
STUDY

LABOR MARKET MODERNIZATION*

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This paper represents what is possibly the first systematic and global analysis of the principal reforms to labor legislation introduced by the current government. These reforms took place between 1979 and 1982 and their scope extends far beyond the range of judicial-legislative analysis. The fundamental motive for the reforms was to make the working of the labor market compatible with the framework of a social market economy and a liberal development model. Among the issues discussed, the paper gives details regarding the nature of the labor relationship, the implications of redundancy payments, the nature of union organization in the light of the new rules and the bases these lay for collective bargaining. Each of these issues has been the scene of controversy, but there can be no doubting that the modernization promoted in this plan by the current regime has changed substantial aspects of Chilean society. At the same time, it has introduced into the debate on these issues, concepts, relations and values that have traditionally been excluded from the analysis of the institutional framework of the national labor market.

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Chapter 1

Introduction

The present paper attempts to make a conceptual analysis of the profound modernization process undertaken in Chile's labor legislation between 1979 and 1982. An outstanding feature of this period was the reform of four legal entities:

- a Reforms to the collective right to employment made in the passing of DL 2.756, on Union Organization and DL 2.758, on Collective Bargaining both in 1979, known at the time as the "Labor Plan";¹
- b Law 18.018, 1981, which modified numerous provisions in DL 2.200 of 1978, relating to individual work relationships;
- c Laws 18.011 and 18.032, 1981 which assimilated workers on board ship and port workers into the general norms of DL 2.200, and
- d Rules relating to labor rights which were established in the Constitution of 1980.

The legal entities mentioned have the characteristics of being mutually consistent and compatible with a free social-market economic system.

The new provisions replaced previous deficient labor legislation, which to a significant degree had contributed to the aggravation of the crises in Chilean society culminating in 1973. The way in which that legislation turned labor relations into a matter of ideology in a class-struggle context, permanently shifted negotiations and understanding between employers and workers into the political arena. In this way, the actors in labor relations were marginalized from their respective roles by various politicized intermediaries and agents of conflict. The degree of distortion present in this area at the beginning of the 1970s, and which is analyzed in this document, helps to explain the drastic solutions brought in by the 1980 constitutional norms regarding safeguards for labor and union activity in the face of political activity.

This modernization is characterized mainly by setting up a normative framework which, in a balanced way, respects the right of all parties involved in labor relations. As well as the parties directly committed by a job contract, it also recognizes that there are third parties who are affected by the labor relationship: consumers, the unemployed and non-unionized workers. Therefore, both the non-waivable rights of workers and unions, as well as the rights of the employer and

¹ In this stage as a complementary legal entity, Decree DL 2.757 was issued, relating to Trade Associations which regulated employers associations, thereby introducing a normative symmetry between these and workers organizations.

the prerogatives of society as a whole should be acknowledged within this context. From this it can be deduced that the role of the government is not to settle differences between the respective leaders or guarantee their agreements, but to ensure the establishment of fair and equal rules to govern their relationships, and to protect the rights of sectors not subscribing to collective agreements. Such sectors also do not participate directly in discussions on the content of labor laws, but nevertheless are often profoundly affected by their provisions.

The progress that the country as a whole is achieving, and therefore also its workers and firms, can be seen as a faithful reflection of their capacity to join forces in a balanced way. Perks and privileges for certain workers do not contribute to the common good: they are simply injustices that infringe the rights of third parties, politicizing the process and its union leaders.

It is worth pointing out, at this point, that DL 1.006, 1975, known as the Corporate Social Charter and conceived as a complement to collective bargaining by activity area—a type of negotiation that is prohibited by current legislation—is not consistent with labor modernization. This charter has been approved, it being established that it should come into force with the passage of the new Employment Code.

Also inconsistent with labor modernization are the provisions in force for workers hired prior to Law 18.018, 1981, on the termination of job contracts, a topic which is analyzed below in the chapter entitled: “Redundancy payments, employment and efficiency”. The maintenance of this inconsistency is serious, because it makes the operation of both individual and collective negotiations unduly difficult, for reasons that are indicated in the corresponding chapters.

During the period, several complementary laws were also approved along with certain amendments to the latter, as well as others which simply introduced technical adjustments. During this period there have also been changes in the area of labor courts. This topic is not analyzed, as the author is not a specialist on such issues, and also because these norms form part of another topic: namely, the overdue modernization of the Chilean judicial system.

Chapter 2

Constitutional Norms

The following are the principal norms that exist at the constitutional level, contained in the Fundamental Charter of 1980 and which now govern labor-market issues.

– **“Freedom of Work, Collective Bargaining and Unionization”**

Article 19. The Constitution ensures for all people:

16 - Job Freedom and Protection.

Everyone has the right to free hiring and to free choice of job for a fair wage.

Any discrimination not based on personal capacity or suitability is prohibited, notwithstanding that the law may require Chilean nationality or age limits in certain cases.

No type of work can be prohibited, except that which is contrary to public morals, safety or hygiene, or as national interest requires and where the law so declares. No law or provision by public authority can demand affiliation to any organizational body as a requirement for carrying out a given activity or job, nor disaffiliation from an organization to remain in such an activity. The law shall determine which professions require a degree or university title and the conditions that must be fulfilled to carry out such a profession.

Collective bargaining with the firm in which they work is a workers' right, except for cases where the law expressly prohibits negotiation. The law shall establish the modes of collective bargaining and the appropriate procedures for reaching a just and peaceful solution therein. The law shall indicate cases where collective bargaining should be submitted to mandatory arbitration, corresponding to special expert tribunals, whose organization and attribution shall be established by law.

Neither State nor municipality officials may call a strike. Nor may people who work in corporations or firms, whatever their nature, goals or function, that provide public utility services, or where a stoppage would cause serious damage to health, the country's economy, the provisioning of the population, or national security. The law shall establish the procedures for determining which are the companies or firms whose workers shall be subject to the prohibition this clause establishes.

19 - Right of unionization in the cases and forms indicated by law. Union membership will always be voluntary.

Labor organizations shall enjoy legal status by the mere fact of registering their statutes and articles of association in the form conditions determined by law.

The law contemplates mechanisms to ensure the autonomy of these organizations.

Union organizations and their leaders may not take part in party-political activities.

- **“Infringement of union autonomy. Incompatibility between union leadership and political militancy”**

Article 23. Intermediate community groups and their leaders who abuse of the autonomy granted them by the Constitution, by taking part unduly in activities outside their specific purposes, will be sanctioned by law. The position of union leader shall be incompatible with militancy in a political party. The law shall establish the sanctions to be applied to union leaders taking part in party political activities, and to leaders of political parties interfering in the workings of union organizations and other intermediate groups as stipulated by law.

- **“Parliamentary incapacity and undue interference by parliamentarians in labor negotiations or conflicts”**

Article 57. A congressman or a senator exerting any influence on administrative or judicial authorities in favor, or in representation, of the employer or workers in labor negotiations or conflicts, in either the public or private sector, or intervening therein before any of the parties, shall cease to hold office.

Chapter 3

Individual Labor Relations and Worker Protection

Individual labor legislation is characterized internationally as being protective of the working party; its clear aim is to legally compensate for the relative weakness of the individual worker in his or her relationship with the employer.

Similar to the laws on children, women, or social security, among others, in this special law it is common practice to place certain restrictions, of a protective nature, on free will. In the case of labor legislation, such practices are reflected in the establishment of non-waivable benefits for the worker on issues such as maximum working hours, weekly rest periods, the payment of overtime, holiday rights, as well as the guaranteeing of wages, union immunities and maternity leave. The provisions enforced, in this regard, in Chilean legislation have a long history, also covering safeguards for worker health and safety.

Over the years, Chile’s labor laws became steadily perverted, losing their spirit of reasonable protection, to the point of being turned into a

mechanism for granting benefits to workers on the basis of political pressure, overtly harmful to others. Such is the case in the creation of job monopolies in favor of certain workers, to the obvious detriment of other people's job choices and chances of hiring, which operated on the basis of professional union or registration cards needed to be able to carry out certain jobs. Such licenses, restricted in their distribution by the respective union leaders, constituted an arbitrary barrier aimed at artificially raising the wages of the benefited workers, infringing against the rights of the unemployed to find work, as well as of those in other occupations wishing to improve their situation by choosing the restricted jobs. In turn, it also limited the normal development of the corresponding economic sector, by restricting competition between firms and exerting pressure towards an artificial mechanization process, clearly prejudicial to employment.

The list of union cards abolished by DL 2.950 is detailed in Table N° 1.

The earlier legislation also extended into the establishment of non-waivable minimum rights, common to all workers, and became a mechanism for improving the levels of wages and granting benefits to certain groups in exchange for political support, thereby taking economic negotiation out of the parties' own environment and shifting it into the political arena. The successive granting of unjustified privileges encouraged a rapid increase in petitions, with a consequent politicization among the leaders of the different pressure groups intervening in these issues. The list of unjustified privileges abolished in successive laws is detailed in Table N° 2.

Special regimes also extended into the field of social security, there being more than sixty different systems in force at the time the respective reform was passed, in DL 3.500, 1980.

