mar and concentrates on some of its specific statements. The article’s aim is to define the tasks that the Ministers have set themselves in order to reach their proclaimed objectives.

Classification of conflicts. Section two describes and characterizes two different types of conflicts: legal disputes, which arise out of an actual or alleged infringement of valid rules, and economic conflicts, which attempt to change an already regulated situation. Legal conflicts may be individual or collective, whereas economic conflicts are always of a collective nature.

Individual conflicts, also known as controversies, fall under the jurisdiction of the Courts whereas collective conflicts are usually assigned by the legislator to the Labour Administrations, to be dealt with by them through mediation, conciliation and arbitration. Exceptions to this general pattern exist, as in the case of Brazil, where judges have jurisdiction to settle collective conflicts.

Reference is also made to multi-party conflicts and so-called improper conflicts. In multi-party conflicts, individual grievances are jointly brought and come to represent a collective interest by virtue of the number of participants, who may request intervention by the Labour Administration, even if only with an eye to conciliation. As for the so-called improper conflicts, these may concern inter-union conflicts related to jurisdictional issues which only involve the organizations in question; internal disputes between a trade union and one or more of its members, which are dealt with by ordinary Courts; and lastly solidarity or political conflicts that are brought to the attention of the political authorities.

The position of the State in labour conflicts. In this section, it is argued that, to the extent that conflicts may have a negative effect on social peace and create obstacles for the normal development of economic activities, the State cannot remain indifferent and passive. At the same time, it is pointed out that policies directed at avoiding, disguising or repressing a conflict are highly undesirable. Based on these considerations, it is recommended that adequate criteria be adopted that help overcome a conflict in a positive way, such that labour relations after the conflict will have improved when compared with the situation before the dispute arose.

Conflict resolution systems. Section four describes judicial, administrative and atypical procedures for dispute resolution. With regard to the court system, it is pointed out that all countries, with the exception of Brazil, assign individual legal controversies to the Courts. It is here recommended that conflict resolution be more often assigned to the Administration, in order to avoid the negative consequences of excessive judicialization. In this context, reference is made to administrative tribunals with jurisdictional authority in Mexico and Panama.

It is argued that Labour Administrations are particularly well equipped for the administrative handling of conflicts, to which it is added that their intervention may also include mere conciliation of legal conflicts.

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Mediation, conciliation and arbitration are seen as the best tools to settle conflicts, while voluntary arbitration is preferred to mandatory arbitration which should be limited to cases affecting the life, health and safety of individuals only.

The United States Federal Mediation and Conciliation Service is positively evaluated for its important contribution to the peaceful solution of labour conflicts. Also, some comments are made on the use of direct negotiations within a collective contract in order to settle labour disputes.

Current problems. Under this title, the study calls attention to the problems that affect the institutions that engage in conflict resolution, in particular their lack of resources that prevents them from setting up adequate facilities and provide training to their employees on a continuous basis. As far as the judiciary is concerned, it is argued that the number of Courts is disproportionate to the caseload, resulting in serious delays in the sentencing process. Various measures are proposed to streamline judicial proceedings, as for instance the creation of a special procedure for labour cases and the introduction of oral argument without possibility of appeal, in an attempt to prevent judges from giving rulings on extra-judicial questions. It is also suggested that the possibility of resorting to administrative organs be further explored, as a means to reduce judicial gridlock. The Canadian example and the above mentioned United States Federal Mediation and Conciliation Service can serve as important reference points.

The article concludes with the following suggestions:
- To work in unison to modernize methods of dispute resolution as part and parcel of labour relations.
- To found future actions on the ILO 1998 Declaration of Fundamental Principles and Rights.
- To streamline judicial proceedings by adopting specific labour procedures that facilitate self-conciliation by the parties and by introducing the possibility of oral trials without possibility to appeal. To promote pre-judicial means of conciliation within the administration.
- To allocate adequate resources to the judicial system and provide professional training to all its members on a continuous basis.
- To create a system of permanent observation of collective labour relations as a means to prevent future conflicts and prepare solutions that further durable agreements and make solid contributions to economic and social progress. To foster direct negotiations within collective contracts.
- To enhance the prestige of the institutions devoted to mediation and conciliation, examining the possibility of creating bodies similar to the United States Federal Mediation and Conciliation Service.
- To make restricted use of mandatory arbitration to settle collective conflicts.

Section I

A. Presentation of the subject

1. Introduction

The Inter-American Labour Conference seeks to modernize labour justice and labour administration, to address labour conflicts throughout the region.

The idea is to outline the problems that currently affect this area and classify them according to the objectives that have been established in a series of declarations aimed at defining the collective approach of the region’s governments in this matter, in particular considering the important precedent set by the Meeting of Viña del Mar. The task that lays ahead consists in describing the different labour justice regimes developed so far within the region, in order to examine their current problems and define the areas where new methodologies might be developed to accomplish the process of modernization. After that, the labour Administrations will receive a similar analysis, characterizing the different types of conflicts, their root causes and particular development, as well as the ways in which these may be resolved. In the course of the analysis, an updated perspective on the role of the State in the face of this social issue will be presented, starting with a definition of the responsibility of public authorities to handle contentious situations that may affect social peace and the economy. To this end, the various actions that are available
to autonomous sectoral agencies and the State will be examined. The analysis provides a perspective on alternative ideas and means to effectively address labour conflicts through a modern approach.

