

# **Labour law: Its role, trends and potential**

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## Editorial

“The fundamental principle of labour legislation is to guarantee the weaker party in the labour market protection and basic rights in order to be in a fair position when negotiating salary and working conditions.” That fact was recalled in 2006 by Marcello Malentacchi, General Secretary of the International Metalworkers Federation (IMF). The reminder was addressed to the government of a member State of the International Labour Organization. In recent years, the government concerned has gained something of a reputation for legislating to dismantle the industrial relations system and weaken trade union rights – among other things, by promoting individual employment contracts, to the detriment of collective agreements negotiated between trade unions and employers. This disdain for the basic principles of labour law has already come in for serious criticism from the ILO supervisory bodies. The dossier is now being examined by the Committee on Freedom of Association, and further developments are likely.

It is certainly a good illustration of the ambivalent interpretations of labour law which still lurk in some minds, and of a dangerous return to times which should have been past and gone. In his contribution to this issue of *Labour Education*, Daniel Blackburn recalls that, historically, the first labour laws (notably the much-bruited Ordinance of Labourers Act of 1349 in England) were mainly aimed at imposing discipline on workers, penalizing any protest movements, and ensuring obedience and loyalty to employers. Often, any breach of contract led to court-ordered forced labour.

Not until the nineteenth century was the need finally understood for a specific body of law that would provide workers with minimum protection against any abuses by employers, while recognizing that people’s working lives cannot be governed by market forces alone. In other words, human labour was no longer to be seen as a commodity. As one writer puts it, “Labour law was assigned to the realm of public protection, contrary to civil law, which assumes that the parties to a contract are equal. Through legislation or collective agreements, labour law seeks to correct the basic inequality between employer and employee.”<sup>1</sup>

This issue of *Labour Education*, to which eminent lawyers have contributed, does not really set out to relate the history of labour law, but rather to stimulate some reflection on its possible role in the globalized world of today. At the same time, we report some developments which suggest that labour law has been drifting away from its basic principle of protecting the weaker party within an unequal contractual relationship.

Labour law’s role, evolution and prospects worldwide, as well as the means of getting it respected (see *Labour Education*, No. 140-141, 2005/3-4 on labour inspection), are clearly ILO business. In particular, they are covered by the core Conventions on freedom of association and the right

to collective bargaining, which has become an essential source of labour law in many countries. Nonetheless, as Miguel Rodríguez Piñero y Bravo Ferrer emphasizes in his contribution, there are still enormous challenges to be faced concerning the right to collective bargaining and the status of the agreements reached.

Beyond the basic right to collective bargaining, the ILO's entire standard-setting activity aims to point national labour law towards the goal of promoting social justice through rules that protect dignity at work. In fact this is a key mission of the ILO's Decent Work Agenda.

To trade unionists, the importance of the international labour standards has long been obvious. But it is sometimes useful to recall the impact that they have on the ground, in the regions, countries and workplaces – and in the labour courts. Xavier Beaudonnet's article does just that, by examining how the ILO's international standards are used within national jurisdictions. It soon becomes clear that, day in day out, judges, lawyers, labour inspectors and trade unionists base themselves on international labour standards in order to get workers' rights respected. Judges quite often apply the provisions of a ratified Convention directly in order to resolve a case, or else they use ILO standards, whether legally binding or not, as a source of interpretation and inspiration when applying their own domestic law.

That is why it is so important – and this point can never be stressed too often – that the trade union movement should encourage member States to ratify the Conventions and systematically take part in the follow-up mechanisms which the ILO has put in place to monitor governments' application of international labour standards and bring offenders to book. In many cases, the ratification of an instrument, and the international obligations which are thereby freely entered into, form a rampart against certain governments' penchant for revising labour law downwards under neo-liberal pressure. Here, María Luz Vega Ruiz shows that the obsession with revising Latin American labour law, in a bid to introduce greater flexibility and reduce labour costs, has not produced the more and better jobs that it was supposed to. Quite the reverse. Not only has it led to casualization for many workers, this savage desire to purge the law of so-called "rigidities" (meaning permanent contracts, protection against unjust dismissal, the minimum wage and some types of social protection) has also produced very poor economic results wherever it has held sway. This analysis could usefully be shared with those who are shaping the evolution of labour law in Africa. There, as Georges Minet and Corinne Vargha explain, the legitimate wish to harmonize labour law in order to achieve greater economic and social cohesion across the continent is running up against the dictates of the World Bank, whose main aim is to flexibilize all the provisions governing recruitment, work times and dismissals.

As Jean-Michel Servais notes, in an age of globalization, the regulation of industrial relations at the international level is an essential task, as the lowering of frontiers is leading to the internationalization of law. Analysing the barriers and pitfalls that will certainly crop up along the way, he concludes that the standard-setting system invented by the ILO is and remains, despite its weaknesses, the best-developed and most widely accepted response to this vital need. That view is shared by Isabelle Duplessis who, after listing and analysing the many current

types of flexible labour market regulation (generally known as “soft law”), advocates a revitalization of international labour standards. We must, she insists, promote the authority of the ILO supervisory mechanisms and of the interpretations they have been placing on the standards ever since the beginning of the 1920s.

In view of the various private “soft law” initiatives, such as multinational companies’ codes of conduct or certain unilateral corporate social responsibility initiatives, some authors denounce what they see as attempts to “privatize” labour law. They argue that companies are granting themselves the freedom to pick and choose between legal rules, as regards both their content and the way in which they may possibly be applied. This kind of freedom calls to mind a remark by the nineteenth-century French priest and politician Henri Lacordaire: “Between the strong and the weak, between the rich and the poor, between master and servant, it is freedom which oppresses and law which sets free.”

Often the fruit of social struggle by trade unions, labour legislation has contributed to the emancipation of workers in many countries. But it is not immune from swings of the pendulum. Today it has become common, as Valérie Jadoul points out, for certain jurisdictions to interpret legal provisions in such a way as to empty them of their content, thus creating case-law that runs counter to social progress. So James Gross insists that any reasonably serious discussion of workers’ rights must take account of the choices made by legislators and by those who have the responsibility of interpreting and applying the law. And those choices, as he makes quite plain, are neither neutral nor always in line with human rights and the aims of social justice. Far from it. In addition to the example of the United States, cited by Professor Gross, the Australian situation as described by Mordy Bromberg bears witness to the ferocity of the attacks launched in various places against the standards that protect workers’ rights and against the basic principles of labour law.

But at the same time, the Australian case and others show the strength, importance and effectiveness of joint action by trade unionists and lawyers to oppose the threats of deregulation and ensure that workers’ rights are not sacrificed on the altar of labour market flexibility.

In this respect, the globalization of the economy is a new challenge but also a new opportunity. The challenge for the trade union organizations will be to maintain and strengthen at national level and to impose elsewhere – in regional and global integration forums as well as industrial relations within the multinationals – the notion of negotiated legislation. In other words, to strengthen the role of collective bargaining, and of freedom of association in the process, as an essential source of labour law. The opportunity is that, as economic integration deepens, we are bound to see more and more drives to harmonize labour law. Trade union organizations ought to be at the forefront of such initiatives, and this field cannot be left to institutions that do not have a mandate for social standard-setting.

In these two respects, the international standards established by the ILO will be an important centre of gravity. For one thing, ratified Conventions are a form of labour law negotiated at the international level. They are negotiated and adopted by all of the ILO’s constituents together (governments, employers and workers) and their provisions are universally applicable minimum standards. They could therefore form a legitimate

basis, and a minimum threshold, for efforts to strengthen and harmonize labour law. Application would be ensured by the labour inspectorates at the national level and by the ILO supervisory bodies at the global level.

This issue of *Labour Education* does not go into every aspect of labour law, and we will be pleased to hear from any readers who might wish to fill some of the gaps or give us their reactions (actrav@ilo.org). Our aim, here in the ILO Bureau for Workers' Activities, is a rather more modest one – to provide union leaders and activists with matter for analysis, comparison and reflection, so that the best possible use can be made of the legal arsenal represented by international labour standards in order to strengthen and promote, at all levels, the protection to which workers around the world are entitled. And so that, tomorrow, labour law will still be an instrument of emancipation and social justice.

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#### **Note**

<sup>1</sup> Ray, J.-E. 1998. *Aborder le droit du travail*, Editions du Seuil, collection Mémo (Paris).

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# The role, impact and future of labour law

*The aim of this article is to provide a trade union audience with a basic outline of the role played by labour law, and to consider the different sources of the rules operating at the workplace. It also considers changes that are affecting labour law in the era of globalization.*

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Some academic commentators have gone so far as to argue that “there is no comprehensive and conceptionally coherent definition of labour law”. One thing is certain: it is not always helpful to view labour law as being primarily a set of laws issued by a State. In many jurisdictions, much of what governs conduct at the workplace is the content of agreements, informal understandings, and formal instructions that originate within the workplace. “Many contemporary studies have shown”, writes Harry Arthurs, “that the law of the workplace is still largely generated from within”.<sup>1</sup> The rules of workplace culture, custom and practice, the employment contract, the works rule-book or employee handbook, and collective agreements often form the core of the rules governing the employment relationship. Legislation becomes relevant only to fill gaps or ensure minimum standards.

Even when we look at the legislation, it is not only “labour laws” that govern the workplace. Often a lawyer must look to constitutional law, the general civil code or civil statutory laws, the “common law”, and even the criminal law. A labour code or labour law statutes will usually be read together with these sources and may be

further subject to the influence of a host of supranational sources of law.

Brian Langille refers to the collision of concepts, legal frameworks and diverse points of reference that make up the subject we know as labour law as “a slice of life”<sup>2</sup> rather than a unified legal concept. The diverse ingredients, he argues, fall together into a compelling whole where they converge around the regulation of the workplace and working life.

There are two explanations of the purpose of labour law that workers’ representatives can feel immediately comfortable with:

- to correct the imbalance of power between the worker and the employer: by protecting workers’ right to organize in trade unions and to bargain collectively, and to putting in place safeguards which prevent the employer from dismissing the worker without good cause, labour law sets up and preserves the processes by which workers are empowered to negotiate from a position of “equality” (or, at least, of less inequality).
- to prevent working conditions being pushed below levels society deems acceptable: by placing restrictions on the contracting partners’ freedom to contract on whatever terms they wish, and setting minimum standards over

Note: The author wishes to thank Professor Keith Ewing for his comments on an earlier version of the paper.

issues such as working time, health and safety, and pay, the law limits the degree to which the more powerful party can exploit the weaker.

These two different aspects of the law as a vehicle to intervene in the bargaining relationship have both delivered real benefits to working people in numerous jurisdictions, and both have been – and continue to be – goals pursued by the trade unions. But it is worth bearing in mind that the former represents the law as a tool to promote worker *empowerment*, while the latter represents a form of worker *protection*.

A third rationale sometimes credited as a purpose of labour law is:

- to regulate the labour market: a State may choose to implement legislation to place either maximum or minimum limits on wages, either nationally or in particular sectors or industries. An example of such legislation from 1349 is frequently cited as the first example of labour law. The Statute of Labourers placed restrictions on wage increases when, in the aftermath of the plague in England, workers – greatly reduced in numbers – found that they were able to agitate to command higher wages. The 1349 Statute criminalized these actions as a means to keep wages down.

And a fourth answer:

- to limit trade union freedom: labour law is also used as an instrument to limit and control trade unions. It is in considering this aspect that trade unionists will be inclined to ask whether they really need labour legislation at all.

### The changing nature of labour law

The perception that labour law consists largely of state-issued legal rules may be attributed in part to the status of organized labour during the post-war period of Keynesian economics. During this period there existed a belief that the State “could and should intervene to maximise economic development and social welfare”.<sup>3</sup>

Labour laws established mechanisms to promote a trade union role as a tool of national regulation across Western Europe, in the then planned economies of the Eastern bloc, and in the United States, where the New Deal institutions of the 1930s continued to promote trade union rights.

This period was followed by the widespread adoption of free market economics that preached a deregulatory agenda and challenged trade unions as “distorting” influences or “privileged interests” that disrupted the supposedly beneficent operations of the market. Declining union membership levels in much of the developed world, and the disorientated labour movements of the former Eastern-bloc, meant that organized labour struggled to challenge the new agenda. Oddly, for a philosophy supposedly based on deregulation, the free-market period produced a huge body of law dedicated to restricting trade union freedoms.<sup>4</sup>

### The sources of labour law

The following sources of law are set out in a rough hierarchy. Generally speaking, the sources nearer to the top of this list will overrule conflicting provisions found in sources lower down the list, but the hierarchy is not valid for all countries or situations. In the French system, for example, it is generally not the rule closest to the top of the hierarchy which dominates, but the rule “most favourable to the worker”.<sup>5</sup>

#### *National constitutions*

The constitutional protection of labour rights can be found in numerous jurisdictions across the world. With exceptions,<sup>6</sup> most European constitutions contain at least some commitment to freedom of association. This cements protection of labour rights deep within the national legal system, but frequently provides little detail. The constitutions of “old Europe” typically include only a general commitment to “freedom of association”<sup>7</sup> and occasion-

ally add the right to collective bargaining or the right to strike<sup>8</sup> (so far as collective rights are concerned).

In the constitutions of “new Europe” freedom of association tends to be defined more widely (explicitly adding both the right to join and the right to form trade unions to the general right to “freedom of association”). Most also protect the right to strike.<sup>9</sup> The distinction is subtle and has significant exceptions<sup>10</sup> but perhaps suggests the influence of the international and regional human and labour rights instruments<sup>11</sup> that have grown in number and significance since the older constitutions were originally drafted.

### *Collective agreements*

Collective agreements are a central pillar of labour regulation throughout the world. Union-management agreements might not always be what we have in mind when we talk about “labour law”, but in many countries collective agreements have a legally binding status and play a key role in the national regulatory framework.

Different countries have different approaches to bargaining. Agreements might be negotiated at national, sectoral, regional, branch or enterprise level and, depending on the general legal framework, the terms of the agreements may be legally binding or not. One possibility is for collective agreements to be given a legal status by a statutory bargaining system.<sup>12</sup> Another possibility is that the contract itself may not be enforceable as such, but its terms might become implied into the contracts of employment of each individual employee. In some cases collective agreements may have internal phrasing that moderates the general legal principle.<sup>13</sup>

In continental Europe the collective bargaining process, or “social dialogue”, is used widely to make and to implement law. In Belgium, collective agreements gain their legal status not under principles of private contract law but under a labour law statute. This provides a legal basis for such agreements to be extended

to cover third parties. Under various different national schemes, agreements may be extended to all members of the relevant union (or to all workers, regardless of union membership) within an enterprise, region or sector.

In Denmark debate continues<sup>14</sup> as to whether the collective bargaining system can be continued as the basis for the implementation of European law, given that Denmark does not provide for the extension of agreements to cover third parties. The theory is that – with up to 80 per cent of workers covered by trade union collective bargaining – the result is “almost full coverage”. The Danish model may fail to provide “full coverage”, but it can also be argued that collective bargaining offers the potential for a responsive implementation of European law, adapted to the needs of Danish workers and employers.

### *Labour legislation*

Many jurisdictions have, over the past 30 years or so, seen a rise in the number of labour law statutes. In part this can be explained by the growth of the neo-liberal agenda and the desire to “rein in” the trade unions with legislation that tightened up control of union elections, political spending, and industrial action.<sup>15</sup> It can also be seen as a response to dwindling collective bargaining coverage and union membership. Across the then 12 Member States of the EU (albeit with important exceptions) density rates declined by 11.5 per cent between 1970 and 2003.

Some jurisdictions, typically those in the civil law tradition, boast a unified labour code. In France, for example, most labour law statutes are inserted into the labour code.<sup>16</sup> The contents of a civil law labour code will typically appear in the form of broad, general principles which are applied to particular situations by the judge, who will typically have a wide discretion to interpret how the law should be applied in any given case. Some civil law commentators wonder if the discretion of the judge to interpret the law has not

become so broad as to cause confusion or insecurity.<sup>17</sup>

Labour law statutes other than a single “code” exist in both common law and civil law traditions. In some civil law systems statutes provide more detailed regulation of particular labour issues and are applied alongside the basic labour code. In the common law systems (and some civil jurisdictions) there is no single labour code but rather a body of statutes that regulate different aspects of labour law. Whatever form legislation might take, its substantive contents are far beyond the scope of this article, but one of the supposed benefits of legislation over collective bargaining is its breadth of application, granting these rights to all working people. But it is worth noting that peculiarities of drafting can do just as much to limit access to labour rights.<sup>18</sup> Despite UK legislation which supposedly protected all of the following, Keith Ewing observed the implications of the exceptions:

Take a young man in his mid 20s, employed as a security guard. Despite the great reforms since 1997, it remains the case that he may be hired on a low minimum wage of £3.70 an hour; he may be required to agree to work long hours, certainly more than the prescribed international and EU maximum of 48 hours weekly; he may have no right to have his trade union recognised for collective bargaining if he has 19 rather than 20 colleagues; he will have no right to be represented by a trade union in the negotiation of his terms and conditions of employment; and he will have no right to be treated fairly by his employer for the first year of his employment.<sup>19</sup>

This problem can be exacerbated when judicial or administrative bodies interpret statutory law restrictively.<sup>20</sup>

### *The contract of employment*

Understanding the role of the contract of employment is fundamental to understanding labour law and the condition of the worker in relation to the employer. Prior to 1875, workers throughout a large

part of the world then under British rule were not treated as equals before the law. The legal position, formally described as “master and servant” was such an “open and visible legal relationship of subordination” that “large sections of the working class had revolutionary, anti-capitalist views”.<sup>21</sup> The reinterpretation of this relationship into a contractual partnership between equal parties demonstrates an attempt to mask the power relationship that is at the heart of the employment dynamic. Otto Kahn Freund wrote in 1972:

The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination and the subordination may be concealed by that indispensable figment of the legal mind known as the “contract of employment”.<sup>22</sup>

The contract of employment now plays a key role in regulating the employment relationship, but the application of contract law rules, typically developed to govern commercial contracts can be quite inappropriate when applied to the workplace. Pascal Lokiec describes the history of French labour law as “an emancipation with regard to the law of contracts ... in the name of workers’ protection”.<sup>23</sup>

In order to determine the content of a contract of employment it may be necessary to look not only at any written document described as the contract, but also at works rule-books that may be incorporated into the contract of employment (as in the British system). In French law the rule-book creates legally enforceable rights, but the rules have “independent value” and are not incorporated in employment contracts. Similar rules apply also to workplace customs and practices in both countries.

Oddly, given the centrality of the contract to the employment relationship, many workers may not actually be in possession of written employment contracts. In the United Kingdom, the requirement is for a “written statement of particulars”,

## Contract law and industrial disputes

The default legal position of the common law regards unions as unlawful organizations and any occurrence of industrial action not as the exercise of a fundamental right, but as an illicit activity that involved not only the breaches of the employment contracts of the individual workers involved, but also incitement to breach commercial and employment contracts (which would constitute torts, or civil wrongs), and the unlawful interruption of third party commercial contracts. As one judge put it: "I find therefore, nothing to differentiate a threat of breach of contract from a threat of physical violence".<sup>1</sup>

Unions in the common law countries are thus entirely dependent upon legislation to provide typically narrow grounds around which a union can organise industrial action without incurring liability. Similarly legislation may protect workers from dismissal during a "lawful" strike, but it will place procedural checks and obstacles in the path of such action.

In those civil law systems which grant a broad right to strike, typically a constitutional right, unions may – in a narrower range of circumstances – be liable in tort. But it is common practice for the law to recognize the suspension of the main duties of both parties to the contract of employment during industrial action. This is an absolutely crucial principal that distinguishes the right to strike in France<sup>2</sup> and Germany, for example, from United Kingdom and other Commonwealth jurisdictions.

There is no convincing argument as to why this principle cannot be applied in common law countries, either through statutory reform or by revision of the common law principles, yet no British government seems to have prioritized this, and the conservatism of the judiciary apparently prevents the latter.

<sup>1</sup> *Rookes v Barnard* [1964] 1 All ER 400. <sup>2</sup> Lokiec, P. "The framework of French labour law and recent trends in regulation" document presented at an international comparative labour law seminar organized in Tokyo, in March 2004, by the Japanese institute for labour policy and training. The full text of the presentation is available at <http://www.csmb.unimo.it/research/JILPTRNo11.pdf>.

while EC law makes similar requirements. Many central European countries demand that the contract of employment should be a written document, but workers in the world's vast informal economy will rarely have any form of employment contract.

A problem arises where an employer denies that an employment relationship exists at all. This may be legitimate (such as when an independent contractor provides services on his or her own terms and with a large degree of autonomy and independence). But the attempt to disguise the employment relationship may be a legal "sham" which disguises the nature of the relationship between employer and employee as though it were one between supplier and purchaser. The disguise may be an attempt to sidestep labour law provisions that may be applicable only to "employees" and not to all "workers".

## Supranational sources of law

The legal sources referenced above all originate within the nation state. Yet labour law also originates from a number of international sources. The sources referenced below all constitute forms of "hard law", that is to say that, by various legal strategies, in some (but not all) jurisdictions, the rights laid down in the various instruments can be enforced.

Whether or not international laws can be enforced is largely determined by the question of whether the state in question operates a "monist" or "dualist" legal system. In a monist system, international legal rules ratified by the state become part of the national legal system, enforceable in national courts. In a dualist system international legal rules are generally considered to be unenforceable within the national context, although these ideas have frequent exceptions.<sup>24</sup>

The main sources of supranational law include:

- International treaties, such as the UN covenants and the ILO Conventions;
- Jurisprudence of international bodies, such as the Freedom of Association Committee of the ILO;
- International customary law, which includes, for example, prohibitions on forced labour;
- Bilateral trade agreements, into which labour law principles may be written;
- Labour law frameworks emanating from regional trading blocs, such as the EU;
- Regional human rights treaties, such as the human rights instruments of the Council of Europe, the Organization of American States and the African Union, all of which contain a commitment to basic trade union rights.

Although there is an increasing acceptance of international law within the national context, it remains the case that the primary enforcement mechanisms of organizations such as the ILO unfold at the international level, and compliance with the Conventions is assured by a process that is part legal complaint and part political persuasion. The main exception is the European region, in which both the EU and the Council of Europe have issued legally binding instruments that regulate labour law, many of which may be relied upon directly in national courts, and which may also be enforced at the European Court of Justice (EU) or the European Court of Human Rights (Council of Europe).

Two landmark legal cases are heading for the Brussels court (the European Court of Justice, (ECJ)) around the question of whether the right to freedom of movement granted under the EC Treaty can be constrained or overridden by the right to take collective action and the principles of freedom of association. The cases seem to typify the growing “globalization” of labour law, referring as they do to attempts by companies to pick and chose between different national labour law systems, and because they have both been taken to a regional la-

bour law forum. An ECJ ruling in the Viking case is expected in early 2007, and will have far-reaching implications. Following Estonia’s accession to the EU, a Finnish shipping company, Viking Line, operating a passenger and cargo ferry between Helsinki and Tallinn, decided that, in the interests of its own competitiveness, it would operate out of Estonia; thus, it sought to re-flag its ships as Estonian ships. In response, the Finnish Seamen’s Union (FSU) objected to the proposal, fearing that it would lead to a worsening of crews’ pay and working conditions. It called for a union blockade of Viking Line, at the same time obtaining the support of the International Transport Workers’ Federation (ITF). The FSU based its right to take collective action on the fact that such a move was a guaranteed constitutional right under Finnish law. However, Viking Line challenged the legality of this action, and has brought a case against both the ITF and the FSU, choosing to take its proceedings to the United Kingdom (UK), where the ITF headquarters are based. The UK High Court ruled in favour of Viking Line. In its decision, it concluded that the company’s right to freedom of movement overrides the existing rights of workers to take collective action, even where these are guaranteed under the country’s constitution. In response, the unions appealed the decision in the UK Court of Appeal, which in turn referred the case to the European Court of Justice (ECJ), as it raised principles and questions involving European law. This case is perceived as a landmark case as it concerns the resolution of fundamental rights, whereby the exercising of one right threatens to negate the rights of another. Both sides, the trade unions and Viking Line, have based their claim on their interpretations of the different Titles of the European Commission (EC) Treaty. Thus, the background to the case, together with the outcome reached, will have important repercussions in understanding how EC/EU law should deal with competing fundamental rights.

A lengthy legal struggle, the “Wilson” case – which involved the de-recognition of a journalists’ union by a newspaper in

the early 1990s – illustrates the growing relevance of the Strasbourg court (the European Court of Human Rights). The domestic law at the heart of the Wilson challenge had been heavily criticized many times by the Council of Europe’s Social Charter machinery, and the International Labour Organization:

Britain was told to change its laws and comply with the international laws which it had ratified. The Labour government refused, as had their predecessors. The unions negotiated with the Labour government. It refused to budge. So the unions (supported by the TUC) took their case to the European Court of Human Rights.<sup>25</sup>

The Wilson decision demonstrated the potential of the European Court to provide a legally enforceable ruling that would require the British authorities to make changes to national law.

### The evolution of labour law

In recent years there has been a rapid expansion of quasi-legal labour rules emerging at the international level, or “soft law”. Typically, these rules cannot be enforced in any court, but they may have alternative forums that may be petitioned to encourage compliance. It is becoming increasingly important for lawyers, academics and trade unionists to make use of them in securing justice in the workplace.

Already unions, NGOs and their lawyers are finding a role for lobbying, letter writing and campaigning that requires skilled drafted, concise and persuasive argument, and case preparation that benefits from formal legal analysis.<sup>26</sup> The leading academic commentator Harry Arthurs observed that “the significance of non-state labour law is likely to grow proportionately”. The result of this change is that labour lawyers are “more and more ... likely to be preoccupied with the significant corpus of labour law which originates from sources other than the state”.<sup>27</sup>

Some examples of these soft laws include:

- Codes of conduct. The International Labor Rights Fund is currently using a corporate code of conduct as the basis for a legally complex action against Wal-Mart in a national court, arguing that the code has been incorporated into contractual agreements.<sup>28</sup>
- Global Framework Agreements. The agreements between Global Union Federations and multinational employers has been interpreted by some as an early development towards global collective bargaining. As yet the legal status of these agreements is unknown.
- OECD guidelines. These quasi-legal rules provide a complaint mechanism which leads to an administrative decision by a government department. At present many complaints fail but it may be that a more legalistic approach to the guidelines would result in better case selection and preparation.

A concern is that many of these soft-law rules are private initiatives. Scholars have asked whether this represents the “privatization” of labour regulation. Others argue that, to some extent, “labour law has always been privatized” and that the kind of contracts of employment and workplace specific rules outlined above represent private legal rules in the national context which codes of conduct and other sources mirror in the international context.

### Conclusion

Whatever the future of labour law, be it increasing drawn from “private” sources or from international regulatory bodies, it seems unlikely that this will mean an end to national labour courts. What seems more likely is a gradual process by which international institutions such as the ILO and the EU are drawing national labour codes closer together around areas of convergence either on fundamental rights (as a result of the ILO’s Declaration on Fundamental Principles and Rights at Work 1998) and on conditions at work (as the EU and

other regional forums coordinate state rules around issues such as working time, etc.).

As this process of drawing together of national labour law regimes occurs the ILO will remain the focal point at which international consensus around these standards is negotiated, and through which the international community can observe and make efforts to promote levels of compliance. But it seems that the most effective vehicles for securing rights for the majority of people will remain through the efforts of trade unions to engage in collective bargaining and through the effective enforcement of labour law within national systems.

## Notes

<sup>1</sup> Arthurs, H. 2007. "Compared to what?", draft paper delivered in honour of the 40th anniversary of the UCLA comparative labour law project.

<sup>2</sup> Langille, B. 2005. "What is international labour law for?", International Institute for Labour Studies, ILO, p. 5.

<sup>3</sup> Sibley, T. 2005. in K.D. Ewing and T. Sibley, *International Trade Union Rights for the New Millennium*, Institute of Employment Rights, p. 5.

<sup>4</sup> In particular, see the extensive British "anti-union" laws.

<sup>5</sup> Lokiec, P. 2004. "The framework of French labour law and recent trends in regulation" document presented at an international comparative labour law seminar organized in Tokyo, March, by the Japanese institute for labour policy and training. The full text of the presentation is available at <http://www.csmb.unimo.it/research/JILPTRNo11.pdf>.

<sup>6</sup> In the Netherlands, ratified international treaties have a status higher than the constitution (see L. Betton, *International Labour Law*, 1994, p. 384). The United Kingdom has no written constitution.

<sup>7</sup> Austria, France, Denmark, Luxembourg (Source: ETUI Fundamental Social Rights in the European Union, 2003).

<sup>8</sup> Germany, Greece, Netherlands (Source: ETUI Fundamental Social Rights in the European Union, 2003).

<sup>9</sup> With the exceptions only of Malta and the Czech Republic, and note that fewer among them provide a constitutional right to collective bargaining than among the constitutions of "old Europe".

<sup>10</sup> Spain and Portugal have extensive constitutional protection of collective labour rights, contrasted with the Czech Republic and Malta (Source: ETUI Fundamental Social Rights in the European Union, 2003).

<sup>11</sup> Thomas, C., Oelz, M., Beaudonnet, X. 2004. "The use of international labour law in domestic courts", in *Mélanges en l'honneur de Nicolas Valticos* (Geneva, ILO).

<sup>12</sup> Like the union "contracts" agreed under the National Labor Relations Act in the USA, for example, or the Belgian system.

<sup>13</sup> For example, the "TINALEA" ("this is not a legally enforceable agreement") clauses in British collective agreements that were commonplace when the Industrial Relations Act 1971 created a statutory presumption that collective agreements would be legally binding, and clauses to the opposite effect that sprang into use when the statutory regime changed to create a presumption that collective agreements would not be enforceable. See Charles Barrow, *Industrial Relations Law* 1997, pp. 159-160.

<sup>14</sup> "Do collective agreements ensure full coverage and compliance with EU Directives?", EIRO Online (1997), Kåre F.V. Petersen.

<sup>15</sup> See the various "anti-union" laws introduced by the Conservative government in the UK from 1979 onwards.

<sup>16</sup> Lokiec, P., op. cit.

<sup>17</sup> Lokiec, P., op. cit.

<sup>18</sup> For example, by restricting the applicability of a statute to "employees" rather than "workers" or by basing applicability on length of service criteria (see the UK's unfair dismissal legislation, for examples of both restrictive criteria).

<sup>19</sup> Ewing, K.D. 2000. "Employment Rights: Building on Fairness at Work", speech to Industrial Law Society, Oxford.

<sup>20</sup> The National Labor Relations Board in the United States has just reinterpreted the meaning of "supervisor" in a decision which US unions believe could remove access to the statutory organizing framework from up to eight million US workers (*International Union Rights*, 2006, vol. 13.3, nos. 12-13).

<sup>21</sup> *Critical Lawyers' Handbook Volume 1, Labour Law*, Edie, A., Grigg-Spall, I., Ireland, P.

<sup>22</sup> Otto Kahn Freund, cited by John Monks (then General Secretary, British TUC), Warwick Lowry Lecture, 17 March 2003.

<sup>23</sup> Lokiec, P., op. cit.

<sup>24</sup> Thomas, C., Oelz, M., Beaudonnet, X., op. cit.

<sup>25</sup> Hendy, J. "Wilson and Palmer v UK", in *International Union Rights*, vol. 9.3, no. 19.

<sup>26</sup> See activities of the International Labor Rights Fund, involvement of legally qualified staff in the Workers' Rights Consortium, the work of the International Centre for Trade Union Rights and the recent formation of the International Commission for Labour Rights.

<sup>27</sup> Arthurs, H., op. cit.

<sup>28</sup> See <http://www.laborrights.org/projects/corporate/walmart/WalMartComplaint091305.pdf>.

# How domestic jurisdictions use universal sources of international law

*Day in day out, though the fact is sometimes overlooked, international labour standards are used by judges, lawyers, labour inspectors and trade unionists to ensure that workers' rights are respected. In the judges' case, courts not infrequently apply the provisions of a ratified Convention directly in resolving a dispute, or else they draw on ILO standards, whether binding or not, as a source of interpretation and inspiration when applying domestic law. This article derives from the training programmes on international law conducted jointly by the ILO's International Training Centre in Turin and the International Labour Office.*

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In many countries, the judicial use of the universal sources of international labour law, namely the instruments elaborated by the ILO and the United Nations, has been very little analysed in doctrinal

terms. This neglect was long attributable to a traditional vision of international law, which was seen as being limited to regulating international relations between States and thus unlikely to intervene in legal disputes at the national level.

Note: This article is a shortened version of a contribution by the author to the *Bulletin de droit comparé du travail et de la sécurité sociale*, published by the Centre de droit comparé du travail et de la sécurité sociale (Centre of comparative labour and social security law) of the University of Mostesquieu-Bordeaux IV. The full article and its extensive bibliography are available at [http://training.itcilo.it/ils/ils\\_judges/training\\_materials/spanish/Beaudonnet\\_utilisation\\_judiciaire\\_sources\\_universelles.pdf](http://training.itcilo.it/ils/ils_judges/training_materials/spanish/Beaudonnet_utilisation_judiciaire_sources_universelles.pdf).

At first sight, it might also be held that the ILO and UN instruments, in the absence of international tribunals competent for ensuring that they are respected, lay down principles that are too general for their provisions to be used by domestic courts, which already have at their disposal a precise and detailed body of labour legislation.

This contribution is also a further development of a joint article by the present author, C. Thomas and M. Oelz, "The Use of International Labour Law in Domestic Courts: Theory, Recent Jurisprudence, and Practical Implications", in *Les normes internationales du travail, un patrimoine pour l'avenir, Mélanges en l'honneur de Nicolas Valticos*, ILO, Geneva, 2004, pp. 249-285. The case-law examples are mainly drawn from a research document of the ILO International Training Centre (Turin), entitled *Utilisation du droit international par les juridictions nationales*, available at [http://training.itcilo.org/ils/ILS\\_Judges/training\\_materials/francais/utilisation\\_droit\\_international\\_juillet2004.pdf](http://training.itcilo.org/ils/ILS_Judges/training_materials/francais/utilisation_droit_international_juillet2004.pdf).