Workers who lost privileges came under a common law, notwithstanding the recognition of any payments they had been receiving up to that time. Also abolished was a rule that unduly restricted changes in activity, technology and, even closure of uneconomic employment sources. This rule required the prior existence of a bi-ministerial permit for the employer to dismiss more than ten workers in a single calendar month. The rule, which was negative in its economic affects and on employment, also involved the government politically by making it responsible for authorizing dismissal. In defense of property rights the new law restored the faculty of the entrepreneur to move out of an activity, which, together with freedom of entry, is fundamental to a social-market economic system.

The new law restored freedom for the employer to terminate a contract, subject to prior payment of compensation to the worker, when redun-

dancy is due to a cause not attributable to the worker. This mode replaced the complex and inoperable attempt at “control of unjustified dismissal”, a doctrine installed in the confusing and grievous Law 16.455 of 1966, which is analyzed separately (See Appendices 1 and 2). However, the framework of redundancy or severance payments drawn up in Law 18.018 was less than perfect: as well as discriminating between Chilean people, it is a progressively damaging trap for labor relations.

The lack of an appropriate conception of redundancy payment is an unfinished part of labor modernization, which is the subject of the following chapter.

TABLE N° 1 PROFESSIONAL UNION CARDS

Abolition of the main norms establishing the mandatory use of professional cards for carrying out certain activities*	Unions
Law N° 9.613 and Decree N° 3335, 1967	Hairdressers.
Law N° 14.890* **	Hoteliers, slaughterers and meat carvers
Decree N° 613, 1963	Orchestral musicians.
Decree N° 843, 1966	Actors and artists.
Decree N° 597, 1967	Parquet setters and polishers
Decree N° 1.005, 1967	Announcers.
Decree N° 797, 1967	Public passenger transport drivers.
Decree N° 8, 1969	Graphic artists
Decree N° 197, 1970	Electricians.
Decree N° 278, 1970	Workers in delicatessens and rotisseries.
Decree N° 383, 1970	Loaders and unloaders of trucks.
Decree N° 448, 1970	Controllers of cinema and public shows.
Decree N° 332, 1971	Bakers.
Decree N° 288, 1971	Wine sellers and similar activities.
Decree N° 1.416, 1972	Cinema technicians.
Law N° 17.772 (Art. 2°)	Cinema Operators.
Decree N° 888, 1975	Lift installers.
Law N° 16.724 Article 23 and 24	Registration of maritime and port workers.
Law N° 17.260 Article 2	Auxiliary employees and managers of General and Special Customs Agents.
Law N° 17.408 Article 5	Faculty for the Labor Directorate to grant professional cards to employees of shipping offices.
Law N° 16.757	Prohibited jobs intrinsic to the principal and permanent production of a given industry to be carried out by subcontractors or concessionaires.

* The decrees indicated correspond to the Ministry of Labor and Social Security.

** This legal body also established the faculty of the President of the Republic to introduce the mandatory use of professional cards for certain associations or jobs, in such conditions as the regulations establish.

Chapter 4

Compensation for dismissal

The right of the employer to free dismissal is consistent with and indispensable to a framework of social market economy. Competitiveness between producers of goods and services and their respective chances for development and survival, presuppose a flexible labor market.

TABLE Nº 2

Abolition of the legal norms affecting wages and working conditions of different groups of workers	Unions
Law Nº 6.242 Law Nº 7.388	Law on chauffeurs in private houses. Law on additional wages for waiters and bartenders (legal tipping).
Law Nº 9.588	Law to Register National Travelers, wages and commissions regime.
Law Nº 9.613	Hairdressers law.
Law Nº 14.837 Article 2, Law Nº 15.141 Article 4 and DFL Nº 1.971	Provisions relating to journalists' wages.
Law Nº 17.515	Minimum wages for chemist employees.
Law Nº 17.570 Article 5	Special protection for employees of notaries, registrars and archivists.
DL 552,1974	Wages and working conditions for Private Mass Passenger Transport.
Law Nº 5.181	Oil workers' wages
Law Nº 6.192	Special compensation for journalists
Law Nº 6.686	Compensation for railway workers.
Art. 189 Law Nº 16. 617	Compensation for workers in the Large Scale Copper Mines, paid in foreign currency.
Law Nº 17.400 Nº 23, Article 159 DFL Nº 4, 1959 Ministry of the Interior	Compensation for iron mining workers.
Art. 2 Law Nº 16.634	Facultates the Director of Electricity Services to cooperate in solving conflicts between public-service firms and their workers.
Art. 2 Law nº 7.173	Immobility for workers during the process of classifying an environment as toxic.
Arts. 9 and 10, Law Nº 17.323	Facultates the President of Republic to implement and regulate a single working day.
	Rights, guarantees and privileges in favor of workers in Chilectra in the case of this firm being acquired by Corfo.

Abolition of the legal norms affecting wages and working conditions of different groups of workers	Unions
Arts 10, 31 and 33, Law N° 17.695	Protection, paid leave, exemption from qualifications, impossibility of transfer or change of function for those elected as company social workers. Monopoly in favor of social assistants to fulfill posts of Heads of Departments and Services for social welfare in the State Sector and a working week not in excess of 33 hours for such professionals.
Art. 14 Law N° 17.077	Obligation of all radio stations to maintain an information service staffed by their own department of journalists hired by the firm.
Laws N° 16. 344 and 17.221 Law N° 17.255	Pharmacies hours of opening to the public. Special legislation for cinema controllers (tripartite commissions, wages, tariffs, compensations etc.).
Law N° 11.999	Closure of grocery establishments at 12.30 on Sundays.
Law N° 17.256	Rights and guarantees for workers in telecommunications firms in the case of nationalization, acquisition or merger firms.
Law N° 7.295	Mixed Commissions for wages, automatic wage increases for years of service and other items, with respect to private sector employees.
First Clause Art. 51 Law N° 16.250	Facultates the President of the Republic to set a percentage of fees to be distributed between employees of Notaries, Property Registrars and Legal Archivists.
Art. 69 Law N° 16.624	Obliges contractors in the Large Scale Copper Mines to pay the same wages and benefits as Codelco, subject to the latter declaring that the jobs carried out constitute a normal activity in a firm involved in the Large Scale Copper Mining.
Supreme Decree N° 307, 1970	Copper Workers Charter; special scheme of constitutional status, regulating union organization and collective bargaining for workers in the sector.
DL 2.200 norms brought together from previous provisions Art. 35	Maximum ordinary duration of work set at 42 hours per week for radio operators, and telephone operators and testers. Maximum duration of 33 hours for operators, drillers and supervisors of mechanized systems for accounting or statistics.
Art 72	Special annual holiday of twenty-five working days for workers living in Regions I, II, III, XI, XII or in the province of Chiloé and for those working in mines.
Acts 145 to 149	Special Norms for hiring artists.

 Tripartite Commissions Discontinued

Constitution	Activity
Decree N° 983, 1974	Construction.
Decree N° 895, 1974	Pasta fabrication
Decree N° 889, 1974	Graphics.
Decree N° 34, 1977	Laundries.
Decree N° 136, 1976	Milling
Decree N° 212, 1975	Industrial Installation.
Decree N° 890, 1974	Paper (excepting the Company <i>Manufacturera de Papeles y Cartones, Industrias Florestales y Celulosa Arauco S.A.</i>)
Decree N° 892, 1974	Textiles
Decree N° 99, 1978	Fishing
Decree N° 115, 1975	Banking
Decree N° 28, 1976	Urban and Interurban Transport in the Private Sector
Decree N° 894, 1974	Assembly and Maintenance of Lifts
Decree N° 891, 1974	Oils and Fuels
Decree N° 126, 1975	Fabrication of Clothing
Decree N° 135, 1976	Glass and Glass Products
Decree N° 115, 1976	Pharmaceutical Laboratories
Decree N° 486, 1975	Agriculture
Decree N° 155, 1975	Private Sector Collective Transport
Decree N° 297, 1977	Maritime Workers of Bahía
Decree N° 297, 1977	National Merchant Marine Crews

Continuous changes in demand, technologies and competitive structures oblige economic units to seek adjustment processes that are timely and efficient. If they do not do so they put their survival at risk. This obliges them constantly to adjust, among many variables, the quantity and quality of the workers they require.

The worker laid-off, or made redundant, obviously has the right to be compensated: a benefit nobody denies. What has been the source of lengthy discussion is whether or not there should be objectively provable reasons to justify lay-off. An evaluation of the theory and history of the doctrine of “duly justified dismissal” is what best highlights the advantages of a free lay-off regime accompanied by non-waivable and reasonable redundancy compensation in favor of the worker. The existence of this benefit has a dual function. It mainly helps to balance a worker-employer relationship exposed to permanent change, by providing an implicit benefit to the worker in affording him an improved bargaining position in the face of the inevitable pressures an employer will apply in the pursuit of efficiency levels, redesign of func-

tions and renegotiation of benefits. In the second place, redundancy payment conceived in this way is an appropriate palliative to the situation of unemployment, in addition to any subsidies social safety nets may provide for this purpose.

Unfortunately, in the past the law has related the level of compensation to the number of years service, and this constitutes a conceptual error leading to extremely serious consequences.