2. Background

Some background must be given to the subject under analysis to: i) pinpoint exactly where and when the present concerns emerged, and ii) determine whether there pre-exists a rational approach to the problem. In this regard there are several milestones worthy of note. The Declaration of the Xº Inter-American Conference of the Labour Ministers of the Organization of American States, issued in Buenos Aires in October 1995, declared that “...it is of the utmost importance to promote the modernization of Labour Courts and the efficiency of their procedures, in order to guarantee to workers and employers expeditious access to labour justice (point 7).” Meanwhile, a Plan of Action attached to the Declaration stated that: “Wherever necessary (the Ministers) shall alter any traditional structures that limit their participation in labour conflicts to mere mediation, and shall adopt active approaches focused on designing policies and programs for employment, professional education and retraining human resources, in order to adjust ourselves to modern manufacturing and service structures”. Both statements show that Labour Ministers throughout the region saw the need to revise traditional approaches to conflict resolution and judicial procedure, by moving beyond mere legal issues towards playing a role that is more responsive to the requirements of modern society. This approach was also incorporated in a Meeting of Ministers of Trade held in Belo Horizonte in May 1997, in the context of a ad hoc declaration where the X Conference of Labour Ministers suggested taking into account, among other criteria, “the modernization of labour relations, to be brought in line with new realities, and the greater role that collective bargaining and autonomous social agents should play in the modernization process.”

In April 19, 1998, claiming that the American nations “...shall promote the fundamental standards recognized by the General Standards Committee of the ILO...” a Declaration issued in Santiago at the II Summit of the Americas, signed by the Chiefs of State of the Americas, indicated the appropriate legal frame for the ongoing modernization process. This statement reflected the univocal position of the region’s Chiefs of State and Prime Ministers with regard to the nature of the foundations for future actions in the area of labour relations, and was in line with a decision made in June of the same year at the Annual Conference of the ILO, that stressed the role of fundamental labour principles and rights.

3. The diagnosis of Viña del Mar

In October 1998, the XI Inter-American Conference of Labour Ministers of the Organization of American States met in Viña del Mar to examine the following subjects: “Social and Labour dimensions of Economic Globalization” and “Modernization of the State and the Labour Administration: Requirements and Challenges”. The meeting issued the Declaration of Viña del Mar, dedicated to the second of these topics. The Declaration stated that all the work conducted up to that point was consistent with guidelines provided by the I and II American Summits, the Declaration of Buenos Aires and a Statement addressed to the Ministers of Trade meeting in Belo Horizonte.

In the context of objectives for the social progress of the American community and the “...attainment of equity and social justice”, seeking to “... generate more and better quality jobs consistent with fundamental internationally recognized labour standards” and agreeing that “... such policies should be concerned in particular with initiatives aimed at improving the situation of those who are already employed and should recognize the fundamental need to promote the incorporation of those who seek employment”, the Ministers gathered at Viña del Mar made a diagnosis of prevailing labour conditions, as well as of actions that should be undertaken by the labour ministries throughout the region, as stated in point 7 of the Declaration: “That the objectives set forth here call on the governments, and in particular the labor ministries, to actively deal with a set of
strategic issues stemming from the new realities in the labour area, resulting from the above-noted processes of economic and commercial internationalization, the speed of technical innovation and the structural and institutional changes associated with those processes. To this end, our ministries of labour should modernize and strengthen their capabilities in order to address these new challenges and to participate more effectively in the formulation of policies on these issues.”

Besides, the Declaration identified the following major priorities: “...the role of the labour ministries; employment and the labour market; professional education; labour relations and fundamental labour rights; social security; safety and occupational health; labour inspection; labour justice and social dialogue.”

What key issues should be done and modified according to labour relationships was clearly stated in the situation diagnosis done by the different Ministers gathered at the Pacific coast.

4. The objectives of Viña del Mar

A Plan of Action annexed to the Declaration of Viña del Mar contains the objectives that must be pursued. Of relevance are the definitions contained in point 1d) and 1e) holding that the labour ministries “Shall promote alternative mechanisms in the area of conflict resolution” and “Provide background information about national practices and initiatives that may give rise to recommendations with respect to jurisdictional functions and labour procedures”.

Thus, the central objective of the approach outlined at Viña del Mar consists in bringing labour administrations in line with global integration and its impact on labour relations. This requires a more active, agile and committed attitude of the labour ministries to remove the hurdles that delay the development of new and more fair ways of bringing social actors together. Confrontations and disagreements generated by unnecessarily prolonged conflicts seriously undercut the chances of the affected sectors to progress, cause hardly recoverable delays and frustrate the objective of improving both the quality of life of workers and the productivity of enterprises. All these factors have an impact on the development of collective and individual conflicts, with detrimental repercussions on the labour administration and the labour courts as well. Hence, the objective is a radical change of current methods of conflict resolution.

Section II

B. Characterization of conflicts

1. Categories

Before proceeding to a description of the traditional approach to the resolution of labour conflicts and developing new alternative proposals, some basic concepts must first be established.

In most countries, labour justice doctrine and positive labour law distinguish between individual and collective conflicts. The former may be individual in the proper sense of the word, or multi-party conflicts. Meanwhile, collective conflicts can be subdivided in economic and legal conflicts (i.e. conflicts of interest and conflicts of law).

The classification is not merely academic, since the countries in the region have chosen their means of conflict resolution on the basis of this classification, although it would be hardly accurate to say that this is done in the same way everywhere. Generally, there is no leading or dominant idea in this respect. There are even some countries where conflicts are qualified by the number of labour subjects that are involved, rather than by their legal nature.

On the other hand, the classification is also used to determine which administrative body will handle the case. With some variations, four countries in the region have assigned all individual and collective conflicts to a single body: Brazil, Mexico, Panama and Canada. As for the rest of the countries, a majority has chosen to assign individual and collective legal conflicts to the justice system,
and collective economic conflicts to administrative institutions specialized in conciliation and arbitration.