And yet, despite the lack of precise statistics on this subject, it does seem possible to distinguish a growing use of these universal sources within labour-related cases. In the course of our research and seminars, examples of the judicial use of ILO and UN instruments have reached us from 52 different countries.<sup>1</sup> Moreover, in almost half of these cases, the earliest rulings communicated to us date back less than ten years, which may mean that such use is, at least from a geographical point of view,

spreading. Indeed, this observation is part of a broader trend towards the progressive opening up of national legal system to international law on personal rights in general and to international labour law in particular. In this respect, it may be noted that a growing number of constitutions and labour codes explicitly give international law an important role in domestic law, either by recognizing that ratified treaties have supralegal force<sup>2</sup> or by assigning them an interpretative function in the application of national law.<sup>3</sup> Similarly, in recent years the highest courts of several countries have modified the interpretation of their constitutions by conferring upon ratified treaties an authority or effect not previously attributed to them.<sup>4</sup>

That said, judicial use of international labour law is clearly far from homogeneous. Quite apart from the fact that no such case law has been reported to us from many countries, practice seems to vary as regards the frequency of use, the type and level of courts that refer to international instruments and the function assigned to international labour law in the resolution of cases. In view of this great diversity, the present article sets out to analyse the main characteristics of the judicial use of international labour law and attempts to determine to what extent these features equally apply to the main different legal systems.

On this last point, studies on the use of international law within domestic law usually start by drawing a distinction between what are known as monist and dualist systems for the incorporation of international law into domestic law. Put simply, monist countries are those in which ratified treaties<sup>5</sup> are a direct part of domestic law.<sup>6</sup> Dualist countries, on the other hand, are those in which the ratification and publication of international treaties do not suffice in order to incorporate them into domestic law, as the applicability of their provisions at the national level is dependent on national legislation adopted after ratification.<sup>7</sup> In this respect, it is often emphasized that in the dualist countries, it is not possible for the courts to apply the provisions of international treaties

directly, inasmuch as they are not part of domestic law. For this reason, an effort will be made throughout this article to assess the real impact of the distinction between monist and dualist systems on the judicial use of international labour law.

So as to better identify the ways in which domestic courts use universal sources of international labour law, we will first analyse the different functions assigned to international labour law by domestic courts when settling a dispute (I). We will then turn to the different sources of international labour law used by domestic jurisdictions (II), before finally giving a selective outline description of the impact of this judicial use on the content of labour law within the countries concerned (III).

## **I. The different functions assigned to international labour law by domestic jurisdictions**

A distinction can be made between instances of the direct application of international law and those of two types of indirect application, namely the interpretative use of international law and its use as a source of inspiration in the recognition of principles of jurisprudence. While the dividing line between the different types of use may sometimes be a little blurred, this categorization does make it possible to draw a certain number of interesting lessons about the subject at hand.

### ***I.A. Direct application of an international provision in settling a dispute***

In this first instance, domestic courts identify and apply an international provision the content of which enables the direct resolution of the dispute without, in theory, the need for recourse to other, complementary sources of law. In such instances, the courts use the international provision exactly as they would do with an article of a national law, namely as the main basis for resolving the dispute.

This type of use presupposes that the international provision is directly applicable, both formally and materially. As regards the first point, direct application is possible only in monist systems, in which ratified treaties are part of domestic law, thus enabling the courts to base themselves directly on their provisions. Then there is the material aspect of direct application. This aspect presupposes a recognition, explicit or not, by the court that the international provision is self-executing. Roughly, this means determining if the provision embodies a principle or right that is sufficiently clear and precise to enable a direct resolution of the dispute. In cases where a direct application of international labour law was noted, it emerged that this first kind of judicial use of international law made it possible to respond to three different types of situation.

#### *I.A.1. Filling a gap in domestic law*

The direct application of international labour law provisions was, first of all, noted in cases where, in the absence of precise domestic legal rules for resolving the litigation, jurisdictions referred directly to the content of the ratified international instruments. Our first example here is from Madagascar, where two flight attendants brought a case before the supreme court concerning the validity of a collective agreement clause specifying a lower retirement age for female cabin crew (age 45) than for their male colleagues (age 50), resulting in a major loss of earnings for the women.<sup>8</sup> In terms of domestic law, the court could base itself only on the Constitution's very general provisions concerning equality, so it referred to the more precise provisions of Articles 1.1.a and 1.1.2 of ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Thus, the court was able to rule that, in the absence of objective grounds inherent in a flight attendant's job and justifying earlier retirement of female personnel, the article in the collective agreement discriminated against them.<sup>9</sup>

A second illustration of this point comes from Italy, in a case concerning the calculation of the remuneration due for paid leave.<sup>10</sup> Faced with the lack of a specific domestic legal provision as to whether regular overtime should be taken into account in determining the wage due for paid leave, the Milan labour court turned to the ILO Holidays with Pay Convention, 1970 (No. 132). Article 7.1 of the Convention specifies that the remuneration paid during the holiday period shall be at least the normal or average remuneration received by the worker. On this basis, the court concluded that overtime, when worked regularly, should be included in the calculation.

#### *I.A.2. Setting aside a domestic provision less favourable to the worker*

In a second series of situations, the content of international labour conventions is used to achieve a solution more favourable to the worker than would have resulted from the application of domestic law. Such instances, in line with the principle of the most favourable provision, do not mean that the jurisdiction has to strike the national provision down. The courts need only set it aside by opting to apply the most protective source of law. A good illustration of this situation is a ruling by the French *Cour de cassation* (highest court of appeal) in 1934, the oldest example identified in our research.<sup>11</sup> Faced with a dispute on the right of a foreign employee who had suffered an accident at work to receive the same compensation as a French worker, the supreme court did not hesitate to set aside the Law of 1898 on the compensation of workplace accidents in favour of the direct application of Article 1(1) of the ILO Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19). This article stipulates that a State ratifying the Convention undertakes to grant to industrial accident victims who are nationals of any other country that is party to the Convention the same treatment regarding compensation as to its own nationals.

### *I.A.3. Striking down a domestic legal provision*

In monist countries where ratified international treaties prevail over national laws, it can happen that competent courts declare a law or regulation void or unconstitutional purely on the grounds of its inconsistency with a ratified international Convention. In such instances, the inconsistency with international law may either coexist with other unconstitutionality or constitute the sole ground for striking down the domestic provision. Freedom of association appears to be a potential field for such use of international labour law. For example, in Colombia, the Superior Court declared unconstitutional a legal article restricting foreign workers' access to leadership positions within trade unions. It argued this ruling mainly from a violation of Article 3 of the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), which among other elements gives trade unions the right to elect their representatives in full freedom.<sup>12</sup>

### *I.B. The interpretative use of international labour law*

In this second type of instance, domestic courts refer to international labour law not in order to resolve directly the case placed before them but to clarify the meaning and scope of the domestic provisions applicable to the dispute.

Very roughly, interpretative recourse to international sources can make it possible either to clear up an ambiguity in domestic law or to define more closely a text that has been drawn up in general terms. One example comes from the Supreme Court of Chile.<sup>13</sup> The court had to determine if the protective regime for workers' representatives applied to employees who had declared their candidature as trade union representatives just before their union was officially registered. Noting a contradiction between two articles of the labour legislation concerning the point of

departure for the application of the status of trade union representative, the Supreme Court turned to the ILO Conventions ratified by Chile, in order to determine which of the two solutions should ultimately prevail. The court referred in particular to Article 3 of ILO Convention No. 87, which gives trade unions the right to elect their representatives in full freedom, as well as Nos. 98<sup>14</sup> and 135, which require States to ensure that workers engaged in trade union activities receive effective and adequate protection against discrimination. On this basis, the Supreme Court decided that the domestic legislation should be interpreted in such a way as to provide effective anti-discrimination protection to those standing as representatives, even when their candidature had been declared before the official registration of the trade union.

It is important to emphasize the potentially very broad nature of the interpretative use of international labour law. While direct application appeared to be limited to the monist countries and restricted to the self-executing provisions of the ratified Conventions, interpretative use is not, a priori, subject to any of these limitations.

Inasmuch as this is not a question of settling a dispute directly by the application of an international provision, the differences in the methods of incorporating international law into domestic law are, in such cases, less noticeable. In this regard, the interpretative use of international labour law has been noted in both dualist and monist countries. A further confirmation of this trend is the growing number, in both monist and dualist countries, of constitutions and labour codes which explicitly assign an interpretative function to international law.

That said, the most numerous examples of interpretative use do seem, up to now, to have been observed in the dualist countries, whereas the relevant case law in monist countries stems mostly from constitutional or supreme courts.<sup>15</sup> In dualist countries, interpretative use is observed first and foremost when the law

being interpreted is intended to incorporate a ratified international Convention into domestic law. In this case, the legal basis for referring to the international instrument is, of course, particularly well founded. However, the interpretative use of international law by the courts of dualist countries is not limited to this one single function. Two types of legal argument may then be advanced in order to extend the interpretative use of international law to pieces of legislation that were not intended to incorporate a ratified treaty. First, it is emphasized that the ratification of a treaty implies legal obligations for all the organs of the State, and that within this context, the judicial arm has a duty to interpret domestic law in a way that conforms as closely as possible to the international commitments entered into by the State. Moreover, if a doubt arises about the meaning of a domestic provision adopted after the ratification of the treaty, the presumption will still be that the national legislator did not wish to breach the State's international obligations.

Thus, it would appear that the interpretative function assigned to international labour law by many domestic courts is probably both the most frequent and the one in which the content of international labour law is most able to assist the courts. That noted, it is a striking fact that not one single explicit case of the interpretative use of international labour law was reported to us from the French-speaking countries. Various explanations, legal or otherwise, could no doubt be advanced for this, but this absence does seem surprising to us, at least from a legal point of view, as both the supralegal status that the constitutions of French-speaking countries grant to ratified treaties and the systematic method of interpretation ought to permit such use of international labour law. In France, for example, such interpretative use would probably have enabled the *Cour de cassation* to come down more rapidly in favour of the reinstatement of a pregnant woman who had been unlawfully dismissed.<sup>16</sup>

### *I.C. International labour law as a source of inspiration in the recognition of jurisprudential principles*

Here, we are looking at a second type of indirect use of international labour law. Faced with gaps or inadequacies in written national law, domestic courts draw inspiration from an international standard, often unratified or not subject to ratification, in order to discern a jurisprudential principle that would enable the case to be resolved. The rules of international labour law are used here as a legal basis or proof that the principle concerned does indeed exist. In the course of our study, such an inspirational function was found only in certain common-law countries, where labour courts are given great latitude in their choice of sources for resolving a case, either because they can function as courts of equity or because they have the task of ensuring respect for "fair labour practices", the content of which is for the courts to determine.<sup>17</sup>

In this respect, mention should be made of the jurisprudence created by the industrial courts in Botswana and Trinidad and Tobago concerning dismissals. In Botswana, national legislation does not explicitly impose the principle of giving grounds for dismissal. However, as it can function as a court of equity, the Court was able to assert that, to be valid, any dismissal must be based on legitimate grounds. Both in order to recognize the applicability of the principle and in order to implement it, the Court regularly refers to the ILO Termination of Employment Convention, 1982 (No. 158), although this Convention, which has not been ratified by Botswana and is therefore not incorporated in national legislation, is not part of Botswana domestic law. As appears clearly from several of its judgements,<sup>18</sup> the Court considers that ILO Conventions and Recommendations express the rules of natural justice or equity, from which the Court therefore opts to draw inspiration.

## II. The sources of international labour law used by domestic courts and the judicial reference to non-binding instruments

It is worthy of note, as has already been briefly mentioned in the analysis of the interpretative use of international labour law, that the courts do not confine themselves to the use of those conventions or treaties that have been ratified by their countries. In instances of the indirect use of international law, domestic courts do often take account of non-binding instruments, although these do not constitute the principal means of resolving a case. This practice, even if it is perhaps more frequent in the common-law countries, has in fact been noted in both dualist and monist countries.

### *II.A. Use of unratified international Conventions*

As we have already seen, some labour courts in common-law countries regularly refer to ILO Conventions not ratified by their countries in order to demonstrate the existence of rules of equity or good industrial relations practice. In the civil law countries, there are fewer instances of this, but on the question of maternity for example, it has been noted that the German Constitutional Court referred to the ILO Maternity Protection Convention, 2000 (No. 183), not ratified by Germany, in support of its ruling that the employer's obligation to make maternity payments (as opposed to sharing this burden with the State) could lead to gender inequality. In support of this, the Court stated that such obligations could diminish women's employment opportunities.<sup>19</sup> This case is a good illustration of how non-binding international sources may constitute a subsidiary or supporting element in national courts' interpretation of domestic law.<sup>20</sup>

### *II.B. Reference to international labour Recommendations*

Elaborated and adopted by the International Labour Conference (ILC) in accordance with procedures identical to those for Conventions, international labour Recommendations do not constitute binding legal instruments and are therefore not open to ratification. Their purpose is not to oblige member States to respect their content, but rather to offer them guidelines for the regulation of labour relations and the implementation of their social policy.

From the point of view of domestic law, there is no difference between an unratified ILO Convention and an ILO Recommendation. Thus, labour courts which see ILO standards as an expression of rules of equity are sometimes prepared to refer to international labour Recommendations. For example, since 1972, the Industrial Court of Trinidad and Tobago has regularly used the ILO Termination of Employment Recommendation, 1963 (No. 119) to introduce into domestic law the notions of prior discussion and unfair dismissal.

Turning to the monist countries, a ruling by the Spanish Constitutional Court in 1981 illustrates perfectly the role that non-binding international instruments can play in labour-related constitutional disputes.<sup>21</sup> In this respect, employees who had stood as candidates in a trade union election went to the Constitutional Court because they had been dismissed on economic grounds the day after declaring their candidature. After failing to win their case in the ordinary courts, the workers had recourse to proceedings for *amparo* (protection), on the grounds that the constitutional principle of freedom of association had been violated.

This action raised two main legal issues. Firstly, the Court had to determine if the constitutional protection afforded to freedom of association implied that legal protection against dismissal should be extended to the candidates, whereas it was currently enjoyed only by the elected representatives of the workers. Secondly, the *amparo* also raised the issue of where

to place the burden of proof in the case of litigation concerning possible anti-union discrimination. At the time, Spanish labour law was silent on this question and, de facto, the workers had been unable to demonstrate, in the ordinary courts, the existence of discrimination. It was therefore for the constitutional court to determine if the protection of freedom of association by the Constitution required changes in the rules governing the burden of proof on this issue.

Interpreting the Spanish Constitution in the light of the ILO Workers' Representatives Recommendation, 1971 (No. 143), and the relevant decisions of the ILO Committee on Freedom of Association, the Court ruled in favour of both the application of reinforced protection against dismissal for candidates in trade union elections and recognized the need to set specific rules for the burden of proof in cases concerning anti-union discrimination. In this respect, the arguments adduced by the Constitutional Court for assigning an interpretative function to ILO Recommendations are worth emphasizing.

Taking as its point of departure Article 10.2 of the Spanish Constitution, which specifies that the fundamental rights recognized by the Constitution are to be interpreted in conformity with ratified international treaties, the Court considered that the Recommendations, even though non-binding, constituted a source for the interpretation of the international labour Conventions, and could therefore be indirectly used in relation to provisions of the Spanish Constitution concerning the same rights and principles.<sup>22</sup> Finally, this ruling is even more noteworthy because it also refers to the decisions of ILO supervisory bodies, in this case the Committee on Freedom of Association. This therefore leads us straight on to our next point.

### *II.C. Judicial reference to the findings and statements of international supervisory bodies*

The application of ILO Conventions and Recommendations is supervised by four linked, complementary mechanisms,<sup>23</sup> some of which have been operating for almost 80 years (see also *Labour Education*, No. 122, 2002/1). Even though the ILO supervisory bodies are not formally empowered to interpret the Conventions and treaties within their purview, their findings and statements nevertheless constitute the most authoritative reading of these instruments. Also, though it may be seen that national courts are not legally obliged to follow the guidance of international supervisory bodies,<sup>24</sup> there are solid legal arguments for their taking account, explicitly or implicitly, of such bodies' views in the interpretation of international labour standards, and hence in the application of their own domestic law.

Indeed, a by no means negligible number of cases showing judicial use of the "jurisprudence" created by supervisory bodies has been found in different countries, mostly for the purposes of interpreting domestic law. Thus, a ruling by the Constitutional Court of South Africa concerning freedom of association is worth citing here because of the general way in which the Court pronounces on the need to take account of the proceedings of the Committee of Experts and the Committee on Freedom of Association.<sup>25</sup> The Constitutional Court considered that "decisions (of these bodies) are therefore an authoritative development of the principles of freedom of association contained in the ILO Conventions. The jurisprudence of these committees too will be an important resource in developing the labour rights contained in our Constitution".<sup>26</sup>

In conclusion, great diversity may be observed in the sources of international labour law used by national courts. In many instances, the elements used do not have binding force within domestic law. This aspect again reflects the fact that, in most cases, international labour law is not used

as a substitute for domestic law but, on the contrary, as a support for its application or development, so permitting the use of non-binding sources. That said, what remains to be analysed is the effect that the judicial use of different international sources has on substantive law.

### **III. Impact of the judicial use of international labour law on the content of positive law**

In the course of the research, it was possible to identify quite a large number of rulings in which reference to international labour law turned out to be more symbolic than decisive to the outcome of the case.<sup>27</sup> However, it is important to emphasize that, in many situations, recourse to the universal sources of international labour law by domestic courts does indeed contribute to a better application of the principles embodied in international labour standards. Here, we propose to cite, selectively, a few convincing examples of the active role that the judiciary may be led to play in harmonizing domestic law with the main thrusts of international labour law. The following illustrations concern dismissals, equality in employment and occupation and, finally, freedom of association.

#### ***III.A. Dismissals***

The first examples concern the way in which cases of dismissal are addressed. As already mentioned, in several common-law countries the affirmation of a legal regime concerning the termination of employment that is distinct from the common-law treatment of breach of contract was made by the courts on the basis of the relevant ILO Conventions and Recommendations. In these various countries, labour legislation did not impose either a general obligation to cite legitimate grounds for dismissal or a requirement to hold a prior discussion with the employee before the breaking of the contract by the employer. So whether in Botswana, South Africa or

Trinidad and Tobago, it was the labour courts which introduced these notions into domestic law, considering that their recognition by the ILO Conventions and Recommendations demonstrated that they were basic principles of labour relations.

#### ***III.B. Equality in employment and occupation***

As regards equality in employment and occupation, judicial recourse to international labour law first of all made it possible, in several cases, to interpret domestic legislation extensively and thus to ensure its conformity with international law. For example, the ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the reading given to it by the Committee of Experts formed the basis for the Australian High Court's inclusion of indirect discrimination among the types of discrimination prohibited by national legislation.

Another illustration of this aspect concerns equality of remuneration between men and women. While the national legislation provided for the application of this principle only in the case of identical jobs (equal pay for equal work), the Labour Court of Israel decided to apply domestic law in the light of the ILO Equal Remuneration Convention, 1951 (No. 100), ratified by Israel, and so to extend its application to jobs that are different but of equal value.<sup>28</sup> Secondly, as in the case of dismissals, domestic courts' use of international law on equality in employment and occupation has sometimes contributed to the introduction of new notions into domestic law, notably the concept of sexual harassment.

Finally, judicial reference to international standards on equality in employment and occupation has, in other instances, contributed to more effective legal protection of the victims of occupational discrimination. For instance, several rulings by constitutional courts concluded that, in line with the combined guidance of their Constitutions and international law,

the effective elimination of discriminatory practices at work implied going beyond the simply pecuniary compensation of employees who had suffered them and awarding them full reparation of the occupational prejudice incurred.<sup>29</sup>

### *III.C. Freedom of association*

Regarding freedom of association, it may be noted, without being exhaustive, that judicial reference to the universal sources of international labour law has, for example, made it possible to expand the scope of freedom of association to broader categories of workers. Thus, the Supreme Court of Canada, by interpreting the Canadian Charter of Rights and Freedoms in the light of Article 2 of ILO Convention No. 87, invalidated a provincial law which excluded agricultural workers from the guarantees provided to other workers concerning freedom of association.<sup>30</sup>

As already mentioned in this article, some courts have also based themselves on the statements of the ILO supervisory bodies in order to limit the restrictions placed on the right to strike. Thus, an Argentinian court referred to the “jurisprudence” created by the Committee on Freedom of Association in order to invalidate the inclusion of education in the list of essential services in which no right to strike was to be recognized.<sup>31</sup> Judicial use of international labour law has also been made, as we have seen, in cases of anti-union discrimination.

So, in many cases, judicial use of international law has indeed further developed positive rights in the countries concerned, by moving them closer to the content of international labour standards, whether ratified or not. In fact, such developments in jurisprudence have quite often been followed by legislative reforms, enshrining in written law the solutions already arrived at in the courts.<sup>32</sup>

### **Conclusion**

At the end of this study, it appears that judicial use of the universal sources of international labour law may have a more supple and extensive physiognomy than expected. Firstly, the degree of judicial use of international labour law seems ultimately not to depend very much on the means of incorporating international law into domestic law. In this respect many countries, whether monist or dualist and with very different legal systems, use international instruments to support the courts in consolidating and developing their jurisprudence on labour issues. Secondly, judicial use of international labour law is not limited to striking down or invalidating domestic legal provisions. Even though such instances do exist, and are often of great importance, recourse to international sources is more frequently the result of a combined application, in which international and domestic law complement each other rather than being in opposition. The existence of this kind of joint application is all the more interesting because it considerably increases the range of instruments and sources of international law that can potentially be used by the courts. Reference to international sources is then possible even if the provisions in question are not embodied in a legally binding instrument and even if they are not self-executing.

We also found that, even if the judicial use of the universal sources of international labour law was not an end in itself, it was often a powerful lever for ensuring better application of international labour standards. So it is encouraging to see the apparently growing number of domestic courts that have included the ILO and UN instruments among the sources of law to be taken into account when resolving labour-related cases. It is to be hoped that the first examples of jurisprudence within legal systems that are traditionally more reluctant to draw on external sources of law will emerge in future, so that the courts may benefit fully from the resources that international labour law places at their

disposal in order to ensure respect for the juridical order as a whole.

To that end, the continuation and development of training and awareness-raising efforts for judges, attorneys and professors of law, conducted for a number of years now in the field of international labour law, are certainly of particular importance.

## Notes

<sup>1</sup> The countries concerned are: Argentina, Australia, Azerbaijan, Benin, Botswana, Brazil, Bulgaria, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Dominican Republic, Ethiopia, Estonia, Fiji, France, Germany, Guatemala, Honduras, India, Israel, Italy, Japan, Kenya, Lesotho, Lithuania, Madagascar, Malawi, Mali, Mexico, Morocco, Norway, Paraguay, Peru, Philippines, Rumania, Russia, Senegal, Slovenia, South Africa, Spain, Switzerland, Taiwan, Trinidad and Tobago, Tunisia, Uruguay, Venezuela, Zambia and Zimbabwe.

<sup>2</sup> This applies to the constitutions of the great majority of countries with a Romano-Germanic tradition, including those in French- and Portuguese-speaking Africa and Latin America.

<sup>3</sup> Cf. particularly the Constitutions of Argentina, Azerbaijan, Colombia, Ethiopia, Fiji, Peru, Rumania, South Africa and Spain. See also the Labour Codes of Albania, Morocco and Lesotho.

<sup>4</sup> See in particular the cases of the Supreme Court of Argentina in 1992 (ruling on *Ekmekdjian, Miguel Angel c. Sofovich, Gerardo y otros, El derecho*, Buenos Aires, 1992, pp. 148-338) and the Supreme Court of Mexico in 1999 (*Amparo en revisión 1475/98*, 11 May 1999, *Seminario Judicial de la Federación*, P. LXXVII/99, tesis 192,867, pleno, 1999, t. X, p. 46).

<sup>5</sup> In many countries, a ratified treaty must be gazetted before the international instrument can be taken into account in national rulings.

<sup>6</sup> A non-exhaustive list of monist countries would include those European countries with a Romano-Germanic tradition, Russia and the countries of Eastern Europe, the countries of French- and Portuguese-speaking Africa and the countries of Latin America. Japan and Namibia are also categorized as monist.

<sup>7</sup> The dualist system applies in most countries following the English legal tradition (except Namibia) and the Nordic countries. The People's Republic of China also appears to apply the dualist theory. Finally, some countries, such as South Africa, show characteristics of both systems.

<sup>8</sup> Supreme Court of Madagascar, *Dugain et autres c. Compagnie Air Madagascar*, 5 September 2003, arrêt n° 231.

<sup>9</sup> For a better understanding of this judgement, it should be noted that early retirement meant a major loss of earnings.

<sup>10</sup> Lower Court of Milan, *AMSA c. Miglio*, 28 March 1990.

<sup>11</sup> Cour de cassation, *Castanié C. Dame veuve Hurtado*, Req. 27 February 1934, D.H. 1934. 203, S. 1935 I.1, note Niboyet.

<sup>12</sup> See Tribunal constitucional, 5 February 2000, judgement No. c-385.

<sup>13</sup> Supreme Court of Chile, *Victor Améstida Stuardo y otro contra Santa Isabel S.A.*, 19 October 2000, dossier no. 10.695.

<sup>14</sup> ILO Convention No. 98 on the right to organize and collective bargaining.

<sup>15</sup> As mentioned, these remarks should not give the impression that no interpretative use of international labour law is made in monist countries. Cases of such use have been noted in Chile, Costa Rica, Germany, Japan and Spain.

<sup>16</sup> Indeed, Articles L-122-25-2 and L-122-30 of the French Labour Code long raised problems of interpretation concerning the sanctions applicable in cases of the unlawful dismissal of pregnant women, as these provisions refer both to the nullity of the dismissal and to the award of damages. A pregnant worker's right to reinstatement was only very belatedly recognized by the *Cour de cassation* (highest court of appeal) in a ruling on 19 November 1997 (Soc. 19 novembre 1997, *Bull. Civ. V*, no. 382). In this regard, the court's interpretation could probably have drawn upon ILO Conventions Nos. 111 and 158 and on the readings given to these instruments by the ILO Committee of Experts on the Application of Conventions and Recommendations.

<sup>17</sup> Here, we may note the case law established in Botswana, South Africa and Trinidad and Tobago, as well as more sporadic rulings in Fiji and Malawi.

<sup>18</sup> See the very explicit reasoning of the Botswana Industrial Court in its ruling on *Gaborone, Joel Sebonego v. Newspaper Editorial and Management Services Ltd*, 23 April 1999, No. IC 64/98.

<sup>19</sup> Federal Constitutional Court, decision of 18 November 2003, 1 BvR 302/96. On this, see Thomas, C., Oelz, M. et Beaudonnet, X., op. cit., p. 275.

<sup>20</sup> This account of the judicial use of international labour Conventions would be incomplete without a brief mention of the special case of South Africa. It is very interesting to note that at the beginning of the 1980s, in order to give some content to the principle of "good labour relations practice" laid down in domestic legislation, South African labour courts did not hesitate to base themselves on ILO Conventions such as No. 158 on the termination of employment. Not only had South Africa not ratified the Conventions concerned, it had actually withdrawn from the ILO in 1966 after the disputes caused by the apartheid regime.

<sup>21</sup> STC 38/1981, 23 November 1981, RA, FJ 5. On this ruling, see García de Enterría, E., Linde, E., Ortega, L.I. and Sánchez Morón, M., *El sistema europeo de protección de los derechos humanos*, Madrid, 1983, 2nd edition, p. 202.

<sup>22</sup> Several rulings of the Spanish Constitutional Court have confirmed the role assigned to international labour Recommendations. See STC 184/1990, 15 November 1990, CI, FJ 4; STC 191/1998, 29 September 1998, RA, FJ 5.

<sup>23</sup> The four types of supervisory mechanism on the application of ILO standards are: regular monitoring, by the Committee of Experts on the Application of Conventions and Recommendations, and then by the Committee on the Application of Standards of the Conference, of the application of ratified Conventions, by virtue of Article 22 of the ILO Constitution; monitoring by an ad hoc tripartite Committee after the lodging of a representation under Article 24 of the Constitution; monitoring by a Commission of Enquiry after the lodging of a complaint under Article 26 of the Constitution; and, finally, monitoring by the Committee on Freedom of Association or by the Fact-finding and Conciliation Commission on Freedom of Association of the Governing Body of the ILO, after the lodging of a complaint concerning freedom of association.

<sup>24</sup> An exception here is a highly controversial ruling by the Constitutional Court of Colombia, assigning to the decisions of the Committee on Freedom of Association not only a binding character but also a constitutional status. See Sala Cuarta de Revisión de Tutelas de la Corte Constitucional, *Sindicato de las Empresas Varias de Medellín contra Ministerio de Trabajo y Seguridad Social, el Ministerio de Relaciones Exteriores, el Municipio de Medellín y las Empresas Varias de Medellín E.S.P.*, 10 August 1999, T-568-99. This ruling was confirmed by two subsequent decisions of the Constitutional Court. See the ruling on *Sintrava-Aviance*, 18 September 2000,

T-1211/2000 and a ruling of 23 July 2003, T-603/2003. For a critical analysis of this jurisprudence, see Molina, C.E., *op. cit.*, pp. 216-223.

<sup>25</sup> Constitutional Court of South Africa, *NUMSA v. Bader Pop*, 13 December 2002, CCT 14/02.

<sup>26</sup> It should be borne in mind that South Africa is one of the countries in which the national Constitution explicitly assigns to international law an interpretative function in the application of domestic law. See Articles 39 and 233 of the Constitution of the Republic of South Africa.

<sup>27</sup> The reference to international labour law then often serves to emphasize the fundamental nature of a right or principle. See for example several rulings in the Dominican Republic, such as *Corte de trabajo del departamento judicial de San Pedro de Macoris*, 6 juillet 2004, Expediente n° 336-04-000 49.

<sup>28</sup> See *Elite Israel Sweets and Chocolate Industry Ltd/Lederman*, 5 March 1978, ICE, 1980, p. 153.

<sup>29</sup> For a case of anti-union discrimination in the breaking of an employment contract, leading to employee reinstatement, see the previously cited ruling of the Spanish Constitutional Court. For a case of discrimination during hiring, related to HIV/AIDS and leading to the hiring of the candidate previously turned down, see Constitutional Court of South Africa, *Jacques Charl Hoffman/South African Airways*, 28 September 2000, no. CCT 17/00.

<sup>30</sup> Supreme Court of Canada, *Dunmore v. Ontario (Attorney General)*, 20 December 2001, No. 2001 SCC 94.

<sup>31</sup> See the previously cited ruling *Unión Docentes Argentinos contra Estado Nacional y otro sobre Acción de Amparo*.

<sup>32</sup> See, for example, the cases of South Africa concerning dismissal procedures, of Spain on anti-union discrimination or of India on sexual harassment.



# Workers' rights and the rule of law: A clash of values, standards of judgement and moral choices

*Any reasonably serious discussion of workers' rights must include assessments of the choices made by legislators and by those who interpret and apply the law. A key to understanding those choices – that may promote or diminish those rights – is the identification of the standards of judgement on which they are made. It needs to be understood that the basic foundation of law, including labour law, is moral choice. It also needs to be understood that the standards of judgement used to make these choices are, in turn, based on values that embrace broader conceptions of justice than the rules of existing statutory law or contractual agreements. The point of this article is to talk about workers' rights, particularly workers' rights as human rights.*

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The common conception of justice is a legalistic one, defining injustice as illegality or unlawfulness. There are many victims of exploitation, arrogance, or neglect who have no recourse to a formal justice system because what was done to them, no matter how unjust, was not illegal. These injustices may never be put right unless their infliction breaks some law or fails to follow some established procedures. We need, therefore, a broader conception of justice that includes the legal model with its rules, adjudications, and institutions but also listens to the voices of all suffering victims.

It is not possible to talk about justice, however, without talking about rights. The point of this article is to talk about workers' rights, particularly workers' rights as human rights. Any reasonably serious discussion of workers' rights must include assessments of the nature of labour laws; the interpretation and application of those laws by judges, administrative agencies, arbitra-

tors and other decision-makers; the choices made by legislators in constructing the law as well as the choices made by those who interpret and apply the law; and the value judgements underlying those choices, particularly what choices and values predominate when the often conflicting rights of labour and management clash. Freedom of association and worker safety and health are examples from the United States for illustration purposes but the points being illustrated have wide-ranging applicability.

## **Freedom of association and worker safety and health: US values**

The current state of the National Labour Relations Act (NLRA) and the Occupational Safety and Health Act (OSHA) in the United States cannot be fully comprehended without identifying those underlying values. The NLRA is not neutral in its intent; the law declares it to be the policy

of the United States to encourage the practice of collective bargaining and to protect workers in their exercise “of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>1</sup> OSHA promised workers a substantive right to safety and health. In 1968, the Secretary of Labour Willard Wirtz told Congress that the legislation was a victory for a new politics that “measure[d] progress in qualitative as well as quantitative terms”; rejected “human sacrifice for the development of progress”; placed “higher value ... on a life, or a limb, or an eye” and asserted “the absolute priority of individual over institutional interests and of human over economic values”.<sup>2</sup>

The promises of both laws have been broken. There are many reasons why that occurred but none are more important than the dominance of market capitalism and its associated values. It has become a virtual article of faith that survival (and jobs) in this new era of global economic competition depends on strategies that are favourable to business and hostile to organized labour: unencumbered and creative management responses to change; the end of costly contracts with unions; the retention or regaining of management prerogatives, power, and flexibility; the freedom to overcome other labour cost advantages enjoyed by competitors around the United States and around the world; and the end of government regulations. What is good for business, the argument goes, is good for the country. In other words, business succeeded not only in dominating the prevailing political and intellectual climate but also in redefining occupational safety and health and labour-management issues in ways that made breaking the promises of the NLRA and OSHA seem necessary for the good of society.