To start with, this mechanism tacitly implies that the worker was not equitably remunerated in the past. It is true, a benefit conceived in this way might be reasonable during the early years of a labor relationship, but over time it implies an over-expansion of worker protection and dismissal costs to the point where the pressure to achieve labor efficiency becomes more and more difficult to assume, and the necessary and continuous renegotiation of incentives and definition of functions more difficult to carry out. The mechanism represents a growing accumulation of liabilities that threaten firms' very survival. This situation is aggravated by the fact that the possibility of compensation for terminating a contract, conceived in this way, ends up being seen by the worker as an asset whose value varies in accordance with years of service. So anyone wanting to become independent or believing they have better prospects in another job, has an big incentive to work badly (limited only by the difficulty of legally proving of lack of integrity) and get themselves fired.

A serious error, resulting from the doctrine of "duly justified dismissal" is the fact, that in this context, the circumstance of the worker fulfilling the requirements for retirement is not seen as a cause for terminating a job contract, and this creates the possibility of the worker delaying retirement indefinitely until he is paid "his compensation for years of service".

The system is out of date, disruptive, and damaging. The legal mechanism, unfortunately long established, acts against the long-run survival of employment sources, by restricting firms' possibilities for adjusting to new economic realities and, what is especially serious, by discriminating against labor-intensive activities. In a country with high levels of unemployment, and capital scarcity, such as ours, this mechanism artificially taxes hiring new workers and gives artificial incentives towards mechanization, all of which is somewhat senseless to say the least.

Some argue that the problem discussed here has been partially resolved, because Law 18.018, 1981, provided for legal severance payments for workers hired subsequent to the law's coming into force, of one month per year of service, subject to an upper limit of 150 days' wages. This new

ruling may have set a reasonable level to redundancy pay; however, it creates two types of workers: those for whom severance pay is bounded, and others whose compensation has no upper limit, consisting mainly of those hired before August 14th 1981. It is easy to predict that this situation will generate pressure from 1986 onwards when the “bounded” workers will want this discrimination to be eliminated along with the capping of their benefits. The reasonable efforts made in Law 18.018 will probably eventually become obsolete, and if this occurs the blame should be placed on the law itself for having been a timid reform in this respect, representing an easy target for future demagoguery.

The basic solution, which is the responsibility of the authorities and sooner or later will have to be implemented, will be to redefine what currently is known as “compensation for years of service”. This should be conceived of as “compensation for dismissal”, a benefit to which all workers have a right if their contracts are terminated through no fault of their own. The benefit, as well as being a non-waivable legal right, should be of a reasonable magnitude so as to ensure compatibility between the protection needed for the worker, and firms’ development and survival.

A definitive break with the concept of compensation for years of service, by adopting freedom of lay-off with reasonable compensation, should also lead to the reinstatement of the circumstances of the worker fulfilling the requirements for retirement, or due to age or disability, into the list of causes for terminating a job contract.

Solution to Redundancy Compensation

What constitutes a “reasonable” level for legal redundancy pay is subject to different interpretations. For example, it could be 90 days’ wages, but only 30 days’ for contracts which at the moment of lay-off have been in force for less than two years. A rule of this kind would certainly not prevent the parties agreeing higher benefits, and its approval would not modify already existing conventions which exceed the minimum.

As a way for this reform to become politically viable it is suggested recognizing as “acquired assets” all compensation potentially accrued under the previous rules. This would bring to an end its future expansion from day one of the new law, with all future contracts being subject to the new legal mode. Such a modification, I am sure, would be acceptable to the vast majority of workers, because in the end they know the current system is not healthy. Many firms have gone bankrupt be-

cause of the mistaken rules on redundancy, and there are many abuses workers themselves acknowledge in this matter. Furthermore, workers fear that at some time a system may be introduced in which they lose everything “already accrued”.

The proposal suggested above should therefore declare the amount of compensation already accrued as non-negotiable, although the time-frame and form of payment should be negotiable. If there the parties were willing, they could even agree for these amounts to be converted into U.F.²

The proposals point to the existence of a single common set of rules for all Chileans, so as not to repeat the mistakes of Law 18.018. Although it may not happen immediately, uniformity will inevitably occur over time thanks to the agreements reached between parties regarding the time-frame for the payment of already accrued benefits.

This framework also has the advantage of allowing firms to raise wages without thereby causing their liabilities to increase unduly. And if the accrued amounts were expressed in U.F., cases could even occur where wage hikes do not increase liabilities. It would also allow for making payments additional to ordinary wages by paying off redundancy liabilities, which without doubt would be warmly welcomed by workers. Furthermore, open corporations could finance these amounts through a share issue, if there was agreement to do so.

It is convenient for the legal severance pay framework to relate only to termination of a contract. For that reason, both the non-waivable minimum and any higher benefits that may be agreed and accrue subsequent to a new law, should be payable only at the moment of termination, if this should occur, rather than as services are provided —a strange doctrine included in Law 18.372.

Legal compensation could remain non-taxable as it is now; however, agreements made in the future should be subject to taxation and social security contributions, insofar as they exceed the minimum non-waivable levels. Otherwise, conventional redundancy payments would be artificially encouraged, to the detriment of the Treasury and the sound framework it is intended to implant.

It is important to underline that as long the issue of compensation for dismissal is not resolved in a fundamental way, individual negotiations will not be able to operate appropriately in the country, with

² Translator’s note: The U.F. or *Unidad de Fomento* is an inflation-linked unit of account used in many contracts in Chile.

consequent damage to the future economy of the country and its inhabitants; nor will the system of collective bargaining function appropriately as we will see in the corresponding chapter, as it is not a question of blaming the design of the negotiations, but the design of redundancy payments.

Retirement Funds?

Some sectors believe that a solution to the problem of compensation is to be found by setting up of national or sectoral compensation funds. Such funds really are unnecessary: with the current social security regime the need for income after retirement is well covered. Compensation for dismissal, as suggested here, will be an appropriate palliative to an unemployment situation, in addition to the legal subsidies which exist for such emergencies.

The existence of compensation funds is an expensive and inefficient alternative. It means mandatory contributions additional to those already in existence for pensions and health, as a charge on the worker's taxable income, although the law states that it is the employer's responsibility. If it is conceived as a pay-as-you-go system, the funds will be exposed to the politics and pressure from powerful groups. It is easy to predict that before long the amounts paid would be discriminatory and, probably for the most part, a charge on the Treasury.

If funds were of individual capitalization, this would oblige setting up a complicated and costly system for operating and supervising the payment of contributions and the correct awarding of benefits.

Chapter 5

Union Organization

The old regime saw unions as unitary and mandatory at the worker level (industrial unions), but of free affiliation at the staff employee level. Mandatory affiliation gave a disproportionate influence to union leaders in the principal decisions of union activity. These unions, given their legal set-up, in most cases became real political cells. Once controlled by politicized groups, they were easily diverted to non-union objectives. The lack of union freedom left the grass-roots worker unprotected without the tools needed to resist.

It is fair to recall that union politicization was strongly encouraged by the previously mentioned practice of legally awarded benefits, and by the collective-bargaining regime in force at that time, whose characteristics are analyzed below.

Law DL 2.756, on union organization, provided a basic solution to the problem. It established the broadest possible union freedom: the freedom to form unions along with free affiliation and disaffiliation from them. The new regulations gave decision-making powers to the union's grass-roots membership through secret ballots held in the presence of a notary, on the most relevant topics of union activity: election of leaders, the amount of union dues, strike decisions and affiliation to federations and confederations.

The old politicized unionization gave way to one of union freedom: from a union centered on its leadership to a union of and for the grass-roots worker.

It is perfectly easy to understand the opposition to the current regime of union organization that was manifested by the politicized leaderships of former years and their advisers. Union life today is very active at grass-roots level, but they call this "atomization" when it does not manifest itself mainly in the political arena and is not channeled through the leaders themselves.

There are several innovative and important aspects in the new legislation which should be highlighted:

- Workers have the right to set up unions organizations without prior authorization, and these assume legal status at the moment of submitting the original minutes of their constitution to the Labor Inspectorate.

- Affiliation or membership is personal and voluntary, and no affiliation or disaffiliation from a union organization can be required in order to carry out any job or activity. The categories of union considered by the law are the following:

- a Company union, covering workers in the same firm.
- b Inter-firm unions which join together workers from at least three different employers.
- c Independent worker unions, which bring together workers who are not dependent on any one employer.
- d Temporary worker unions; this category of union has the special objective of providing jobs to its members, current or future, under conditions agreed with different employers (laborexchange).

The purposes of union organizations are:

- 1 To represent workers in the exercise of rights emanating from individual work contracts, when required to do so by their members;
- 2 Channeling concerns and needs for integration as regards the firm and the job;
- 3 Ensuring compliance with social security and labor laws, reporting infringements of the law to the administrative or judicial authorities, acting as a party in hearings or complaints that give rise to the application of fines or other sanctions;
- 4 To provide support to members and promote mutual cooperation among them, stimulating human fellowship and integration and providing for recreation;
- 5 To promote the trade, technical and general education of their members;
- 6 To promote the improvement of systems of protection against job risks and the prevention of professional illnesses, notwithstanding the competencies of bipartite worker-management committees, and
- 7 To set up mutual societies and other non-profit-making services, for their members' benefit.
 - Only company unions have the right to bargain collectively.
 - Union quorums.

The reform grants the broadest freedom for workers to group together in whatever unions they choose to form.