2. **Individual conflicts**

Individual conflicts are also called controversies. These are always of a legal nature, because when a party to a labour contract seeks to alter binding provisions, the absence of agreement inevitably leads to the extinction of the labour relationship. That is why a controversy will always emerge when a worker claims non-compliance with a certain provision or suggests a different interpretation of a valid rule related to an individual contract, whether in force or already expired. For these reasons, the individual conflict has no public profile, does not affect the productive activities of the enterprise in question and has no impact on social peace. Yet, it is precisely in those cases where the dispute is rooted in different interpretations of enforceable standards, that the allocation of a decision in the judicial system gives the action a jurisprudential character that may change the way in which a statute is enforced or alter the criteria that are used to enforce a collective agreement. Under these circumstances, the individual conflict becomes a source of social concern, particularly with respect to the design of public policy by the labour ministries.

3. **Collective conflicts**

Collective conflicts denote a confrontation between an employer or a group of employers and their combined work force, normally represented by one or more trade unions. In general, this is the kind of setting where a discrepancy or a different way of approaching the issue stands in the way of reaching an agreement or compromise. The net result of this course of events is to alter the terms of the previous relationship between the affected parties, either between the parties, towards third parties or both. It has been argued that the definition of collective conflicts should be reserved only to disputes resulting from antagonism over issues of a purely professional nature. On the other hand, it has also been argued that the definition should extend to a series of situations that emerge for different reasons, such as solidarity actions or political statements. More detailed comment on these situations will be provided in due course.

It is useful to establish at this point the nature of the elements that differentiate collective economic conflicts and legal collective conflicts. The former involve collective conflicts caused by the intent of one of the parties to the labour relationship to introduce changes in the core of valid standards and regulations, and to create a new framework capable of meeting requirements that were so far unforeseen. The incorporation of new wage systems, innovative approaches to the working day or breaks or, most commonly, demands for improvement of wages may be some of the ways in which workers trigger an economic conflict. Essentially, an event of this nature erupts when the parties fail to reach an agreement over the drafting of a new collective labour contract. But this does not mean that confrontations may not arise outside the negotiation, due to endogenous or exogenous developments that were not contemplated in the labour contract currently in force, which the parties would therefore like to revise. Unfortunately, this type of situations have frequently risen in Latin America due to inflation.

On the employers’ side, potential conflicts may arise due to the desire to change current arrangements such as paid rest; linkage between wage improvements and increased productivity; and perhaps due to increasingly exacting demands with regard to worker training. Thus, any of these or other similar issues may evolve into a conflict of interest, to the extent that they reflect a serious difference of opinions over the renewal of the collective labour contract, imply a change with respect to the status quo, or face resistance from the other party.

On the other hand, the legal conflict has nothing to do with change. On the contrary, it implies a protest against non-compliance with enforceable standards. The party that raises the claim does not seek changes, but rather wants to abide by the status quo ante, which was apparently disregarded by the counterpart. Usually, these legal conflicts have an individual dimension: A worker personally
requests the employer to pay his/her wages, honor vacation time or pay severance money after termination of the contract. Yet, it would appear that there are as many situations where the legal conflict is triggered by the workers in one enterprise or group of enterprises demanding compliance with an unquestionably valid and enforceable statute, or disputing a given interpretation of a valid arrangement, only to find opposition from the other party. At that point, a collective legal conflict has emerged.

It does not matter a great deal if in those collective conflicts the controversy manifests itself within the relationship or rather affects third parties. The parties involved need not take immediate action, it is sufficient that they announce the possibility of their doing so in the future.

Against this background, it would seem that interest or economic conflicts are always of a collective nature, while legal conflicts are mostly individual ones. Yet, reality escapes academic distinctions and it is almost impossible to establish univocal criteria about this question.

A collective conflict sets in when a direct negotiation between delegates appointed by workers and employers fails to close the gap between the parties and the discussion moves beyond the negotiating table, to impact the regular activities of both the enterprise and the workers. The labour administration is interested in the kind of conflict that changes the normal course of work activities due to actions undertaken by some of the parties with the intent of putting pressure on the opposite side, in the expectation of persuading it to accept or drop its demands, depending on the circumstances. Traditionally, workers have gone to strike to put pressure on their employers, while the latter used to lock out their workers to put pressure on them. Labour authorities have traditionally responded to these recurrent means of conducting labour conflicts by supporting some dubious notions about the legitimacy of direct action measures. However, modern doctrine, specially on the European continent, considers that strikes and lockouts are not the only licit features of a conflict, championing instead the use of other means such as sit-down strikes or go slow-strikes, among others. By the same token, it is believed that employers should be allowed to refuse to grant over time, suppress some kind of incentives or slow down production to deprive their workers of the benefits of productivity. Yet, the discussion about broadening criteria does not end there. By the end of the XX century, pressure tactics on the part of trade unions expanded to actions outside the enterprise, such as disruption of urban and highway traffic, sit down-strikes at the facilities of the stricken enterprise, as well as at public places, and demonstrations in front of the homes of the owners or managers of the enterprises involved. These are the new ways of managing conflicts which, according to Ernida Uriarte, are more concerned with gaining a high public profile, than having a direct effect on the counterpart, in the expectation that public repercussions will put pressure upon the labour relationship. In any case, these conflicts are expressions of disagreements that cause a substantial alteration of productive activities and obstruct social peace.

The latest doctrine is now inclined to accept the exercise of pressure tactics by both parties as a lawful tool in the course of a conflict, even after an administrative authority has decided to participate in conflict resolution. This approach would appear to revise previous theory which held that direct action measures are no longer admissible once the labour administration has implemented means of conflict resolution such as conciliation or arbitration.