The each-versus-all individualism that drives the “free market” approach to life, for example, induces people to be preoccupied with their own private self-interests and, ultimately, to accept even the

harsh economic and social consequences of the market as the inevitable results of impersonal forces beyond their control or comprehension. The consequences for people in the system, therefore, are neither intended nor foreseen. The bad things that happen to workers in their working lives are merely misfortunes beyond anyone’s control. Consequently, the argument goes, it is absurd to demand justice of such a process because there is no answer to the question of who has been unjust. In the words of a foremost advocate of free market theory social justice is not only irrelevant it is simply a “quasi-religious superstition”.<sup>3</sup> Here is the complete separation of morality from economics.

These doctrines are hardly new in the United States. It defies the reality of the last 35 years to claim that current US labour law is a model of freedom of association and it defies labour history to claim that the freedom of association has been respected even generally in this country for anything but brief periods of time. Various doctrines have been used to prevent organized worker “interference” with the exercise of property rights including England’s long-established law of master servant, with its essential component of subordination to authority and common law doctrines of criminal conspiracy, illegal purpose, the labour injunction, and freedom of contract.<sup>4</sup> The results were coercive and oppressive for workers, in part due to the values of the judges who interpreted and applied these doctrines. As former Supreme Court Justice Benjamin Cardozo once wrote, “The decisions of the courts on economic and social questions depend upon their economic and social philosophy.”<sup>5</sup> These judges, overwhelmingly “solid, independent men of middle class”, were “terrified of class struggle, mob rule, the anarchists and their bombs, railroad strikers and the collapse of the social system as they knew it”.<sup>6</sup> Yet, their decisions were written – and the history of their decisions has often been written – as if they were not influenced at all by the political and economic struggles going on around them or by “free market” ideology but only by objective rules.

## Wagner Act values then and now: The freedom of association

It took the crushing failure of the unregulated market system in the Great Depression of the 1930s to cause a hiatus in the otherwise continuous dominance of market values. In 1935, the Wagner Act (NLRA) established the most democratic procedure in US labour history for the participation of workers in the determination of their wages, hours, and working condition. The Wagner Act had the potential to bring about a major redistribution of power from the powerful to the powerless at U.S. workplaces covered by the statute. For Senator Robert Wagner the key sponsor of this law, the right to organize and bargain collectively was “at the bottom of social justice for the worker”<sup>7</sup> and was essential for a free and democratic society. He opposed the tyranny of both free-market laissez-faire, in which “men become the servile pawns of their masters in the factories” and the authoritarian “super government”.<sup>8</sup>

The promises made in the NLRA embody fundamentally different values and conceptions of rights and justice than those underlying the allegedly free market system. These values of workers’ rights and social justice underlying Wagner’s statute were subordinated to the values of free market economics and the rights of property and management. Labour never came close to achieving the system of workplace democracy envisioned by Wagner. This was due in great part to the 1947 Taft-Hartley amendments to the Wagner Act which were inconsistent with the Wagner Act concept of the federal government as a promoter of the exercise of the right of freedom of association. Near the end of 1984, a House Subcommittee on Labour-Management Relations concluded that the Act was being used “as a weapon to obstruct collective bargaining” and that unions were “being badly betrayed”.<sup>9</sup> In 2000, Human Rights Watch found that despite a system “with all the appearance of legality” the “Freedom of Association is under sustained attack in the United States

and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers’ rights.”<sup>10</sup>

It bears repeating that there are many reasons why a policy that encouraged the replacement of industrial autocracy with a democratic system of power sharing was turned into governmental protection of employers’ unilateral decision-making authority at the workplace. But among all the reasons, employer “free speech”, the 1947 Section 8(c)<sup>11</sup> amendment to the NLRA, has become “the primary instrument used by employers to discourage unionization and collective bargaining”.<sup>12</sup> Employer anti-union speech during representation campaigns causes a clash among the right of freedom of association, the right of freedom of speech (employer, union, and employees), and property rights. The dominant hierarchy of rights established by the choices of Congress and judicial and administrative decision-makers, particularly in the past 30 years, gives employer speech and property rights priority over employees’ right of freedom of association.

The doctrinal justification for this “balance” of rights is that Section 8(c) is a “constitutional” right whereas employees’ right to organize is only a statutory right trumped by an employer’s constitutional right. There is a certain degree of semantic fraud in the phrase “employer free speech”. The phrase conceals the real policy choice: the extent to which, if at all, an employer should be permitted to exert economic power through speech in regard to employees’ choice of and participation in unions. The choice made in the United States was to sanction and facilitate (by law and interpretation of that law) active employer resistance to unionization – particularly for employers who knew how to make threats look like predictions, possibilities, or statements of legal position.

In this country, the historically rooted principles of employer property rights still override many of the most basic principles of the national labour policy including the fundamental principle of freedom of

association. Judicial and administrative board (the National Labour Relations Board – NLRB) decisions concerning access to employer property to communicate with employees about unionization are good examples.

By Supreme Court decision, employees are permitted to solicit union membership and distribute organization literature on their employer's property but only in non-work areas, on non-working time, as long as it does not interfere with production, discipline, or safety. For almost 50 years, however, the Supreme Court has considered non-employee union organizers trespassers and barred them from access to employers' property. The real issue raised in these cases is whether, in light of the undisputed right of employees to receive information about their rights under the NLRA, any employer property interest is sufficiently important to justify exclusion of non-employee organizers from the workplace. Yet the choice is to make property rights dominant over workers' rights.<sup>13</sup>

Another area of case law governing union organizing campaigns provides sharp examples of the range of choices available to decision-makers as well as the standards of judgement used to make those decisions and the values underlying those standards. Shortly before the passage of the Taft-Hartley amendments, the NLRB ruled that requiring employees to listen to their employer's anti-union speeches on company property, during work time, a "captive audience" speech, was inherently coercive and per se a violation of the law.<sup>14</sup> After the amendments, the NLRB decided that it was not the employer's captive audience speech that was illegal but the employer's denial of an equal opportunity for the union to speak to the employees under the same circumstances.<sup>15</sup> Later, a reconstituted NLRB talked of property rights, employer free speech, and the pre-eminence of the individual's right to choose not to join a union and ruled that it was lawful for an employer to give a captive audience speech and to deny a union's request for equal time on the employer's property.<sup>16</sup>

### *Worker safety and health: The values of labour arbitrators*

As in labour relations, employer competitiveness, efficiency, and profitability has taken precedence over workplace safety and health. For example, cost-benefit analysis is proposed as the way to determine how much of society's scarce resources go to occupational safety and health. OSHA should be abolished, it is argued, because economic incentives in the market such as workers' compensation and hazard pay provide almost all the protection workers need. Many economists argue that workers will bargain for the wage premiums, or hazard pay, as extra compensation for exposing themselves to workplace hazards and that employers will pay those wage premiums to attract those workers to hazardous jobs until the cost of removing or substantially reducing the hazards is less than the cost of the premium pay. (It should be pointed out that free market economic theory assumes that employers have the right to expose workers to hazardous conditions of work.)

Moreover, the overwhelming number of workers in this country have no bargaining power to negotiate wage premiums – particularly when their employment can be terminated at will. In the words of one worker:

"Every worker has a choice. Any worker can quit his job. But the realities of life – family, the children, mortgage payment – impose certain limitations on the worker's right to just quit. I don't feel personally that people should have to quit to protect their health. I feel that the employer by obligation, by law, must provide a safe and healthy workplace. And if the employers live up to their obligations, then there would be no reason for a worker to make that choice".<sup>17</sup>

In the United States, labour arbitrators who interpret collectively bargained contracts create and apply rules that, among other things, embody presumptions about the nature of the power and rights relationship of employer-employee as well as sources of worker and employer rights. Arbitrators, in exercising this prerogative of

choice, are making judgements that reflect their own political, social, and economic philosophies. The standards for judgement that arbitrators use when they decide cases determine whether they see the workplace through the eyes of employees on the shop floor, in offices or classrooms, or from the perspective of those who manage those enterprises. The available evidence reveals an arbitral deference to management rights, management goals of efficiency and productivity, and management's control and direction of the workforce.

This is particularly true in cases involving worker refusals to work for reasons of health and safety – a fundamental clash between management's right to operate the enterprise and workers' right to a safe and healthful workplace. Arbitrators perceive these refusal to work cases as insubordination cases. This approach downgrades workers' fears and concerns about their safety and health to the level of an excuse for not obeying a work order. Although technically employers have the burden of proof in discipline and discharge cases, treating these cases as insubordination cases puts the burden on already disciplined workers to prove that the work assignment, or equipment, or work environment was sufficiently hazardous to health and bodily integrity to justify the refusal to perform work. In addition, arbitrators also make this burden of proof as heavy as possible thereby confirming not only their choice of employers' rights over workers' rights, but also their desire to discourage challenges to the exercise of managerial authority at the workplace.<sup>18</sup> Among other things, this value scheme confronts workers with an unfair dilemma – to work and risk their health or safety or refuse to work and risk their jobs.

### **A human rights standard of judgement**

The economic and management authority standards of judgement being applied to workplace safety and health and freedom of association issues obscure more

humane value judgements, namely that nothing is more important at the workplace than human life and health and that a full human life requires the kind of participation in the economic (and political and social) life of the human community that enables people to have an influence on the decisions that affect their lives.

Other than in basic Wagner Act principles, the concept of human rights, particularly workers' rights as human rights, has never been an important influence in the making of US labour law or policy. Human rights are a species of moral rights which all persons possess inherently, simply because they are human. The underlying principles of human rights include: that every person possesses human rights equally; that every human being is sacred; that human beings are not objects or resources to be used for others' purposes; and that because every human being is sacred "certain things ought not to be done to any human being and certain other things ought to be done for every human being".<sup>19</sup> In the economic context, therefore, employer-worker relations are more than economic in nature because workers are persons.

Human rights values do conflict with the values dominant in much of US labour relations, particularly in regard to freedom of association and safety and health at the workplace. The management rights value judgement underlying the arbitrators' insubordination approach (already discussed), for example, is contrary to the human rights value affirming the sacredness of human life as more important to promote and protect than property rights or other interests such as profits, efficiency, cost-benefit analysis, management authority and economic progress.

It is important to consider what changes would occur if arbitrators and other decision-makers resolved conflicts of rights by applying human rights standards of judgement. In regard to safety and health cases, one of the most important would be to place on employers, rather than on employees, the burden of proving that workplaces were in fact safe or that work

assignments did not endanger the health or safety of their employees. These cases would be perceived primarily as safety and health cases not as matters of insubordination and management rights and this approach would confirm the sacredness and dignity of human life and its paramount importance – even at the workplace.

If an employer successfully carried its burden of proof, then the worker or workers involved would be required to demonstrate a good-faith belief that the workplace or work assignment was a threat to safety or health. Only if the employee cannot demonstrate a good faith belief would the insubordination question be considered. Use of the human rights standard would also require fundamental changes in the superior-subordinate conception of employer-employee relations at the workplace. One of the most important rights that workers have for self-protection is the right to refuse work that they believe in good faith threatens their safety and health, consequently, enforcement of those human rights through self-help without retaliation is necessary and justified.<sup>20</sup>

It all connects. This self-protection constitutes an exercise of the human right of freedom of association. The exercise of freedom of association at the workplace enables people to obtain sufficient power to make the claims of their human rights both known and effective so that respect for their rights is not dependent solely on the interests of their employers or others. Given that the place of work is the most effective place for labour organizing, employee freedom of association rights could be given priority over employer property rights in ways most protective of both rights by allowing non-employee union organizers to organize on the employer's property under the same rules that apply to employee organizing: in non-work areas and on non-work time. The NLRB and the courts could also return to the earlier doctrine requiring employers who deliver captive audience speeches to provide equal opportunity for a union to address employees on the employer's premises.

## Concluding comments

The article has focused on the importance of identifying and assessing the standards of judgement that decision-makers raise in choosing among alternative ways to resolve clashes of rights at the workplace. This focus, however, should not obscure the fact that fights over rights are at their core fights over the redistribution of power. Although might does not make right, it does take might to get right done.

To be more than pious talk human rights must be protected by the rule of law and be made enforceable through public and private institutions such as legislation, judicial and administrative agency decisions, and collectively bargained contracts between employers and representatives of their employees. Before that can happen, human rights need to become part of all people's values. At issue is what kind of people we choose to be and what kind of society we choose to have. No choices are more important.

## Notes

<sup>1</sup> Pub. L. No. 74-198, 49 STAT. 449-50 (1935) (Codified as amended at 29 U.S.C. §§141-44, 167, 171-87 (1944).

<sup>2</sup> Noble, C. 1986. *Liberalism At Work: The Rise and Fall of OSHA* (Philadelphia, Temple University Press) p. 82. Quoting *Occupational Safety and Health: Hearings on H.R. 14816 Before the Select Subcomm. On Labor of the House Comm. On Educ. And Labor; 90<sup>th</sup> Cong. 17-18 (1968).*

<sup>3</sup> Hayek, F.A. 1976. *The Mirage of Social Justice* (Chicago, University of Chicago Press) p. 66.

<sup>4</sup> The Master and Servants Act was the culmination of a series of laws designed to regulate relations between employers and employees during the 18th and 19th centuries, although heavily biased on the employers' terms. It was instituted in 1823 in Great Britain and described its purpose as "for the better regulations of servants, labourers and work people". This law greatly influenced labour relations and employment law in Australia (1845), the USA, Canada (1847), New Zealand (1856) and South Africa (1856). In reality the law was designed to discipline employees and repress the "combination" of workers in labour unions. The law required the obedience and loyalty from servants to their contracted employer, with infringements of the contract punishable before a court of law, often with a jail sentence of hard labour. It was used against workers organizing for

better conditions from its inception until well after the first Trade Union Act was implemented in Great Britain in 1871, which secured the legal status of trade unions. Up till then a trade union could be regarded as criminal because of being "in restraint of trade".

<sup>5</sup> Cardozo, B. 1921. *The Nature of the Judicial Process* (New Haven, Yale University Press) p. 171.

<sup>6</sup> Friedmen, L.M. 1973. *A History of American Law* (New York, Simon & Schuster) p. 486.

<sup>7</sup> Gross, J.A. 2002. "Worker Rights as Human Rights: Wagner Act Values and Moral Choices", in *Journal of Labor & Employment Law*, No. 4, p. 481.

<sup>8</sup> *ibid.*

<sup>9</sup> Gross, J.A. (ed.). 2003. *Workers' Rights as Human Rights* (Ithaca and London, Cornell University Press) p. 3.

<sup>10</sup> Human Rights Watch. 2000. *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (New York, Human Rights Watch) pp. 8 and 16.

<sup>11</sup> 29 U.S.C. 1994. 158(c).

<sup>12</sup> Summers, C.A. 1998. "Questioning the Unquestioned in Collective Labor Law", *Catholic University Law Review*, No. 47, pp. 791 and 806.

<sup>13</sup> Gross, J.A. 1999. "A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association", in *Employee Rights and Employment Policy Journal*, No. 3, pp. 21-22.

<sup>14</sup> *Clark Brothers Co.*, 70 N.L.R.B. 802 (1946).

<sup>15</sup> *Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).

<sup>16</sup> *Livingston Shirt Corp.*, 107 N.L.R.B. 400 (1953).

<sup>17</sup> Gross, J.A. 1998. "The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice", in *Chicago-Kent Law Review*, No. 73, p. 375.

<sup>18</sup> Gross, J.A. 2004. "Incorporating Human Rights Principles into U.S. Labor Arbitration: A Proposal for Fundamental Change", in *Employee Rights and Employment Policy Journal*, No. 8, pp. 31-32.

<sup>19</sup> Perry, M.J. 1998. *The Idea of Human Rights: Four Inquiries* (New York, Oxford University Press) No. 4, pp. 63 and 71.

<sup>20</sup> See Emily A. Spieler, "Risks and Rights: The Case for Occupational Safety and Health as a Core Worker Right", in Gross (ed.), 2003, *Workers' Rights as Human Rights*, p. 99.



# Universal labour standards and national cultures

*In the age of globalization, the international regulation of industrial relations has become a vital but perilous task. Vital because the lowering of frontiers is leading to the internationalization of law. Perilous because there are plenty of stumbling blocks, both cultural and economic. The standard-setting system devised by the ILO has its weaknesses, but it is and remains the best developed and most widely accepted response to this pressing need.*

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All ILO activities, in particular the production of labour standards, are universal in scope. This derives from the ILO Constitution, which in principle opens the Organization to all States worldwide. In the same way, the procedure by which international labour Conventions are drafted involves all the Members and their industrial associations.

Some authors have suggested that ILO adopts different rules depending on the regime, to take account of cultural diversity and of differing levels of economic development, but this is not the case. While it is true that many ILO standards have their roots in European history, they have nevertheless been expressly adopted or accepted by the representatives of what is often a large majority of countries in many international institutions, including ILO.

What is more, is it wise, from the human point of view, to treat workers differently in areas that touch on their lives, health

and dignity? The Discrimination (Employment and Occupation) Convention (No. 111), adopted by the Organization in 1958, covers discrimination against individuals in employment and occupation. It deplores “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin”.<sup>1</sup> Should not the same policy of equality prevail in relations between States?

There is another reason for applying the ILO standards in general: to ensure that dissimilar conditions of employment do not distort competition between States and seriously handicap those offering the best terms.<sup>2</sup> Beyond this, ILO instruments are intended to facilitate the process of globalization in different socio-cultural contexts, in particular during periods of transition.

If a State considers that its socio-economic situation precludes the immediate

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implementation of an international labour Convention, there is nothing to prevent it from postponing ratification, which is a voluntary, sovereign act. It can also take advantage of the flexibility clauses and devices contained, as we shall see, in many of the Conventions.

There is another point. One country can be home to several cultures: that of a majority of its citizens and that of those of others who are fewer in number and hail from different backgrounds. The United States is an oft-studied example. Western Europe today is also tending to form multicultural societies. Minorities inevitably influence the culture in the host country. In this article, national culture is considered as a diverse whole.

### Situation-specific arrangements

ILO incorporates cultural concerns – and economic constraints – in the wording of its Conventions and Recommendations. To start with, texts are prepared by a process comprising several stages during all of which the aim is to obtain the cooperation of most member States. The secretariat produces an overall report on legislation and practice in respect of the topic at hand. The report is accompanied by a questionnaire for the governments and for employers' and workers' organizations. A summary document is submitted to the International Labour Conference and to one of its commissions especially constituted for the purpose. Their conclusions are the subject of further consultation conducted in the same manner. The International Labour Office then prepares one or several draft instruments and submits them to another session of the Conference, for a second reading. The Conference and its ad hoc commission discuss them and usually adopt a Convention and/or a Recommendation.

These texts seek to accommodate different situations. They contain only minimum rules, basic principles that can be incorporated into most, if not all national legal frameworks.<sup>3</sup> What is more, they contain flexibility clauses and devices designed

to meet concerns not only about the weak economic development of some countries, but also about specific cultural characteristics. Let us explain the concept.

The ILO has always refused to accept ratifications accompanied by reservations because of the involvement of employers' and workers' organizations in the process of adopting the international labour Conventions and in their implementations mechanisms. Such reservations are also deemed to be incompatible with the purpose of the Conventions, namely the establishment of standardized employment conditions.

The founding members of the Organization, however, inscribed in its Constitution (Article 19, para. 3) that its annual Conference had a duty to introduce flexibility into the legal texts it adopted:

In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organisation or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

Their successors therefore introduced into the instruments they adopted what are known as flexibility clauses.

Different means were used to do this depending on the objective: allowing countries to ratify only part of a Convention, to choose between different levels of requirements, or to make exceptions for certain categories of workers or branches of activity, softening the wording by using expressions such as "where [or "if"] necessary",<sup>4</sup> "where appropriate",<sup>5</sup> "as appropriate",<sup>6</sup> "as far as possible",<sup>7</sup> "in accordance with national conditions [law] and practice",<sup>8</sup> and other terms that give greater leeway to the authorities in charge of giving effect to the content of an instrument.

Some ILO Conventions deal directly with problems of cultural differences and propose adjustments. They require, for example, that the weekly rest should coincide

with the day of the week established as a day of rest by local tradition or custom.<sup>9</sup>

The instruments on migrant workers seek to strike a balance between two goals: the elimination of discrimination and respect for distinct traditions. The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), calls on the States to encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin; it specifically mentions the possibility for children to be given some knowledge of their mother tongue.<sup>10</sup> The Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955 (No. 100) encourages the States to offer migrants facilities for the remittance of funds, the exchange of correspondence and the performance of any customary obligations they wish to observe.<sup>11</sup> The Migrant Workers Recommendation, 1975 (No. 151), suggests that account be taken of the special needs of migrants until they have adapted to the society of the country of employment. The policy adopted for that purpose should be based, in particular, on an examination of conditions in both the migrants' host country and the countries of origin.<sup>12</sup>

The ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), is very specific: it requires the authorities to recognize and protect the social, cultural, religious and spiritual values and practices of these people and to respect the integrity of their institutions and practices.<sup>13</sup> The Human Resources Development Convention, 1975 (No. 142), is more general, requiring human resources development programmes and policies to take account of the stage and level of economic, social and cultural development.<sup>14</sup>

## Lasting problems

The universal character of international labour standards makes it more complex to give effect to the obligations they contain: the usual legal difficulties relating

to content, wording, supervision, etc., are compounded by other factors.

For example, the role of the law in the settlement of disputes varies from one society to another. American citizens turn more readily to the courts than those of East and South-East Asia, who see court action as a last resort when all efforts at conciliation have failed. Another factor is that disciplined conduct and respect for authority are more marked in some mentalities and periods than others, as evidenced by the well-known anecdote about German railway workers in the early twentieth century who bought their platform tickets before joining a demonstration at a railway station platform. Times have certainly changed – where in today's world could one imagine workers acting like that?

Besides the level of economic development, the State's institutional capacities are another factor of paramount importance for the incorporation of international labour standards into the domestic legal order;<sup>15</sup> social security springs to mind. The same holds true of religious convictions; they encourage observation of measures to protect others. When faith gives way to superstition, on the other hand, the effect can be perverse, such as in the case of the Thai workers in a knife factory who thought there was no point in wearing the requisite safety equipment once the workshop had been blessed by a Buddhist monk.

The methods chosen to implement labour standards are also predicated on the historical context, the power of employers' and workers' associations, the experience of their leaders, and the respective place of the law and collective work agreements in the system of industrial relations. More fundamentally, how a rule is worded and given effect depends on the ideas, customs, skills, arts, etc., of a people or group, that are transferred, communicated or passed along to succeeding generations; in other words, on its culture.<sup>16</sup>

## Culture, labour and industrial relations

Our view of labour is shaped by where we live. The American view allows enormous scope for individual initiative. It prefers enterprise (or establishment)-level collective bargaining on employment conditions to legislation, to the point that the United States has no labour code or equivalent statute, even at state level. The collective agreements concluded with trade unions (or other forms of worker representation), usually within production units, constitute the essential form of labour protection and provide most social security. Where there is no such agreement, guarantees depend on the company's personnel policy. In short, American legislation focuses on civil liberties rather than on labour law, on equality of opportunity and treatment rather than on solidarity in the distribution of income. Hence the recent tendency among Anglo-Saxon scholars wishing to strengthen solidarity to make the defence of workers' rights part of human rights.

The situation is very different in Western Europe, where social legislation applies to all units of production; sector collective agreements still have primacy and are often made obligatory, even in unrepresented companies, by extension. (See, for example, the article by Valérie Jadoul in this issue.) Wages and social costs are therefore not a factor of competition and the risks of social dumping more remote.

The price of social dialogue and its repercussions in terms of competition undoubtedly explain the highly conflictual nature of industrial relations in the United States and the amount of labour litigation.

The way in which American unions see their role highlights the contrast with the European social scene. Focused on the enterprise (or the establishment), their main aim until recently has been to defend the direct interests of those of the enterprise's workers who have joined the union and of other wage-earners in the unit of negotiation concerned.

In continental Europe, on the other hand, the notion of labour is reflected in

institutions that foster state intervention in economic and social policies. The public authorities meet with the social partners to discuss social policies in particular. Detailed social legislation is supplemented by social dialogue whose structure is essentially national and sectoral. The trade unions speak for all employed, unemployed and underemployed workers. They fiercely defend a sophisticated system of state social protection. The European social model, an expression of solidarity in the face of unemployment and poverty, may well be open to debate but it continues to set the continent apart from other parts of the world. Europeans are unwilling to accept, no matter what political power they vote into power, the phenomena of exclusion and extreme inequality. They want the State to remedy the negative human consequences of an excessively mechanical market economy and an overly painful process of globalization. Fear may be expressed about the threat this policy poses to European competitiveness, but European electors, as recent history as shown, continue to prefer it, albeit with minor adaptations.

### Should the law differentiate?

Those who counter the contention that the same standards must apply with the right to be different can provoke even greater misunderstandings in that everyone clings to their vision of social relations and the powerful tend to prevail.<sup>17</sup> Those who speak for some cultures often feel those cultures have been overlooked and invoke their specificity to distance themselves from a common rule.

Their position is not unfounded, but it also has limits: cultural identity encompasses the individual's belonging and bars him, by the risk of being seen as a traitor, from doubt, irony, reason – anything that could detach him from the collective matrix.<sup>18</sup> This ambivalence is characteristic of international labour law. It exhorts us to strike the best possible balance.

It is therefore important, as we have seen, for international labour standards to

be worded flexibly, so as to take account of the socio-economic specificities of States. The ILO Conventions also require, often explicitly, that account be taken of those specificities in the choice of means of giving effect to the instruments. There can be no flexibility, however, when an infraction is observed. *Dura lex sed lex*: a legal system is only credible if it guarantees the same methods of evaluation for all.

### A shared ethical framework

The opening of borders has telescoped cultures and been a learning experience for some, a source of instability for many. The quest for universal values, while more necessary, has stumbled on local traditions. The answer, initially, is to build a common ethical framework, one of ILO's goals since its inception.<sup>19</sup> ILO seeks to overcome the insecurity that remains at the core of work: labour market and job insecurity, income and occupational insecurity, employment insecurity arising from risks to life and health or discriminatory practices, insecurity in the defence of one's interests and collective representation.

Workers feel threatened by all these dangers largely because of their dependent situation: the legal subordination of wage-earners and economic dependency of many self-employed is compounded by fear of cultural subjugation. Foreign investment and other forms of globalization have promoted a third kind of subordination: the obligation to accept another culture. A Tunisian subcontractor confided at a recent meeting how difficult he found it to reconcile the code of conduct imposed by an Anglo-Saxon company with the rules of behaviour of a population steeped in tradition.

### Effective regulation

The first step is to prepare international rules that garner broad support among countries and their citizens. The second is effective execution of those rules, or support in more than words.

The vaster – geographically speaking – the authority of the bodies tasked with adopting the rules, the more numerous the obstacles to their tangible implementation. Indeed, the effectiveness of a rule is measured at the local level, at the level of the service giver and service taker. Hence the complexity of giving effect to labour regulations voted by an international organization: their implementation depends on the conviction and quality of the national authorities concerned. The degree to which they are imperative basically hinges on the determination and capacity of a majority of States to dictate, under threat of sanction, specific rules of social conduct.

Any manner of approach can be used to that end, from the mildest, which relies chiefly on persuasion and reason, to the harshest, which involves severe penalties for failure to discharge an obligation. The former comprises the conclusion of political undertakings, the adoption of economic measures, the launch of training and information initiatives and the preparation of “technical” (as opposed to “legal”) standards and practical guidelines. The latter relates to international treaties and agreements which, like the ILO Conventions, the States undertake to respect by the voluntary and sovereign act of ratification. Between these two extremes lie instruments that are less binding in nature: Recommendations, solemn declarations such as the Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998, resolutions adopted by the managing bodies of international organizations, model regulations and collections of practical guidelines. In some quarters this is referred to, somewhat ambiguously, as “soft law”. All the States have to do, in the best of cases, is explain to what extent they have taken account of the relevant provisions, which large corporations also turn to when they adopt codes of conduct unilaterally or in agreement with workers' associations.

## Choice in the means of legislating

Let us return to the law itself, i.e. the rules that make it possible to require a type of conduct under threat of sanction. A distinction is usually made between rules of conduct – which make it obligatory to act a certain way – and rules of organization, which attribute power; both are mandatory and legal in nature.<sup>20</sup> Reflections on doctrine have taken this classification a step further and currently set rules of procedure, which give some institutions a mandate to deliberate and find the best possible solution to a social problem, apart from rules of substance.<sup>21</sup> Rules of procedure reflect the reluctance of the national or international legislative authorities to rule on a matter of substance, because of its complexity or because they wish to remain neutral in the face of the range of interests involved: the decision is left to other players who are closer to the issue.

This distinction also occurs in international labour law, where standards are either “technical” or “programmatically” depending on the nature of the obligations they contain. The former have a specific technical content; they concern employment conditions broadly speaking and social services. They give rise to debate about the future of the legal protection of work and its adaptation to the economic imperatives of the day.

The programmatic standards are less controversial. Drawing on modern techniques of human resources management, they are content to set relatively general objectives for employment, vocational training, harmonious industrial relations, etc. The only obligations they contain are of means: the subject of the standard is obliged to do everything in its power to succeed (conduct certain activities, take certain initiatives, prepare and implement a project or programme) but can usually choose the method; there is no obligation to succeed, as in the case of an obligation of result. It must be emphasized that legislating in this way does not amount to “deregulating”, or to adopting a purely voluntarist approach that leaves the social players total freedom

to define their relations. Quite the contrary, contacts between the parties are part of a framework and strategy determined by binding rules, i.e. with threats of penalties in case of infringement.

This category comprises standards facilitating collective relations between the social players that, through their discussions and negotiations, help solve labour problems.

The means used to implement them are not all legal: definition of political projects, economic measures, training and information campaigns, recourse to “technical” (i.e. “non-legal”) regulations. When it comes to employment and vocational training, for example, these standards seek to make the activities of the public authorities more coherent and systematic;<sup>22</sup> they contain specific measures on the labour market and how to evaluate its effectiveness. In terms of employment conditions, the Protocol of 1990 to the Night Work (Women) Convention (Revised) 1948 (No. 89) authorizes<sup>23</sup> the social partners to conclude agreements derogating from the principle stipulated in the Convention and to set the terms and conditions of such derogations.

Supervising implementation of these standards gives rise to specific problems because the evaluation examines the methods employed more than the results obtained. Qualitative and even quantitative indicators would seem to be called for. This being said, when these standards confer an important role on the social partners, much depends on the balance of power between them. For the method to be effective, all the parties to the labour relations must have a reasonable possibility to act on a more or less equal footing. Were this not to be the case, the result could be greater inequality between them.

Clearly, programmatic standards are helpful for embracing a cultural dimension in international regulations. They provide the ideal means of applying universal principles in a specific context. They delegate to the national authorities or the social partners at different levels the task of giving effect to grand objectives established and agreed at the global level.

For example, the Labour Relations (Public Services) Convention, 1978 (No. 151) aims to regulate labour relations in the public service. In its preamble, however, it points not only to the diversity of political, social and economic systems among member States, but also to the differences in practice among them as to the respective functions of the institutions concerned (central, local and, as the case may be, federal authorities, state-owned undertakings and autonomous or semi-autonomous public bodies) and as to the nature of employment relationships. Indeed, the status of the public service reflects how each State views the role of the public authorities. This is why article 8 of the Convention leaves the choice to the States when it comes to the settlement of disputes arising in connection with the determination of terms and conditions of employment; it gives an overview of the most common practices in that regard (negotiations, independent and impartial machinery such as mediation, conciliation and arbitration), but imposes none of the mechanisms suggested.

Likewise, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) requires the ratifying countries to make a commitment of principle: to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. It leaves them free to choose methods “appropriate to national conditions and practice”,<sup>24</sup> but specifies the general direction to be taken: enact or repeal legislation; modify any administrative instructions or practices which are inconsistent with the policy; promote educational programmes to encourage it; ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under their direction; scrupulously pursue the principles of non-discrimination in respect of employment under the direct control of a national authority.

The Convention also stresses that the national authorities must seek the cooperation of employers’ and workers’ organ-

izations and other appropriate bodies in promoting the acceptance and observance of the policy. That concern to involve employers’ and workers’ organizations in the preparation and implementation of labour policy or its arrangements is to be found in many ILO Conventions, among them those dealing with occupational health, including the prevention of major industrial accidents,<sup>25</sup> the worst forms of child labour,<sup>26</sup> working hours (night work,<sup>27</sup> part-time work<sup>28</sup>), home work,<sup>29</sup> and employment (coordination of protection against unemployment and employment promotion,<sup>30</sup> status of private employment agencies<sup>31</sup>).

An exercise in globalization of the spirit, the international regulation of labour relations is a necessary but perilous undertaking: it is indispensable because the elimination of borders leads to internationalization of the law, and risky because the path to international regulation is rife with cultural and economic pitfalls, and mistrust waiting round every corner. It is easy for the sceptics to sneer about the shortcomings of acculturation. They must not overdo it if the aim is globality on a human scale. The system invented by the ILO has its defects and they are well known. It is nevertheless the most elaborate, and best accepted, response to the equally globalized social question.

The preceding pages have highlighted the legal procedures by which international labour law can take better account of economic and cultural variables. The ILO standards are designed to be incorporated into the domestic order of the member States by the process of ratification, or at least to influence that order if the States are not ready to make such a commitment. They serve as a basis for regional groups of States drafting social charters or other instruments, and for countries wishing to insert social provisions in their bilateral treaties.