As there are union privileges and permits involved, the only restrictions are minimum quorums regarding rights on these issues as recognized by the law.

Setting up a company union requires the agreement of a minimum of 10% of the workers, representing at least 25 workers.

In the case of firms with more than one establishment, the union can be set up with a minimum of 40% of the workers in each establishment provided they represent at least 25 workers.

Any group of 250 workers or more, can form a union, whatever the percentage of the firm they represent. In firms with less than 25 workers, just 8 of them can form a union, provide they represent more than 50% of all workers.

- Unions are independent of the employer, or employers, and may not receive from him, or them, direct or indirect financing of any sort. The activities they carry out are therefore directly related to the membership dues their members agree to pay. In this way, the old vice of financing leadership activities with funds obtained for the union in collective bargaining is overcome; such funds now go to the members and it is they who decide how much they are willing to hand over as funds for the leadership.

- Unions with 250 or more members have to provide a yearly balance sheet signed by an accountant. Unions with less than 250 workers have to maintain a book for incomings and outgoings together with an inventory, without the need for an accountant's signature.

- The dissolution of a union can only be declared by a Minister of the Labor Court or of the Appeal Court.

- Federations and confederations may not sign collective job contracts; although they may actively advise in collective bargaining processes in which their member unions are involved.

- Affiliation or disaffiliation of a union from federations and confederations must be agreed by an absolute majority of members, in a secret ballot held in the presence of a notary.

- Affiliation or disaffiliation of a federation from a confederation shall be agreed by a majority of the member unions.

- The legal union framework is not applicable to officials of State Administration, belonging to either central or local government. Nor does it apply to officials of the Judiciary, the National Congress and State firms that are dependencies of the Ministry of Defense. However, it does cover workers in State-owned corporations.

The spirit of labor modernization is that federations should operate very close to their member unions, collaborating in the training of leaders, collective bargaining, legal advice, recreation etc. Confederations, on the other hand, should represent the interests and different viewpoints, of labor groupings regarding the laws relating to labor, social security, health, labor training, etc. What still needs to be done is to include, in the text of the law, details regarding their respective fields of action. This would be helped in practice, if confederations only affiliated grass-roots unions and not federations as well. It would also be appropriate to suppress the regulation obliging federations of 20 or more unions to become confederations, as this has no justification.

Chapter 6

Collective Bargaining

a Economic Negotiation or Socio-Political Conflict.

Collective bargaining prior to DL 2.758 was conceived, or at least operated, as an expression of class conflict. So much so, that even the

name of the process was “collective conflict”. The periodical pressure by workers to obtain improvements were justified in terms of grievances or claims and were supposedly at the cost of capital. Improvements were defined as class achievements, and in this framework it was not necessary for them to correspond to a fair compensation for worker productivity in a particular firm. Despite the fact that its origin and justification correspond to a Marxist framework, this view was also attractive for non-Marxist unions, because effectively the mechanisms in vogue at the time often gave improvements, in part only apparent, in excess of worker productivity and market realities. However, this approach was detrimental to the interests of consumers and the unemployed; in the latter case narrowing rather than broadening their job opportunities. The system also negatively affected the country’s possibilities for economic and social development, and enormously complicated the working of fluid and fertile labor relations, leading, on more than one occasion, to expropriations from the employer.

The very design of the conflict meant that the workers’, without risk, and from a state of permanent and exclusive job tenure, press for an above-equilibrium wage level. This form of pressure, which was common, prevented solving conflicts at the level of the parties, projecting them above all on to society as a whole, with a series of harmful consequences for the common good which we will consider below.

If the strike is a refusal to work for an indefinite period on the part of the workers, implying a loss of management faculties for the employer, it is clear that such a framework leaves one of the bargaining parties with no legitimate options, as a result of which the problem tends to shift to other arenas in search of a solution. Strikes conceived in this way create political problems because they inevitably involve the government. In practice the public authorities had to take responsibility for finding a formula to overcome each conflict, or concede mechanisms to allow the effects of agreements reached under this framework to be alleviated.

Experience shows that, normally, any “arrangement” presumed on the part of the government a recognition of the new costs that the employer was taking on and authorization for these costs to be shifted to prices through tariffs or subsidies, or the permanent maintenance of high rates of inflation which diluted the wage gains obtained.

Part of any improvement was real and part only an apparent conquest for the worker. If the wages obtained exceeded productivity levels, the excess was financed by the consuming public, the employer

and unemployment. The formula put pressure on entrepreneurs to modify their operational strategy for using capital and labor, which redounded in an premature mechanization of productive processes — somewhat irrational in a country of capital scarcity and chronic unemployment, but brought about precisely due to a deficiency in labor legislation.

To allow part or all of the excess over and above productivity levels to not become effective, the entire Chilean society had to tolerate a process of high inflation, which was damaging to the development of the country and especially hit the poorest and worst organized members of Chilean society.

This situation was highly evident in the bargaining situations of firms of a certain size and in processes of bargaining by activity area. In smaller firms, however, strikes appear not to rebound on the government as they did not represent a significant political problem. However, in such cases, the main defense for the entrepreneur came to be the maintenance of a process of high inflation.

The entrepreneur's response to the system was to cut back his demand for labor as far as possible, as revealed by a reluctance to enter into activities that involved the hiring of many workers, and a propensity towards artificial mechanization. The system also fueled a clear phobia of unionization among entrepreneurs, with the consequent deterioration of labor relations inside the firm and frustration among workers.

DL 2.758 brought this negative situation to an end. It conceived bargaining as a periodical peaceful and fair process for determining future wages, in accordance with workers' productivity levels, in a framework of market discipline — a responsibility which the benefits, costs and the risks of the process confer on the parties.

Negotiation is aimed at setting wage levels in accordance with productivity inputs, rather than the establishment of incomes related to states of need, or mere aspiration. If wage levels established in this way are considered socially insufficient, it will be the responsibility of the community (through the social safety net set up by the State), and not the entrepreneur, to top them up through social security channels.

For bargaining thus conceived to be feasible, it was provided that in the process the parties could maintain their rights as contracting parties and therefore exercise legitimate options backed up by their real negotiating power.

The fact that union power is restricted by what in fairness corresponds to it, is of enormous social significance, and should allow the

development of private-sector firms hiring large amounts of labor as well as a greater inclination to hire on the part of medium- and small-scale employers. In this context, union activity becomes definitely oriented towards contributing to the fairness and enrichment of labor relations, ceasing to be a source of antagonism and forces acting against the survival of jobs.

Strike action ceases to be the ever-convenient mechanism of former years, and an object of abuse, as shown in the figures relating to comparative realities in several countries. (Table N° 3).

Opposition by politicized union leaderships to the regulations designed for strikes has its roots in the fact that the bargaining process, thus conceived, allows solutions to be reached at the level of the parties, without interference from outside the firm. This circumstance weakens them and reduces their power as pseudo-union political leaders by taking a formidable instrument of social pressure away from them. In the case of the communists, it frustrates their attempts to destroy the foundations of a free society. The identification of these leaders with workers' interests is, in addition, clearly opportunistic and not disinterested. Once communism comes to power, collective bargaining, strikes and other labor rights are immediately suppressed, as can be seen in all international experiences.

b The Right to Strike and the Employer's Options

The idea of conflict sustains the thesis of a "zero-sum game", which assumes the existence and the permanence, in the economy, of a total cake, which when shared out means that what one party gets, the other party necessarily will no longer get.

Common sense and unbiased observation can see that the elements that unite workers and employers are more numerous and more significant than those that disunite them. For one thing, mutual cooperation makes the firm's existence possible; without joint action there is no possibility of wealth creation. The history of improvements in wages and working conditions, seen in economies throughout the world, show that these are the result of economic development and productivity increases, rather than conquests achieved through social struggle or in "fundamental" conflicts with entrepreneurs.

TABLE N° 3 INDEX OF STRIKES IN CHILE, UNITED STATES AND UNITED KINGDOM.

Year	Man days lost due to strikes, per worker			Striking workers as a percentage of all workers			Man days lost due to strikes, per striking worker		
	Chile	USA	UK	Chile	USA	UK	Chile	USA	UK
1961	0.934	0.248	0.132	11.3	2.2	3.3	8.3	11.2	4.0
1962	0.522	0.279	0.248	7.8	1.8	1.9	6.7	11.0	1.3
1963	0.693	0.238	0.075	13.6	1.4	2.5	5.1	17.1	3.0
1964	0.669	0.330	0.096	14.06	2.4	3.7	4.6	14.0	2.6
1965	0.835	0.328	0.122	13.3	2.2	3.6	6.3	15.1	3.4
1966	0.421	0.349	0.100	6.1	2.7	2.2	6.9	12.9	4.5
1967	0.835	0.328	0.122	13.3	2.2	3.6	6.3	15.1	3.4
1968	1.380	0.646	0.198	10.7	3.5	9.5	12.9	18.5	2.1
1969	0.688	0.550	0.290	19.3	3.2	7.0	3.6	17.3	4.1
1970	1.191	0.845	0.468	18.1	4.2	7.7	6.6	20.1	6.1

Source: John H. Pencavel, *The Legal Framework of Collective Bargaining, Lessons from the Chilean Experience*, Stanford University, 1981.