Nevertheless, it should be emphasized that national legislation and jurisprudence have both failed to incorporate, in the majority of the region’s countries, something that stands almost unopposed in doctrine: i.e. the legal qualification of direct action measures as lawful or unlawful by the administrative or judicial authorities, should be sparingly used. In other words, the legal doctrine has started to reduce the necessary requirements for lawful strikes, while the subjective effects of power tactics tend to expand. In fact, even public servants may now exercise the right to strike, which used to be unthinkable.

The previous background about collective conflicts is relevant to interest and legal conflicts alike.
4. Multi-party conflicts

Collective multi-party conflicts may be called atypical. They arise when a group of workers with individual grievances of a similar kind against the same employer or group of employers decide to bundle their forces and seek collective response to their claims. Although theirs is a collective legal conflict, the labour collective does not seek legal redress, relying instead on group pressure to achieve a satisfactory conclusion. Whenever the workers decide to take direct action measures, these disputes have detrimental effects on productive activities and generate social tension. Therefore, even without seeking to reach an agreement or restore the relationship, the labour administration is compelled to act in order to minimize public repercussions and achieve a settlement, to redirect the situation to the judiciary, which is its natural environment. In spite of being characterized as atypical, multi-party controversies deserve the continued attention of the labour ministries.

5. Improper conflicts

The cornucopia of labour conflicts around the world includes other cases which, in spite of being as important as those reviewed so far, demand marginally, or not at all, the preferential attention of labour administrators. They should still be mentioned here, so that the different ways in which they are addressed may be discussed later. The category involves a certain type of conflicts that has accurately been called ‘improper’, since they do not imply the existence of a dispute between employers and workers. These are rather conflicts between and within unions, solidarity conflicts and political conflicts.

Conflicts between unions arise when two trade unions clash over their right to represent the workers. Most of the time, these disputes are settled through the intervention of an organization of higher standing such as a federation of unions. The internal conflict is usually a confrontation between the organization and one of its members. Overall, legal systems assign the solution of these disputes to courts concerned with individual rights. Yet, the creation of a previous stage within the labour ministries would be convenient, since these are the administrative bodies that are usually empowered to charter trade unions.

Solidarity conflicts arise because unions need to support the grievances of a single worker or a group of workers, and even the grievances of members of different unions. Generally, these actions respond to the union’s refusal to silently accept a situation that may sooner or later become a negative precedent for the organization in question. Since these cases have failed to generate any legislative interest in the region, the obvious response of the labour administration should not be technical, but rather political. This would depend on an evaluation of the desirability of intervening to avoid having to prosecute the dispute to the end or to prolong it not only time wise, but also in geographical terms.

Other political conflicts that are ignored by the legislative branch of government are those where unions—usually the federations—promote some type of direct action measures to protest against a governmental decision, whether labour related or not, usually by implementing a general strike. Classic examples of these industrial actions are strikes that protest against a rise in public transport fares. While these episodes are obviously known to State authorities—including the labour ministries—the officials in charge are political officers who do not follow regular procedures.

Section III

C. The role of the State in labour conflicts

1. The responsibility of the State to secure social peace and economic productivity

This subtitle entails taking a stand on the subject, since it implies that the State is duty bound to act in a certain manner when faced with a conflict in the area of labour relations. In fact, the idea that the State may not react to events that alter social peace, sometimes through violent episodes that threaten the safety of the people, sounds intolerable to the republican spirit of the region. On top of that, conflicts prevent the development of regular economic activities, and have detrimental
effects on the general welfare of a nation, occasionally creating conditions that may prevent the population from meeting their needs. Therefore, the notion that the State must play an active role in the face of conflicts must be sustained as an eloquent manifestation of the posture that governments throughout the region should adopt. However, not any kind of action will do. History shows that States have tended to evade conflicts, whether by elusion, concealment or repression. Besides going against the grain of a libertarian and democratic spirit, such attitudes also impair the enjoyment of fundamental principles and rights that are recognized by the ILO, by limiting freedom of association and preventing collective bargaining.

For all these reasons, the notion should be installed in the region that conflict may be the engine of social progress. The irruption of a dispute proves to a great extent that the opposite interests that are intrinsic to labour relations have failed to be reconciled. Therefore, new means to overcome critical situations must be devised in order to forge new, more effective labour relations. In the pursuit of this objective, the State should play an active role by contributing to the development of all the necessary agreements.

Then, the region's labour ministries should recommit themselves to paying attention to potential conflicts, taking a constructive stand to foster a positive evolution of labour disputes in order to achieve concrete social improvements throughout the region. Such an attitude should imply sustaining regulations that empower the labour ministries to implement management policies aimed at obtaining truly beneficial solutions for each confrontational event among social actors, while also admitting the possibility of conflict management by independent State bodies.

Section IV

D. Systems of conflict resolution

1. Traditional and valid systems

Judicial and administrative labour intervention in the region start from the idea that the State must assist in conflict resolution through the intervention of a public official operating as an impartial third party. This applies to any kind of labour dispute in the judicial and administrative areas.

Ever since labour justice became a legal discipline, the social actors have admitted the presence of an independent third party as a factor that may help reaching an agreement. This approach has promoted the use of very clear tools of conflict resolution such as conciliation and arbitration; the former has been incorporated into the codes of labour justice procedure in many countries.

It is important to provide a general perspective on the current situation with respect to the means available to address labour disputes and conflicts throughout the region.

2. The judicature

The overwhelming majority of the countries in the region have agreed to distinguish between economic and legal conflicts. The latter fall under the jurisdiction of the judges, with the sole exception of Brazil, where labour courts are empowered to resolve all types of conflicts, including those of a purely economic nature.

Following exceedingly broad criteria, the region’s Courts of law are competent to resolve legal labour controversies and empowered to use coercive means to impose their decisions on the parties. Furthermore, the courts receive appeals of decisions in the area of labour relations.