Looking beyond interstate relations, the standards can serve as models for large corporations – mainly multinationals – drafting codes of conduct, for employers’ and workers’ organizations

engaged in a process of national or supra-national collective bargaining, and for the campaigns waged by activists from other social organizations. This is why it is so important to have legal instruments that are truly applicable in all cultures.

## Notes

- <sup>1</sup> Article 1, para. 1a).
- <sup>2</sup> Servais, J.-M. 2004. *Les normes internationales du travail* (Paris, LGDJ), para. 6 (English edition published by Kluwer in 2005).
- <sup>3</sup> Servais, J.-M. 1997. *Droits en synergie sur le travail* (Brussels, Bruylant), p. 28.
- <sup>4</sup> See Convention No. 98, 1949, on the right to organize and collective bargaining, articles 3 and 4, and Convention No. 149, 1977, on nursing personnel, article 7.
- <sup>5</sup> See Convention No. 175, 1994, on part-time work, article 10.
- <sup>6</sup> See Convention No. 169, 1989, on indigenous and tribal peoples, article 4.
- <sup>7</sup> See Convention No. 177, 1994, on home work, article 4.
- <sup>8</sup> See Convention No. 161, 1985, on occupational health services, articles 7 and 9, and Convention No. 181, 1997, on employment agencies, article 3.
- <sup>9</sup> See Convention No. 14, 1921, on weekly rest (industry), article 2, para. 3, and Convention No. 106, 1957, on weekly rest (commerce and offices), article 6. The latter provision stipulates that the traditions and customs of religious minorities shall, as far as possible, be respected. See also article 6 of the Night Work (Women) Convention, 1948 (No. 89), and para. 9 of the Working Conditions (Hotels and Restaurants) Recommendation, 1991 (No. 179).
- <sup>10</sup> Article 12, para. f. For further information, see J.-M. Servais, *Les normes internationales du travail*, op. cit., para. 772 to 781.
- <sup>11</sup> Paragraph 48.
- <sup>12</sup> Paragraphs 9 and 10.
- <sup>13</sup> Article 5; see also articles 8, 13, 17 and 30, and No. 35, 1930, on forced labour (indirect compulsion).
- <sup>14</sup> Article 1, para. 2b).
- <sup>15</sup> See T. L. Caraway, "Protective repression, international pressure and institutional design: explaining labor reform in Indonesia", *Studies in Comparative International Development*, fall 2004, Vol. 39, No. 3, pp. 28-49.
- <sup>16</sup> This is how culture is defined in *Webster's New World Dictionary*, 3rd College Edition, Simon & Schuster Inc., New York, 1994.
- <sup>17</sup> See, for example, R. Dore, *New forms and meanings at work in an increasingly globalized world* (ILO social policy lectures, Tokyo, 2003), Geneva, ILS, 2004, pp. 66-67; A. Supiot, "The labyrinth of human rights", *New Left Review*, May-June 2003, pp. 118-136. See also A. Supiot, *Homo Juridicus. Essai sur la fonction anthropologique du droit*, Paris, Seuil, 2005, in particular pp. 312 and ff. S.M. Jacoby, "Economics ideas and the labor market: origins of the Anglo-American model and prospects for global diffusion", in *Comp. Lab. Law Pol. Journal*, Vol. 25 (i), fall 2003, pp. 43-78.
- <sup>18</sup> Finkelkraut, A. 1987. *La défaite de la pensée* (Paris, Gallimard (NRF)), p. 165.
- <sup>19</sup> Daghistani, F. 2004. "In search of a common ethical framework", in D. Peccoud (ed.), *Philosophical and spiritual perspectives on decent work* (Geneva, ILO), pp. 150 ff.
- <sup>20</sup> François, L. 2001. *Le cap des tempêtes. Essai de microscopie du droit* (Paris, LGDJ; Brussels, Bruylant), p. 283.
- <sup>21</sup> See A. Lyon-Caen, "Droit du travail et procéduralisation", in J. de Munck, J. Lenoble and M. Molitor (eds.), *L'avenir de la concertation sociale en Europe*, Louvain, Centre de philosophie du droit (Catholic University of Louvain), 1995, Vol. II, pp. 176 ff; S. Deakin, *Renewing Labour Market Institutions* (ILO Social Policy Lectures, Budapest, 27-30 November 2001), Geneva, ILO (ILS), 2004, especially pp. 52-55; M. de Nanteuil-Miribel and M. Nachi, "Flexibility and security: what forms of political regulation", *Transfer*, Vol. 10(2), Summer 2004, pp. 309-311 and 313-314.
- <sup>22</sup> See articles 1 and 2 of ILO Convention No. 122, 1964, on employment policy, and articles 1 to 5 of the Convention No. 142, 1975, on human resources development.
- <sup>23</sup> Article 1 of the Protocol.
- <sup>24</sup> Articles 2 and 3.
- <sup>25</sup> Convention No. 161, 1985, on occupational health services, articles 3 and 4, and Convention No. 174, 1993, on the prevention of major industrial accidents, article 4.
- <sup>26</sup> Convention No. 182, 1999, on the worst forms of child labour, article 6.
- <sup>27</sup> Convention No. 171, 1990, on night work, article 10.
- <sup>28</sup> Convention No. 175, 1994, on part-time work, article 11.
- <sup>29</sup> Convention No. 177, 1996, on home work, article 3.
- <sup>30</sup> Convention No. 168, 1988, on employment promotion and protection against unemployment, article 3.
- <sup>31</sup> Convention No. 181, 1997, on private employment agencies, articles 3, 7 and 8.

# Soft law and international labour law

*International law, particularly in the labour field, intersects with various forms of social regulation, of both public and private origin, which may or may not be presented as having legal force. Several of these regulatory types are known as “soft law”. This term is applied to standard-setting processes that form the framework for relations between the actors, but without resorting to legal constraints, which popular opinion still often equates with judicial sanctions. What should be the ILO’s role in the linkage of the soft and hard standards set by international labour law emanating from both public and private actors?*

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The soft law phenomenon has intensified over the past 30 years. While flexible types of regulation were at first mainly a characteristic of international organizations’ activity, they have now also come to cover certain relations between States. Moreover, they are frequently used by non-State actors such as multinational corporations, trade unions, pressure groups and other non-governmental organizations (NGOs) to manage the international dimension of relations. The growth in soft forms of standard-setting, and the wide range of actors using them, calls for reflection on the role of this regulatory type within the present-day international legal system. What is the function of soft law in decentralized societies such as the international community, and what consequences does the proliferation of soft instruments imply for international labour law in particular?

## Legal constraint and soft law

Theory often measures the constraining force of the law by the availability of a sanction if the obligations flowing from it are breached. This representation over-rides the understanding of law and of soft forms of regulation. Seen in this light, “soft law” seems to be an oxymoron. It contradicts the very idea of law by embodying legal rules whose constraining force is either non-existent or ambiguous. And yet the absence of constraining force by no means prevents soft standards from being effective. So a dissonance arises between theory and practice.

Certain parameters may be drawn from doctrine, as a means of discovering what is generally meant by a legal rule devoid of constraining force. Soft law does not, it seems, impose precise rules of conduct,

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neither does it involve legal responsibility or even to cease or make amends for the prejudice caused to parties when it is breached. Unlike contractual or customary obligations, the execution of which can be imposed under constraint by a party asserting its rights, the violation of a soft standard would not, it appears, be subject to any sanction. Its implementation would remain voluntary and not actionable.<sup>1</sup> Finally, soft law is said to formulate imperfect legal obligations, perfection being measured in legal theory by the sanction available in the case of a violation.

Certain observers, who have no time for nuances, argue that all international legal standards are soft, since no public authority can apply sanctions if they are breached. But why this tendency to take the imperative out of standard-setting, so running the risk of bringing the whole of public law into discredit through this definition? Why is the legal sphere always regarded as being marked by the phenomenon of coercion? Are legal standards adopted with the sole aim of breaking people's will and obliging individuals to act in a certain way?

This last question must obviously be answered in the negative. Rather than being prohibitive, some standards provide a framework for the exercise of the actors' powers and rights. However, one is forced to conclude that people's superficial general impression of legal rules is that the law is coercitive, whereas no account is taken of its permissive potential. And the penal function of legal regulation often seems to be at the forefront in lawyers' minds, as well as in the thinking of the man in the street. Soft law causes apprehension because it cuts right across the centuries-old feeling that legal standards are hierarchical commandments and law is a matter of constraint.

Yet the element of constraint by no means constitutes the whole of the law. Whether hard or soft, and regardless of whether or not it is backed by sanctions, a legal standard is first and foremost a means of imparting an overall direction to individual behaviours within a given group.

## Formal soft law and material soft law

Most of the misunderstandings which fuel the controversies surrounding soft law arise because it is not specified whether the softness of the proposed standard itself is under discussion, or rather the elasticity of the instrument that embodies the standard. Confusion should be avoided by distinguishing the legal softness of the standard's contents from that of its standard-setting support. In the case of standards with an indeterminate injunctive structure, containing phrases such as "if States see fit" or "as may be deemed appropriate", the softness is in the substance of the proposition. In such cases, soft law is material and refers to the standard-setting density of the written formulation of the obligations provided for in an instrument which, on the other hand, may itself be hard. Flexible provisions are extremely frequent in treaties, and notably in international labour Conventions.<sup>2</sup> Despite their softness, their obligatory nature should not be called into question, as they are contained in an instrument of hard law.

Formal soft law, for its part, plays the role of a subsidiary category. It consists of the standard-setting instruments that are not listed in Article 38 of the Statute of the International Court of Justice (ICJ).<sup>3</sup> The softness of the resolutions of international organizations, declarations, concerted acts between States by gentleman's agreement only, of the ICJ's advisory opinions, the Recommendations of quasi-judicial monitoring mechanisms or the codes of conduct adopted by multinational corporations derives more from the juridical underpinning than from the substance of the standard-setting proposal, which may be very detailed. Formal soft law opens up the legal system to the presence and standard-setting activity of international organizations and atypical actors.

For some, the recognition of these flexible forms of regulation within the legal system raises the burning question of the binding force of the law. Some flexible standards are effective, even though they

do not derive from one of the procedures foreseen by the theory of the sources of international law, which are considered by jurists to be the sole generators of binding legal obligations. To the extent that they are, of themselves, incapable of conferring a binding value upon the standards that they vehiculate, elastic instruments used regularly in the practice of the international organizations have suffered from this conception of the elaboration of international standards. In this respect, the case of the ILO Recommendations, where they are perceived as the weakest link within the international organization's standard-setting system and the poor relations of the Conventions ratified by Member States, is striking.<sup>4</sup>

And yet at the outset, nobody could have foreseen the practice which introduced a hierarchy of the standard-setting instruments provided for in the ILO Constitution, and which consists of representing the Recommendations as accessory to the Conventions. Article 19(1) simply grants the International Labour Conference the power to pronounce in favour of an international Convention or else of a Recommendation when the object under consideration or one of its aspects does not lend itself to the immediate adoption of a Convention. So through its Constitution, the ILO had at its disposal two directive techniques instead of one for promoting its values and principles of social justice. The Recommendations fulfilled the vital function of "exploring social reforms", and of "experimental measures" in a field where economic and social facts are not easily captured within a pre-established juridical signification. Recommendations should make it possible to benefit from the experience of the many Member States. This approach counted on the progressive incorporation, by mimetism, of the standard-setting provisions adopted within the ILO.

In fact, the spirit of Article 19(1) of the ILO Constitution has been only partially followed within the Organization's practice. The Recommendations quickly fell victim to a hierarchical conception of their

relationship to the Conventions, the more so because the two were often adopted in tandem. This twinning practice, born of the wish to enable a small number of States that were socially more advanced than the majority to move towards standards going beyond the protection provided within their national law, paradoxically contributed to the banalization of the Recommendations. These proved to be "second-tier Conventions" which mopped up those provisions which the ILO constituents had seen fit to strip out of the Convention itself, or which reproduced the Conventions, but without their binding force.

In the case of material soft law, the softness does not derive from the instrument as seen in the light of the listing in Article 38 of the *Statute of the ICJ*, but from the substance of the standard. Hard law has always contained principles or dispositions that are flexible by definition. It is not uncommon to find within a treaty a rule conditioned by a phrase of the type "if the States deem it reasonable" or "necessary". Despite its flexibility, the disposition within the Convention is binding, and it is for this reason that it must be distinguished from formal soft law. It simply grants the State some room for manoeuvre in the exercise of its power. The freedom of action granted to the recipients of the standard by a soft provision may concern the means to be adopted in order to attain an objective which is otherwise rigorously set. Its obligatory nature is one of result. On the other hand, the objective may remain flexible while the obligation to behave in a certain way is rigidly set and is detailed.

The example of the Employment Policy Convention, 1964 (No. 122)<sup>5</sup> illustrates the flexibility of Convention provisions concerning employment policy. The Convention lays down that "with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely

chosen employment”<sup>6</sup>. The objective of the standard is broadly defined. Nonetheless, Article 2 imposes on States the conduct to be followed in elaborating national employment, by calling upon them to “decide on and keep under review, within the framework of a coordinated economic and social policy, the measures to be adopted for attaining the objectives specified” and to “take such steps as may be needed, including when appropriate the establishment of programmes, for the application of these measures”. The freedom of action accorded to States in this provision does not mean an absence of constraints concerning the conduct to be followed. The progressive achievement of rights, which characterizes the flexible provision, cannot be interpreted as implying the right to postpone indefinitely the efforts to be made. The existence of such efforts could be subject to examination by the supervisory mechanisms. In fact, the Committee of Experts on the Application of Conventions and Recommendations could verify the measures adopted by the Member States that have ratified the Employment Policy Convention. Persistent violations could, possibly, be subject to political monitoring within the Committee on the Application of Standards of the International Labour Conference.

Article 19(3) of the ILO Constitution encourages the International Labour Conference to apply the flexible directive technique when drawing up international labour standards: “In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different”.<sup>7</sup> It is therefore not unusual for the Conference to introduce flexible provisions within Conventions, adjusting them to realities in the different Member States. This may be a matter of flexibility in the scope of application. The limitation will be *ratione materiae* (e.g. the agricultural sector) or *ratione personae* (a category of workers). Flexibility

may be definitional.<sup>8</sup> It may also be structural, to the effect that certain parts of the Convention are optional and others obligatory. Depending on its national situation, a State that is unable to adopt a unified approach to the Convention may nonetheless select those parts that it wishes to see applied.

In the recent example of the Consolidated Maritime Convention,<sup>9</sup> flexibility takes on a new dimension, bearing witness to the dynamism of flexible regulatory modes. The Convention closely combines the two forms of standard-setting within one instrument. Hard is mixed with soft. Some criticisms have been expressed about this conceptual flexibility. Might not a hybrid standard-setting approach bring with it the risk of blurring the borderlines between international Conventions and Recommendations, so weakening the message sent out by these standards?

Certainly, the flexibility of the Consolidated Maritime Convention is innovative, but it is part of the long-standing ILO practice of using different types of international regulation to achieve a complex social objective. The phenomenon of soft law, whether formal or material, is no newcomer to the ILO. Right from the start, the Organization’s Constitution provided for flexibility as a directive technique in the elaboration of international standards appropriate to conditions in the different Member States. Although this method was encouraged, it was nevertheless the subject of constant debates about the binding force of international labour standards and their effectiveness. Since the end of the Cold War, will the calls for more flexibility within the ILO not end up by diminishing the whole body of international labour standards, as interpreted by the supervisory mechanisms? Is the aim to elude hard law?

In the past, the Employers’ Group constantly came down in favour of the flexible technique for elaborating international labour standards, as they advocated the adoption of Recommendations rather than Conventions. The employers’ position has scarcely changed at all over time. They

wish to replace the whole body of Conventions with a limited number of flexible instruments. For the Workers' Group, this position would lead to too much softness and the dissipation of the International Labour Code. On this point, was it not Wilfred Jenks who pointed out in another era that maximum flexibility would be attained by having no standards at all?

The demands of the Employers' Group did not fall on deaf ears, as the ILO Governing Body, between 1995 and 2002, examined the whole of the standards adopted by the Organization prior to 1985, except the fundamental and priority Conventions. In the context of globalization, the debates within the International Labour Conference would now do well to get back to the spirit of the Organization's Constitution, which provides for two complementary types of standard-setting, and to concentrate on the pragmatic linkage of flexible and hard standards.

### The private appropriation of regulatory means – The consequences for international labour law

The reconciliation of flexible and hard standards has been prompted by a particular challenge. The ILO is no longer the only one using soft law to elaborate international labour standards. Drawing upon an objectivist conception of international law, one that sets greater store by the function than the form of legal standards, flexible types of regulation are now being created by both public and private international actors. For these actors, the use of formal soft law is in fact often the only option, as the hard law channels are closed to them. So what role do flexible regulatory approaches play for the different international actors and what are the consequences of such multiple standard-setting for the international labour law elaborated within the framework of the ILO ever since its foundation in 1919?

### A. The function of soft law for the international actors

States often favour flexible modes of regulation within their international relations for reasons of commodity, on subjects which call for standard-setting action but whose complexity is not easily grasped by the formal sources of law. While feeling the need to cooperate, States may wish to elude legal responsibility and the supervisory mechanisms which sometimes monitor violations of a treaty's provisions.

By adopting flexible instruments, States may ultimately modify the rules of the juridical system and usher in a new *modus vivendi*. The international social order is then transformed. Soft law reinforces the heuristic method between States. A telling example of this is the use of the ILO Recommendations as a laboratory for national legislation. The initiators of a new standard keep an exit route open, until they see whether their peers are in turn going to adopt the behaviour suggested by the flexible standard. At this stage, they have not entered into any legal commitments and this situation facilitates national experimentation. From the actors' point of view, should soft law not then be seen as a ruse employed by the system in order to introduce essential legal modifications into a decentralized international society? It is certainly a progressive source, tending to lead international law into pastures new.

The promotional logic of the 1998 *ILO Declaration on Fundamental Principles and Rights at Work* plays an equivalent heuristic role, but in this case it calls upon the Organization to provide technical assistance to its Member States, with a view to ensuring that rights and fundamental principles are respected at work. "It is not improbable that these new forms of regulation have an educational and incentive value. They are based on the cooperation, accompaniment and assistance, particularly in technical matters, which are now indispensable for any assessment of the effectiveness of standards."<sup>10</sup>

Soft law works like a discreet social architect<sup>11</sup> by facilitating cooperation

between the international actors. Today, competence for the elaboration of international law is shared between the States, traditionally recognized as the sole possessors of a legal personality, the international organizations and the atypical actors.<sup>12</sup> Indeed, it was the international organizations which started the move towards flexible forms of regulation and which are still the centres of soft power *par excellence*. They profoundly altered the way in which international law is created and is presented to those subject to it. Right from the start of their activities, these organizations had to opt for other methods than hierarchical command in order to encourage international organization. They went on to develop a consistent juridical technique, aimed at persuading and not constraining their Member States to conduct themselves in line with the standards.

The artificial nature of a strict demarcation between juridical and pre-judicial obligations is manifest in the case of unratified ILO Conventions.<sup>13</sup> In theory, the Conventions are instruments of hard law and contain juridical obligations which have binding force. However, when they are not ratified, they undergo a kind of juridical disqualification which changes them into instruments of soft law. But despite this reduced status and the concomitant lack of binding force, Article 19(5)(e) of the *ILO Constitution* sets out a procedure for Member States to report to the Director-General of the International Labour Office on the state of their legislation and practice concerning the matter that is the subject of the unratified Convention. States are then under an obligation to explain to what extent they have followed up on any of the provisions in the Convention by legislative or administrative means, collective agreement or any other means, and to identify the difficulties that are preventing or delaying ratification.

## ***B. Consequences of soft law within international labour law***

So the flexible forms of regulation are part of the legal system and have variable effects. They may sometimes assist in the interpretation of standards, or else influence their effects. But this influence exercised by soft law upon hard law may serve either to raise or to lower respect for legal standards. Given the proliferation of flexible regulatory instruments, the latter scenario is often evoked. What are we to think of the fears raised of an instrumental use of flexible standards as a way of side-stepping or even dissolving hard law? Are the consequences of soft law necessarily bad for international labour law? Should the calls for more flexibility within the ILO be seen as an attempt to tone down international labour standards?

The strategy of toning down international labour law through the use of material soft law, i.e. softer and softer standards within the Conventions, has been denounced recently in connection with precarious work. A study of the clauses in three Conventions adopted successively during the 1990s shows a slide towards softness and a consequent lessening of the protection of workers' rights. The Part-Time Work Convention, 1994 (No. 175), stipulates that measures should be taken to ensure that part-time workers receive the same protection as full-time workers, while the Home Work Convention, 1996 (No. 177) provides for national policies on homeworking which, as far as possible and taking account of the particular characteristics of home work, promote equality of treatment between homeworkers and other wage-earners. The slide towards softness is very plain in the Private Employment Agencies Convention, 1997 (No.181), which abandons the aim of parity pursued by the preceding Conventions, and instead merely promotes adequate protection for workers employed by private employment agencies.

At the formal level, the slide towards softness was also denounced when the

International Labour Conference adopted the Declaration in 1998, in response to the challenges raised by a predominantly economic globalization. Since the adoption of this flexible regulatory instrument, Member States are under an obligation to respect, promote and implement, purely on the basis of their membership of the Organization and even if they have not ratified the relevant Conventions, the principles concerning the following fundamental rights: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

What the Declaration is reproached with is not only its flexibility but also its content and its possible substitution effect for hard standards within international labour law. Seen from this point of view, the Declaration is a Trojan horse inside the International Labour Code developed by the ILO since 1919. Critics say this new scheme of things shifts the emphasis towards the principles, rather than the rights, defined in the international Conventions. Indeed, a linkage between the principles and rights set out in the Declaration and the relevant Conventions was explicitly rejected during the negotiations leading up to its adoption. The spirit of the new set-up is a promotional approach which is quite distinct from the body of international labour standards as interpreted by the traditional ILO supervisory mechanisms.

Beyond this general slide into formal and material softness, the criticisms levelled at the ILO raise the issues of the sidestepping of the traditional supervisory mechanisms, with preference going instead to formless follow-up procedures and non-binding standards with no sanctions in case of violation. Contrary to hard law, the image immediately summoned up by the term “soft law” is the absence of supervisory mechanisms and the lack of any third party monitoring its application. However, this image does not

entirely correspond to reality, particularly within the ILO.

In addition to the procedures provided for under Article 19 of the ILO Constitution, as regards reporting on unratified Recommendations and Conventions, several instruments of formal soft law are also accompanied by follow-up procedures. Some find them formless in comparison with the traditional supervisory mechanisms attached to hard standards. Nonetheless, as for example in the follow-up elaborated for the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* of 1977, modified in 2000, flexible procedures do exist for flexible standards.

The discussions surrounding the adoption of the Declaration in 1998, and its impact on the practice of the international actors, undeniably illustrate an ambivalent approach to law within the ILO since the end of the Cold War. Among the western governments and the employers, there is a noticeable malaise about standards interpreted by the supervisory mechanisms, especially those developed on the right to strike by the Committee of Experts on the Application of Conventions and Recommendations and the Committee of Experts on the Application of Standards from the interpretation of Article 3 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). This Article provides that workers’ and employers’ organizations “shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes”. On the other hand, the workers’ side has been bidding up the hardness of law, to the detriment of its flexibility – a sort of legalistic inflation exemplified by the treatment of Recommendations as the poor relations of Conventions and by the lukewarm initial reactions in the debates on the adoption of the 1998 Declaration.

But one thing is for sure. The adoption of the 1998 Declaration and the technical cooperation which has subsequently been

developed have ensured wide publicity for the fundamental principles and rights at work, both inside and outside the ILO. A number of public initiatives have taken them on board – often in connection with free trade agreements.

If the linkage of flexible and hard standards needed for good worldwide governance was already a colossal task for the ILO in the context of public external initiatives, it is likely to be even more difficult in the case of private initiatives. Several codes of conduct adopted by multinational corporations refer to the principles and fundamental rights set out in the ILO Declaration. But the linkage has yet to be made. The selection of international standards to suit the private interests of a company and its staff, the multiplication of codes of conduct and their often deficient implementation in practice are issues that are quite rightly raised. More and more multinationals pick and choose between standards and then, in some cases, themselves make sure that the selected ones are applied. Multiple elaboration of standards paves the way for contradictory interpretations of the content of international labour standards and the implosion of the international labour code. Follow-up to these flexible standards can sometimes be established in parallel but private initiatives have seldom made it possible to verify the effectiveness of international labour standards on the ground.

This trend towards the dispersion of references brings with it the risk of diluting the international labour code, and the difficulties involved in making the linkage between flexible and hard standards are absolutely real. Might not the 1998 Declaration lead to a polarization between the hard standards and the soft ones?<sup>14</sup> Should it not be seen within a logic of a complementarity of means, with a view to ensuring greater respect for workers' rights?

## Conclusion

As its Constitution urged it to do, the ILO has long favoured the adoption of soft law as a standard-setting technique within international labour law. The new element these days is the establishment of a parallel system, the elaboration and implementation of principles and fundamental rights by public or private actors. The risk of diluting rights at work, as interpreted by the supervisory mechanisms ever since the founding of the ILO, is a real one – all the more so because the role of law in protecting workers seems to have become an issue since the end of the Cold War. What role should the ILO have in the linkage of the flexible and hard standards of international labour law, emanating from both public and private actors?

The Organization must do everything possible to integrate the soft standards emanating from outside actors. Just as the international actors have appropriated international labour standards, so the ILO must, in return, appropriate soft law and integrate it into the juridical system. Bridges must be built between flexible and hard standards and reference must be made to the Conventions and Recommendations as interpreted by the supervisory mechanisms since 1919. The revitalization of the international labour standards requires a harmonious linkage of flexible standards (Recommendations and Declarations) and hard ones (Conventions), as well as the promotion of the authority of the ILO supervisory mechanisms and of the interpretation that they have given to the standards since the early 1920s. At the political level, given the ideological cracks emerging between the constituents since the end of the Cold War, the debates within the ILO should get back to concentrating on the Organization's institutional mission and the spirit of its Constitution, so as to ponder the role of the international labour standards in ensuring the promotion and respect of workers' rights.

Why should the ILO be assigned a leading role in the linkage of flexible and hard standards within international labour

law? From what does it derive its authority? International organizations in general are privileged bodies within the synergistic dynamic of world governance and the linkage of flexible and hard standards in a decentralized international society. They facilitate the developing countries' participation in the creation and application of international standards. As well as having a public and universal character at the level of State representation, the ILO enables civil society actors to create and apply the international labour standards. Tripartite in its composition, it fosters democratic debate and the consolidation of the law-based State.

## Notes

<sup>1</sup> Marcelo Dias Varella, "La complexité croissante du système juridique international : certains problèmes de cohérence systémique", (2003-2), VI *Revue belge de droit international* 331, p. 358.

<sup>2</sup> This flexibility of juridical provisions is not unique to international law. Examples can be found in all legal systems: Jean Carbonnier, *Flexible droit : textes pour une sociologie du droit sans rigueur*, Paris, Librairie générale du droit et de la jurisprudence, 5th edition, 1983.

<sup>3</sup> Article 38 (1) reads as follows: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international Conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." Annex to the Charter of the United Nations, adopted on 26 June 1945. <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>

<sup>4</sup> The following reflections on the Recommendations are inspired by George P. Politakis and Kroum Markov, "Les recommandations internationales du travail : instruments mal exploités ou maillon faible du système normatif?", in Jean-Claude Javillier and Bernard Gernigon (ed.), *Les normes internationales du travail : un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, International Labour Office, Geneva, 2004, pp. 497-525.

<sup>5</sup> This is a priority Convention for the ILO. By April 2006, it had been ratified by 95 Member States: [www.ilo.org/ilolex](http://www.ilo.org/ilolex)

<sup>6</sup> Article 1(1) of Convention No. 122. Article 1(3) also encourages recourse to flexibility with reference to the national context: "The said policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices."

<sup>7</sup> This provision reflects the concerns of several Asian countries whose climate made the general application of the international labour standard difficult: George P. Politakis, "Deconstructing flexibility in International Labour Conventions", in J.-C. Javillier and B. Gernigon (ed.), op. cit., note 4, pp. 463-496.

<sup>8</sup> An example of definitional flexibility is Article 1(b) of the *Night Work Convention* (No. 171, 1990), which specifies that "the term *night worker* means an employed person whose work requires performance of a substantial number of hours of night work which exceeds a specified limit. This limit shall be fixed by the competent authority after consulting the most representative organizations of employers and workers or by collective agreements."

<sup>9</sup> The Consolidated Maritime Convention was adopted on 23 February 2006 at the 94th session (maritime) of the International Labour Conference in Geneva, with 314 votes in favour, none against and 4 abstentions. It groups within one single standard-setting instrument 38 Conventions and 30 Recommendations, as well as the fundamental principles set out in particular in the fundamental Conventions. It is innovative in combining hard and flexible provisions, by inserting into one part of the Convention something resembling a Recommendation. Also, it includes a simplified amendment procedure which permits the rapid updating of the technical provisions. Cleopatra Doumbia-Henry, "The Consolidated Maritime Labour Convention: A Marriage of the Traditional and the New", in J.-C. Javillier and B. Gernigon (eds.), op. cit., note 4, pp. 463-496.

<sup>10</sup> Isabelle Daugeireilh, "La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l'homme au travail : le contre-exemple des accords internationaux", in Isabelle Daugeireilh (ed.), *Mondialisation, travail et droits fondamentaux*, Brussels, Bruylant., 2005, pp. 231-263.

<sup>11</sup> This expression comes from G. Abi-Saab, "Eloge du 'droit assourdi'. Quelques réflexions sur le rôle de la soft law en droit international contemporain", in *Nouveaux itinéraires en droit. Hommage à François Rigaux*, Bruxelles, Bruylant, 1993, pp. 59-68.

<sup>12</sup> Atypical actors are so called in reference to the traditional legal doctrine that only States possess legal personality. Atypical actors are the NGOs and the multinational corporations, and some commentators place them within the broader category of international civil society. Sandra Szurek, "La

société civile internationale et l'élaboration du droit international", in Habib Gherari et Sandra Szurek (ed.), *L'émergence de la société civile internationale. Vers la privatisation du droit international?*, Paris, Pedone, 2003, pp. 49-75; p. 54.

<sup>13</sup> The *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969, similarly emphasizes the artificiality of a single juridical threshold. Article 18 provides for unratified Conventions to have direct juridical effect, by obliging the signatory State to refrain from acts which would defeat the object and purpose of a treaty. <http://web.archive.org/web/20050208040137/http://www.un.org/law/ilc/texts/treatfra.htm>

<sup>14</sup> Isabelle Daugareilh, "La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l'homme au travail : le contre-exemple des accords internationaux", in I. Daugareilh (ed.), *Mondialisation, travail et droits fondamentaux*, Bruxelles, Bruylant, L.G.D.J., 2005. Discussing the 1998 Declaration, Isabelle Daugareilh states (in French): "It is therefore the only international text which, concerning social responsibility, proposes linkages between soft law and hard law, tangible points of contact between private space and public space and, consequently, connections between private standards on social responsibility and public standards on fundamental rights."

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# International protection of collective bargaining – A difficult task

*Collective bargaining is an integral part of trade union rights. It is within the hard, unalterable core of freedom of association. Without it, that freedom would lose its meaning. But while international labour standards and the doctrine developed by the ILO supervisory bodies have done much to strengthen the global protection of bargaining freedom, much remains to be done if a kind of global legal status is to be achieved for what comes out of this bargaining – collective agreements.*

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Freedom of association has a key part to play in the constitutional system of the International Labour Organization. The ILO has contributed decisively to ensuring that freedom of association is incorporated into the universal catalogue of human rights and that trade unions are regarded not only as indispensable instruments for the improvement of labour conditions but also as an expression of working people's dignity, freedom and sphere of self-determination. Trade union freedom has become an essential component of a law-based democratic State. Today, respect for freedom of association is a useful yardstick for the level of democratic development and human rights recognition in a given country.

Freedom of association and the conception that trade unions are organizations promoting, defending and representing workers' interests have taken on universal value, even though national trade union structures, methods and culture may change and vary. Contributing to this universality are the international standards on freedom of association elaborated by the International Labour Organization, as well as the elaboration of a practice and "doctrine" of freedom of association by the relevant bodies within it, notably the Committee on Freedom of Association, the Committee of Experts and the Committee on the Application of Standards of the Conference.

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The present article makes reference to the comments of the ILO's Committee of Experts on the Application of Conventions and Recommendations and the recommendations of its Committee on Freedom of Association.

## The scope of freedom of association

Regarding the scope of freedom of association, these bodies have similar criteria which complement and enrich each other. This similarity is also reflected in the two reports already drawn up in connection with the Declaration on Fundamental Principles and Rights at Work, which was adopted in June 1998 by the International Labour Conference and which recognizes, as basic rights at the highest “political” level, the rights to freedom of association and collective bargaining.

The doctrinal and educational work performed by the ILO on the issue of freedom of association has had a marked influence on the various national jurisdictions. Based on interpretation of the much-ratified Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), a homogeneous body of principles and rules, with firm, clear, precise, commonly accepted criteria, has been created concerning the scope of freedom of association and of the obligations that it places both on public authorities and employers.

Although international labour standards do not aim at uniformity, and although national trade union systems correspond to different traditions and national constitutional systems vary greatly, the principles and rules derived from the Conventions and Recommendations, the Declaration and the ILO’s own Constitution regarding the “essential content” of freedom of association form a universal *ius gentium* which make it possible to determine, clearly and with certainty, the scope of the rights enjoyed by workers and their organizations, and also of States’ obligations as regards compliance with international labour standards on freedom of association. The follow-up and monitoring bodies within the ILO do not have a difficult task in this respect, as they can count on a clear, precise doctrine which is nonetheless adaptable to different situations and changing circumstances.