The Right to Strike

Workers do a job and gain experience which in some activities is significantly more valuable where they work than in alternative jobs. Collective bargaining is justified because, in such cases, workers individually have insufficient bargaining power to demand payment for the value of their specific productivity, due to the fact that they separately face a single negotiator (the employer). Individually, they can only threaten to opt to carry out their functions in other jobs, where their contribution is less and the wage would be lower—a situation which gives them no bargaining power. In joining together, the union allows them to bargain with the employer for the true value of their work. What is negotiated, therefore, is the difference between the wage in alternative jobs and the worker's replacement cost.

Some people mistakenly see strike action as a mechanism necessarily leading to an improvement in wage levels and working conditions. Such is not the rationale for strike action; it needs to be understood as an instrument of pressure in support of workers' bargaining power. In normal economic times it would be logical for strikes, and the option to exercise the right to strike, to lead to such improvements as are consistent with the increase in the value of productivity measurable in such periods. In periods of recession

and crisis, however, the justification for strike action rests on its capacity to prevent wages falling further than the drop in the value of productivity in a period of declining economic activity.

A successful regulation of collective bargaining, therefore, manages to achieve a level of wages effectively corresponding to the productivity level of the group of workers in question.

The fact that strike action does not always lead to an improvement in wages has led some people to argue that a strike established under appropriate labor regulations is not a real right, because "it has insufficient force". A similar opinion is reflected in the mistaken conception of the role played by the option for strike action, corresponding to the ideological framework that seeks a return to the previous system. For such critics it is inconceivable for wages not to rise in real terms after a strike and, furthermore, that they should suffer an appreciable deterioration such as occurred in the period 1982-1984, years of acute economic crisis.

The Employer's Options

The entrepreneur has the right, deriving from constitutionally protected property rights, to manage his firm and use all legitimate options that allow him to remain competitive.

Those who see strike action as a necessarily successful option in pressing workers' claims, seek to give it all the trappings of an incontrovertible power of pressure. Communists, interested in corroding the bases of free economic systems, have operated with considerable skill in this endeavor. The path is well known and consists of successively reducing the employer's options. Once the employer has been stripped of his legitimate options, not only will he have had his bargaining power unfairly cut back, but in addition the process will become subject to the discretionary power of the strikers and eventually the government.

The old thesis postulates that a refusal to work on the part of the worker must deprive the employer of his faculties to run the firm. Consequently, this means that strikers' refusal to work will prevail over the right of the entrepreneur to keep his firm running, exercising an attribute of property rights: namely, that of hiring personnel. It means in other words, acknowledging that strikers have a sort of monopoly of tenure over their jobs and in negotiating with their employer. Consequently, it also implies the impossibility for the employer to negotiate contracts with workers other than those on strike.

The removal of legitimate options from either bargaining party leads to the inevitable result of preventing negotiations from reaching fair solutions among the parties involved. Negotiations cease to be negotiation, automatically turning into social conflict and shifting to the political arena in the search for a solution.

In communist countries the worker does not have job freedom or the right to negotiate either individually or collectively. Wage levels are thus a private decision of the State. A similar effect is achieved by tying the employer's hands during negotiations in the free economic world. In this case too, the State—and more than the State, the government itself—ends up becoming the main body responsible for imposing solutions which, in the context of free negotiation, ought to be a matter of agreement between the parties.

What is negotiated: the range between ceiling and floor.

Strike action needs legal regulation aimed at achieving a balance of forces in accordance with legitimate rights and the effective bargaining capacity of the parties. The solution to this conflict of interests must necessarily be conceived of as a non-transferable responsibility of the parties, a responsibility which they must assume as adults, carefully weighing up the benefits, costs, risks and consequences that negotiation involves.

The aims and issues of collective bargaining relate to the value to be placed on the workers' input to the firm. As has been mentioned above, workers usually give to the firm they work in a value in excess of what they could achieve in other workplaces. This is due, for example, to experience, acquired professional skills, and cohesion within a staff team. For this reason—and only for this reason—it is fair that a procedure should exist that recognizes wages in accordance with the value of productivity, above what could be achieved in alternative jobs.

However, the interests of society need to be safeguarded. It is not fair that wage levels should exceed those demanded by other workers capable of providing the same input, nor that they subjugate the rights of the employer and consumers. The level of other workers' claims is represented by the cost of replacement. The bounds to collective bargaining, as is well known, are therefore—as a floor or lower bound—the wage of the alternative job and—as a ceiling or upper bound—replacement cost to the employer.

A fair and balanced legal normative framework should place collective bargaining in a framework consistent with workers' bargaining power and the legitimate options of the employer.

The rights of the parties

Laws DL 2.758 on collective bargaining, and DL 2.756 relating to union organizations have achieved this balance. Both the rights and the margin of protection in favor of workers are reflected in provisions such as the following:

- a Workers are conceded wide-ranging facilities allowing them to organize in whatever way they consider most convenient, provided the minimum demands for quorums are complied with.
- b Immunity is established for all workers involved in negotiations, while these take place, and permanently for all union leaders;
- c Defenses are established against unfair practices by the employer.
- d The employer is obliged to respond to and negotiate the collective bargaining projects that are presented to him;
- e In the case of strike action, the employer is prohibited from hiring permanent replacements for 60 days. During this period workers retain the exclusive right to negotiate with the employer and,
- f Strikers may demand to be rehired under the conditions in force at the end of the collective contract.³

Recognition of the employer's legitimate options includes permanent respect for the faculty to manage his firm, and, once a strike has lasted 60 days, the possibility to terminate the labor relation. A refusal to work (strike) is for an indefinite period, but continuity of attachment is a right workers have of limited duration: once this period has expired, workers cease to have exclusive right to their jobs. It is obvious that by conceding this monopoly to them encourages wage demands above the levels that are in accordance with worker productivity or —what is the same thing— with their replacement cost, thereby making it unlikely that an agreement between the parties will be reached.

Experience with the old system was very clear in this respect.

As a deduction from the above discussion, strike action conceived of as a refusal by workers to provide their services, in conditions they consider

³ This provision — a nominal lower bound in collective bargaining— arose out of the existence of often large severance payments, which in the absence of a lower limit would weaken the strike mechanism for workers. Indeed, strikers would not be able to sustain their position beyond 60 days, even if this corresponded to the value of their productivity, because they would lose the stock represented by their eventual compensation for dismissal.

Due to the fact that since 1974, and as a result of high rates of inflation, it was part of the government's wage policy to index wages to 100% of the increase in the consumer price index, indexation was extended to this lower bound, until in 1982 it was abolished along with the elimination of the general indexation norms governing the rest of Chilean workers.

unsatisfactory, is a situation that could perfectly well extend indefinitely. If workers' claims do not exceed the replacement cost for the employer, the latter will continue negotiating exclusively with the strikers even after 60 days have passed, despite the absence of a contractual link between them.

By way of comparison regarding the rights of the parties, in North America workers do not have the right to demand to be rehired at any minimum wage level, and their job connection is broken once the contract has expired. In other words, once the contract ends, not even for a single day do workers have the exclusive right to negotiate new contracts. From the very moment of strike or lock-out the employer can contract or hire definitive replacements. Lock-out also may also be offensive, an employer right which is not recognized in Chilean legislation.

In summary, the framework designed allows for solutions at the level of the parties, and avoids negotiations overflowing into the political space. It prevents abuses and irresponsibility in the use of the strike option and maintains consistency between wages and worker productivity.

However, there is an unsolved technical problem, which until it is resolved will prevent the proper functioning of the collective bargaining mechanism. The problem is the existence, from long before labor modernization, of the concept of severance payments seen as a progressive function of years of service. This means that workers with many years' service will be inhibited from exceeding 60 days on strike insisting on their legitimate rights, because they would begin to lose their eventual accrued severance payments.

The existence of eventual severance payments at an unreasonable level also hinders the appropriate functioning of individual bargaining, an issue that has already been the subject of earlier comment. Shortcomings in this area should be blamed on a deficient design of severance payments, rather than regulations on collective bargaining.

c Company level bargaining

The specific value of a worker's productivity is something that occurs and can be assessed only inside the firm and, therefore, this is the only reasonable context in which wages and working conditions can efficiently be negotiated. The same job title in practice can mean very different functions and responsibilities from one place of work to another, even among firms in the same activity area. In addition, supposedly similar jobs are carried out with considerable productivity differences between one firm and another. Differences arise from various sources: the functionality of the

good or service being supplied, the timeliness with which it is provided, the complexity and nature of the technology used, production volumes and demand, the supply of workers of a specific quality, worker training and motivation, only to mention a few of the factors.

Negotiations by activity area attempt the impossible: namely, deciding, in a single instance, fair wage levels for countless workers from different workplaces, of great diversity regarding the goods and services they generate and highly varied productivity —workers who appear to do the same job only in name.

The shortcomings inherent in bargaining by activity area are the best example of their inappropriateness for determining wage levels and working conditions. The following are some of these deficiencies.

Unfairness and unemployment

The conditions agreed on are manifestly unfair to workers of high productivity and also inappropriate, to say the least, for the reality of low-technology firms, those of small scale operation and small workshops.

Wage levels set for high-productivity workplaces are lower than those that would be determined in company-level bargaining, while those set for low-productivity workplaces would, in general, exceed the realities of those establishments, leading them into bankruptcy, and producing an obscene and cruel form of unemployment for their workers.