Yet the States should be extremely careful with regard to the range of judicial competencies, and make all efforts to resolve conflicts within the administration, in order to avoid distortion of the social and economic objectives of the individual nations due to excessive judicial involvement. In other words, it should be taken into account that a sentence passed in a particular dispute may set a precedent that influences the economy by introducing pernicious distortions or conditions. A judicial ruling in Argentina in 1972 may serve as a telling warning. Through an overly broad interpretation of the scope of employment accident benefits, the decision in question burdened the economy with an additional cost of over 10% of the nation’s payroll.
3. Pre-judicial administration

In Argentina, Brazil, Canada and Costa Rica, administrative bodies may intervene in an early stage in individual or multi-party controversies (sometimes on a mandatory basis) before parties may litigate their case in Court. Thus, complaints, which are overwhelmingly brought by the workers, must first pass through the administration, and only if no conciliation can be reached, may the dispute be brought to court. In Argentina and Canada, this procedure is mandatory.

In Argentina, it takes place before a private mediator chartered by the labour ministry, which approves the agreement and closes the case. In the event of a second failure, the door is open to the judicial process before a Court specialized in Labour law. In Canada, the dispute is brought before a kind of tripartite administrative court empowered to resolve the controversy, which decision can be appealed before a civil court.

Brazilian legislation empowers Pre Judicial Conciliation Commissions which operate in the branch union or at the enterprise level; these bodies are composed of representatives of the entrepreneurs and the trade unions. Any agreements reached by the Conciliation Commissions are final. In Costa Rica, agreements reached by the Center of Alternative Resolution of Labour Conflicts, which is an organ of the labour ministry, are also final; in both countries, these services are not mandatory.

These cases may be used as models for two ways – mandatory or voluntary- of trying to cut short the process and avoid litigation in court.

The advantage of the Canadian example is that the pre-judicial intervention takes place before a kind of administrative tribunal constituted by delegates who represent the workers, the employers and the State, and who have – at least the former two - a more immediate knowledge of the situation of the actors who appear before them. Yet the lack of specific technical competence on the part of the Common law tribunals that intervene should the pre-judicial process fail, constitutes a serious drawback.

Conversely, Argentina’s weak spot is the lack of specialized mediators in this area. The remarkably high number of cases settled at this level may reduce the caseload of labour Courts, but does not necessarily guarantee technical effectiveness.

Nevertheless, the countries in question are satisfied that these alternative methods tend to avoid the gridlock that has become proverbial in the judicial system, particularly in Latin America.

Pre-judicial intervention is restricted to individual conflicts, since in the majority of regimes it is hardly possible to bring collective conflicts of interest before the Courts.

This situation goes back to the adoption of a criterion approved at a meeting held in Montevideo in 1948 where this question was for the first time examined at the regional level and within the framework of the ILO. Said criterion, which was followed in most situations, suggested that questions related to conflicts of a general economic nature (and in some instances also those of a judicial and collective nature) should be handled by the administrative authority through conciliation and arbitration.

Nevertheless, two highly significant exceptions must be named: Mexico and Panama, where Conciliation Boards function as administrative bodies whose decisions have jurisdictional effects, to the extent that they process and settle all kinds of disputes and allow judicial intervention only at the appellate level before the highest court of justice, in order to ensure compliance with the Constitution. These Boards have a single instance, a tripartite constitution and material competence (depending on the different economic sectors).

Brazil exhibits perhaps the most atypical of all the jurisdictional models in the region. The national Constitution empowers the nation’s Courts to intervene in any kind of labour conflict, including individual and collective disputes, injunctions of foreign public law and of the direct and indirect public administration of municipal governments.

In the past, the Brazilian Courts used to have a tripartite composition, since professional judges were joined by law judges
with limited mandate. These judges represented the organizations of workers and employers. Today, the courts consist only of professionally qualified judges.

The rest of the countries overwhelmingly adhere to the notion that the Courts should enjoy jurisdictional capacities and be competent to tell the law and hand down enforceable sentences. The judges are professionals specialized in labour law. In this respect, the United States and Canada, where all labour disputes are handled by common law judges, are the exceptions.

Regional Labour law doctrine has propounded a series of principles that have come to be seen as pillars of Labour justice. The enunciation of these principles is necessarily linked to the current problems affecting the Labour justice system and any proposals that may be advanced to help its unavoidable modernization. It has been said that Labour justice procedure is founded on ideas such as procedural initiative, free access, immediacy, procedural concentration, *in dubio pro operario*, a quest for the truth and swiftness. All of this exacts a substantial effort from the court, which must direct the process and declare the law, promote the development of cases and often close the gaps between the parties, by virtue of the fact that labour justice is seen as a public order issue. These principles have in general been incorporated into the nations' institutional make up, but failed to eradicate recurrent problems. Gallart Folch's 1936 *dictum* to the effect that "labour disputes demand extreme simplicity, great swiftness and absolutely free access", still stands unfulfilled. Only the third requisite has materialized.

Another aspect related to procedural labour structures has to do with the instances that are available in a given case. Overall, cases are decided in single instance, in some cases through oral procedures. But many systems still hold on to written procedures with the possibility of appeal. In both cases, the possibility of a Constitutional appeal before the supreme tribunals subsists. This issue is in line with the composition of the Courts: First instance courts are usually in the hands of a single professional judge, while at the appellate level the Court has a collegiate composition. Sometimes the court in single instances procedures may be tripartite through incorporation of representatives of the workers and employers.

4. Administrative management

Conflict resolution at the administrative level is the competence of the Labour Administrations. These State bodies must act in accordance with the earlier mentioned fundamental principles and rights acclaimed by the ILO. Part of this approach is a set of assumptions that modify the usual way of looking at labour relationships, such as indications of the existence of a dispute and use of the dispute as a means to put pressure on the other party.