To a certain extent, the same goes for the right to strike. As such, it is not directly

and explicitly enshrined in the ILO instruments, but it has been recognized as a right derived from freedom of association and as a manifestation of trade unions’ specific right, as recognized in Convention No. 87, to carry out activities and draw up action programmes in their members’ defence. Among the activities that trade unions have a right to carry out is strike action which, when exercised “peacefully”, must be generally recognized as a trade union right.

Starting from this collective, trade union vision of the right to strike, both the Committee of Experts and the Committee on Freedom of Association, which are the competent bodies, have built up a very elaborate, consolidated doctrine on the right to strike, and this has greatly influenced national jurisdictions. From this doctrine may be safely deduced the scope of the right to strike, the formal and material requirements that may be placed upon it without rendering it impracticable, those enjoying it (with restrictions in the case of the armed forces and the police), the modalities for exercising it, the protection of the striking trade union and workers, or the specific limit on the maintenance of essential services and the restrictive understanding of which services are concerned.

The level of doctrinal certainty achieved by the ILO concerning freedom of association and the right to strike does not exist with respect to the right to collective bargaining. The concept of collective bargaining and the scope of the separate recognition of such a right is rather less clear, both in the ILO Conventions and Recommendations and in the Declaration on Fundamental Principles and Rights at Work, as also in the doctrine and practice of the Organization’s follow-up and monitoring bodies.

The reasons for this degree of imprecision on the subject of collective bargaining are partly intrinsic, deriving from the ambiguity of the expression “collective bargaining” itself, and partly extrinsic, deriving from the particular way in which collective bargaining is treated

separately from freedom of association. This treatment has not been particularly to the advantage of the right to collective bargaining.

### The right to collective bargaining

Collective bargaining is a social phenomenon, a manifestation of social autonomy which is not necessarily linked to a trade union protagonist, even though one of the main purposes of a trade union, as a collective organization, is to regulate working conditions, in a concerted way, by means of collective agreements.

The preparatory work on Convention No. 87 took this premise as its point of departure, and as the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) did not yet exist, the right to collective bargaining would have been deduced from the right to trade union action. The right to freedom of association already guarantees to the trade unions a right to negotiate freely with employers on the determination of working conditions, with a view to reaching collective agreements. However, the separation of the treatment of freedom of association and of collective bargaining in Conventions Nos. 87 and 98, possibly in an attempt to avoid tackling the subject of strikes, neither achieved this latter aim – as the right to strike was nonetheless held to derive directly from freedom of association – nor promoted a full, clear development of the right to collective bargaining. Moreover, this right is inseparable from the right to strike and from systems for resolving collective disputes, which receive the attention they deserve in Convention No. 98.

What is more, Convention No. 98 does not refer solely to collective bargaining. In fact, its main regulatory weight is in Article 1, which guarantees workers adequate protection against acts of anti-union discrimination, relegating the right to collective bargaining to second place as regards the “density” of regulation – in other words, its scope and the degree of protection it offers in comparison with the

strong, “hard” protection given to freedom of association.

Collective bargaining is part of the complex of collective labour rights having in common their basis in the collective guardianship of workers’ interests, and it forms part of the minimum, indispensable nucleus of freedom of association, without which that freedom would not be recognizable. A joint reading of Conventions Nos. 87 and 98 makes it possible to grasp the full complexity of the manifestations deriving from the enshrinement of the autonomous, collective guardianship of labour interests. However, such a reading does not resolve in every respect the question of the role to be assigned to negotiation and, above all, to collective agreements since, although the right to collective bargaining does not suppose a right to obtain a negotiated outcome but only a right to adopt instrumental behaviour such as may help to reach accords, these accords or collective agreements are the result to be hoped for, and the recognition itself of the right to collective bargaining corresponds to this.

The Committee on Freedom of Association has affirmed that an essential element of freedom of association is the right of trade unions to negotiate freely with employers through collective bargaining, and that the public authorities must abstain from any interference that might restrict this right or impede the legitimate exercise of it. Nonetheless, this idea has remained very diluted in the interpretation of Convention No. 87, which has emphasized the implications that freedom of association has for the ability to adopt such conduct and action as are necessary for achieving effective coalition. It has also remained very diluted in the interpretation of Convention No. 98, as regards using the framing of the right to collective autonomy as a possibility for generating rules applicable to labour contracts. The interpretation of Convention No. 98 has not made it possible to reflect either the importance of collective autonomy (concretely, the importance of collective agreements as a regulatory source of labour law) or the

particularities that require its protection and enshrinement, by virtue of its being such a regulatory source.

The inadequacy of Convention No. 98 is shown by the fact that it has had to be supplemented by other Conventions, notably the Labour Relations (Public Service) Convention, 1978 (No. 151) and, above all, the important but little-ratified Collective Bargaining Convention, 1981 (No. 154). But neither have these two instruments adequately resolved the issue of the content and scope of the right to collective bargaining and collective agreements.

This does not mean that the follow-up and monitoring bodies have not moved to firmly protect collective bargaining activity. On the contrary, they have in particular ensured the independence and effectiveness of trade unions as bargaining agents and their truly representative nature, preventing the negotiations from being falsified through the imposition, by the public authorities or employers themselves, of restrictions on certain representative trade unionists, whether through the abolition of trade union pluralism or the arbitrary choice of a single bargaining agent.

To guarantee that collective bargaining and collective agreements on working conditions are conducted with genuinely representative trade unions means, first and foremost, defending free trade unionism and genuine, unfalsified negotiation, but this strengthens unions' bargaining freedom more than it strengthens collective autonomy, particularly as regards anything going beyond the trade union sphere.

Convention No. 98, despite its title, does not openly recognize the right to collective bargaining, nor even collective bargaining freedom, although it does presuppose this. It requires only the taking of "measures appropriate to national conditions" to encourage and promote the development and use of collective negotiating procedures, and it puts the emphasis on the process itself, more than on its result, the agreement.

## Promoting the negotiating process

Encouraging negotiation does not necessarily imply any particular recognition of the effects of the agreement. This, from a juridical point of view, is what has caused the biggest problems within the national jurisdictions – integrating the bargaining power of unions and employers' organizations into a political and institutional context. Here, the law may play an active part in building these collective rules into the state provisions, particularly in the many legal systems whose rules on labour relations stem more from the law than from collective autonomy. The Convention does not contain any mandate for States to develop, shape, regulate and legally channel the freedom to bargain collectively. It does not even call for legislative intervention in order to develop and protect the exercise of the right to collective bargaining.

There is a striking contrast between the purely promotional vision of the negotiating process within Convention No. 98 and the contents of the Collective Agreements Recommendation, 1951 (No. 91), which refers to the classic standard-setting effect of collective agreements and to the precedence that they take over contracts of employment, setting out the binding nature *ultra partes* of an agreement, its unquashable effects in favour of individual autonomy, the application of the "most favourable interpretation" principle by safeguarding more favourable conditions in employment contracts etc.

A purely promotional view of collective bargaining is also reflected in Article 5 of Convention No. 154, which lays down that "measures adapted to national conditions shall be taken to promote collective bargaining". In addition, it sets out what those measures might be, whether in terms of their aims (that collective bargaining should be "made possible for all employers and all groups of workers in the branches of activity covered by this Convention" and that it should be "progressively extended to all matters") or of their means (the "establishment of rules

of procedure agreed between employers' and workers' organizations" and that "bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining", but without blocking the functioning of industrial relations systems in which collective bargaining takes place within the framework of voluntary systems of conciliation or arbitration).

Convention No. 154 refers solely to the regulation of the "collective bargaining process". It requires States to ensure that collective bargaining is not hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules, and that measures taken by public authorities to encourage and promote the development of collective bargaining are the subject of prior consultation and, whenever possible, agreement between public authorities and employers' and workers' organizations (Art. 7). It also stipulates that the measures taken "shall not be so conceived or applied as to hamper the freedom of collective bargaining" (Art. 8).

The national legislator is set a goal that is conditioned and restricted by what might be termed a principle of minimum intervention, a collective *laissez-faire* wary of any legal interventions that could imply limits on the exercise of the right to collective bargaining. Collective bargaining is thus seen, first and foremost, as a right to freedom, a substantive component of the free market economy, a "curb on curbs" by the public authorities, a sphere of autonomy – more precisely, of collective autonomy. Above all, the State must abstain from influencing or interfering with these negotiations.

Hence, the doctrine elaborated both by the Committee of Experts and by the Committee on Freedom of Association aims above all to protect the freedom to negotiate, so that the negotiation of collective agreements is not hampered, important subjects are not excluded from the potential content of such agreements, formal requirements are not imposed that might unreasonably jeopardize the viability of

an agreement, and there is no obligation to submit collective agreements for the authorities' approval nor any possibility for the authorities to annul or modify the contents of collective agreements. Even when collective bargaining has been influenced by temporary wage restraint policies, these limitations have been recognized as special conditions and restrictions.

Emphasis has been placed on the voluntary nature of bargaining, which cannot be imposed by those not party to the agreement, but without prejudice to the good faith that must reign during negotiations. This voluntariness also extends to the "auxiliary" or back-up mechanisms behind the negotiations. Reasonable time periods have been demanded for imposed conciliation and mediation procedures. In principle, compulsory arbitration has been rejected, although voluntary arbitration is accepted.

The handling of these conflict resolution systems, rooted as it is in the requirement of voluntariness and also the respect of freedom of association, means that it has not been possible to assign them the role that they ought to have in a "mature" industrial relations setting. Within such a setting, negotiation, consultation and mechanisms for the prevention and resolution of conflicts must be sufficiently articulated as manifestations of collective autonomy, and should complement and support each other. Collective autonomy should play a fundamental role in the conduct and autonomous solution of collective disputes, once the "joint" procedure of collective bargaining has broken down.

On the other hand, the negotiating procedure is, above all, a preliminary phase in achieving an agreement, and it is this collective agreement, as a product of collective bargaining, which produces and maintains juridical effect in labour relations and employment contracts. Nonetheless, Convention No. 98 does not oblige States to put at the bargaining partners' disposal an effective, binding collective bargaining system, nor does it require the establishment of legal rules recognizing the standard-setting effect of collective

agreements. Convention No. 154 alone – and then only concerning the regulation of the negotiating process – requires that collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules.

Although the Committee of Experts has stated that, since the aim of collective bargaining is to regulate working conditions through accords or agreements, such agreements should be binding and should take precedence unless employment contracts are more favourable, no doctrine exists on the efficacy of collective agreements, nor on the requirements for an effective collective bargaining system. Of course, the public authorities' respect of a collective agreement is imposed in order to prevent suspensions or derogations or to oblige the parties to renegotiate agreements that are already in force. However, concerning the juridical value of collective agreements and their relationship to employment contracts, the establishment of firm criteria has been avoided. This is due to the assumption that the relationship between employment contracts and collective agreements is treated differently in different countries and different collective bargaining systems. It is recognized that when the law accords the same status to individual contracts as to collective agreements, it neither promotes nor encourages collective bargaining and that the possibility of derogating from collective agreements, through individual covenants, is a matter that should be analysed case by case, by examining whether or not it is compatible with the agreements and the principles of freedom of association.

In sum, when looking at this topic, particularly from the point of view of the "promotion" of collective bargaining and not the protection of collective bargaining autonomy as a substantive component of the right to collective bargaining, the protection of collective agreements is better ensured vis-à-vis interventions by the public authorities than vis-à-vis individual bargaining autonomy.

## Protecting collective agreements

Convention No. 98 reflects a labour relations epoch in which more attention was given to disputes than to agreements or commitments, and this may explain the existence of a much more developed doctrine on the recognition of the freedom to negotiate than on the legal protection of the collective bargaining system. Nonetheless, a comparison of experiences shows that an indispensable means of promoting collective bargaining is to ensure its binding effect through legislation or state intervention which recognizes the outcome of the negotiations, respects the voluntary elements within agreements and ensures that they are effective within employment contracts.

In many national jurisdictions, the legislation on collective agreements plays a central role in the ordering, articulation and shaping of the labour relations system, guarantees the agreements' effectiveness and gives legal force to the social regulatory power of the trade union and employer organizations, although in so doing, it may circumscribe and orientate the development of collective autonomy, by establishing binding criteria for the validity and effectiveness of agreements. Without this legal framework, which ensures that the collective agreement is given effect, it would not be easy for the social power of the social partners to ensure its effectiveness.

This has given rise to a problem – that of the relationship between the law and collective agreements. This relationship has been particularly dynamic in recent times when, faced with the challenge of flexibility, national jurisdictions have been trying to assign new functions to collective agreements. They have done so by adjusting the balance within both the state-derived and the collective sources of labour law, and this rebalancing has implied a profound transformation of collective agreements. In many cases, they have ceased to be a "unilateral" instrument for the introduction of improvements "at the collective level" and have also become an instrument for facilitating wider margins of flexibility in the running of an enterprise.

Recent legal reforms have reduced legal regulatory levels and have established new forms of coordination, cooperation and the integration of the law and collective agreements, and have increased the scope for self-regulation, by reducing substantive legal regulation while at the same time increasing procedural legal regulation as regards collective bargaining processes. This has accentuated elements of management and bilateralism within collective agreements through open rules on the organization of work. The broadening out of the regulatory role of collective agreements, so that they establish more open, dynamic and adaptable norms, has implied a change in their functions, but also in the relationship between norms set by the State and those set collectively.

### Defining the collective agreement

International labour standards have had more difficulty than national legislation in adapting to the deep transformations taking place in production systems, labour relations systems and the role of collective bargaining. Having, amongst other things, concentrated more on the freedom to bargain than on its results, the monitoring bodies, although they recognize the usefulness of collective bargaining in solving the problems of rationalizing enterprises and increasing their efficiency, have been rather disconcerted to see how these aims are conditioned by legal measures that do not necessarily correspond to the principle of voluntary negotiation which inspires Convention No. 98.

Neither, on the other hand, has it been possible to come up with a clear, well-defined notion of what a collective agreement is, or of what distinguishes it from other instruments such as agreements resulting from consultation and information procedures, from dispute-settling arrangements or from social dialogue.

Convention No. 98 does not give a definition of "collective agreements" (nor, really, does Convention No. 154, although it does describe their composition and

purpose), but it does make it possible to deduce their essential elements, as it refers to the regulation of terms and conditions of employment by means of "collective agreements". Recommendation No. 91 does give a definition, but from a classic perspective which no longer corresponds at all to present-day realities. Moreover, while Convention No. 98 refers to "workers' organizations" as parties to collective agreements, Recommendation No. 91 also mentions, in the absence of such organizations, "the representatives of the workers duly elected and authorized by them", and, what is more, it assigns the competence to decide on this to national legislation.

In this way, the possibility of "collective" entities or representatives other than trade unions is recognized, as is the possibility of collective agreements separate from or outside of trade unions. For its part, Convention No. 154, in Art. 3, permits collective bargaining with workers' elected representatives provided that the existence of these representatives is not used to undermine the position of the workers' organizations concerned.

This lack of a definition of the actors and the possibility of collective bargaining outside the trade unions does not promote genuine, union-based collective bargaining. On the contrary, it opens the door to direct negotiations, and dangerous direct labour relations without trade unions, thus putting at risk the traditional methods and structures for worker representation and even collective bargaining itself. The Committee on Freedom of Association referred to this danger, but without too much emphasis, by stating that in "certain cases" direct negotiations between an enterprise and its workers may be to the detriment of the collective bargaining principle.

### Legislating collective bargaining

On the other hand, the ILO Conventions are neutral about the level of collective bargaining (enterprise, local, sectoral, national). This is a matter which, in principle, is left to the wishes of the contracting

parties and should not be decided by law, nor by the administrative judicial authorities. But more and more, in dividing up functions between the law and collective agreements, legislation assigns specific tasks to a given level of collective bargaining. In addition, the fairly widespread trend towards increasing enterprise-level collective bargaining is posing a problem which Convention No. 154 (and also the Workers' Representatives Convention, 1971, No. 135) foreshadows without resolving it – the relationship not between the elected representatives and the trade union representatives but between the outcomes of consultation and information systems, which may be reflected in enterprise-level agreements, and those of collective bargaining by trade unions.

This problem stems from the difficulty of drawing a line between collective bargaining proper and other processes of consultation and information, inasmuch as these materially lead to negotiations and even accords which influence the adoption of enterprise-level measures without achieving a formal collective agreement as properly defined. The fact that the content of many collective agreements centres mainly on the protection and maintenance of employment, rather than on working conditions, does complicate matters, also when it comes to deciding which is better for the workers – to preserve jobs or to maintain working conditions which may be unviable for the enterprise's future. National judiciaries are now facing this sensitive problem, upon which the ILO supervisory and monitoring bodies will also sooner or later have to pronounce.

Another complicating factor in the collective bargaining sphere is social dialogue, a tool counterpoised to that of collective bargaining proper. Social dialogue

attempts to influence economic and social policy decisions and legal reforms, even at the risk of accepting certain straitjackets on collective bargaining. Social dialogue positions itself outside collective bargaining and the culture of dispute. Contacts, consultations, exchanges of information and the quest for accords between governments, employers' organizations and trade unions on economic and social policy issues are also being promoted from within the ILO and are reflected in some of its promotional Conventions. These presuppose freedom of association and the right to collective bargaining, without which social dialogue could not exist. But social dialogue processes must not be confused with collective bargaining, nor can they substitute for it. However, the ILO instruments and the doctrine developed by its follow-up and monitoring bodies have not managed to establish clear borderlines between social dialogue and collective bargaining nor, above all, to rule on the legitimacy of the limitations that social dialogue is placing on collective bargaining.

To sum up, although both the ILO's Conventions and the doctrine established by its monitoring bodies have done much, at the international level, to protect the freedom to negotiate collectively, it still faces the considerable task, which is not an easy one, of determining what might be called an international collective bargaining status. The centrality of collective agreements within national industrial relations frameworks does not correspond to the centrality of collective agreements in the ILO's instruments and practice. These factors have, of course, ensured the basic freedoms which make genuine collective negotiation possible, so guaranteeing the effectiveness, within national systems, of the results of collective bargaining.

# Labour law and social partnership under pressure – The Belgian case

*When it comes to generating social law, Belgium's system of "concertation" between the social partners may be judged a long-term success. However, particularly since the 1980s, successive governments have kept this concertation on a short leash. All too often, they have based themselves on the analyses of institutions like the International Monetary Fund, whose social-mindedness is none too evident.*

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Belgium is a European State, born in 1830 after it declared its independence from the Netherlands. After several reforms of its structures, it is now a federal State made up of three Regions which, little by little, have acquired competence on matters such as employment policy, economic policy, environmental protection, housing, agriculture etc.

## The context

On 1 January 2005, Belgium had 10,445,852 inhabitants, of whom the majority (6,043,161) live in the Flemish region and speak Dutch. The rest of the population lives in the regions of Wallonia and of Brussels-Capital and are, for the most part either French-speaking (Wallonia and the Brussels-Capital region) or German-speaking (in the "Eastern Cantons").

Belgium's capital, Brussels, is also the seat of the Commission of the European Union. The Organization for Economic Cooperation and Development (OECD) puts the unionization rate among blue-collar workers at 56 per cent (in the year 2000). The Belgian Centre for Sociopolitical Research and Information (CRISP), for its part, puts the overall unionization rate in 2000 (for all wage and salary earners, ei-

ther currently in work or registered unemployed, plus pensioners and those on early retirement) at 76.16 per cent. The coverage rate for collective agreements is more than 90 per cent (OECD figures, 2000), while life expectancy for Belgians is 81.5 years for women and 75 for men – figures that are mainly attributed to a good level of social protection.

## A few pointers

In the nineteenth century, Belgium was a highly industrialized country (textiles, iron and steel, glass, coal-mining and metalworking), and a pioneer of mechanization and the geographical concentration of the productive apparatus. Working conditions and pay were worse than in the neighbouring countries. Since then, the structure of the country's economy and employment has profoundly altered, as it has shifted from an industrial society to a service-based one.

The protective social legislation currently enjoyed by workers employed on Belgian territory is mainly the result of:

- social struggles (worker revolts in 1886, strikes at the end of the First World War, strikes in 1936), the setting up of

the first trade unions and the massive influx into these unions at the end of the First World War

- the progressive reform of the electoral franchise which followed on from this and which brought the Belgian Labour Party (*Parti Ouvrier Belge* – the socialist party at that time) into parliament and subsequently into government
- the draft accord on social solidarity (1944) agreed by the underground “Employers’ and Workers’ Committee” – the outcome of these discussions between employers and workers’ representatives subsequently inspired the legislators to establish the Belgian system of concertation and social security.

### Structure of Belgian social concertation

The first “paritary commission” (bringing together employer and worker representatives from a particular sector, with parity of representation) was set up in 1919 in order to end the social conflicts raging at that time, and the first “national labour conference” of employers, workers and the State was held in 1936 following strikes for shorter hours and for paid annual leave. But the concertation system was not officially approved until 1945 (paritary commissions) and 1948, when a basic law on concertation was passed – the law on the organization of the economy.

Today, this law still governs the creation of bodies whose mission is essentially consultative. These bodies include the workplace councils – with equal representation of the employer, by employer-designated members of management, and of the workers, elected by them in the workplace-level social elections held every four years. Another such body is the Central Council of the Economy, whose basic mission is general consultation on the economic life of the country.

It is worth noting that the workplace councils have decision-making powers on

the in-house work regulations which govern, notably, work times and disciplinary sanctions. This law, supplemented by the 1952 law setting up the National Labour Council; the 1968 law on collective agreements and paritary commissions; and the creation of the High Council for Prevention and Protection at Work was to reform, institutionalize and generalize social concertation. The resulting Belgian model of social concertation now comprises a series of characteristics.

**A paritary structure.** Employer and union representatives meet in equal numbers at various levels: the National Labour Council at the “interprofessional” (i.e. cross-sectoral) level, the paritary commissions at the level of the various sectors of activity and the “committees for prevention and protection at work” (i.e. the health and safety committees) at the workplace level. At the workplace level, there is another form of trade union representation, the “trade union delegation”,<sup>1</sup> whose tasks include negotiating workplace-level collective agreements with the employer (so, in this particular case, the agreements are not reached within a paritary body) and defending workers in the case of individual disputes. The establishment of workplace councils, committees for prevention and protection at work and trade union delegations depends on the number of workers within the workplace.

**A recognition that the sector is the best level for concertation.** Today, there are about a hundred paritary commissions and some seventy paritary subcommissions. Within each, employers engaged in similar activities meet with an equal number of worker representatives from the same sector. Some paritary commissions are more active than others. They have concluded hundreds of collective agreements on such matters as working conditions and pay, the right to vocational regrading, training schemes, “time credits”,<sup>2</sup> sectoral modalities for wage indexation, the sectoral minimum wage, early retirement, job classifications, employer contributions to transport costs, and many more.

**Limitations on state intervention.** The freedom of negotiation of the social partners is recognized.

**Possible broader application of the agreements.** Subject to certain conditions, the State may be asked to make the collective agreements mandatory and so to widen their field of application. It should be added that the National Labour Council, which was originally purely consultative, was later assigned the functions of negotiating and concluding collective agreements at the national level. To date, 87 collective agreements have been signed at the “interprofessional” (national, cross-sectoral) level on subjects ranging from the cross-sectoral minimum wage, temporary lay-offs and emergency leave to the introduction of new working patterns or new technologies, early retirement, collective dismissals and outplacement. The National Labour Council also plays an important role in concertation at the international level, notably within the International Labour Organization (ILO) and the International Labour Conference as well as within the framework of European social dialogue (EU).

Alongside this more institutionalized form of concertation, a more informal type of negotiation has developed – the “interprofessional agreements”. These are a modern version of the old “National Labour Conferences”. Concluded (if any agreement is reached) within the “Group of 10” consisting of the top union and employer leaderships, the interprofessional agreements set, for a period of two years, the framework for the sectoral and/or enterprise-level negotiations that immediately follow them. The interprofessional agreements are not regulated by the law, even though one of them (and an important one at that – on the preventive safeguarding of competitiveness) does refer to the law. These agreements have, in fact, come to occupy the biggest space within social concertation. They deal with matters such as work times, workers’ travel expenses (between home and the workplace), maternity leave, the cross-sectoral minimum wage, early retirement (framework agree-

ment), “time credits” (framework agreement), vocational training etc.

As part of the draft agreement in 1944, the social security system and the bodies associated with it were reformed, and paritary (worker/employer) management of the scheme was entrenched once and for all. But the social partners’ involvement in running public institutions is by no means limited to the paritary control of social security bodies and to the framing of social law within the National Labour Council or the paritary commissions.

The unions and employers are also closely associated with the policies followed in these fields. Any government initiative in the social field generally has to be submitted, for an opinion, to the management committees of the public bodies concerned and to the National Labour Council, on which the social partners are represented. Nor are the social partners at all bashful about lobbying their respective friends in high governmental places – sometimes even while negotiations are in progress within the official concertation bodies. The social partners also sit on the benches of the labour courts and tribunals, alongside the professional magistrates.

Another crucial factor is the institutional devolution within Belgium in recent years. In particular, it means that the employment issue has been passed on to the Regions. Also, it has led to an increase in the number of forums for discussion between the social partners (through the creation of regional economic and social councils) and has multiplied the number of legislatures involved, although the federal State has kept control of labour law and unemployment legislation. This institutional situation has caused a bit of a stir among the country’s different communities – for instance, by sparking a debate about regional collective agreements.

Meanwhile, an effective public administration has been put in place to oil the wheels of social consultation. The chairpersons of the paritary commissions are public employees and their secretariats are run by the civil service. Social conciliators are also made available to the social

partners. In fact, the conciliators are often the chairs of paritary commissions. Civil servants are also often invited to take part, as experts, in the committees of the National Labour Council.

Although the first social inspection services were set up very rapidly – at the end of the nineteenth century – they nonetheless suffer from an acute lack of resources.

### The sources of Belgian labour law

As already mentioned, Belgian labour law is derived from various sources – sometimes legal or constitutional, sometimes rooted in negotiation.

Belgian legislation includes a provision establishing a hierarchy of labour law (Law of 5 December 1968 on collective labour agreements and paritary commissions, Art. 51). The hierarchy is as follows:

1. The law, in as far as its provisions are binding.
2. Collective labour agreements, where these have been made mandatory, and in the following order: National Labour Council, paritary commission, paritary subcommission.
3. Collective labour agreements that have not been made mandatory, but where the employer is a signatory or is affiliated to a signatory organization, and in the following order: National Labour Council, paritary commission, paritary subcommission and, finally, agreements concluded outside a paritary body (workplace agreements).
4. Individual written contracts (employment contracts).
5. Collective labour agreements concluded within a paritary body but not made mandatory, provided that the employer, although not a signatory or not affiliated to a signatory organization, is within the coverage of the paritary body within which the agreement has been concluded.
6. Work regulations.

7. The law in its suppletive provisions.
8. Individual verbal contracts (employment contracts).
9. Custom.

In addition, the case law created by the courts and tribunals is of considerable importance. Both the *Cour de cassation* (the highest court on the judicial side, empowered to overturn rulings if it holds them to be contrary to law, without regard to the merits of the case) and the *Cour d'arbitrage* (the constitutional court) have issued important rulings on social issues.

In this respect, the case law created by the *Cour de cassation* has sometimes been rather unfortunate. Although, in the past, this court did issue some basic rulings that are fundamental to the protection of workers (e.g. on the right to strike), some of its other judgements appear to have emptied the legal provisions of their content (protection of workers against unfair dismissal, disproportionate importance accorded to the way in which the parties qualify the contract).

Doctrine is also a source of inspiration for the courts, but in social law, it is unfortunately all too often the product of pro-employer jurists.

Finally, the international context is not neutral. While the European directives on workplace health and safety, enterprise restructuring and enterprise transfers have had a considerable impact on Belgian law, the incessant “benchmarking” of Belgium’s performance on flexibility and employability against that of neighbouring countries is often partial in both senses of the word. But these days, such performance-related benchmarking techniques very often form the basis of the Government’s employment policies and the resulting adjustments to the regulations.

## Some characteristic features of the Belgian system

### *The binding force of collective labour agreements*

A collective labour agreement is an agreement concluded between one or more organizations of workers and one or more organizations of employers or one or more employers. The purpose of such agreements is to determine the individual and collective relations between employers and workers at the enterprise, sectoral or cross-sectoral level, and also to set out the rights and obligations of the contracting parties.

Those necessarily bound by the agreement are: the employers who concluded it (in the case of enterprise-level agreements); employers who are members of the employers' organization that concluded it; employers who become party to the agreement and those who are members of an organization that has become party to it; and all the workers (unionized or not) of an employer who is bound by the agreement.

This means that an employment contract or a set of work regulations which, in part, runs counter to the collective agreement is, in part, null and void. However, provisions within the employment contract that are more favourable to the workers than those in the collective labour agreement do remain valid. Even when the agreement has expired, the modifications that it has implicitly made to the employment contract are maintained (theory of the incorporation of the collective agreement into the employment contract), but they lose their binding force. They can then be modified in such a way that they are less favourable to the workers.

Suppletively bound by the agreement are those employers who are not members of a signatory organization, and their workers, provided that the agreement is concluded within a paritary body (the National Labour Council or a paritary commission), that the employer is within the

purview of that paritary body and that the employer is within the field of application of the agreement. In this case, however, the employment contract may contain clauses that do not accord with the agreement.

As explained above, collective agreements may be concluded at various levels: the National Labour Council, which deals with cross-sectoral matters; the paritary commissions and subcommissions, which deal with sectoral matters; and the workplace (in which case the employer negotiates not with the workplace council but with the trade union delegation).

The agreements reached within the National Labour Council and the paritary commissions can have their field of application extended by an *Arrêté Royal*,<sup>3</sup> at the request of one of the contracting parties. This means that they will be binding on employers and workers who were, up to then, only suppletively bound. Moreover, for the *Cour de cassation*, an agreement that has been made mandatory by the King constitutes a law within the meaning of the judicial code. So a judicial ruling that runs counter to it can be appealed and possibly reversed. And non-respect of agreements that have been made mandatory is subject to penal sanctions. The future adoption of a draft code of social penal law is unlikely to change this.

It should be noted that sectoral and workplace-level negotiations are generally inspired by the content of the "inter-professional" (cross-sectoral) agreement that chronologically precedes them. If it has not been possible to reach an inter-professional agreement, the climate during the sectoral or workplace-level negotiations is tense and they often take longer, but it is rare for them not to reach a conclusion at this level.

If the coverage rate of the collective labour agreements is so high (more than 90 per cent), this is due in particular to the provisions just discussed, governing the field of application of these agreements. According to the OECD, the 10 per cent of workers not covered are in the informal sector or are outside the scope of normal employment contracts.

## Trade union rights

The Belgian legislature deliberately abstained from setting the parameters of the right to strike. When the legislation mentions it at all, it confines itself to specifying some particular aspect of the phenomenon, such as by:

- placing conciliation bodies at the disposal of the parties to the dispute (paritary commissions, social conciliators, the social inspectorate);
- ensuring that the strike does not compromise the meeting of certain vital needs of the population and does not cause irremediable damage to the means of production. The modalities are defined by the paritary commissions or, by default, the civil power. In practice, these provisions are rarely applied;
- stipulating the effects of the strike on entitlement to certain social benefits;
- prohibiting recourse to replacement contracts and temporary work in the case of a strike.

The right to strike was generally inferred from the law of 1948 on the performance of tasks in the general interest during peacetime, but since then, it has been proclaimed in certain international instruments ratified by Belgium: the UN's International Covenant on Economic, Social and Cultural Rights (19 December 1966) and the European Social Charter.

While the *Cour de Cassation* has confirmed that taking part in a strike is not, per se, an illicit act, the employers have been trying, for several years now, to get the courts to prohibit certain modalities or acts that are allegedly "separable" from the strike itself (picketing). According to them, such action is tantamount to assault and infringes on the property rights of the enterprise or the freedom to work of those workers who are prevented from entering the premises. The employers bring these cases by "unilateral request" (a preventive, exceptional and non-adversarial

procedure) and call for the disputed acts to cease, under pain of fines.

The authors of a study on the rulings issued during the trade union action of October 2005 conclude that, generally, the courts found that preventing those wishing to work, or third parties, from entering an enterprise did constitute assault, regardless of whether or not violence was used. Some judges even accepted "preventive" requests that did not cite any concrete grounds for supposing that assault "might" be committed. These rulings place considerable restrictions on the right to strike and are not compatible with the jurisprudence established by the ILO Committee on Freedom of Association and the European Committee of Social Rights, which monitors compliance with the European Social Charter.

In this respect, the mutual understanding reached by the social partners in 2002, in a bid to revive the effectiveness of the social conciliation processes and to prevent, among other things, overly hasty employer recourse to the courts, has been seriously strained. Moreover in 2005, the Minister of the Interior issued a circular which led some Governors<sup>4</sup> to ban certain acts that are inherent to the right to strike, under pain of penal sanctions. The provision invoked, unjustifiably in our view, is Article 406 of the Penal Code, which prohibits "malicious obstruction of traffic".

## Pay

Wage fixing, originally left up to collective bargaining is still, today, governed by the law of 26 July 1996 "on the promotion of employment and the preventive safeguarding of the competitiveness of enterprises". This law is undoubtedly the most striking example of State intervention in collective bargaining – apart from the pay freeze and the temporary suspension of index-linking decided by the government during the 1980s as part of a wage moderation policy.

This law also legitimizes recourse to "interprofessional" agreements, as it makes

explicit reference to them. Its purpose is to preventively keep Belgian wage developments in line with those in Belgium's main trading partners, namely France, Germany and the Netherlands. To that end, the Central Council of the Economy has the task of preparing an annual technical report on the maximum margins available for the evolution of wage costs. It bases its assessment on wage developments over the past two years and expected developments in wage costs over the next two years within the three reference countries.