Distortions in labor relations

Negotiation by activity area radically worsens dialog and understanding between workers and employers. It erects a wall between workers and their employers in an open expression of class struggle, handing responsibility for solving their differences not to the workers and employers themselves, but to third parties outside the firm. In this way, union leaders and workers are forced to cultivate political contacts, as this is more effective for them than bargaining with the employer, whereas the employers abstain from negotiating while they wait to see what gets decided at the political level.

Proliferation of sources of payment for factors other than productivity input.

Solutions to the social conflict, put this way, tend to establish uniform percentage increases, without discriminating between the relative situation of different groups of workers, who may therefore be paid above, at

or below their productivity. Due to the diversity of situations the negotiations are intended to cover, a significant part of total wages ends up being expressed in benefits that bear no relation at all to the provision of services or productivity inputs. Such is the case of uniform holiday allowances according to family size, and stipends associated with not working, such as the payment of indemnities for severance. Particularly serious is the fact that in this way the system in general does not establish incentives, and where it does so they are of very poor design.

Political conflict

A characteristic of negotiations by activity area is that they artificially fuel political conflicts. Governments find it difficult to stay on the sidelines if the population is not being provided with a good or service; or in the case of there being a large number of workers on strike. To the above should be added the pressure that politicized agents can exert to make negotiations overflow into conflict, so as to manipulate the process, take it into the political arena and place it at the service of party-political ends. Such agents aspire to creating conflict, and the more widespread the better, because in that way they manage to take responsibility for a solution further away from the parties' reach. The more successful they are this attempt, the greater is the exclusion of the parties from solutions and the greater the power that befalls the leaders.

Politicized agents will always be great supporters of negotiation by activity area.

Power by causing damage

Strike action in negotiations by activity area, unlike strikes in company-level bargaining, depends on the extent of the damage it can cause to third parties, and not on the value of the workers' productivity. This leads to the solution to area strikes tending to be political.

Restrictions on competition

Agreements by activity area are comparatively cheaper for employers who use capital-intensive technologies, favoring them by diminishing competition by establishing conditions that prevent the entry and permanence in the activity of small-scale competitors who are less mechanized and use labor more intensively.

Bad examples

The fact that bargaining by activity area appears in the comparative legislation is not a reason for the country to follow bad examples, still less if its shortcomings are increasingly visible. There are many countries that have taken significant steps towards liberating themselves from this system, so it is already in clear decline. Europe bargains increasingly by firm; Japan negotiates by firm and United States, as a general rule also does so. In the latter country, negotiation by area is only the exception and it is subject to growing academic criticism, justly so due to its defects. Great Britain has been greatly harmed by area negotiations, and this is one of the important reasons for the decline of that country in the world ranking of developed nations.

d. Mandatory Arbitration

Law DL 2.758 has established, for reasons that are easy to understand, that workers may not come out on strike if they work in firms providing public-utility services, or where a stoppage would be seriously harmful to health, to the provision of the population, to the country's economy, or to national security.

Firms in this category are identified annually by a joint resolution of the Ministries of Labor and Social Security, Defense and Economics.

In such firms, if no agreement can be reached between the parties, the law establishes that they must proceed to mandatory arbitration, a responsibility which falls on an arbitration body whose composition and attributions are regulated by DL 2.977, 1979.

An original rule of great utility established by DL 2.758 is that arbitrators are obliged to find in favor of one or other of the two proposals on the table at the moment of submitting to arbitration, accepting one of them in its entirety, following the market criteria indicated by the law. As a consequence, the tribunal can not decide in favor of other alternatives, nor may it include in its findings proposals from each of the two parties. The idea of this formulation is to prevent the parties from taking up extreme positions hoping the arbitrator will resolve the dispute by splitting the difference, an attitude in accordance with natural tendency to appear fair. By obliging the parties to reveal their real and final positions, at the risk of losing the arbitration hearing, these positions are often very close to one another, and agreement is reached without the need for a ruling from the arbitrator.

The mandatory arbitration system is viable although it does have certain difficulties —as has been seen in practice— in a few specific public-utility firms. In such cases it is reasonable to contemplate arbitrators who are exempt from pressures from the parties. However, as a mass solution, its implications could be disastrous, given the infinite number of rulings one could imagine for the system, and the shaky technical training of arbitrators. It is easy to imagine the chaos that would ensue in small remote workplaces. Finally, and worse still, the arbitration institution would be extremely vulnerable to political influences with a consequent effect on the selection and behavior of arbitrators.

The argument in favor of mandatory arbitration on a massive scale does nothing except put forward once more, at a different level, the same disadvantages suffered by taking negotiation out of the parties' environment and shifting it to sphere of decision-making outside the firm. This position confirms exclusive job tenure, thereby exempting workers from all risk in pressing their claims for wages above productivity in an unjustified way. In the long run the mandatory arbitration formula allows workers to exert such pressure successfully; it is not difficult to imagine the support they would receive in this from parties interested in broadening the scope of their political influence, or on the part of politically weakened governments. This solution in a earlier era would had been the most successful in expanding the frontiers of the social area of the economy. Sooner or later, generalized mandatory arbitration obliges governments to establish subsidies or privileges for financing gains legitimized by demagogic arbitration rulings. This whole sequence of distortions in economic activity and the labor market implies high costs for consumers, the unemployed and less organized workers.

e. Other important elements of collective bargaining

Law DL 2.758 made two profound and transcendental modifications to the previous rules on collective bargaining. In the first place it established fair and balanced conditions for the free play of the legitimate options the parties may propose in the course of bargaining, thereby making the process independent of external pressures. In the second place, it circumscribed the process within the firm, bearing in mind that is in the arena of the firm where job productivity is generated.

The rules contain other important elements, in addition to those already mentioned, which have made it possible for negotiating processes to flow fairly and expeditiously. Among these the following are worth mentioning:

- Freedom of association for workers, either in unions or solely for negotiating purposes, in the latter case requiring the same minimum quorums as for setting up unions.

- The date of a company's negotiation is unique, except by the common agreement between the parties. This avoids a sequence of negotiations and competition between different groups. Agreements remain in force for a minimum of two years, a period in which labor tranquility is expected to facilitate improvements in productivity.

- There can be no collective bargaining in services and institutions of State Administration, either centralized or decentralized, nor in firms that are dependencies of the Ministry of National Defense, nor in the Judicial Authorities or the National Congress. Nor may there be in institutions or firms where more than 50% of their financing comes from the State, either directly or through duties or taxes.

- There is collective bargaining in all State-owned corporations; with wages and conditions of work in Enap, Lan Chile, Banco del Estado etc. ceasing to be legal matters.

- Bargaining is not available to managers, agents, representatives, supervisors or apprentices. A subsequent debatable adjustment was made to include management secretaries and members of the personnel department.

- Individual negotiation is a non-waivable right, and any action which directly or indirectly acts against this right is prohibited.

- Issues for collective bargaining include anything relating to wages, benefits and common conditions deriving from the job contract. Bargaining does not cover issues that are unrelated to the working of the firm and which constrain the employer's faculty to organize, direct or administrate. Included in this latter category are questions such as the size of the team of workers, the pace of production, system of promotion, use of machinery, hiring of non-union workers, etc.

- The bargaining process does include wages of workers not belonging to the negotiating group, the financing of union organizations and contributions to external funds involving workers from other employers (old centers for sustaining bargaining by activity area).

- The employer may declare as unsuitable for initiating negotiations a maximum period of 60 days in the calendar year, thereby preventing this coinciding with critical management periods.

- The members of the Negotiating Commission and the employer's representatives have the widest possible faculties, which they may exercise without need for prior consultation with the people they represent. Nevertheless, the members of the Negotiating Commission under no circumstan-

ces may declare a strike, as this decision requires approval by the members of the union or negotiating group.

- Instances of mediation and arbitration are voluntary for the parties, except in firms required to submit to this procedure compulsorily.

- If there is no majority in favor of strike action, or if the vote has been against it, this becomes effective on the third day following the vote, it being understood that the workers have accepted the final proposals made by the employer. The workers may also choose to maintain the conditions of the previous contract except the clauses relating to future indexation.

- Once a strike has become effective, the employer has the right, provided certain conditions are fulfilled, to declare total or partial lock-out. Partial lockout is understood as the temporary prevention of access for workers belonging to one or more of the firm's establishments, provided a strike situation exists in those establishments. Lock-out can not extend beyond 30 days from the start of the strike, or after the day the strike ends, should that occur first.

- A strike does not effect the right of the employer to organize, direct and administrate the firm. Workers can engage in other employment or temporary jobs during a strike, without this meaning the end of their job contract with the employer.

- Once 30 days have elapsed from the start of the strike, any worker can withdraw from the negotiation, and demand to be rehired under the conditions existing at the end of the previous contract. Before this period has been completed, the employer may not offer terms to individual workers, nor may he receive them.

- During a strike, the Negotiating Commission, or 10% of those involved, may call another vote in order to pronounce on the employer's current offer or submit the matter to arbitration. 20% of the workers can call for a vote of censure on the Negotiating Commission, which requires an absolute majority in a secret ballot for approval.