Further ahead we will spell out different ways of shaping administrative conflict resolution. Meanwhile, suffice to say that administrative intervention must encompass all the types of conflicts reviewed so far. Hence, the Labour Administration must have the power to intervene in all kinds of labour conflicts, even if their acts and decisions may not always have the same judicial effect. Obviously, in individual controversies where a worker claims payment of wages or disputes the interpretation of a conventional rule, the labour administration cannot impose payment of pending wages or determine the correct interpretation, for lack of jurisdicational authority. But there is no doubt that its intervention may be valuable to the parties and help them seek a solution. A good example is the Mexican Board of Conciliation and Arbitration, a body empowered to intervene in all controversial labour matters, and its undeniable contribution to conflict resolution.

There is no doubt that the role of the labour administration becomes most important in the face of collective conflicts. It would appear that these cases best fit the profile of these bodies. It is also undeniable that economic or interest disputes are most appropriately handled by the administration. However, a broad and respectful vision of the labour administration’s mission to secure social peace and the economy, suggests that even in case of legal conflicts the administration may be of use in finding a swift and effective solution.

A description of the different forms of administrative conflict resolution follows.
a) Conciliation and mediation

Actually, neither positive law nor legal doctrine clearly differentiate between conciliation and mediation. The former is described by doctrine as the intent of a third party to bring the parties closer together, to get them to sit down at the negotiation table, when they fail to talk in the presence of a conflict. It is called mediation when the third party not only brings the litigants together, but also offers proposals or polishes and clarifies proposals of the parties. Therefore, it is accurate to say that conciliators and mediators try to move the parties in conflict towards a consensual solution.

In some cases, this role is performed by a third extra-judicial and non-governmental party. In other words, an individual with no official authority and unrelated to any of the parties. Besides, as was mentioned earlier, there are tripartite collegial bodies authorized to act as arbitrators. But the greater majority of litigants use the services of officials of the labour ministries who are empowered to intervene in these matters.

It has been said many times, although to no great effect, that the conciliator and the parties need an appropriate environment to carry out negotiations. This aspect should be examined with a view to its implementation.

The issue of the objectives of conciliation deserves particular attention, since they should not be limited to reaching a peaceful solution or avoiding a strike. Although these are important objectives, dispute resolution should aim at more. The administrative authority and the autonomous sectors should make sure that an agreement includes useful concepts for the future relationship between the parties, leading to an objective improvement of their relationship.

Lastly, among the various elements that should be introduced to modernize extra-judicial means of conflict resolution, we highlight increasing the authority of conciliatory intervention. Because this depends to a major extent on the prestige of the conciliator, excellence should be the norm.

b) Means of conciliation

Conciliation may be voluntary or mandatory. In case of voluntary conciliation, the labour authority calls the parties to start a dialogue aimed at settling a dispute. Usually, it does not abide by formal regulations or time-tables and moves along according to the parties’ decisions. On the other hand, mandatory conciliation is backed by a binding call to the parties to engage in negotiations. It usually includes by-laws but does not impose conciliation. Both approaches have proved to be very useful within the region and the choice for one or the other depends on the characteristics of a given conflict.

Formerly, the process of conciliation was excessively formal, burdened with a heavy load of requisites that were out of synch with the nature of labour relations, which ask for direct and swift action. However, after some hesitation, the region moved to adopt more flexible procedures, such as those currently in use. Countries such as Costa Rica and Panama were the first to adhere to flexible and more informal actions. This approach includes shorter conciliation time-tables, although the parties may decide to take more time to talk if they feel that prolonging the process may be conducive to an agreement. Conciliation should be promoted by having the parties attending meetings and independent instances such as the labour ministries, in order to contribute to build up government supported devices for conflict resolution that may meet the objectives of conciliation mentioned above.

The issue of the costs of conciliation has not been dealt with in a comprehensive manner. Most countries find that these services should be provided at no cost to the parties, because the State is interested in settling labour disputes in an appropriate manner. It has also been argued that charging fees for conciliation by State officials would severely burden the workers. Nevertheless, some countries raise fees that must be shared by both parties; in other countries, the cost of conciliation is shouldered by the looser. This last solution, however, should not be taken as a model, since conciliation is not designed to generate winners or losers, but to reach an agreement that serves both parties.

As far as the results of conciliation are concerned, the system is positively evaluated throughout the region; prevailing opinion has it that conflict resolution contributes to an adequate handling of labour disputes. In most
countries, the agreements achieved so far tend to have legal effect as collective contracts, whenever conflicts of interest are involved. However, in Argentina, Brazil, Panama and Costa Rica, agreements related to legal controversies sometimes take on characteristics that are similar to those of final judicial sentences.

c) Arbitration

Arbitration hardly enjoys the same massive favorable support garnered so far by conciliation. This system requires the parties to submit to the decision of an arbitrator who intervenes to settle the dispute. The arbitration process may be mandatory or voluntary; the arbitrator may be an independent individual or a tribunal whose composition includes other arbitrators appointed by the parties.

Although arbitration is a legally recognized device for conflict resolution, it is hardly used in the region. Trade unions oppose arbitration, arguing that it may become an obstacle to the deployment of direct action measures and weaken their ability to fight. On the other side, the employers usually see the arbitrator as a possible threat to their decision making abilities with regard to the design of ways and means to execute labour relations.

Resistance to the use of this device grows stronger in the face of mandatory arbitration imposed by the State to put an end to a conflict. The ILO recommends voluntary arbitration and accepts the mandatory variety only under very qualified circumstances, taking into account the hazards that it represents for the population at large.