On the basis of this technical report, the social interlocutors – or, if they fail to agree, the government – fix, for the period under negotiation (i.e. the two-year span of the interprofessional agreements), the maximum percentage increase in wage costs. This indicative (non-mandatory) maximum margin includes, as a minimum, wage indexation and increments due to seniority, age, normal promotions and individual changes of category as laid down in collective agreements. In principle, all wage-related entitlements are included in the margin, even the overall increase in nominal wage costs due to a reduction in working time.

## Recent developments

As we have seen, Belgian social law has been mainly a product of social concertation. This is true of the many juridical instruments developed and negotiated by the social partners (collective agreements concluded within the National Labour Council, the paritary commissions and the workplace, work regulations agreed within workplace councils where these exist, interprofessional agreements, etc.), but also of parliamentary or government initiatives since, by law, any initiative on social issues must be submitted to the National Labour Council and to the management committees of the public bodies in which the social partners are represented.

As far as the production of social law is concerned, the Belgian style of social concertation may, in the long run, be consid-

ered a success. However, particularly since the 1980s, social concertation has been strongly oriented by successive governments (for example, as regards wage fixing and, more recently, the drive to increase older workers' participation rate), whereas it was originally conceived as something that happened between two parties – the workers' representatives and the employers' representatives. The government sometimes justifies this strong-arming by its wish to "stimulate" the conclusion of "agreements" when social concertation breaks down. The most recent interprofessional negotiations and the 2005 push to raise the retirement age are no exceptions to this interventionist policy.

This state of affairs would not greatly bother any of the parties, and would still be fairly much in line with basic ILO principles, were it not for the fact that the government's thinking is often inspired by the views of certain international bodies such as the IMF and the OECD and by incessant benchmarking against other countries, thus calling into question the checks and balances achieved in Belgium.

It has to be said that intervention by Belgian governments has sometimes, over the past 25 years, tipped the balance towards one of the social partners, and this has had certain consequences for the evolution of social legislation and protection.

Finally, while in some countries, such as France, it is the unions who brandish the judicial weapon and interim injunctions against the employers (notably as regards checks on the quality of the information provided by employers in the case of restructuring), in Belgium, it is the employers who rule that particular roost by successfully asking judges to intervene in collective disputes.

In October 2005, the Belgian Federal Public Service for Employment, Labour and Social Concertation organized a seminar on *Social Dialogue in Belgium*. It pointed to a number of "new" parameters which the social partners absolutely had to take into account, including the globalization of the economy, the broader scope of the dossiers submitted to the

partners, the Europeanization of the social agenda, the politicization of social concertation, the mediatization of social concertation and the lack of vision in terms of “change management”.

And when it comes to labour conditions, the unions are having to face absentee employers (in other words, the employers are “elsewhere”), a continuing increase in the number of unemployed union members, the individualization of labour conditions combined with the conversion of fixed costs into variable costs (bonuses, stock options), and the almost total absence of trade union representation in small and medium-sized enterprises, which employ roughly 50 per cent of the workers in Belgium, as well as sustained government bids to make access to work more flexible (temping) and to give more weight to enterprise-level negotiations. In this context, given that negotiations (when they really happen at all) are becoming tripartite, the situation of the unions and the workers is sometimes untenable.

Meanwhile, as if to prove that Belgian concertation is alive and well, the top leaders of the employer and union organizations (the “Group of 10”) have just reached agreement on a declaration dealing at one and the same time with competitiveness

(corrective mechanism if the pay margin is exceeded), training, innovation and diversity in the workplace (an anti-discrimination measure).

The future of the Belgian social concertation model will no doubt depend on the ability of all the protagonists to (re)act, despite an extremely unfavourable context, but also in part on the attitude of future Belgian governments to this issue.

## Notes

<sup>1</sup> Throughout this article, the phrase “trade union delegation” is used in its precise Belgian sense, namely the official representation of a trade union within the workplace or enterprise. “Delegates” are workplace-level union representatives, roughly equivalent to shop stewards. – Ed.

<sup>2</sup> Under the “time credit” system, workers can opt to reduce or suspend their professional activities for a certain length of time, without ending their employment contracts. They therefore continue to enjoy the same degree of protection against dismissal and are entitled to go back to the same job or an equivalent one. During these career breaks, an “interruption grant” is paid by the unemployment insurance system. – Ed.

<sup>3</sup> An *Arrêté Royal* (Royal Order) is a federal decree governing the practical application of a law. – Ed.

<sup>4</sup> Each Belgian province is headed by a Governor – Ed.

## Trade unions and the law – An Australian overview

*For more than one and a half centuries, trade unions in all parts of the world have been able to ensure that improvements in peoples' working conditions are gradually built into labour legislation, securing legal rights for the workforce and their representatives. This body of legislation is now under threat in many countries. Sadly, Australia's Federal Government has taken the lead in this movement and has been found in breach of freedom of association by the ILO supervisory bodies. Yet the Australian case may also serve to highlight the strength, importance and effectiveness of the relationship between trade unions and labour lawyers in challenging the deregulation moves and seeing to it that workers' rights are not sacrificed on the altar of labour market flexibility.*

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Over the past three hundred years, trade unions have developed into a number of forms with very different political, economic and legal climates influencing both their development and their ability to defend and further the interests of their members.

The focus of this article is principally on the contemporary political and legal climate in Australia and in particular the way in which the federal legislative framework in place from time to time has impacted on the ability of trade unions in Australia to undertake what may be described as their core task, that of defending and furthering the interests of their members.<sup>1</sup> However, it is only since 1996 that this impact can be described as adverse. Prior to this time the federal legislative framework was generally supportive of trade unions through the provision of such rights as union preference, right of entry and the right to achieve comprehensive and binding awards.

Broadly defined, trade union rights encompass all the rights and freedoms which are essential for the existence, and the efficient and efficacious functioning of democratic trade unions in their role of defending and furthering the interests of their members. Of fundamental importance in this respect is freedom of association which requires that workers have the right to form their own trade unions or organizations and to join them freely with guarantees that these unions or organizations are able to function without interference from the public authorities. Rarely, however, have trade unions or other workers' organizations been able to function without interference from the public authorities. Such interference has manifested itself in various guises over time, including the incitement of public opposition to trade union formation or action and/or legislation that either renders trade union formation illegal, with concomitant severe penalties for attempting

to form and organize trade unions or that places severe restrictions on trade union activities. As the eighteenth-century capitalist economist Adam Smith noted in *The Wealth of Nations*:

[When workers combine] masters ... never cease to call aloud for the assistance of the civil magistrate, and the rigorous execution of those laws which have been enacted with so much severity against the combinations of servants, labourers and journeymen.<sup>2</sup>

It is axiomatic that the legislative environment in place from time to time in any given country will have a direct effect on both trade union formation and trade union activity.

### Australia – Trade unions prior to 1990

The events, factors and motivations giving rise to the system of compulsory conciliation and arbitration in Australia early last century have been thoroughly canvassed elsewhere.<sup>3</sup> Suffice to say for present purposes that the early 1890s was a turbulent period in Australia's history. This period was characterized by an economic crisis which constituted a severe depression by any standards, and by an unprecedented wave of industrial unrest. The trade union movement became involved in a series of major disputes which involved strike action in the maritime industry in 1890 encompassing a broad range of associations, including the marine officers, seaman carters, shearers, wharf labourers and coal miners, and others in support, strike action by miners in 1892 and by shearers in 1894. These strikes resulted in crippling defeats for the trade union movement. Hutson describes the strikes in this way:

[44] Each [strike] lasted a few months, but they were part of the general struggle between capital and labour as to who was to carry the main burden of the economic depression. It was fought with a fury and bitterness unknown before or since in Australia, for the employers made ruthless use of the state machinery which

they controlled...The strikes were represented as insurrection and treated as such, with the full force of troops, police, law courts, and pulpit brought to bear against the strikers. Anyone who dared to champion the cause of the workers got short shrift....<sup>4</sup>

One consequence of these momentous events was that they induced the trade union movement to move towards giving support to a system of compulsory conciliation and arbitration – that is, to endeavour to use the law as a means of trying to force employers to negotiate with them. While not all union leaders or union members agreed with this course of action, by the late 1890s it was clearly set in train and was buttressed by the fact that trade unions had moved to form the Labor Party which helped to overcome their distrust of the State and ultimately achieve workable and acceptable compulsory conciliation and arbitration legislation.<sup>5</sup>

The Commonwealth Conciliation and Arbitration Act 1904 (the C & A Act) established a Federal Court of Conciliation and Arbitration with a broad range of powers, including the power to make compulsory awards in settlement of industrial disputes that crossed the boundaries of the Australian States. Collective agreements arising from conciliated disputes could be registered and be binding as awards. Strikes, lockouts and the flouting of awards were subject to penalties. An important part of the legislative framework of compulsory conciliation and arbitration was the establishment of a registration system for organizations of employers and employees. Through registration these organizations obtained corporate status and official recognition as part of the federal industrial system, with the ability to initiate and/or be parties to industrial disputes. Over time the Court's powers of compulsory conciliation and arbitration came to be vested in an independent tribunal which has assumed various forms, with its present manifestation being the Australian Industrial Relations Commission (the AIRC).

A key factor in union support for the system of compulsory conciliation and

arbitration was that it secured basic organizational rights. As Rimmer has observed of the C & A Act:

An original object of the Act (deleted in 1996) was “to encourage the organisation of representative bodies of employers and employees and their registration under the Act”. Registered organisations were guaranteed the rights to compel employers to attend hearings, to observe awards, and for unionists to have preference in employment.<sup>6</sup>

The C & A Act guaranteed rights of union access to the workplace.

It is not surprising that with the passage of the C & A Act employers sought to make the legislation unworkable. According to Plowman the employers:

... attempted to frustrate the arbitration system by refusing to register their associations ... by establishing and having registered bogus unions ... by deliberately lengthening procedures and choking the Court with work ... and by using legal representation to increase costs to unions.<sup>7</sup>

But the employers’ most determined bid to undermine, and reduce the influence of, the federal system of compulsory conciliation and arbitration was by way of legal action. The employers mounted numerous legal challenges to the federal system which were highly successful in restricting the scope of federal conciliation and arbitration until 1913. While this legal strategy proved to be less successful after this time the conservative forces in Australian society continued their opposition to the federal system of compulsory conciliation and arbitration.<sup>8</sup>

In 1929 an attempt by the Bruce conservative federal government to remove itself from the field of industrial regulation resulted in not only defeat for the government at the ensuing election but also in Bruce losing his own seat of Flinders.

While some employers and conservative elements persisted in their calls for the abolition of the federal system after 1929, in reality they made little legislative

headway. Indeed, the majority of employers came to accept the system and by 1950, “the structure and functions of employers’ associations had come to reflect the needs of operating within the arbitration system.”<sup>9</sup>

Over time the federal system of compulsory conciliation and arbitration provided the means by which unions pursued their core task of defending and furthering the interests of their members with considerable success as evidenced by:

- the extension of federal tribunal and federal award coverage of the major industries in the Australian economy;
- the general adherence to, and compliance with, award obligations;
- the right to preference in employment for union members;
- the right of union representatives to enter workplaces for the purposes of organizing and recruitment and to ensure award compliance;
- the ability to improve conditions of employment in a range of areas including redundancy, termination of employment and parental leave through the prosecution of test cases in the federal tribunal.

The system and the rights and entitlements it bestowed on participants within it, particularly trade unions, remained largely intact until the election of conservative state governments in the early 1990s and the Howard conservative federal government in 1996.

### **Industrial relations from the early 1990s onwards**

The federal industrial system along with state industrial systems that were also premised on compulsory conciliation and arbitration started coming under sustained attack from the mid-1980s as the quest for greater labour market flexibility, efficiency, productivity and economic competitiveness (particularly international economic com-

petitiveness) gained pace. The early 1990s saw the increasing adoption of aggressive “individualisation” and “de-unionisation” strategies by some employers coupled with the introduction of “de-collectivist” labour laws by some conservative State governments. These laws were designed to wind back the legal rights that had traditionally been accorded to trade unions, to undermine collective bargaining and to encourage and foster an individualistic model of industrial relations based on freedom of choice and freedom of contract.<sup>10</sup>

At the federal level the Hawke and Keating Labor Governments sought to respond to these pressures:

... initially through the “award restructuring” and “structural efficiency” processes in the late 1980s; and then (when these processes proved insufficient), through the introduction of “enterprise bargaining” from the early 1990s.

While Labor’s enterprise bargaining reforms facilitated the desired shift towards an enterprise focus for workplace agreement-making, they contained two important safeguards for workers: first, agreements were subject to close scrutiny by the Australian Industrial Relations Commission (AIRC), to ensure fair treatment of employees in both the making and content of agreements; and secondly, enterprise agreements were subject to the “no-disadvantage” test which required that employees not be worse off compared with their terms and conditions under any relevant award or law. Further, enterprise or “certified” agreements had to be collective in nature, although, controversially, Labor’s 1993 reform legislation permitted the making of these agreements without the involvement of trade unions.<sup>11</sup>

Notwithstanding these reforms, the role of trade unions within the federal system, (although somewhat attenuated) still remained pivotal to the operation of the system.

## The Howard Government’s 1996 legislative reforms

Upon the election of the Howard conservative federal government to office in 1996 the pivotal and traditional role of trade unions came under the sort of overt and sustained attack which had typified the early years of the last century. Speaking at a Young Liberals Conference shortly before his election as Prime Minister, John Howard made clear his vision for “decollectivizing” the federal industrial relations system:

[T]he goals of meaningful reforms, more jobs and better higher wages, cannot be achieved unless the union monopoly over the bargaining processes in our industrial relations system is dismantled.<sup>12</sup>

It came as no surprise that the Howard Government immediately sought to take the process of decentralizing and deregulating the federal industrial system considerably further than its Labor predecessors.

The passage of the Workplace Relations and Other Legislation Amendment Act 1996 (the WROLA Act)<sup>13</sup> went some way towards achieving the professed aims of the Howard Government:

The Act stripped back the content of awards necessitating that unions protect workers’ entitlements by attempting to push award stipulations into enterprise agreements. It seriously curtailed the ability of the AIRC to intervene in industrial disputes and introduced hefty fines for unions taking “unprotected” action. The Act introduced individual Australian Workplace Agreements (AWAs) which excluded unions. A range of other changes in the Act made it more difficult for unions to access and to represent workers and easier for employers to choose whether, and to what extent, they would negotiate and bargain with the collective representatives of their workers. As such the Act has been identified as enshrining a “decollectivist” ethos in the regulation of employment. Another effect was that it signalled the diminution of formal and external regula-

tion of work and workplaces through awards and the intervention of the AIRC.<sup>14</sup>

In addition the Act contained an array of measures specifically aimed at removing or restricting the rights that trade unions had enjoyed in the federal system and destabilizing established union structures and patterns of union coverage primarily through the encouragement of competition between unions, expanding the rights of non-unionists. Such measures included:

... provisions for the creation of new “enterprise unions”, and for disaffected union members to “disamalgamate” from large industry unions. The monopoly representation rights that unions long held ... were weakened. Award and enterprise agreement provisions for “closed shops”, or other forms of union security, were banned. Union “rights of entry” for recruitment and compliance purposes were limited through the introduction of permit and notice requirements. Further, legal protections available to union members under the “freedom of association” provisions (such as protection from victimization) were also extended to non-members.<sup>15</sup>

The legislation was accompanied by an aggressive push by the Howard Government towards individualization of employment relations in the federal public service and the higher education sector through the offering of AWAs.

These legislative reforms were opposed by the Labor Party, the union movement and a range of other organizations and individuals. One such organization was the International Centre for Trade Union Rights (ICTUR). ICTUR is an international organization which is dedicated to defending and promoting the rights of trade unions and trade unionists throughout the world. In carrying out its activities ICTUR seeks recognition of, and adherence to, internationally accepted labour rights such as those embodied in Declarations of the United Nations (UN) and Conventions and Recommendations of the International Labour Organization (ILO). In 1993 ICTUR was recognized as an important,

independent international organization and was granted accredited status with both the UN and the ILO.

In a substantial submission to the Australian Senate Committee charged with the function of reviewing the Howard Government’s draft legislation, a panel of experts, assembled by the Australian National Committee of ICTUR, identified a range of areas where the proposed legislation was in serious breach of Australia’s international obligations. These obligations in respect of employment arise through a number of sources including the ILO Constitution, ILO Conventions and UN Declarations. Not surprisingly, the Howard Government chose to ignore such concerns. As a result, the ILO’s Committee of Experts has repeatedly found that the Howard Government’s 1996 legislation contravenes fundamental ILO Conventions on freedom of association and the right to bargain collectively.<sup>16</sup>

What impact did the 1996 legislative reforms have on union activity? Quite clearly the reforms created a more hostile industrial environment for trade unions characterized by an inability to maintain comprehensive award protection for members, given the limits placed on the award-making and dispute-resolution powers of the AIRC, diminished rights in respect of bargaining and access to workplaces and increased employer militancy particularly directed to efforts to individualize the employment relationship.

Thus far, trade unions and the trade union movement as a whole have responded to this increasingly hostile environment by putting in place a range of strategies including activist organizing strategies emphasizing renewal at the workplace,<sup>17</sup> and legal strategies, which are of particular interest in the context of this article.

Working closely with labour lawyers, unions have skilfully and creatively used the provisions of the Workplace Relations Act 1996, particularly the freedom of association provisions, to thwart employer restructuring and individualization strategies and protect the interest of their

members. In referring to the freedom of association provisions Forsyth and Sutherland write:

In a number of high-profile cases, unions have used the provisions to obtain interim injunctions, preventing employers from implementing strategies that could be shown to be “tainted” by impermissible anti-union or “de-collectivization” objectives. So, for example, the corporate restructure and subsequent termination of union members’ employment undertaken by Patrick Stevedores in the 1998 waterfront dispute fell foul of the freedom of association provisions; as did the outsourcing of home care functions by a local council; and attempts by the Commonwealth Bank to place its entire workforce on individual workplace agreements, and (a few years later) to create a subsidiary entity as a basis for individualizing employment relations in one of its business units.<sup>18</sup>

These cases serve to highlight the strength, importance and effectiveness of the relationship between unions and labour lawyers in Australia in terms of protecting the interests of workers. There can be little doubt that if the employers in the above cases had succeeded in implementing their respective restructuring and individualization strategies it would have emboldened other employers to pursue similar strategies designed to erode or remove the protections traditionally enjoyed by their employees.

But of course the existence and importance of the relationship between trade unions and labour lawyers is not confined to Australia. For example, the Australian National Committee of ICTUR was instrumental in establishing a Trade Union Rights Centre in Jakarta, Indonesia. This centre is largely staffed by labour lawyers who work closely with unions and trade unionists in Indonesia, in devising and implementing legal strategies designed to protect and promote the interests of workers which are all too often under attack from employer interests.

## The Howard Government’s 2005 legislative reforms

The “Work Choices” legislation enacted by the Federal Parliament in 2005<sup>19</sup> builds on the 1996 legislation and other policy measures pursued by the Howard Government that have restricted the activities and undermined the traditional legal rights of, and security previously enjoyed by, trade unions in Australia. The aggressive and unashamedly anti-union, anti-worker nature of the legislation (as briefly outlined below) is only likely to buttress the already strong relationship that exists between trade unions and labour lawyers in Australia, as creative legal strategies will need to be developed to meet this renewed assault on the interests of unions and workers in Australia.

It is not the intention of this article to deal with the reforms brought about by the “Work Choices” legislation in any great detail but to focus on the more salient anti-union, anti-worker aspects of it.

The “Work Choices” legislation seeks to close the door on many avenues for effective union organization and representation while at the same time encouraging and further facilitating the move towards the individualization and de-collectivization of employment relations in Australia.

Under the “Work Choices” legislation:

- the AIRC has been stripped of its compulsory conciliation and arbitration functions. It will no longer be empowered to deal with industrial disputes on anything other than a voluntary basis;
- the scope of awards is further attenuated with the removal of a raft of other matters that can be the subject of award regulation, thus further marginalizing the role of awards in collective agreement making;
- collective and individual agreements are no longer tested against the applicable award but a mere five minimum conditions of employment;
- the AIRC is no longer to have any role in vetting workplace agreements;

- the efficacy of collective agreements and awards is severely curtailed in that an individual employment agreement (AWA) will wholly displace the operation of a collective agreement and/or award;
- union right of entry to workplaces has been severely restricted;
- it is prohibited to include a range of matters in workplace agreements including trade union training leave, mandating union involvement in dispute resolution and providing a remedy for unfair dismissal. Any attempt to include such matters will result in substantial fines ranging up to AU\$33,000;
- significant and time-consuming obstacles have been placed in the way of a union wishing to take “protected” industrial action.

These further reforms are clearly designed to bolster the power and bargaining position of employers while at the same time weaken unions by further restricting their activities and undermining their traditional rights and structures. Collective bargaining will inevitably be undermined by the blatant encouragement of individualized agreement-making.

There can be little doubt, as ICTUR pointed out in its submission to the Australian Senate Committee charged with the function of reviewing the 2005 legislation, that the legislation has compounded Australia’s breaches of its international obligations and generate further criticism from the supervisory bodies of the ILO.

Unions and labour lawyers face a renewed challenge to ensure that the interests of workers continue to be protected as far as possible under the new legislation and not sacrificed on the altar of labour market flexibility, particularly given that the Howard Government has not been able to establish any proven link between labour market flexibility and increased productivity or employment creation.

## Notes

<sup>1</sup> This article does not canvass the legislative arrangements in place from time to time in the various Australian States.

<sup>2</sup> Smith, A. 1976. “An Inquiry into the Nature and Causes of the Wealth of Nations”, in R. H. Campbell and A. S. Skinner (eds.) (London, Oxford University Press), Vol. 1, p. 85.

<sup>3</sup> See Macintyre, S. and Mitchell, R. (eds.). 1989. *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration, 1890-1914* (Melbourne, Oxford University Press).

<sup>4</sup> Hutson, J. 1983. *Penal Colony to Penal Powers*, rev. ed. (Sydney, AMWSU).

<sup>5</sup> See Rimmer, M. 2004. “Unions and Arbitration”, in *The New Province For Law and Order*, J. Isaac and S. Mcintyre (eds.) (Melbourne, Cambridge University Press), p. 277.

<sup>6</sup> Rimmer, *ibid.*, pp. 281-282.

<sup>7</sup> Plowman, D. “Employers’ Associations and Compulsory Arbitration” in *The New Province For Law and Order*, J. Isaac and S. Mcintyre (eds.) *op. cit.*, p. 241.

<sup>8</sup> Plowman, *ibid.*, p. 244.

<sup>9</sup> Plowman, *ibid.*, p. 257.

<sup>10</sup> See generally: Deery, S. and Mitchell, R. (eds.) 1999. *Employment Relations: Individualisation and Union Exclusion – An International Study* (Sydney, The Federation Press).

<sup>11</sup> Forsyth, A. and Sutherland, C. 2006. “Collective Labour Relations under Siege: The Work Choices Legislation and Collective Bargaining”, in *19 Australian Journal of Labour Law* (forthcoming) (footnotes omitted).

<sup>12</sup> Cooper, R. 2005. “Life in the Old Dog Yet? ‘Deregulation’ and Trade Unionism in Australia”, in *Labour Market Deregulation – Rewriting the Rules* (The Federation Press, Sydney) p. 95.

<sup>13</sup> The WROLA Act substantially amended what was previously titled the *Industrial Relations Act 1988* including amending the name of that Act to the *Workplace Relations Act 1996*.

<sup>14</sup> Cooper, *op. cit.*, p. 95.

<sup>15</sup> Forsyth, A. and Sutherland, C. 2006. “From ‘Uncharted Seas’ to ‘Stormy Waters’: How Will Trade Unions Fare under the Work Choices Legislation?”, in *Economic and Labour Relations Review* (forthcoming).

<sup>16</sup> See, for example, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 86th Session, ILC, 1998, Report III (Part 1A), pp. 222-224.

<sup>17</sup> See generally: Forsyth, A. and Sutherland, C. “From ‘Uncharted Seas’”, *op. cit.*; Cooper, R., *op. cit.*

<sup>18</sup> Forsyth and Sutherland. *ibid.*, p. 16 (footnotes omitted).

<sup>19</sup> *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).



# The outlook for African labour law – Between the OHADA way and the World Bank recommendations

*The context within which labour law will be developing in Africa at the dawn of the twenty-first century is marked on the one hand by an attempt to achieve regional labour law uniformity, launched by the Organization for the Harmonization of Business Law in Africa (OHADA), and on the other by the new World Bank “conditionalities” aimed at flexibilizing – also in a uniform way – the whole body of provisions governing recruitment, working times and dismissals. Although their objectives may look similar – to facilitate economic growth and development – the main difference between the OHADA and World Bank initiatives is that the first seeks African economic and social cohesion, whereas the latter is promoting a predetermined economic model.*

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“The important thing is to be convinced that effective economic solidarity is a precondition for Africa’s economic and social development. But this solidarity ... cannot exist without the support of a relatively uniformized, relatively homogenized, sufficiently muscular juridical order.” These remarks, aimed at halting the effects of a double balkanization – “a political one, which the African States never wanted” and “a juridical one, for which they are themselves responsible” – were made 35 years ago by an eminent African lawyer.<sup>1</sup>

## OHADA or the quest for African juridical unity

And indeed, back in 1963, a proposal for a legal harmonization bureau had already been floated – the uniform codes and laws that it would have drafted were to have

been submitted to a Council of Justice Ministers and, after approval by Heads of State and a unanimous vote, they would have taken effect *ipso facto* in all the States. The founding of the Organization for the Harmonization of Business Law in Africa (OHADA) in 1993 under the Treaty of Port-Louis shows the ongoing nature of this ambition, and represents an achievement in the quest for African juridical unity.

OHADA has set itself the task of overcoming the juridical and judicial insecurity which exists in its Member States, so as to restore confidence among investors and economic operators and contribute to the emergence of a climate favourable to development. By so doing, OHADA is satisfying the requirements that are summed up by the concept of “good governance”, which includes a component on comforting the rule of law. Nor was there any lack of praise for the “remarkable dynamism”, “realism” and “political maturity” of those

African States – 17 to date<sup>2</sup> – which have united in order to harmonize their business law within this framework. They have fully “understood that an economic zone cannot really exist unless enterprises find everywhere, in all the countries of the region, *one single legality*, which is modern and which dynamizes and simplifies life for enterprises instead of hobbling them – a legality which preserves the fundamental civilizational values of the countries concerned”.<sup>3</sup> The mission assigned to OHADA is indeed in the spirit of what is known as “afro-realism”. Of course, the daringness of this initiative was certainly also noted, and is perhaps nowhere more clearly seen than in its ambition to regulate the field of labour relations!

It is important to state at the outset what OHADA is not – the umpteenth regional grouping on a continent already weighed down by their proliferation – and what it is – a tool for juridical uniformization, at the service of African regionalism. But only the content of this harmonized law can reveal to which kind of regionalism its members wish to contribute the powerful support of juridical integration. In this sense, the explicit inclusion, in Article 2 of the Treaty, of labour law among the aspects to be harmonized may possibly indicate the choice of a social dimension, embodied in a uniform “labour code”, this being characteristic of integration movements responding to political objectives (“deep integration”). On the other hand, it may simply be part of a commercial regionalization process, pursuing mainly economic aims (“shallow integration”). So what is at stake in the harmonization of labour law within the framework of OHADA is, as P. G. Pougoué puts it,<sup>4</sup> “the writing of a social and economic cohesion”. As it raises “the question of a social model”, it necessarily goes beyond the issue of business law in the narrowest sense. Thus, the organization is seen for what it really is – a vehicle for general juridical integration, covering the broad field of economic and social regulation. Obviously, recognizing this dimension, as the social actors in the region have not failed to do, entails widening the parameters of

the debate on the content itself, and indeed on the purpose of a future Uniform Act on labour law.

Despite its name, OHADA has set out to achieve the unification of law, and not merely its harmonization.<sup>5</sup> Article 10 of the Treaty leaves this in no doubt – Uniform Acts “are directly applicable and overriding in the Contracting States notwithstanding any conflict they may give rise to in respect of previous or subsequent enactment of domestic laws.” This direct effect is reinforced by Article 9, which divests the national executive bodies of their power of promulgation: no decree is needed for the Uniform Acts to take effect, and OHADA law automatically acquires the status of positive law within the internal order of the States. The precedence to be taken by the Acts over national law has been confirmed by the Organization’s Common Court of Justice and Arbitration.<sup>6</sup> A Uniform Act on labour law will therefore replace all or some of the provisions of the labour codes in each member country.

### *Is labour law harmonization desirable and feasible?*

In 1999, the Organization’s Council of Ministers officially placed labour law on its harmonization agenda. Aware of the “delicate and complex” nature of this subject, the Council instructed the Permanent Secretariat to “associate closely with the process of harmonization the Ministers with responsibility for Labour and the social partners of the States Parties”. In 2002, the Council of Ministers confirmed the need to adopt a Uniform Act on labour law, thereby launching the elaboration process for the first draft of an Act.

It should be emphasized here that nobody disputed the appropriateness of embarking on this work. The most that can be said is that a certain scepticism soon crept in when the exercise ran into difficulties. In the nature of things, it was a less easy task than those which had gone before it, as they had all concerned areas of business law well suited to a thoroughly technical

approach. But nowhere was its usefulness challenged in principle. Indeed, the harmonization of labour law is among the strategies recommended by the Plan of Action for Promotion of Employment and Poverty Alleviation. Adopted in 2004 by the African Union's employment summit in Ouagadougou, the plan advocates "harmonizing and coordinating labour legislation and investment codes in order to attract investors". It also seeks to "strengthen cooperation of regional economic communities to promote more economic opportunities through harmonization of labour laws and regulations, establishing mutual recognitions of training and skills development systems, business and investment opportunities".

While the scale of the task that the Organization has set itself in this field is undeniable, the feasibility study prepared for the ILO by Professor Béraud took a positive view of the project, concluding that an act in the field of labour law "could certainly cover a sufficiently coherent set of issues to make it a real uniform Labour Code" – even if it "seems difficult (for it) to present the same degree of imperative force on all the issues". Nonetheless, "the objectives assigned to OHADA by the Treaty of Port-Louis imply that, wherever possible, the highest degree of juridical integration should be sought".<sup>7</sup>

The "perimeters" to be given to the Uniform Act are indeed the central issue here, and this question should be resolved prior to any examination of the substantive draft. From this point of view, the issues of its scope *ratione materiae* and the intensity of the uniformization sought should be at the heart of the discussions if a Uniform Act is to be adopted that is both effective and juridically sound. The question should be raised of whether a project that attempts to encompass in detail the whole of the subject matter that is traditionally dealt with at national level can guarantee the legal certainties that the regional and foreign economic actors expect. Reflection must take place concerning the level of legal uniformization sought. Here, two approaches are possible.

One is to place greater emphasis, as the present draft already does, on recourse to the technique of referring back to national legal regulations on some points. The important thing here is to distinguish clearly between, on the one hand, points concerning the principles, orientations and essential elements of labour law, as laid down by the Uniform Act, and, on the other, peripheral issues or questions of implementation, which belong at the national level.

The other approach is to stop considering the level of uniformization in terms of scope, and instead to regard it as a hierarchy of standards. In that case, one would be moving towards the adoption of a Uniform Act on a body of "Fundamental Principles concerning Labour Law" to which the States Parties to the Treaty must commit. This core could, in particular, refer to the international labour standards, whether or not they have been ratified by all of the States Parties. Such an approach would make it possible to construct a Uniform Act that would be a pledge of progress by all of the OHADA States Parties. It would also have the advantage of keeping within the national sphere a portion of the power to regulate, and avoiding unwanted possible social and political consequences. And if new States with systems based on common law decided to join OHADA, a Uniform Act formulated in this way would not need to be revised later.

### *Social dialogue in OHADA*

However, it is on the conditions for the elaboration of uniform labour law that we wish to focus here. These have to do with the consequences that OHADA's system of governance has for the effective involvement of the labour relations actors.

The systematic participation of the social partners in the national consultations on the first draft of the Uniform Act on labour issues is an essential condition for ownership of the Uniform Act by its future users and thus for its effectiveness.

To be successful in practice, any such standard-setting construct does require that the actors directly concerned, both from government and from the workers' and employers' organizations, should be very closely associated with its elaboration. In the field of labour legislation, the juridical reliability and certainty which justify uniformization are themselves entirely dependent on the degree of legitimacy that will be enjoyed by the provisions adopted.

From the outset, it was clear that appropriate modalities would have to be found to reconcile the demands of tackling the subject of labour law with the institutional provisions of the treaty, which places the running of the Organization solely in the hands of the Ministers of Justice and Finance. The national texts, on the other hand, confer upon the Ministers with labour portfolios, and also upon the tripartite consultative bodies established by the Labour Codes, explicit responsibilities concerning labour issues. Recourse to the relevant consultative body is generally obligatory in the case of draft labour legislation. Chaired by the Minister of Labour, such bodies comprise the most representatives employers' and workers' organizations, and in some cases representatives of the Ministries of Justice and Finance. In many places over the past few years, these bodies, that had too often become inactive, have been systematically redynamized, with the support of, in particular, the ILO's Programme for the Promotion of Social Dialogue in French-speaking Africa (PRODIAF).

Granted, OHADA has launched a formula which consists of setting up in each State Party a national ad hoc committee established by the Ministry of Justice and composed of experts tasked with examining and preparing observations on the first drafts of Acts. However, it has to be admitted that "these committees, which are supposed to be the transmission belt between each Member State and the Permanent Secretariat, so as to take account of the different States' concerns and put a national stamp on the Uniform Acts, do

not function satisfactorily," within a system where "the totality of those entitled to take part in the elaboration of a law at the national level (Parliaments, the professional bodies concerned, the Economic and Social Committee etc.) are not systematically involved in the examination of draft Uniform Acts".<sup>8</sup>

So at the very least, involvement should be sought within the national framework of the exercise of the twin competences of the national OHADA committee and of the relevant consultative body.