- On completion of 60 days from the start of the strike, all contractual links between the workers and the employer, which had been maintained legally since the beginning of the strike despite the non-existence of a contract, are severed, and therefore the immunity protecting workers also comes to an end. The legal expedient used for this purpose is to declare that the workers have resigned. It would be better to for this to be included as a reason for terminating the contract.

- If it is considered that a strike would be seriously harmful to health, the provisioning of the population, or to the economy or national security, the executive may decree a return to work for 90 days and appoint

a mediator from a member of the arbitration body. When this period has elapsed, the periods which were suspended are reinstated on return to work.

- The employer and the workers in a firm may sign a collective accord with same effect as the collective contract. The negotiations preceding this are not subject to the procedural laws on collective bargaining, nor do they give rise to the corresponding rights and obligations.

Chapter 7

a Legal Gratifications

The Chilean legislation contains rules on gratifications which are mistaken in their conception and objective.

Although the rules are not overtly damaging, due their lack of content, in practice they can be as they create expectations backed by an erroneous doctrine, which is that the wage level should have, or has, a direct relation to the profits of the firm in which labor services are provided.

Profits are a final result. They are what is left over for capital and what justifies the risk assumed; profits represent a payment to the entrepreneur for the quality and timeliness of his management, reflected in the result of various decisions of his incumbency, such as entering or leaving an activity, the successful or unsuccessful hiring of a management team, the mode of financing used and other decisions. The final result is influenced by what happens during the period to interest rates, inflation, exchange rates—to mention the main variables—, in addition to payments for the necessary inputs and services provided by collaborators, valued at their respective market and opportunity costs, to mention just some of the factors involved. Only the residual is the profit or loss for the period.

The ruling norms provide for all establishments keeping accounts to designate 30% of profits earned in the period as bonuses payable to workers in the firm, this being done in proportion to the wages earned in the year by each of them.

For the purpose of calculation, the law provides for the employer to have the right to make a prior 10% deduction from profits, representing interest on his own capital. However, an employer who grants a bonus of 25% of monthly wages, subject to an upper limit of 4.75 times the monthly minimum wage, is exempted from this obligation. Workers who have not completed one year of service have the right to this bonus in proportion to the months worked.

As regards incentive systems, there have been many studies on the effectiveness of alternative modes. Profit-sharing is recognized as an inefficient system and thus it is seldom used by the parties in a voluntary way. There are too many factors affecting annual profits, most of which are outside the workers' performance. For this reason, the incentives that operate in practice tend to be designed so as to be directly related to the worker's contribution to output (number of parts produced, achieving a certain result, completing a job in a certain period, etc.). Firms therefore prefer to comply in practice with the legal provisions on bonuses by paying the upper limit which exempts them from the obligation, in full knowledge that the true level of wages paid includes the bonus mentioned. The legal bonus is therefore nothing other than a formula that appears in contracts and on workers' wage slips, but which means several million multiplications and additions per year with no true significance. In other words it is a legal provision empty of content.

However, if the provision exempting the employer from the legal gratification by paying 25% of wages, up to the upper limit indicated, were to be suspended, and the distribution of 30% of all profits was made mandatory, the provision would indeed become extremely damaging. The entrepreneur who works with no capital and pays market wages would see 30% of the value of his entrepreneurial effort expropriated. At the other extreme, in firms with a very high capital ratio, and profits of over 10%, legal bonuses might exceed several times over the level of wages paid, and for the same reason, the value that the market places on the workers' input. This reasoning reveals that the rule only satisfies a demagogic mirage, and in turn it fuels the illusion, and widespread misconception that wages should rise as long as there profits (until profits disappear, according to the Marxist viewpoint). Similarly mistaken is the argument that the existence of losses is a reason for not paying wage increases.

The truth is quite the opposite. Wages tend to be set by the market with negotiating groups basing their arguments on replacement cost, and the wages achieved are not related to the profit-and-loss situation in the firm where they provide their services. It is therefore also mistaken to believe that negotiation should take place in the light of balance sheet figures.

It would be highly advisable to completely replace the ruling system of legal bonuses, and install a system conceived as a benefit of similar or lower level than reasonable redundancy payments, to rule in cases of voluntary withdrawal or retirement by workers with many years of service with the same employer.

b Attacks on modernization already achieved

The labor regulations that have been replaced were developed over the years, based on ideologies and with no interdisciplinary considerations taking account of their effects on other sectors. Distortions to the symmetry needed for their appropriate functioning grew in number along with the disintegration of Chilean society. The process was presented as the result of the tripartite nature of the labor market: the doctrine of the International Labor Organization that promotes understanding between government, employers and workers in the search for solutions to their differences and in decreeing fair labor standards and worker protection.

The objective of the ILO is praiseworthy and the effort without doubt has certain benefits to show for it, especially in fields such as minimum working conditions, safety at work, training etc. However, this does not mean that in Chile we should adopt its highly numerous and debatable agreements and recommendations, often developed to justify its bloated bureaucracy in a highly politicized context. Apart from anything else, the second industrial revolution is increasingly turning its schemes into utopias of very poor performance in real life.

The role of the State is not to mediate between workers' and employers' leaderships. Its true role is in designing and supervising a framework of rules leading to fruitful labor relations and fair agreements, offering a sufficient degree of protection for the legitimate rights of the parties, as well as those of third parties liable to be affected.

The Chilean experience was that under the umbrella of the attractive tripartite concept, governments and parliamentarians increasingly neglected the common good yielding to pressures from groups and directives. This included artificially setting up pressure groups, designing perks and privileges for groups with no prior cohesion. Special social security systems were granted, professional permits, legal wages increases, additional budgetary amounts—in the case of institutions—, all of which at the expense of the poor and the least organized.

The popularization of this mechanism and the excesses achieved, led to the most deprived, or those most neglected in the demagogic share-out, to initiate a system known as “sit-ins”, in order to force preferential treatment for their own sector. Sit-ins at universities were followed by sit-ins in buildings, industries and even law courts, as well as churches and a regimental barracks. The disintegration of the institutional framework became total, and the energies of many in Chilean society turned towards a fight for

total power, seen as a source of rapid solution to all problems, especially those related to justice and poverty.

The crisis of 1973 was no more than the practical demonstration that successful societies are built otherwise: through years of creative and responsible work, the development and adoption of technology, saving, and respect for property. Most importantly, with governments that defend the common good and who are exemplary in their management of available resources.

It could be argued that workers who “took part” in efforts to obtain improvements through political channels obtained good results. However, it is reasonable to question whether the wear and tear, and the irrationality, resulting from these struggles, and the consequent slowing down of economic development, meant positive outcomes in a long-term context for the pressure groups who supposedly benefited, or an improvement in their children’s future opportunities.

In the period 1982-86, the economic crisis unfortunately contributed to a return to demagoguery. The union leaders of the past returned to the battle, demanding a return to discriminatory laws and their participation in collective bargaining. They reject the framework that permits solutions at the level of the parties, claiming “union atomization” and that strikes which lead to the severance of a contractual relation are a “joke”.

Unfortunately certain governmental authorities, hoping to obtain political support from such leaders, which in the best of cases would be ephemeral, showing little or no understanding of the issue and falling into tripartite decrees, submitted fundamental modifications to some of these laws for legislative process, which if they had been approved would have meant the abolition or removal of the basic pillars of labor modernization. However there were enough sectors that had understood the merits of modernization and who joined forces to ensure its maintenance.

To some people, the idea that bargaining at the firm level with a minimum of 8 workers leaves a significant percentage of the population without access to collective bargaining, is a strong argument. However, this argument suggests that the only effective means of negotiation is collective, thus forgetting that individual negotiation is the main bargaining mechanism in nearly all countries. Furthermore, in small firms and in those of high technology, it is usually the only one.

In the United States, a country of undisputed leadership in the technological economic and unionization fields, only 15% of non-agricultural workers negotiate collectively (there is no collective bargaining in agriculture). In France only 20% do so. In Chile collective-bargaining

contracts cover slightly more than 10% of workers, although industrial recovery will take this very quickly to percentages similar to those in the countries mentioned.

There is a deeper reality to keep in mind, and one involving other dimensions, which will always fuel people's desire to try to change the nature of things: namely, human nature. In the face of the mental and emotional difficulties involved in confronting the future's uncertainties, changes and crises, people are receptive to those who offer to spin the wheel of fortune for them. There will always be agents interested in taking advantage of this weakness and using it to bring pressure to bear on the political system.

It is very common for the human subconscious to assume that the occurrence of certain events grants permanent rights: that "any soul has a right to happiness, to have children and for them to fulfill their expectations, to obtain a job or achieve relevance and to preserve this as an acquired right, independently of their endeavors and the ups and downs of society and the economy". However, such is not in nature of things.

The ability to keep up to date is something that firms and workers have to earn every day. Any attempt at fair legal protection has limited scope; it is easy for this road to lead to a lack of protection for others and even to the usurpation of the legitimate rights of third parties.

It has been shown to be unrealistic to imagine there could be neutral tribunals to decide whether the termination of a job contract had "justified causes". This is an attempt to legislate beyond what can be legislated for.

A disproportionate attachment to "acquired rights" is a cultural elusion that is widespread in Chile and largely explains its under-development.