In spite of the poor support enjoyed by arbitration, it should be pointed out that its use becomes specially relevant in the area of conflicts with a collective economic character. In these cases, the arbitrator's decision will have regulatory effects on labour relations within the subjective boundaries of the conflict. Anyhow, by virtue of both its low level of acceptance and peculiarities, arbitration takes a subsidiary position among the various effective devices for conflict resolution.

d) Types of arbitration

As stated above, arbitration may be voluntary or mandatory. The former takes place when the parties to a conflict, failing to reach a direct or indirect agreement by other means, subscribe to an arbitral agreement in which they appoint an arbitrator and lay down the points that the decision will cover.

Voluntary arbitration includes those situations in which the collective contract that binds the parties stipulates recurrence to arbitration in case of future conflicts. Although the arbitration in this case becomes mandatory due to the obligatory nature of the contract, it is considered voluntary because the parties have decided on their own free will that their affairs should be dealt with in such a way.

There also exist legal provisions that require parties to take their differences over the terms of their collective contract to an interpretation commission created by the contract. While these commissions are expressions of consensus, the parties are obliged to abide by their decisions, which makes them similar to arbitrators.

In many countries in the region, legislators have ordered mandatory arbitration in situations that affect essential public services. Yet, trade unions have seen in this stand an attempt to restrict their right to strike in an environment where the concept of essential public services has been expanded without bounds.

Today, there is a prevailing tendency to invoke the definition developed by the ILO, holding that essential public services are those that involve the life, health and safety of the people, as well as those services that have similar effects by virtue of the intensity of their actions or their extension in time. This reflects an adequate attempt of the doctrine to grant the States the possibility of defending themselves in the event of labour disputes that may put at risk not only the exercise of important rights such as the right to work and freedom of movement, but also the survival of a given community. Therefore, mandatory arbitration may be an option to settle collective conflicts when the risks involved are very severe.
e) Alternative systems

The United States Federal Mediation and Conciliation Service, founded in 1947 to settle labour conflicts, is a widely known example of alternative dispute resolution. Since then, the Service has substantially expanded its activities to become an international training center for labour mediators and conciliators. Inspired by the theory that generated Alternative Dispute Resolution, whose aim was to free all sorts of social disputes from excessively formal procedures and reduce their overly protracted duration, the Federal Service became essentially involved with the field of labour relations. Most social actors recognize the benefits generated by the Federal Service through its adequate resolution of conflicts and its contribution to the training of mediators from 85 countries. This initiative deserves being highlighted, since some countries are currently attempting to replicate it. The role of this U.S. Agency reporting directly to the White House, consists in offering solutions to settle disputes over the terms of collective contracts, as well as providing intervention by third impartial parties whose arbitration services contribute to finding an acceptable way out to the parties. Two essential characteristics deserve to be underscored as beneficial contributions to the consolidation of the system: i) the Federal Service keeps itself equidistant both from the social sectors and the government as far as political influences are concerned; ii) it can count on the services of over 1,700 private arbitrators appointed on the basis of their expertise, professional affinity, geographical location and other criteria.

5. Direct negotiation

This scheme has been intentionally left on hold, in an attempt to underline its importance around the world. Contemporary labour doctrine exhibits a high degree of consensus about the desirability of promoting the autonomous development of regulatory frameworks in the area of labour relations. Obviously, this results from a series of ideas advocating the deregulation of production relations, of which labour relations are an important part. But it is also true that the introduction of objectives such as competitiveness and efficiency, along with productivity schemes and continuous improvement, require that the parties avail of appropriate tools to overcome the all too frequent situations of conflict in the labour field. This is a highly interesting issue, particularly because the emphasis on decentralization of collective bargaining goes hand in hand with the idea that each contract should create its own devices of direct negotiation between the parties in the face of possible conflicts. This means that collective contracts should adopt their own system of conflict resolution, particularly in the area of collective disputes, notwithstanding the existence of procedures for complaint that have shown their effectiveness in resolving individual disputes.

Section V

E. Current problems

Presently, the implementation of all systems of labour dispute resolution is rather deficient. Some of their imperfections impair legal effectiveness in the decision making area, while in terms of labour policy -which is a fundamental concern of the Declaration of Viña del Mar- most results are not as expected. Therefore, a brief review of these issues is in order.

The first prevailing regional problem with regard to judicial and administrative management of labour conflicts, is the meagerness of the budgetary resources that are available to the public bodies that must discharge these duties. There is a noticeable lack of adequate facilities and financial resources to train public officers on a continuous basis.

As far as the Courts are concerned, the problem also consists in poor budget allocations. Therefore, the small number of judges available cannot process the high number of cases before them. The net result of this situation is that labour trials may last for many years before coming to an end. Slow justice is justice denied, specially when the rights of workers are violated. Delays are also due to remnants of civil law in the labour procedures, that emphasize form over content.
It is interesting to note that some researchers working with the Mexican Conciliation and Arbitration Boards—a somewhat intermediate or mixed system—have reported that similar problems are affecting their atypical tribunals too.

These conditions remind us that the implementation of procedural systems founded on principles of labour procedure—which in turn should rely on the principles of substantive labour law, specially in two fields (protective labour law and integration of labour law in the realm of public order) is still pending. The need for a process specifically designed for labour justice is readily apparent in Uruguay, whose 1989 General Procedural Code embraces all legal matters, including labour justice. However, this accumulation of different disciplines has evolved in such a way that labour judges who have no code of their own, have developed a jurisprudential structure to fill the gap. Thus, reality rather than legislative efforts has shaped a working set-up supported by sheer necessity. In other cases, the failure to adapt trial systems involving labour conflicts is not as drastic. But the persistence of written procedures and double instance trials—two features that are characteristic of civil procedure, where formal truth prevails over actual truth and the party’s request over the judge’s decision—have contributed to prevent the achievement of objectives such as simplicity and swiftness and affect Labour law principles such as speed, concentration, immediacy and even the supremacy of reality.