As the 1990s demonstrated in the context of the processes for the revision of labour codes, the promotion of social dialogue is essential if a climate of confidence is to be established between all the actors concerned.<sup>9</sup> It even appears that the World Bank has explicitly recognized, in Africa, the value of this traditional ILO message.<sup>10</sup> Also, at a time when emphasis is being put on the absolute need for genuine participation by the social actors in the framing and implementation of policy,<sup>11</sup> it is inconceivable that attempts should be made to build a regional juridical space, intended as a substitute for domestic law, without duly consulting those most directly concerned.

In fact, it is impossible to build a regional legal edifice without involving its recipients and those to whom it will administer justice. Not to involve them would be to give the lie to the affirmation made by those selfsame States that "democracy requires the practice of dialogue at all levels, whether between citizens, between the social partners, between the political parties or between the State and civil society".<sup>12</sup>

### *Interim assessment*

Up to now, the conclusion has to be that, with some possible exceptions and despite some modest advances, the involvement of the main stakeholders remains unsatisfactory and deficient.

For one thing, cooperation – or even mere communication – between the Ministries of Justice and Finance, which are

the only ones represented on the Organization's Council of Ministers, and their opposite numbers in the labour ministries is still lacking in most cases, even though it was agreed back in 1999 that the labour ministries should be involved in this work. They clearly expressed their dissatisfaction at this state of affairs during the Labour Ministers' Forum on OHADA, held in N'Djamena in February 2005 by the African Regional Labour Administration Centre (CRADAT), and more recently on the fringes of the June 2006 session of the ILO International Labour Conference in Geneva. So it still seems essential that the States Parties should really get down to improving coordination and communication between the ministries that are OHADA's institutional interlocutors and the ministries with responsibility for labour, as the latter are technically those most directly concerned by this draft Uniform Act. As an instrument of regional integration, OHADA law in any case has a bearing on all areas of government policy, and the conditions under which it is framed are a litmus test of the coherency of the latter's formulation and implementation.

Held in January 2006 by the CRADAT and the ILO, a workshop on the draft Act showed that the full extent of OHADA's uniformization philosophy has not been understood by all representatives of labour administrations, some of whom still have a harmonization mindset which allows them to regard a Uniform Act as a non-binding charter. In fact a certain resistance, with a "sovereignist" edge to it, against the regional standard can be observed (it already exists within certain national jurisdictions concerning the acts currently in force), whereas the elaboration phase of the draft Act is in for a long haul and revised national codes are still being adopted within the OHADA area.

As for the social partners in the countries concerned, the capacities of their industrial relations systems have continued to benefit from a deliberate effort, during this period, to dynamize the existing social dialogue mechanisms or to

invent more productive ones, even if the old judgement that the partners are, on the whole, "weak, badly structured and poor"<sup>13</sup> is still all too true today. Consequently, the promotion of social dialogue at the national level has progressed, and the creation of dialogue structures is well on its way at the level of the regional economic communities CEMAC (Economic and Monetary Community in Central Africa) and UEMOA (West African Economic and Monetary Union).

Until now, both the employers' organizations and the trade unions have been taking a "wait and see" attitude, which has certainly been shaken at the workshops that it has been possible to hold in a number of countries, and at the meetings of national committees at the national and sub-regional levels,<sup>14</sup> but which has not yet given way to any real mobilization on an issue that is, after all, a major one for the future of industrial relations within the framework of the current "new regionalism". In particular, with a few rare exceptions such as that of the Central African employers grouped in UNIPACE, no position has been taken on this issue by the regional employer and union federations. Fortunately, however, a workshop for trade union leaders from the OHADA countries concerning the first draft of the harmonization project did lead, in May 2003, to the adoption of a memorandum<sup>15</sup> which clearly emphasized the need for the elaboration process to bear the stamp of social dialogue. Interestingly enough, the participants even expressed the wish that OHADA itself should acquire a tripartite dimension.... However, as regards the substantive options, no common position has yet been reached that goes beyond the national positions.

A coordination of positions, respectively within the employers' groups and within the workers' groups of the States Parties, will in any case have to precede the final stage of the elaboration process, or the holding of a plenary meeting of the national committees. In the meantime, a first draft should have been finalized by a group of experts.

In short, unless there is a space for de-liberation, the chances are that no common juridical space will be created to regulate labour relations. By concentrating its efforts on establishing a common labour regime, OHADA would be better able to counter the perception that its mechanisms “will scarcely be of interest to the great mass of people to whom justice is dispensed and (that it) is disingenuous, to say the least ... to see in it a tool for bringing populations out of the state ... of great material and moral misery with which they currently have to contend”<sup>16</sup>

The elaboration by OHADA of a Uniform Act on labour issues has the characteristics of a theme around which several ILO objectives could be grouped, such as support for processes of regional integration, the improved effectiveness and wider communication of juridical rules, a tripartite approach to the formulation of those rules, and stronger involvement of Labour Ministers in the governmental decision-making process on matters within their competence.

The ILO has set itself the task of working, with the countries concerned and OHADA, to ensure that harmonization will not turn into a hunt for the lowest common denominator in member countries’ legislations, but will represent an advance by enabling all to benefit from the experience and social gains of each.

In parallel to the work going on within OHADA, the World Bank is taking a renewed interest in labour law in Africa.

### **The World Bank or the quest for a model, flexible labour law**

Back in the 1990s, through the structural adjustment programmes and their conditionalities, the World Bank had already established itself as the main promoter in Africa of the flexibilization of the legal framework governing the labour market. A good many countries proceeded, within this context, to revise their labour codes and modernized, or more often than not flexibilized, the provisions governing job

placement, recruitment, the various types of employment contract, dismissals, night work by women, and collective labour relations.<sup>17</sup>

Although these days, development policies have evolved towards a double recognition of the fight against poverty as the ultimate aim of economic and social policy, and of the importance of effective participation by the national actors in the elaboration and implementation of policy, they seem to have had no influence on the terms of the debate on labour law, as approached by the World Bank.

Concerned solely about its economic effectiveness, the World Bank analysts have persisted in their one-dimensional reading of labour regulation, purely and simply overlooking the fact that labour law’s objective and *raison d’être* is to govern the individual and collective relations between workers and employers, so as to ensure a satisfactory balance between not only the economic interests but also the social and political interests of all concerned – employers, workers and governments.

### ***A unique analytical reference point: the Doing Business indicators***

Launched three years ago, the report *Doing Business*<sup>18</sup> rates countries each year on the basis, firstly, of the main regulations governing the creation and development of enterprises and, secondly, of the legislative reforms implemented. This business regulation index is composed of a number of indicators, of which some evaluate the rigidity of the provisions governing employment and, in particular, recruitment, dismissals and working hours.

As regards labour law, this report’s basic postulate, leaving no room for either nuances or discussion, is that certain regulations in these fields create such labour market rigidities that they prevent the development of enterprises and employment creation. The *Doing Business* indexes take no account of the fact that these regulations may correspond to specific organizational needs of national labour

markets or the need to ensure adequate protection and safety for workers, in addition to the measures taken to ensure that employers have the flexibilities they need. As the usefulness of labour law is evaluated purely in relation to the economic interests of one single category of recipient, rather than all of them together, any analysis derived from this method cannot be other than one-dimensional and therefore partial.

Nonetheless, despite all the criticisms that can levelled at it, this index has been designed to “give policymakers the ability to measure regulatory performance in comparison to other countries, learn from best practices globally, and prioritize reforms”. While the 2006 report was scathing in its conclusions about African countries, most of which were put at the bottom of the league, the 2007 report emphasizes African countries’ reform efforts.<sup>19</sup>

These conclusions will no doubt be used – in fact, they are already being used – to promote new revisions of legislation in countries where the Bank is supporting the implementation of poverty reduction strategy papers and, in particular, the “private sector development” side of the lending frameworks that go with them, namely the Poverty Reduction Support Credits (PRSCs).

### ***African labour law reforms subject to conditionalities again***

The PRSCs were introduced by the World Bank in 2001, to give financial support to the implementation of the national development plans contained in the poverty reduction strategy papers (PRSPs). While serving to establish a hierarchy of national priorities and identify the action to be taken, they also contain “triggers” which enable their implementation to be evaluated. Depending on the degree of realization, countries are classed in the “high”, “base” or “low” category, and this rating determines the amount of the future credits that will be granted to assist the fight against poverty.

So these reference points are, in fact, additional conditions which the national partners play very little part in determining. In most of the countries, the content and details of government commitments concerning specific policy measures and the loans as a whole have been little publicized – in marked contrast to the policy of transparency and consultation with national actors vaunted in the PRSPs. Some observers therefore feel that the conditions accompanying the PRSCs are in open contradiction to the principle of the national determination of economic and social policy, and they call for independent external reviews of the effects of these conditions on poverty reduction and the democratic ownership of political choices.<sup>20</sup> At the end of an independent evaluation, in 2004, of the progress achieved by the World Bank and the IMF regarding poverty reduction strategies, recommendations were drawn up to “reduce or eliminate uniform requirements, to encourage PRSPs to explore a wider range of policy options and to define clearer partnership frameworks for better accountability”.<sup>21</sup>

However, the “triggers” are still, at the time of writing, defined in terms of actions or reforms to be implemented. As regards labour law, these pointers are inevitably influenced by the conclusions of the *Doing Business* reports, the aim of which is precisely to identify the reforms judged to be necessary, including in the field of labour law. So it is no surprise to discover that the revision of legislation is among the PRSC “triggers”. This is the case for the PRSCs of Burkina Faso and Mozambique. For these two countries, poverty reduction support credits are conditioned in part by the revision of labour code provisions regarded as constraints that slow down economic development and employment creation.

In this regard, the report *Doing Business 2007* welcomes the stimulating effect on some 29 African countries of the conditionalities set by the International Development Association and the US Millennium Challenge Account. In 2003 and 2004 respectively, they set targets for reducing the time and cost of starting a business as

conditions for obtaining additional grant money. The lesson drawn from this by the report's authors is that "what gets measured gets done".<sup>22</sup> Taking that conclusion a step further, are we to understand that what doesn't get measured doesn't get done?

The fact that the business regulation index *Doing Business*, constructed on partial postulates inspired by neo-liberalism, is guiding labour law reforms recommended by the World Bank in the framework of the PRSCs is a good illustration, if any were needed, of what Claude Kwaku Akpokavie emphasized in *Labour Education*, 2004/1-2, No. 134-135, in terms similar to those used by a growing number of analysts and social partners, namely that the economic and social policies thus promoted have not evolved in any radical way towards a real focus on issues of equity.<sup>23</sup> To our knowledge, there are no indicators so far that measure, and thus promote, the social effectiveness of labour legislation in terms of equity.

So it seems that we should be preparing for a revival, over the coming months and years, of the debate on labour law flexibility in Africa – under the impulsion of the World Bank. The social partners should not only participate in that debate but should actually run it so that it moves beyond ideological conditioning and tackles, in a pragmatic, constructive and useful way, the real problems of the world of work and its actors in the context of the fight against poverty. That can only happen if everyone recognizes the *raison d'être* of labour law – in its economic, social and political dimensions – and thus the need to seek a balance that meets the divergent interests of labour law users as a whole, be they employers, workers or governments.

As they are still completely relevant, let us recall in the present context the recommendations made in 1997 by the representatives of governments, employers' organizations and trade unions at the seminar, organized jointly by the ILO and the World Bank in Abidjan, on labour law reform in French-speaking Africa, and more particularly this recommendation:

Labour law, while ensuring adequate protection for workers, should establish working conditions which encourage the workers to contribute to the interests of the enterprise, to the growth of its productivity and competitiveness. The appropriate regulation of labour relations and relations between the employer and the worker should, in its application, promote stability, predictability and mutual confidence, as well as just and equitable treatment, within employment relations. In any process of labour law reform, the social partners should seek a balance between the workers' need for equitable and appropriate protection and the enterprise's need for efficiency and productivity.<sup>24</sup>

## Notes

<sup>1</sup> M'Baye, K. 1971. "L'Unification du droit en Afrique", in *Revue Sénégalaise de Droit*, No. 10, pp. 67, 69.

<sup>2</sup> Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comores, Congo, Côte d'Ivoire, D.R. Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Niger, Senegal, Togo.

<sup>3</sup> Paillusseau, J. (ed.), Preface, "Le nouveau droit des affaires en Afrique – OHADA", Price Waterhouse Fidafrica, pp. 5-6.

<sup>4</sup> Pougoué, P.G. 2005. "Etude préparatoire sur l'harmonisation du droit du travail", in *Mémoire des leaders syndicaux des pays de l'OHADA sur l'avant-projet d'harmonisation du droit du travail*, ILO, Sub-Regional Office for Central Africa (April).

<sup>5</sup> The texts of the Treaty and Uniform Acts adopted, as well as the doctrine ("Ohadata") and jurisprudence, are available at [www.ohada.com](http://www.ohada.com). For a detailed introduction, see J. Issa-Sayegh and J. Lohoues-Oble, 2002, *Harmonisation du droit des affaires* (Brussels, Bruylant).

<sup>6</sup> Opinion No. 002/99/EP, on 13 October 1999.

<sup>7</sup> ILO. 2003. "Etude préalable à l'adoption d'un acte uniforme en droit du travail dans le cadre de l'OHADA", by J-M. Béraud, pp. 102-103.

<sup>8</sup> Lohoues-Oble. 2003. *Le Traité OHADA*, 5 ans après, Ohadata D-03-06, p. 11.

<sup>9</sup> ILO. 1997. "Séminaire sur le rôle des partenaires sociaux dans la révision des codes du travail (Abidjan, 9-11 avril 1997), Recommandations des participants", p. 18.

<sup>10</sup> "Any business plan requires developing a supportive, mutually accountable relationship among business, labor and government. Strong business associations and labor movements can help in this ... Cooperation and higher productivity are more likely when a consultative process ensures the effective participation of labor in policy formulation, or at least

its full understanding of the benefits.” (World Bank, 2000, *Can Africa Claim the 21<sup>st</sup> Century?*, p. 225).

<sup>11</sup> Buckley, G., Casale, G. 2006. “Social Dialogue and Poverty Reduction Strategies”, ILO.

<sup>12</sup> Declaration of Bamako (3 November 2000), para. 6, in *Parlements et Francophonie*, No. 111, p. 46.

<sup>13</sup> Etukudo, A. 1995. “Reflections on the role of African employers’ organizations in tripartism and social dialogue”, in *International Labour Review*, Vol. 134, No. 1, p. 70.

<sup>14</sup> In 2003, in Bamako for West Africa (July) et Libreville for Central Africa (September).

<sup>15</sup> *Mémorandum des leaders syndicaux des pays de l’OHADA*, see note 4.

<sup>16</sup> Vanderlinden, J. 2001. “‘Production pluraliste du droit’ et reconstruction de l’Etat africain?”, *Afrique contemporaine*, No. spécial, 3<sup>e</sup> trimestre, p. 89.

<sup>17</sup> For a comparative analysis, see ILO, 1995, *ILO/World Bank workshop on labour code reforms in Africa*, Working document, Washington DC, 16-17 Oct.

<sup>18</sup> The *Doing Business* reports for 2004, 2005 and 2006 are available at [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>19</sup> See the press release “Doing Business in 2006: African Nations Lag Behind in Efforts to Encourage Businesses through Regulatory Reforms”.

<sup>20</sup> ILO. 2005. *Decent Work and Poverty Reduction Strategies (PRS) – A reference manual for ILO staff and constituents*.

<sup>21</sup> ILO. 2005. *Decent Work and Poverty Reduction Strategies*, p. 6.2.

<sup>22</sup> *Doing Business 2007 – How to Reform*, Overview, p. 4 ff.

<sup>23</sup> For a more detailed analysis of these issues, see Claude Kwaku Akpokavie, 2004, “Unions and Poverty Reduction Strategy Papers – an Overview”, *Labour Education*, No. 134-135, 2004/1-2.

<sup>24</sup> World Bank. 1999. *La réforme du droit du travail en Afrique francophone, Actes du séminaire BIT-Banque mondiale* (eds. Corinne Vargha and Philipp English).



## Labour reform in Latin America

*The reforms of labour legislation in Latin America, centring on flexible employment contracts and reduced labour costs, have not led to the improvements in employment that they were supposed to produce. So the factors that were labelled as “rigidities” in the labour market may have been nothing of the kind. And other factors may be more crucial – debt, inequality and the levels of investment in human capital.*

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Latin America, particularly over the past fifteen years, has not escaped the classic legislative debate about protection and flexibility.<sup>1</sup> A whole series of reforms have been brought in, aimed both at a “downward” modification of some of the rights traditionally recognized by labour law and at reducing labour costs, as a sacrifice on the altar of greater competitiveness and job creation. On the other hand, some revisions of standards have consolidated or improved worker rights and have modernized institutions.

From the year 2000 onwards, following on to a certain extent from the reforms undertaken in some industrialized countries, the focus of the discussion shifted from general, radical reform to more closely defined topics. Thus, the regularization of undocumented workers, of those working “on the black”, and the search for fuller legal coverage of the various types of employment relationship, through contract types that take sufficient account of a changing market and of certain growing employment needs, are key themes of the national and international debate. In other words, the main theme now is employment creation, but as governments have been coming to recognize, the jobs created must meet certain criteria of relevance and quality. They should, in short, be what the ILO calls “decent work”.

In recent years, however, criticism of the excessively protectionist nature of standards in the region has been modified to a certain extent. These days, what tends to be said is that, although Latin American labour legislation is too regulatory and too extensive, this is not the main problem. Rather, its main failing is said to be rooted in the lack of effective implementation mechanisms, to the detriment of the workers whom it is supposed to protect.

While some writers maintain that the modifications made to labour legislation in the region are inadequate, a review of reform laws shows that, in fact, almost all the labour codes have undergone far-reaching modification, some of them several times over, as regards their basic institutions.<sup>2</sup> The exceptions are Costa Rica, Cuba, Honduras, Mexico and Uruguay,<sup>3</sup> although labour laws have been partially modified in these countries too, and reforms are underway.<sup>4</sup> Even those reforms that are seen as more protection-oriented (Brazil, Venezuela) show many signs of flexibility, aimed at adjusting labour relations to economic change.

Generally, these reforms deal only with the substantive aspects and there are no corresponding reforms in the structures and procedures in order to promote the implementation and effectiveness of standards, whether judicially or administratively. A

particular case in point is an Argentinian law dating from 2004 in which the reform of labour inspection, aimed at better internal structuring and operational efficiency, features prominently alongside substantive changes to individual and collective relationships. Other changes, apart from the reforms to the Codes of Procedure in Ecuador and Venezuela, are those adopted in Peru, and to a lesser extent in Brazil, Chile, Guatemala and Nicaragua.

If the overall promulgation rate for new labour laws has slowed down considerably over the past five years, the reforms have continued in a number of countries, sometimes in opposite directions, so demonstrating both the ineffectiveness of some initial changes – particularly as regards employment creation – and the need for corrections to reassert rights that were temporarily curbed.

Thus, revisions of labour legislation are controversial not only for technical reasons, but also for ideological, philosophical and political ones that have to do with the “model” of economic opening and its demands, as well as the need to preserve labour values and rights, irrespective of the economic model in force. Such controversies may, however, be complicated by differing levels of knowledge of the scope of the legislation and its reforms, or simply by the fact that discussants are thinking of different cases or time periods. Consequently, if dialogue is to lead to more uniform criteria and conclusions, a necessary condition is that the topic – in other words, the legislation and reforms to be debated – should be clearly defined.

It should be added that the reforms of individual and collective labour relations are not the only ones to have taken place in the region recently in the labour field. There have also been reforms of social security (health and pensions), vocational training, labour court procedures and, to a lesser extent, occupational health and safety.

## Main modifications to individual employment relations

As far as the regulation of individual relations is concerned, the main legislative changes concern the employment contract regime, working conditions and attempts to regulate labour relations in small and medium-sized enterprises while taking account of their specificities and needs.

### *The employment contract*

The beginning and the ending of an employment contract are the two key moments in the development of an individual employment relationship and, as such, two of the main focuses of the Latin American legislative reforms over the past decade.

Originally, a preference for contracts of unspecified duration was the rule in Latin American legislation, and historically this reflected the intentions of those binding themselves by a voluntary contract on labour issues. This preference was expressed in the presumption that the employment contract is for an indefinite period unless proof can be shown to the contrary,<sup>5</sup> and in the specification of the restricted circumstances in which durations limited by time or by the nature of the work were admissible.

Some employment contract reforms, mainly those in Argentina (in their initial phases), Colombia, Chile, Peru, and to a lesser degree Brazil and Panama, consisted in lightening or eliminating the rules that made contracts of unspecified duration the “preferred” form of employment contract. In these cases, the idea prevailed that fixed-term contracts are better adapted to firms’ requirements, permit labour mobility and considerably reduce labour costs.

In Peru, the most extreme case, new modalities have existed since 1991 for fixed-term contracts, which may be concluded for a very long duration. In fact, the regulations are detailed but permissive. Thus, a fixed-term contract authorized on the grounds of *market needs*, in order to provide for “economically conditioned” production

increases triggered by substantial variations in demand on the market, may have a duration of up to five years, which does not seem to accord with the “economically conditioned” aims assigned to it.

Reviewing these trends, it is difficult to measure with any precision the general impact of the new contract policies, both because of the speed with which they have been promulgated and due to the lack of reliable statistics. Nonetheless, in perhaps the most typical cases, Argentina and Peru, the labour effects are not particularly encouraging. In practice, the employment problems have not diminished. Rather, they have increased, even though the reforms were justified as a way of improving enterprises’ competitiveness by overcoming rigidities which “discouraged employment creation because they made dismissals more difficult or expensive”.

In this regard, it seems that the ends pursued through the massive use of fixed-term contracts are being called into question, from the point of view not only of social protection, but also of economic effectiveness. Moreover, frequent recourse to fixed-term contracts can create complications within firms’ own personnel management and discourage investment in worker training, thus inevitably limiting, over a certain period, firms’ technical capacities and the technical qualifications that international markets may require.

Some reforms authorize new types of subcontracting by third parties (labour outsourcing via cooperative societies), which may promote precarious contracts by casualizing the labour of those concerned. Certainly, in Peru the cooperative society members do not acquire the status of employees within the user enterprise, nor within the cooperatives of which they are partners.<sup>6</sup> Nonetheless, purely for social security purposes, a “legal fiction” means that they are regarded as dependent employees for the purposes of the private pension system, the national pension system and the health insurance scheme (Law 26504 of 8.7.95, Art. 15). From the juridical point of view at least, this device is certainly questionable.

On the other hand, modifications to the trial period, in the interests of flexibility, have not been used in the region to the same extent as in some European countries, where trial periods can even be set by collective agreement.

Generally, the maximum trial period in the region is on average between two months (Colombia, Guatemala, Honduras, Paraguay) and three months (Bolivia, Brazil, Ecuador, Panama), although as part of the region’s reforms, there does seem to be a trend towards extending it to six months.

The preference for contracts of unlimited duration has traditionally been complemented in the legislation by restrictions on the employer’s ability to terminate them, motivated by the principle of employment stability, which is enshrined in the constitutions of most countries in the region. In concrete terms, this principle translates into the protection of the worker against arbitrary or unjustified dismissal, or at least when there is no culpability on the worker’s part.

Because of its economic and social implications, the termination of the employment relationship at the employer’s initiative remains one of the most debated issues. For workers, protection against dismissal is a key element of the right to employment. For employers, strict regulation of terminations may limit the enterprise’s possibilities for adjusting to changing market situations and the demands of competitiveness.

Discussion about the termination of the employment contract is generally limited to the subject of dismissal – the annulment of the contract at the wish of the employer, as termination by mutual consent, at the worker’s wish or at the end of the contract’s duration, does not create specific problems because it does not generate additional costs for the enterprise. So the debate centres on the grounds for dismissal, the length of notice and the possible payment of financial compensation in lieu of notice, the indemnity owed by the employer for terminating the contract and, to a lesser extent, in the

role played by rehiring or reinstatement<sup>7</sup> which is less common.

Brazil was the first country to deregulate and flexibilize dismissal, from 1966 onwards, although this flexibility was mitigated by the Constitution of 1988, which decided that, although the early stages of the Length of Service Guarantee Fund (FGTS) were not to be regulated, unjustly dismissed workers were entitled, apart from the sums deposited in the FGTS, to an indemnity equivalent to 40 per cent of the funds accumulated and to 30 days' notice, at the employer's expense.

Later, various reforms opted for the creation of redundancy funds which lightened the compensation burden (Colombia) and the introduction of economic and structural grounds for dismissal, which permit lay-offs for objective causes (Chile, Peru), with fewer procedural requirements and lower compensation.

In Peru, further grounds for dismissal were added from 1991, including the termination of the employment relationship for objective reasons, for which a simplified compensation regime was provided, based on length of service, with a notice period of 30 days which may be replaced by compensation payments. In Argentina, since 1990, a number of laws have facilitated dismissals and simplified the procedure.

In Colombia, a so-called redundancy regime was established, the amount involved being calculable only at the end of the employment relationship.<sup>8</sup> The law created a system of annual redundancy deposits on individual interest-bearing accounts, which have been administered since 1993 by redundancy and pension funds. This avoids the need for the employer to pay redundancy compensation at the moment when the employment contract is terminated and, in principle, guarantees to the worker the coverage of the sums owed, even if the employer is insolvent.

In Ecuador, the indemnities owed in the case of unjust dismissal were increased in 1991, but up to then, they had been very modest: the increase brought them up to a minimum of three months' pay and, for

dismissal without notice, one week's pay per year of service. The indemnities for unjust dismissal were also increased in the Dominican Republic, El Salvador and Paraguay (which also slightly increased the notice), while in Venezuela a ceiling was imposed. In Nicaragua, the indemnities are the lowest in the region, namely one month's pay for each of the first three years and 20 days' pay for the others, with a ceiling of five months' pay.

As far as collective dismissals are concerned, the innovations have not been very far-reaching, amounting simply to a clearer definition of the grounds (Argentina, Chile, Panama, Peru), which are generally to do with economic and organizational matters.

### *Working conditions*

As well as the initiation and termination of the employment contract, the law regulates its content, although this does not prevent the parties from changing or adding to it, as long as they do not breach binding regulations. As part of the recent reforms, some changes are being made concerning worktimes, breaks and pay.

In general, the norms governing the working day do not differ greatly from one country to another in the region, probably because limits on daily working times have been a traditional social demand, long since enshrined in international standards. The great majority of the region's countries have maintained a legally defined eight-hour working day and 44-48-hour week, with variations set for the most part by collective agreements. Leisure time is 9 or 10 hours per day at a minimum.

Without prejudice to the legal requirements, there has been a tendency, in countries such as Argentina, Brazil, Chile, Colombia and Mexico, to increase the real number of hours worked (which in some sectors exceeds the legal working day). This may be linked to the low cost of overtime and the ineffectiveness of the control mechanisms.

It should be noted that in Argentina, collective agreements may establish methods of calculating the maximum working day on the basis of averages, "according to the characteristics of the activity concerned", thus allowing hours to be tallied by the week, the month or the year. In Brazil, the Constitution already permitted time-based compensation and the reduction of the working day, by mutual agreement or collective agreement. It also established a reduced working day of six hours in the case of discontinuous shifts, unless otherwise agreed through collective bargaining, which was certainly an interesting opening. The changes introduced in January 1998 complete the flexible system, bringing with them the legal recognition of flextime (already established in some collective agreements).

The law usually permits overtime, either in exceptional circumstances (Bolivia, Dominican Republic), or by establishing quantitative limits (Paraguay and Venezuela). The recent reforms have maintained certain guarantees of protection for the worker. However, recourse to overtime over and above legal limits is common practice.

As regards night work, there have been few innovative reforms and the tendency has been towards improvements in the percentage of the bonuses paid. Only in Paraguay is night work subject to administrative authorization.

In addition to the norms on working times, some reforms have extended annual leave entitlements, in line with international trends. Venezuela added to its 15 days of annual leave one day per year of service, up to a maximum of 30. Paraguay increased entitlements on the basis of progressive criteria linked to seniority. Guatemala made its 15-day minimum applicable to all sectors. Nonetheless, average annual leave entitlement across the region is 15-20 days, with a waiting period of 11 months or a year before leave becomes due.

Some reforms have opted to clarify the legal definition of a wage, in order to decide which concepts must be used as the basis for calculating dismissal indemnities

and other labour benefits as well as social security and vocational training contributions. In 1992, Panamanian legislation excluded "production bonuses and other allowances" from the definition of a wage, while the Ecuadorian reform in 1991 excluded from the same definition "usage, accommodation and benefits in kind".

The reforms in Colombia and Peru introduced the concept of a consolidated wage,<sup>9</sup> a formula which makes it possible to group together all the payments made for different reasons in the course of one year, with the exception of paid leave in Colombia and fringe benefits in Peru.

The minimum wage, another important aspect of the legislation, sets limits on the negotiating freedom of the partners, who may not agree rates below the minimum. The rare legal reforms concerning the minimum wage centre on concrete issues (Chile, Ecuador and the Dominican Republic).

### *Labour law and small enterprises*

Labour regulations for small enterprises are not homogeneous throughout the region and are at an early stage. Some reforms establish particular rules on working conditions, particularly daily worktimes, that are more supple and less burdensome for the employer. In particular, the law in Argentina not only eases the inscription and registration system for small enterprises, but also permits them to use temporary contracts without the still generally required prior entitlement or approval by collective agreement. On working conditions, it permits modification by collective agreement of the formalities, requirements, notices and opportunity for normal annual leave, subject to certain conditions, and this opens up space for almost unlimited flexibilization on this issue. The Brazilian law, meanwhile, although maintaining the obligation on the enterprise to control the leave periods of its employees, is nonetheless moving in the same direction, towards freeing small businesses from the obligation of communicating the

starting and finishing dates of holidays to the authorities.

The simplification of dismissal procedures is another possible objective of the reforms, the argument being that small enterprises need greater contractual leeway. In a number of countries, the general provisions on the termination of the employment relationship do not apply to small enterprises, for historical reasons or on the grounds of flexibility or simplification. In Latin America, there are some examples of this, but in none of them are the small enterprises exempted from the norms on dismissals themselves. Rather, exemptions centre on the effects of the dismissals, and above all on indemnities.

### **Main changes to collective labour relations**

The spread of democratic regimes throughout the region over the past two decades, together with the high ratification rate for ILO Conventions Nos. 87 and 98, respectively on freedom of association and the right to organize and to bargain collectively,<sup>10</sup> is certainly one of the reasons leading to a series of revisions on these issues in the region. On the other hand, the observations of the ILO Committee of Experts on the Application of Conventions and Recommendations concerning both Conventions have continued to be extensive and the number of complaints lodged with the Committee on Freedom of Association is still constantly increasing, showing that there are many difficulties in this area.

#### *Freedom of association*

Recent reforms in the field aim, generally and formally, to reinforce trade union rights, either by evolving the legislation or, as in the case of Chile, by an attempt to restore the previous system, a drive which is still only half-completed.

An exceptional case in the region is undoubtedly the process launched in

Venezuela by the adoption of the 1999 Constitution whose articles 95 and 293 respectively make provision for interference in trade unions' management, elections and free use of their funds. Other norms established since then continue down this part of interference.

Apart from the rescission of norms that restrict freedom of association (the case of El Salvador), some reforms tend towards facilitating the exercise of this right, either by reducing the minimum number of members required in order to found a union (El Salvador, Panama) or by simplifying the procedure for registering a union and obtaining a legal personality, up to and including a presumption that full registration has taken place if the authorities neither respond nor intervene (Colombia, El Salvador, Panama and Paraguay). Other reforms extend the right to organize to new categories of worker (agricultural workers in El Salvador; public service workers in Chile, Nicaragua and Panama), or facilitate the establishment of enterprise-based unions, or unions of casual or temporary workers, or of the self-employed (Peru), or sectoral unions (Chile), or foreign workers' unions (Panama and to a certain extent Colombia), or federations and confederations (Chile, El Salvador). And in Colombia, the recent reform of Law 584 abolishes controls on the trade unions' internal management.

However, the practical effects of these measures are far removed from their aims. In many countries, trade union organizations have been weakened and have low rates of membership. Is this situation a direct consequence of the reforms? It is difficult to explain this rather regressive effect in terms of a progressive reform. The fact is that the reforms have taken place in a context of stronger enterprise-level labour relations, and in countries where the proportion of SMEs is very high, they assume a major decline in the role of sectoral trade union organizations, and, therefore, a limit on the inclusion of workers in trade union structures. Indeed, fragmentation (the minimum number of people required to form a union is, on average, 20) makes

it more difficult to bring workers into an organization, as industrial unions do not exist in practice (and, indirectly, are limited by the legislation).

Another pending issue is the unionization of the public sector, which is generally ignored by the law, is poorly developed and is subject to practical limitations on its growth (as is the case in Bolivia, Colombia, El Salvador and Paraguay).

### *Collective bargaining*

Within this context, the regulation of collective bargaining has also been renewed and in some cases, this was the fruit of consensus or agreements between governments, workers and employers (in Argentina for example).

Reforms in this field cover mainly the following aspects: the development of collective bargaining, approval procedures, and the flexibilization of individual labour relations through negotiation.

Various reforms (Chile, Dominican Republic, Venezuela) tend to favour the development of collective bargaining, either through expansion of the number of issues that it can cover (Panama and Peru), or of its scope, including the public services (Argentina, Paraguay, Venezuela), or by broadening the coverage of so-called "unregulated bargaining" (Chile).

In addition, there have been attempts to consolidate collective bargaining as a trade union activity, and in some countries, groups of workers have been prohibited from bargaining collectively when a trade union is available to do so (Costa Rica, El Salvador). In Peru, Ecuador and Colombia, on the other hand, the law does permit collective agreements with non-unionized workers and, in Colombia since 1990, collective pacts (agreements without trade union participation) have increased to around 10 per cent of the total, while collective agreements have decreased in proportion.