Vertiginous technological change has increasingly brought to light the need to be receptive to realities and to abandon utopian ideologies that appear to be protective but only fuel backwardness. The pragmatism and cohesion in labor issues achieved by Japan in recent decades, and adopted by other market economies in the far East, are obliging several European countries to modify their labor laws and accept the nature of things. Chile has already done so.

More than a mistake, it would be an anachronism for the country in the future to depart from reality again.

Appendix N° 1

The Doctrine of “ Dismissal for Justified Cause Only ”

Convention N° 158 of the International Labor Organization (ILO) is the latest version of this doctrine, and it is from there that we extract its main points:

“A worker’s job contract can not be terminated unless there exists a justified cause for doing so, related to his capacity or conduct, or based on the needs of the operation of the firm, establishment or service”.

“The following causes are not considered justified for terminating a job contract:

- a Affiliation to a union or participation in union activities outside hours of work, or with the permission of the employer, during hours of work.
- b Standing as a candidate to represent workers, or acting, or having acted in this capacity,
- c Presenting a complaint or participating in a procedure against an employer for alleged violations of laws or regulations, or recurring to the competent administrative authorities.
- d Race, color, sex, marital status, family responsibilities, pregnancy, religion, political opinions, national or social origin.
- e Absence from work during maternity leave.

“Any worker who considers the termination of his job contract to be unjustified, has the right to recur to a neutral organism, such as a labor tribunal, an arbitration board or a referee”.

“It is incumbent upon the employer to prove the existence of a justified cause for termination”.

“The following categories of employed persons can be excluded from all or some of the provisions of the present resolution:

- a Workers with a job contract of defined duration or a contract to undertake a specific job,
- b Workers in a trial period, or those who have not completed the required length of service, provided that in either case the duration has been fixed beforehand and is reasonable,
- c Workers hired in an occasional manner for a short time period”.

“Any worker whose job contract has been terminated shall have the right to:

- a Compensation for severance, or other similar benefits whose quantity is set as a function, among other things, of length of service and the wage rate, paid direct by the employer or through a fund set up through contributions made by the employer; or

- b Unemployment insurance benefits, from an unemployment benefit scheme, or other form of social security, such as benefits for old age or disability, under the normal conditions to which such benefits are subject, or
- c a combination of such compensation or benefits”.
 “When the employer anticipates lay-offs for economic, technological, structural or analogous reasons:
 - a He shall provide to the representatives of interested workers in a timely fashion, all relevant information, including the motive for the anticipated lay-offs, the number and category of workers who could be affected, and the period during which the redundancies will be put into effect.
 - b In accordance with national legislation and practice, the employer shall offer representatives of interested workers, as early as possible, an opportunity to discuss the measures to be adopted to avoid or limit redundancies, as well as measures to alleviate the adverse consequences of all redundancies for affected workers, for example by finding them other jobs”.

ILO Convention N° 166 contains additional considerations which are interesting to analyze.

“Nor will the following be considered due cause for terminating a job contract:

- a Age, notwithstanding national legislation and practice with regard to retirement.
- b Absence from work due to compulsory military service or the fulfillment of civic obligations in accordance with national legislation and practices.
- c Temporary absence from work due to illness or injury should not constitute a just cause for terminating a job contract”.

“All interested parties should try to avoid, or limit as far as possible, terminating a job contract for economic, technological, structural or analogous reasons, notwithstanding the smooth running of the firm, establishment or service, and make efforts to alleviate the adverse consequences for the worker or interested parties, of any termination of a job contract for such motives. When this does occur, the competent authority should help the parties seek solutions to the problems caused by the anticipated lay-offs.

An employer who anticipates introducing significant changes, liable to provoke redundancies, into the firm’s production program, organization, structure or technology, should consult as soon as possible with the repre-

sentatives of interested workers, among other things on the introduction of such changes, their possible repercussions, and measures to avoid or alleviate harmful effects”.

“Measures to be considered with a view to avoiding or minimizing redundancies for economic, technological, structural or analogous motives, should include restrictions on hiring staff, making use of natural wastage of personnel by not replacing those who leave during a certain period, internal transfers, worker training and reskilling, voluntary early retirement with adequate income protection, reduced overtime and a reduction in the normal working hours”.

“Selection, by the employer, of the workers whose job contracts will be terminated for economic, technological, structural or analogous reasons should be undertaken according to criteria as far as possible fixed in advance, taking due account of the interests of the firm, establishment or service as well as those of the workers”.

Appendix N° 2

Law N° 16.455; Evaluation of its Consequences

Law N° 16.455, known at the time as the “Immobility Law”, aimed to include the ILO doctrine of “Dismissal for Justified Cause Only” in its text.

Although it was repealed 15 years later with the passage of Law N° 18.018., it stills retains validity through its harmful effects on contracts entered into prior to the passing of the law repealing it, as these are governed by the original text of law DL 2.200, a legal rule which unfortunately consolidated the practical effects of the immobility law.

The International Labor Organization illustrates its doctrine by detailing unjustified reasons for severance, highlighting among these, race, sex, religion, political opinions and union membership. Law N° 16.455, on the other hand, lists three justified causes for terminating a contract. As well as causes that are easy to understand and apply, other more ambiguous ones were included, which jurisprudence ended by turning them into dead letters. This is the case with causes such as the following:

- 4 Reckless and imprudent acts or omissions affecting the safety of the establishment or workers, or their health.
- 9 A lack or loss of professional suitability of a skilled worker, duly verified according to the regulations.
- 10 Those determined in accordance with the needs of the functioning of the firm, establishment or service.

The passing of Law N° 16.455 gave rise to a proliferation of legal actions for unjustified dismissal. In addition to dismissals for reasons that are difficult to prove, claims were made against those citing inefficiency, and what is more serious, those caused by changes in technology and demand conditions.

The rulings in such cases established that except in the case of easy proof, all other dismissal was deemed unjustified; including the requirements of the operation of the firm, so this ended up being a vacuous rule.

As the law makes no mention of age as a requirement for retirement, or a reason for terminating a contract, it is up to the employer to prove that a worker is not fulfilling his contract in cases of old age.

The sanction applied by the tribunals for refusal to reinstate a worker, is generalized in a severance payment of one month per year of service. The mere existence of this rule ended up creating the expectation among workers of the existence of a benefit, parallel to wages, consisting of one month per year of service.

The passing of this law therefore meant a technical 8.33% increase in the cost of the payroll, and the accumulation of a technical liability, without tax or accounting recognition, amounting to one month's wages per year of service for all personnel working at the time of the law. Exempted from this situation were only cases of dismissal of staff in positions of confidence and those based on easily provable reasons.

Law N° 16.455 was extremely costly for the country's development prospects, whatever may have been the original spirit of the legislator with respect to its objective and anticipated functioning. The reality produced is that after a few years of service, a strong and progressive over-protection of the worker is created such that pressure for efficiency and innovation becomes increasingly difficult, to the point where the economic unit may be incapable of surviving—a situation that occurred in thousands of firms.

In view of the fact that the legal process of suing against unjustified dismissal became a mere formality, DL 2.200 chose to reaffirm freedom of dismissal, taxing it with the compensation created in practice by Law 16.455.

It is unfortunate that on that occasion the utopian doctrine of justified cause for dismissal was not discarded. The over-protection of the worker was corrected by Law N° 18.018, by the mistaken mechanism of establishing an upper limit of 150 days' compensation, a formula which comes into effect for hires made after the passing of the law. This created two types of Chilean worker, those hired before the law and those hired after the law, a situation which will generate problems in the future.

An important reason for the existing legal confusion on this issue is the ideological nature of positions and viewpoints. There are intertwined problems which, although different, unfortunately tend to get mixed up together. The problem of a worker's future security is different from his needs on becoming unemployed, which in turn are different from the sanctions needed for unfair practices and worker protection to facilitate relations with the employer.

Unfortunately some people believed it was possible to resolve these four problems, which are so different, with a single unique tool: a system of compensation of one month per year of service, with no upper limit. Curiously there is an additional trap here: many people believe that if the right to compensation exists, the only one possible form of compensation is what has just been described.

Logic and practice advise designing and using tools that are appropriate to the solution of each problem, in order to achieve efficient solutions. The problem of pensions was satisfactorily resolved through the reform of social security. Unemployment should be resolved by appropriate unem-

ployment subsidies, as has been done successfully in developed countries. A strengthening of legislation, with increased sanctions, would seem to be the approach for avoiding unfair practices. Finally, for labor relations that become unsatisfactory, for whatever reason (demand, job designs, efficiency, technology), a harmonious solution should be sought giving each party their fair due. In a social-market-economy regime, necessary lay-offs should be a freely exercisable right for an employer, as it is vital for him to be able to efficiently administer his firm and survive. However, redundancy should include a reasonable benefit in terms protecting the worker thus deprived of his source of income and “socio-employment activity”.

Reasonable cost would lead the employer to hire cautiously, manage the firm appropriately and moderate pressure for efficiency and innovation. Reasonable compensation constitutes, in addition to social support for the worker, a means of improving his bargaining power so as to confront the employer’s pressures on a better footing. However, compensation should in no way constitute a trap whereby it becomes advantageous for the worker to get fired. Nor should it constitute a senseless defense for an eventual lack of efficiency or collaboration, nor for inflexibility towards change, a suffocating element for any firm in a world of rapid technological change. □