To slowness and procrastination should be added a strong tendency of the social actors to recur to the courts in order to settle many kinds of conflicts, including collective ones. Excessive judicialization raises a problem that should be carefully assessed, because it could constitute a veiled attempt to deny justice.

This development is the consequence of excessive responsibilities of judges who may, through their rulings, influence the interpretation of statutes and collective contracts, not with the intent of resolving matters of interpretation among the parties, but to generate decisions that may impact the overall economic and social order. To resolve the questions before them, judges must resort to current law, but they are not competent to engage in political considerations about the desirability and convenience of certain norms that were laid down by the legislature and the Executive branch. Many petitions, although addressed to the Courts, are actually intended to have effects beyond the parties to a dispute (ergo omnes).

These petitions try to make use of the expansionist nature of jurisprudence with a view to affecting society at large. The courts of law in these cases are compelled to conduct an analysis of economic policy issues such as the opportunity of implementing a given reform, promoting a particular activity, championing a region in a particular way or regulating certain relationships between entrepreneurs and trade unions, just to mention some examples of subjects that are foreign to judicial duties. Therefore, an intermediate system designed to avoid these undesirable consequences on labour relations and their environment, would be a rational undertaking.

This idea involves another important consideration. A major characteristic of this era in terms of labour relations and the impact of globalization in this field, is the swiftness of the changes that are taking place in the organization of production, marketing and consumer preference. Along with the impact of a high level of technological development, all these factors suggest the inevitability of permanent change. Even if the courts were to reach prompt decisions, the judicial response may become a hurdle, because it creates future effects based on past events. Therefore, the issue of excessive judicialization should be under permanent scrutiny throughout the region. It is recommended to enhance the activities of administrative bodies such as the Canadian commissions on labour relations, whose tripartite composition offers stronger guarantees than the Conseils de Prud’hommes originated in French law, or organizations such as the United States Federal Mediation and Conciliation Service, before resorting to a court. On the basis of the intervention of these public administrative bodies, the possibility of reserving to the labour judicature the double role of telling the law and controlling the observance of the law, specially with regard to constitutional guarantees, should be examined.

As far as the administration is concerned, the absence of permanent observation of labour relations impedes early intervention in the event of disputes. This could be
compensated by defining strategies that are directed to ensure the development of conciliatory activities in contexts that are conducive to obtaining certain results through the agreements achieved in the process. Lastly, it must be said that, in the areas of mediation and conciliation, some legislation is still very much attached to excessive procedural regulations. Rigid procedure and extended deadlines go against the flexibility that is necessary to settle conflicts.

As a general comment regarding administrative mechanisms, it should be said that all the situations reviewed above are unrelated to what this paper has classified as alternative systems based on the activities of public bodies, since these constitute alternative devices of conflict resolution.

Conclusions

On the basis of the previous descriptive and analytical account and with respect to labour justice, the following suggestions are brought to the attention of the XII Inter-American Conference of Labour Ministers:

The countries in the region should work in an univocal fashion to modernize their conflict resolution mechanisms in the area of labour relations, recognizing that disputes should not be seen as something foreign to labour relations, but rather as manifestations of their nature, assuming a positive approach and admitting that the occurrence of a dispute should not generate rejection, repression or deception, but rather a positive attitude.

The 1998 ILO Declaration on Labour Fundamental Principles and Rights provides a model for the activities of the different countries in the area of labour relations.

From this point of view, it is of paramount importance to continue to make progress with regard to the modernization of labour justice. In this sense, streamlining procedures is a major objective. Besides, notwithstanding domestic law and practice, the importance of effective judicial systems capable of settling individual disputes in a fast and uncomplicated manner and that respect the legal security of the parties, must be stressed. Likewise, a study should be conducted to assess whether in the interest of conducting faster trials, a special procedure for labour cases should be adopted that makes room for self-conciliation, allows for oral trials and eliminates the possibility to appeal. These changes would be complemented if the courts could limit themselves to individual or collective legal conflicts, excluding economic or interest disputes.

Providing the courts with greater budgetary allocations to carry out their work in a proper manner and granting judges and their assistants the necessary professional training on a continuous basis, would be a very important step. Likewise, in an effort to reduce judicial gridlock, the possibility of mandatory pre-judicial procedure before a tribunal or administrative body empowered to settle single controversies through self-conciliation of rights and interests, should be explored.

At the collective level, the region’s labour administration systems, with the participation of social actors, should actively and permanently follow the development of labour relations, not only to prevent disputes, but also to work towards their solution once the conflict has been declared. Meanwhile, the terms and content of the agreements should not be indifferent or neutral. These are related to the strength of the consensus achieved and its endurance, which is a matter of essential concern to the administrative authority for reasons related to social peace. Conciliation efforts should instruct parties to include issues of social interest to the State, such as employment, worker protection, implementation of professional education programs and improvement of productivity, among others.

Institutions devoted to mediation and conciliation services should be qualified and their reputation enhanced, to make sure that the social actors feel that their interventions safeguard their rights. This objective would be highly strengthened by the creation of services devoted to conflict resolution, such as the United States Federal Conciliation Service, and establishing direct negotiation mechanisms within collective contracts.

This would be in line with the distinction between legal and economic conflicts, reserving the latter to administrative conciliation and arbitration, even though the ministries of labour may be allowed to intervene in the former for purely conciliatory
purposes. This would produce greater impact to the extent that parties agree on more simple, flexible and adaptable procedures.

Lastly, the system of voluntary arbitration should be maintained as a device to settle collective conflicts, whereas the mandatory variety should be accepted as a subsidiary tool only, with the sole purpose of taking care of unresolved disputes affecting essential public services, due to their impact on the life, health and safety of the people, in cases of extreme need.
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