Some reforms emphasize the role of collective bargaining in regulating employment contracts, including by means

of clauses which alter the legal minimum provisions or reduce workers' benefits.

### *Disputes – and dispute prevention or resolution*

The meagre reforms of recent years also seem to confirm a trend towards less state intervention in disputes. These reforms do refer both to the issue of strikes and to the mechanisms for preventing and resolving collective disputes.

In the new norms, more leeway is given in regulating the concept of strikes and the procedures for strikes (for instance, in Chile, Colombia and Nicaragua), including public service strikes and solidarity strikes. At the same time, some legislations do deal with the exercise of this right, either through a requirement to give notice (Paraguay), or by setting a time period for the declaration of a strike, or by prescribing a maximum duration of 60 days (Colombia). There are also some reforms which prohibit or limit strikes in essential services, and which provide for a minimum service in the case of a strike.

Some new legislations deal with mechanisms relating to disputes, particularly conciliation and arbitration, whether voluntary or compulsory (Argentina, Chile, Peru).

### **Conclusions**

Looking back over the labour legislation produced in the past decade, it is possible to draw some conclusions about the reforms and their scope.

Firstly, there have been reforms in most of the Latin American countries, to a greater or lesser extent and in different forms.

In many of the reforms, the influence of an *external factor* may have prevailed – for example, the conditionalities for loans or assistance from the international financial institutions, or the comments through which the ILO Committee of Experts on the Application of Conventions

and Recommendations requests a Member State to bring its legislation into line with such and such a Convention that it has ratified.

Secondly, behind some reforms there is the intention of flexibilizing employment relationships. Thus, Panama sought to “ensure that capital receives a fair return on its investments”, whereas in the Code of 1971, the aim was to “establish special State protection to the benefit of the workers”. And the preamble to the Colombian reform states that “the modernization of the economy makes it necessary for the labour system to become more flexible, in order to ensure that our products are more competitive, to promote investment and to increase the creation of employment...”

Thirdly, one of the main concerns guiding the most important reforms has been to promote employment. Starting from the assumption that the traditional employment contract set-up and the costs associated with dismissals are rigid and expensive, and so discourage employment, schemes have been devised to simplify the initiation and termination of contracts and reduce wage costs, including indemnities for dismissal. Nonetheless, more flexible contracts and lower costs have not brought about growth in waged employment, any more than have the structural reforms that inspired them.

Experience should lead to new thinking about the possible relationship between labour legislation and employment creation. It is a basic legal tenet that the law should take great account of the social reality that it regulates, so in this case all the efforts made to constantly adapt labour legislation to the reality of relations between employers and workers may be legitimate, provided that they do not entail sacrificing the principles and values on which this law has been based. However, it does not look as if labour standards are among the variables that put a brake on employment in Latin America, or at least not at the same level as elements like insufficient investment, external debt, misaligned currencies, political problems,

violence, poverty and inequality, together with limitations on the creation of technology and modern enterprises and deficiencies in vocational training.

Fourthly, one aim of the reform may in some cases have been to strengthen the position of the workers and their organizations, as may be seen above all in the treatment of collective employment relations and the search for greater collective autonomy.

Finally, for many reasons, it is very difficult to give a precise assessment of the labour reforms, except in cases where there has been radical change ... Many problems ascribed to substantive legal issues may in fact be due to improper application of the law and to long, complicated, costly administrative and judicial procedures. The search for rapidity, simplicity and transparency, under the watchful eye of the social interlocutors, could lead to a new, more satisfactory stage in the regulation of labour relations.

## Notes

<sup>1</sup> The present text draws on a summary of the author's book *La reforma laboral en América Latina: 15 años después. Un análisis comparado* (Lima, 2006).

<sup>2</sup> Bolivia is a special case, with a Code dating from 1939 which has undergone continual partial modifications.

<sup>3</sup> The labour reforms of 1985 in Uruguay were aimed at annulling the trade union laws of the dictatorship period, which were never replaced by new legislation.

<sup>4</sup> In Costa Rica, for example, Law No. 7360 was adopted in 1993. This reformed the law on solidarity associations, the Labour Code and the organic law governing the Ministry of Labour. In Honduras, active work has been carried out for a number of years on a reform of the Labour Code, and various partial modifications exist. The same goes for Cuba since 1999.

<sup>5</sup> Unless otherwise specified, the employment contract is presumed to have been concluded for an indefinite period, full-time and to be devoid of any particularities having a bearing on its aims or the place or type of work.

<sup>6</sup> Even though the law does, since 1995, entitle them to incomes and working conditions that are not inferior to those due to workers within the user enterprise who perform comparable tasks.

<sup>7</sup> Reinstatement exists in Cuba, Honduras, Mexico Nicaragua, Panama, Peru and Venezuela, although it is subject to conditions such as a minimum of one year in Mexico, a minimum number of workers in the enterprise in Venezuela, etc.

<sup>8</sup> Which also meant that enterprises which had employed staff for longer had to pay more than those which fired people frequently.

<sup>9</sup> This is a monthly wage that includes all economic benefits due from the employer. A worker who

opts for this formula does not receive legal benefits or fringe benefits such as redundancy compensation or Christmas bonuses, as all such elements are consolidated into an improved monthly wage. This means that the worker receives, month by month with the normal wage, all the other payments due from the employer.

<sup>10</sup> As of July 2001, Convention 87 had been ratified by 18 Member States in the region and Convention 98 by 17.



# Chinese labour law in transition

*The Labour Code of the People's Republic of China is obsolescent, and different parts of the country's labour legislation sometimes contradict each other. These inconsistencies are partly due to the country's rapid transition towards a social market economy. In this article, the need for labour law reform is placed in its broader economic and legislative context.*

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At the end of 2005, the Standing Committee of the National People's Congress (NPC)<sup>1</sup> organized a special evaluation of the implementation and application of the Labour Code at the national level. This was the second such evaluation since its entry into force (the first was in 1996). The report<sup>2</sup> affirms the achievements of the Labour Code, including:

- Helping enact supplementary statutes and regulations (including the 7 administrative statutes adopted by the State Council, more than 50 departmental regulations adopted by competent ministries, relevant interpretations by the Supreme Court and a range of local legislation);
- Implementing active employment policies, promoting job creation and controlling the unemployment ratio;
- Establishing primarily new forms of employment relations and implementing labour contract, collective consultation and collective contract systems. A tripartite system was set up at the national, provincial and municipal levels. The coverage of labour contracts has reached 85 per cent in state and collectively-owned enterprises and foreign investment ventures;
- Regulating wages and improving labour remuneration;

- Establishing a widespread social security system.

At the same time, the report contributes just as much to the identification of existing problems, "especially in the construction, light industry, garment, hotel and restaurant etc., labour-intensive sectors and in medium and small enterprises and individual economic organizations, where infringements of workers' legal rights are widespread, and some problems are fairly serious". These problems include, firstly, low coverage of labour contracts, but also a tendency towards short contract terms and unregulated contract content. The coverage of labour contracts is less than 20 per cent in small and medium-sized enterprises (SMEs). Most contracts are limited to one year. Some employers abuse the probation period to exploit workers, especially peasant workers. Many contracts are full of illegal clauses. Some employers provide work contracts without any consultation or even provide blank contracts.

Moreover, the minimum wage system has not been fully implemented, and delays in payment are still a frequent occurrence. According to the survey, 12.7 per cent of workers' wages are below the local minimum wage. Occasionally, the minimum wage is set too low to meet workers' subsistence needs. Some employers randomly increase the production quota

but decrease the piece rate, and workers cannot finish the production quota within regular work times. More than forty per cent of cases sanctioned by the labour inspection in 2004 were due to deductions and delays in payment. The survey suggests that 7.8 per cent (16 per cent in some provinces) of workers had experienced a delay in payment averaging 3.2 months. The problem is particularly prominent in the construction, manufacturing and hotel and restaurant sectors. Some employers make profits by “disappearing” after wage payments become due.

Illegal overtime is widespread and labour conditions are poor. Many employers request workers to work supplementary hours, in breach of the labour law, and often without overtime payments. In some enterprises, workers are exposed to dust, noise, heat or even toxic environments, while injuries and accidents are frequent. Some enterprises fail to implement legal provisions on the protection of women and minors.

Furthermore, social security coverage is narrow, the harmonization of social security contributions and benefits is low and the delays in paying social security contributions are serious. A large number of non-public enterprises and individual economic organizations have not participated in the social security system, and the majority of peasant workers find themselves excluded by the current system. In most places, harmonization has taken place only at the county level, and this causes difficulties for the transfer of contributions and funds. Some employers avoid paying contributions by falsifying the amount of salary paid and the number of employees.

Finally, labour inspection is too weak. The labour inspection department is short of manpower, has restricted scope for action and is weak in enforcing sanctions.

## A complex labour relation system

In sum, the report not only acknowledges the challenges presented by the diversity of market actors, the multiple forms of employment relations and the complexity of labour relations, but also identifies the deficiencies, sometimes obsolescence, of law and policies, the lack of knowledge of labour law by law enforcement agencies and local protectionism as main causes of these problems.

A decade after the entry into force of the Labour Code, this initiative taken by the NPC aimed to review the system of Chinese labour law and to assess the gap between that law and its application in practice.

This article sets out to give a general introduction to Chinese labour law, including the context in which it is being developed, its place in the overall Chinese legal system, the most recent discussions and debates amongst Chinese jurists, and some principal difficulties identified by actors responsible for implementing the law.

As regards the basis of the law, the Chinese modern legal system has been classified as a “socialist system” functioning in parallel to the common law and continental law systems. It is also described as a “socialist continental system” by some Chinese jurists since it is mainly based on statutes and written legal documents.

Historically, as a big country with a broad territory inhabited by diverse groups, the centralized power gave much more importance to penal law than any other law. It “prioritized penal and downplayed civil law” in ruling the State. Civil and commercial law, as a body of law governing legal relations between two private parties, has been developed in an unsystematic way, compared with the effective instruments of penal law, with their obligations imposed vertically by the State on its people.

Later, while the industrial revolution was under way in Europe, China was struggling to change its “semi-feudal, semi-colonized” situation. After the foundation

of the People's Republic of China in 1949, the early establishment of the Chinese socialist legal system was strongly influenced by that of the Soviet Union. The principles and ideology of socialism, such as socialist public ownership and the omnipotence of collective interests, were reflected or incorporated in the enactment of laws. The leading role of the working class in society was established, and all members of society were expected to work for the interests of the State. In this period, the internal regulations of work units regarding labour discipline were usually binding for the workers and produced quasi-legal effects.

The process of legislation was interrupted when several political movements, such as the "Struggle against Rightists", and the "Great Leap Forward", came one after another. A slogan of "smash the public security, the procuratorship and the justice system" was raised and all law enforcement became paralyzed during the Cultural Revolution. For nearly two decades, there was almost a legislative void in China. The situation changed after the crack-down on the "Gang of Four" in the 1970s: law enforcement agencies were progressively re-established and law schools re-opened. The Constitution promulgated in 1982<sup>3</sup> recognizing "socialist public ownership" was amended three times within less than 20 years, in 1988, 1993 and 1999 respectively. Each time the amendment focused on the ownership of property. From 1982, only "socialist public ownership" was accepted. Under the 1993 Amendment, "the State practises the socialist market economy".<sup>4</sup> And when the 1999 Amendment recognized that "the individual economy and the private economy" constitute "an important component of the country's socialist market economy" and that public ownership and diverse forms of ownership develop "side by side",<sup>5</sup> China had completed its process of normalizing the ownership of property. Each amendment, particularly that of 1999, has historical significance for the Chinese political, economic and legal system. A socialist market economy constituted by multiple components requires reform in all areas.

## Labour law – A late developer

Compared with penal and civil law, the development of labour law was delayed. No labour law was enacted until 1994. The adoption of the Labour Code in 1994 could be regarded as a milestone for the establishment of a Chinese labour law system, even though it was adopted before the recognition of the private economy by the 1999 Constitution. Since its entry into force, it has played an important role in promoting employment and protecting workers' rights and interests. The Labour Code is the core instrument around which the Chinese labour law system is being constructed. It recognizes workers' right to resign, introduces the concept of discrimination at work (though with a narrow focus on discrimination based on ethnicity, race, sex or religion), sets minimum wages, and empowers trade unions (see box) to bargain for collective contracts. The Labour Code comprises 107 articles divided into 13 chapters, including general provisions, promotion of employment, labour and collective contracts, working hours, rest and vacations, wages, occupational safety and health, special protection for female and young workers, and social insurance and welfare.

The Labour Code can be described as a skeleton laying down the framework and main principles, but fleshed out by subsidiary legislation in the form of regulations, decisions and circulars, etc. such as 17 new labour laws promulgated by the Ministry of Labour (MOLSS) shortly after its enactment, covering the aspects and subjects addressed by the Labour Code.

The sources of labour law include the Constitution, laws, administrative regulations, administrative rules, local regulations, local administrative rules, judicial interpretation and international treaties. China has ratified 23 ILO Conventions, including four out of eight fundamental Conventions, namely the Equal Remuneration Convention, 1951 (No. 100), the Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182), and the Discrimination

(Employment and Occupation) Convention, 1958 (No. 111).<sup>6</sup> These ratified Conventions have been taken into consideration when relevant legislation is enacted and reformed. Others, though not ratified, are also given attention. For example, forced labour is prohibited by labour law and was added as a new crime when the Penal Code was revised in 1997.

## Hierarchy of law

To understand the hierarchy of Chinese law is a prerequisite for studying and applying it.

- The NPC, together with its Standing Committee, is the highest organ of State power. It has the sole power to amend the Constitution and enact and amend “penal, civil, State organic and other basic laws”. The Penal Code and General Principles of Civil Law were adopted at this level. Law in respect of 10 categories of matters relating to State sovereignty, establishment, organization and authority of State organs, the autonomy system of ethnic and special administrative regions, crime and criminal sanctions, fundamental civil institutions, and the fundamental economic system, are reserved for the NPC (Art. 8 of the Legislation Law). Other basic laws harmonizing some essential relationships of political and social life and playing an important part in ensuring normal order in the society, such as Marriage Law and Electoral Law, should also be promulgated by the NPC.
- The Standing Committee of the NPC enacts and amends all laws except those only enacted by the NPC. The current Labour Code was enacted by the Standing Committee. As labour issues are neither explicitly enumerated in the list of laws reserved to the NPC nor given as much attention as other basic laws, in the hierarchy of legislation the Labour Code is therefore inferior to other basic laws.

- The State Council was traditionally given extensive power to adopt administrative measures and enact administrative rules.
- Administrative departments: various Ministries are entitled to make regulations within their jurisdictional areas
- At local level, Local People’s Congresses and governments are empowered to enact specific measures relating to the localities and to draft local decrees within the sphere of their authority.

In the past 20 years, China has seen one of the greatest floods of legislation in its history. However, the above-mentioned legislative power and competence of various State organs had not been clearly defined for a long period. Effectively, legislation in various forms of laws, regulations, statutes, rules, decisions, decrees, circulars, provisions, interim provisions, implementing measures and even responding letters was adopted by different organs without procedural rules or hierarchy to respect. The adoption of the Legislation Law in 2000 was expected to change the situation by harmonizing legislative procedures, structuring the hierarchy of legislation and clarifying *who* has *what* competence to adopt *what* forms of legislation at *which* level. However, since the Legislation Law has no retroactive effect on laws adopted before its entry into force, these laws remain effective and sometimes contradictory to the Legislation Law. While whether China needs to establish a judicial review mechanism is still a long-debated topic, and judicial reviews have rarely been conducted, the jungle of law constituted before the entry into force of this law continues to create much confusion both for law enforcement agencies and for employers and workers.

Conflicts and incoherence between legislation at the same hierarchical level, as applied by different organs, are not rare. The same goes for legislation at different hierarchical levels. In some cases, one issue is governed by more than one regulation

with substantially different stipulations. A typical case is the provision with regard to working hours: the working week is stipulated as being 44 hours (art. 36) in the Labour Code, while in the decision issued by the State Council (in 1995), it is 40 hours. Another example is the re-education through labour system (RETL), which was established in 1957 by a decision of the State Council and later specified by another administrative decision of the Ministry of Public Security. Both the legislative organs (criminal sanctions are a reserved competence of the NPC) and the form of legislation (legislation restricting physical liberty can only take the form of a “law”) have been in conflict with the amended Constitution, the Administrative Punishment Law and the Legislation Law for years.

In the current legal set-up, whether the labour law system stands as an independent legal department or branch in the whole system remains ambiguous. At universities, labour law is classified as a sub-category of either economic or administrative law. In the 1950s, China followed almost completely the Soviet Union’s socialist system, which brushed aside the distinction between private and public law on the grounds that socialism has transformed everything in the economic sphere in a collective society. The division of law as a general theory of legal science was not raised until the rule of law was stressed in the 1990s. Although Chinese academicians and jurists are referring more and more to the distinction between “public law” and “private law” in their legal language, how to fit this division of law into the theory of the Chinese socialism legal system remains to be explored. Labour law, as an overlapping system of private and public law, risks becoming a “patchwork” if no further clarification is given in Chinese legal theory with regard to the place and importance of Chinese labour law in the whole legal system.

## Labour rights – A contractual matter?

That labour law has traditionally been given less importance and attention in the legal system is reflected by the very small number of scholars and academicians studying labour law compared with those in penal, civil and economic law areas. Labour law is taught as an optional subject in most law schools. The Standing Committee of the NPC, as a legislature, has not established an individual office of labour law in its legal affairs department as it did for penal and civil laws. This lack of clear identification and independence of labour law in the legal system could be one reason for misunderstanding, confusion, or worse, manipulation of labour law in its application by public and different actors. In theory and in practice, the characteristics of labour law – the intervention of the State – are insufficiently reflected in law. Labour relations are usually confused with employment relations. The protection of labour rights is then dependent on the employer’s discretion and conduct. Labour contracts, including abusive clauses such as “the employer is not responsible for any accidents at work place”, “the employer will not be responsible for the maternity, retirement, sickness, and death of workers”, are sometimes understood by both employers and workers as effectively and legally established, since they have been negotiated between both contracting parties and valid consent is given by them.

This lack of independence can also be reflected by the labour dispute settlement system. There are neither special procedures nor specifically established institutions for labour litigation. The Civil Procedure Law is to apply to labour litigation. With the development of a diversified economy and the reform of Chinese political systems, the Civil Procedure Law is becoming ill-equipped to respond to increasingly complicated labour disputes. Theoretically, labour law is characterized both by private law through respect for freedom of contract and by public law through the imposition by the State of obligations on both parties to the labour

contract, beyond the free choice of parties as in civil law. In this sense, the substantive labour law cannot be appropriately implemented through the application of the Civil Procedure Law:

1. When workers, especially peasant workers,<sup>7</sup> are in a vulnerable position and not unionized, most labour disputes arising from sometimes serious violations by employers of their obligations are not “disputes” in the sense of civil law (which are principally determined by the principle of freedom of contract by two parties in an equal position), but rather a challenge to the public power of the State which should be settled through interventions of the State. These obligations are imperative and compulsory. The violations of these obligations are not subject to compromise, are non-negotiable and non-conciliable, and should be sanctioned. However, the application of the Civil Procedure to labour disputes (Chinese civil procedures place particular emphasis on mediation in resolving disputes, and mediation is applied wherever possible) turns these violations into ordinary civil cases, and the intervention of the State in labour relations is not reflected in the settlement process. In particular, when there are no specially established institutions to examine the substantive nature of the dispute (such as labour courts or the “conseils” in France’s special “Prud’hommes” labour jurisdiction), the circumstances under which disputes could be regarded as violations of obligations defined by labour laws, and the extent to which the violations will be punished, depends too much on the occasional and optional coordination between civil courts and labour inspectorates. And yet, 22.2 per cent of municipalities and 42.2 per cent of counties have not established a labour inspectorate structure. In a city like Guangzhou, where there is a concentration of labour-intensive production, only 130 labour inspectors are respon-

sible for 280,000 employers with more than 5.1 million workers.<sup>8</sup> Litigation involving violation(s), in most cases by employers, of labour laws also ends in compromise, negotiation and conciliation, instead of the employers’ being held responsible for their illegal conduct. There is a risk that the same violations will be repeated.

2. Considering that workers are in a relatively vulnerable position, and that legal assistance from professionals and support from workers’ organizations are rarely provided, the principle that “the burden of proof is on the complainant” in civil procedure appears inappropriate to labour litigation. In particular, as the absence of labour contracts is still a serious and widespread problem, and as most peasant workers are not familiar with laws, the onus of proof is obviously another burden for workers. Some local governments, such as Zhejiang province, have pioneered innovative legislation by inverting the burden of proof, so that it rests with the employers, but this is limited to disputes arising from wage payments. The Supreme Court also specified several categories of dispute, such as discharge of workers, termination of contracts and reduction of payments, in which the burden of proof is on the employers.<sup>9</sup>
3. The law on the preservation of property, and the prerequisite systems, could be used to secure the future execution of judgements in ordinary civil cases, but this is usually under the condition that the litigant put up a financial guarantee equivalent to the sum claimed. If the case is lost, the guarantee is forfeited. This makes the use of such procedures nearly impossible for workers who are already in financial difficulties because of the dispute.

The number of disputes received by Arbitration Committees kept increasing, from 33,000 in 1995 to 120,191 in 1999 then 184,000 in 2002, and 240,000 in 2004.

## China and ILO standards

China has ratified neither of the two fundamental ILO Conventions on freedom of association; the right to organize and to bargain collectively (ILO Conventions No. 87 and No. 98). In February 2001, it ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), but announced at the same time that provisions guaranteed under Article 8, 1 (a) of the covenant, namely the right to establish and join workers' organizations of one's own choosing, would be dealt with in accordance with Chinese law. In doing so, the government effectively entered a reservation concerning a fundamental element of the Covenant, thereby putting itself in breach of internationally recognized principles on the law of treaties. It did not, however, enter any such reservation concerning Article 8, 1 (d) of the covenant which, alone amongst international legal instruments, explicitly guarantees the right to strike.

### Freedom of association

China's Trade Union Law was adopted in 1950. It was amended in 1992 and again in October 2001. Workers are not free to form or join the trade unions of their choice. Only one "workers'" organization is recognized in law, the All China Federation of Trade Unions (ACFTU).

According to the revised version of the law, "the ACFTU and all organizations under it represent the interests of the workers and safeguard their legitimate rights". Trade unions must also "observe and safeguard the Constitution ... take economic development as the central task, uphold the socialist road, the people's democratic dictatorship, leadership by the Communist Party of China, and Marxist-Leninism, Mao Zedong Thought and Deng Xiaoping Theory ... and conduct their work independently in accordance with the Constitution of trade unions".

Among their basic duties and functions, trade unions shall "coordinate labour relations through consultation", "mobilize workers to strive to fulfil their tasks in production" and "educate them in the ideological, ethical, professional, scientific, cultural and other areas, as well as self-discipline and moral integrity". The law also gives trade unions ample prerogatives in various areas such as "democratic management and supervision" (see below).

### Trade union monopoly

Article 10 of the law establishes the ACFTU as the "unified national organization". Under Article 11, the establishment of any trade union organization, whether local, national or industrial, "shall be submitted to the trade union organization at the next higher level for approval". Trade union organizations at a higher level "shall exercise leadership" over those at lower level. The law also empowers the ACFTU to exercise financial control over all its constituents.

### Collective bargaining

There is currently no law governing collective bargaining procedures, only regulations on collective contracts (CC). However, if a collective contract is established in line with the regulations, it is legally binding. The new labour law (effective 1995) adopted collective consultation as a key medium for settling disputes between employers and workers, with the government pushing the ACFTU to "consult" with employers on labour terms for workers as a way of pre-empting independent efforts at negotiations. Article 33 of the Labour Law states that workers have the right to conclude a collective contract "in an enterprise where the trade union has not yet been set up". The CC regulations also reinforce this.

The 2004 government "white paper" on employment encourages the ACFTU to conclude "collective contracts" in order to protect workers' rights, and the labour law permits collective consultation and contracts to be concluded between the ACFTU (or workers' representatives) and the management. According to official statistics, collective contracts cover almost 100 million workers with some 80,000 sectoral/industrial contracts for 33 million workers while 61.7 million workers are parties to contracts with their individual employers.

In May 2004, amendments to the Provisions on Collective Contracts came into force. They call for more detail in the collective contracts signed. The regulations also outline the procedures involved in the consultation and the theoretical equality of both parties. However, despite greater opportunities for collective bargaining and the obvious need for worker protection for many workers – including migrants – there has been little progress towards any form of genuine collective bargaining. Instead the ACFTU continues to "represent" the workers to management and government structures, without seeing the need to discuss, inform, listen to or be guided by the workers who still have little say in policy. In the private sector, where branches of the ACFTU are largely non-existent, workers denied the ability to organize independently face almost insurmountable obstacles to collective bargaining and representation.

Source: ICFTU Annual Survey on Trade Union Rights Violations, 2006.

This includes collective disputes, whose number increased even more rapidly.<sup>10</sup> Disputes are more and more characterized by acute conflicts, which are difficult to mediate. Some collective disputes end in street demonstrations. At the same time, abusive working conditions are frequently reported. Certain extreme cases, such as workers dying from exhaustion at work, have been widely reported by the media. In late 2003, the All China Federation of Trade Unions (ACFTU) revealed that the total amount of unpaid wages owed to peasant workers had reached 100 billion yuan (approximately US\$12.5 billion). According to the Beijing Statistics Bureau, the salaries of 72.2 per cent of construction workers were unpaid or delayed in payment, and only 6 per cent of workers were paid punctually.<sup>11</sup> The initiatives taken by certain local governments, such as the publication of a list of “sweatshops” in Guangzhou, may be locally effective only as a short-term solution. All these phenomena of abuse of workers require a legal response. This has stimulated discussions among Chinese labour law specialists on the eventual possibility of legal reform. Especially after the last amendment to the Constitution in 2004, which recognizes that “the State respects and protects human rights”, the discussions have increasingly been framed in the language of the protection of human rights.

### Labour law in transition

As the core of the labour law system and the source of inspiration for future subsidiary legislation, the Labour Code is obsolete. It was adopted before the recognition of a private and individual economy by the 1999 Constitution, which had a radical influence on labour relations. While private property is legally recognized, workers have lost the ownership of means of production, and the State is no longer the only employer. Some lately adopted labour legislation has entered into conflict with

provisions in the Labour Code. This bears all the hallmarks of a system which is still in a transitional period from a planned to a market economy. The orientation of the Labour Code is rather one of labour administration than of a set of rights and obligations. The paradox is, that, while the Labour Code is obsolete, some of its norms appear too exacting and ambitious to be complied with, even according to today’s standards. It sets future goals to be attained, rather than taking realistically into consideration the level of economic, political and social development and other circumstances in China today.

Moreover, the provisions in the Labour Code are general principles and not directly applicable. Its implementation measures are devolved to the competent authorities within central government and local legislative bodies. It is then criticized by legal specialists for leaving too much power to local government. The consequences of this are, firstly, abusive local protectionism and, secondly, difficulties of harmonization on certain issues. For example, the social security system is more or less unified only at the county level. For the numerous workers who find employment in other municipalities or provinces, there are no applicable regulations to be followed for the transfer and continuation of contributions.

The Labour Code also leaves also too much of a legislative vacuum in some essential areas. There are no provisions either for foreign workers employed in China, or for expatriate Chinese workers; no stipulations or criteria for the economic compensation due in case of the revocation of labour contracts by employers; no provisions on the legal effects on the employment relationship of employer mergers/demergers/restructuring. In other areas, the simple stipulation of principles has not sufficed to regulate labour relations, and the pace of enactment of auxiliary regulations needs to be intensified. For example, there is much confusion as to whether or not the Civil General Principles and Contract Law should be applied to regulate the labour contract system,

which is claimed to be the core of the Labour Code, whilst a Labour Contract Law has not been enacted until today.

At the same time, the content of labour rights and their protection needs to be further developed. According to the theory commonly acknowledged by labour lawyer, the role of law in securing justice in labour relations is to intervene not only in a substantial way by regulating labour relations in the form of a human rights code, but also in a procedural way by protecting freedom of association and structuring the bargaining process. In this sense, the content of both procedural and substantial labour law in China could be further discussed. Some Chinese labour law specialists divide labour rights into “individual” and “collective” rights, considering that the protection of the former is fairly adequate in law while the latter needs further development.<sup>12</sup> In particular, China ratified the International Covenant on Economic, Social and Cultural Rights in 2001 but entered a reservation on Article 8.1 (a) by declaring that its application shall be consistent with the relevant provisions of the Constitution, Trade Union Law and Labour Law of the People’s Republic of China. The right to strike was not subject to a reservation but it has not been effectively incorporated into domestic legislation.<sup>13</sup> Nevertheless, the protection of individual rights could still be improved.

With regard to the controversial issue of the scope of application of the Labour Code, Article 2 stipulates that all enterprises and individual economic organizations and labourers who form a “labour relationship” are to be regarded as one category; and State organs, institutional organizations and societies who form a “labour contract relationship” as another. Neither of these two terms is defined in the Code. Whether or not interim workers fall within the jurisdiction of the Labour Code remains unclear. In its *Opinions on Implementation of the Labour Code*, the Ministry of Labour (MOLSS) explicitly excluded civil servants, peasants, soldiers in active service and domestic workers from the scope of application. This placed a question

mark over the status of almost 200 million “peasant workers”.<sup>14</sup> But in 2003, in its letter of response to the Supreme Court with respect to the application of labour law to peasant workers, the MOLSS changed its opinion by confirming that “for all peasant workers who form labour relations with an employing unit, the Labour Code shall apply”.<sup>15</sup>

However, the discrimination against peasant workers with regard to legal access is only one of various forms of discrimination to which they are subjected in a dual society where cities are administered separately from the countryside. There are currently 98 million peasants “entering cities for employment” and 130 million peasants engaged in “village and township enterprises”. China ratified the ILO’s Discrimination Convention (Employment and Occupation), 1958 (No. 111) in 2005 but the provision in the *Labour Code* on the prohibition of discrimination is much narrower than that of the Convention. How to eliminate other forms of discrimination as a consequence of the “Hukou”<sup>16</sup> system, which splits people into those with urban and those with rural status, is the highest priority for Chinese labour authorities. Some researchers argue that the key reason for the violation of peasant workers’ economic, social and cultural rights is the loss of their civil and political rights. The “Hukou” system should be systematically reformed in such a way as to permit all citizens to choose their place of work and residence and to benefit from equal rights and protection.<sup>17</sup>

As for access to justice, the procedure for labour dispute settlement has been established in a contradictory way in the Labour Code, and the process takes too long. Art. 77 of the Labour Code stipulates that the methods to be used to resolve labour disputes, including consultation, mediation, arbitration and litigation, are to be freely chosen by the disputing parties, while Art. 79 provides that arbitration should be the preliminary procedure, prior to recourse to civil tribunals. The Supreme Court confirms<sup>18</sup> that if a party has recourse to the courts, according to

the administrative litigation procedure, against a decision by an arbitration committee to dismiss a dispute, the courts will not accept the case. In 2001, the Supreme Court clarified the procedure applicable for labour disputes by specifying that if courts regard the disputes in question as labour disputes, the courts should accept the case.<sup>19</sup> However, for cases exceeding the prescription period for arbitration, i.e. 60 days from the occurrence of the dispute, the courts will reject the request. Still, the parties will never get an opportunity to have the substantive part of labour disputes examined because of procedural defaults, especially when the period of prescription is limited to 60 days. This appears unreasonably short compared with the two-year period for ordinary civil cases.

In addition, this “one mediation, one arbitration, then two litigations” procedure is a burden for the parties to a dispute, and especially for the workers. Completing the whole procedure could take up to two years.<sup>20</sup> This represents an investment of time and money so enormous that an ordinary worker could never afford it. Unpaid workers may find that lawyers are reluctant to represent their interests, and that employers disappear or file for bankruptcy in order to avoid paying what is owed.

Furthermore, the arbitration committees, as standing bodies for the settlement of labour disputes, are not freely chosen by the parties to a dispute and are attached to labour administration institutions whose interventions influence the independence of the committees. The absence of trade union and employers’ organization representatives from these committees and the lack of professionalism of committee members explain why a high per centage of arbitration decisions are subsequently brought to court.

Finally, even though statistics indicate that most court judgements come down in favour of the workers rather than of their employers, the enforcement of civil judgements remains a serious problem. The enforcement rate for civil and economic

judgements in China is less than 50 per cent on average and 30 per cent in some economically less developed regions. Xiao Yang, the President of the Supreme Court, in the Court’s 2004 and 2005 Annual Reports to the NPC, stated: “the difficulty of executing civil and commercial judgements has become a major “chronic ailment”, often leading to chaos in the enforcement process”. It would be difficult to be any more optimistic about the implementation of arbitration decisions, as this relies on judicial assistance from the courts.

In conclusion, the birth of the Chinese social market legal system is still very recent and much time is still needed to explore the paths towards China’s goal of a democratic and harmonized society. Chinese labour law is certainly not isolated from this process. Studies on Chinese labour law should be placed in the context of the evolution and reform of the whole Chinese legal system. Its conflicts with other laws and the obsolescence of some parts of labour law have been emerging only gradually, following the progressive establishment or reform of other legal systems – in particular, of constitutional reform. The accession of China to the WTO has triggered much legislation and legal reform, especially in the field of private law. In addition, China is preparing actively for the ratification of the International Covenant on Civil and Political Rights (ICCPR), which will bring further reform of the Chinese legal system with regard to the effective protection of human rights, including labour rights. No doubt, much action is still needed to strengthen the government’s capacity to both adopt and implement labour legislation.

Studies on Chinese labour law should also be placed in the context of the challenges posed to China by globalization and the internationalization of employment. As four-fifths of multinational companies have a presence in China, and China is said to have been transformed into a world workshop, criticized as “sweatshop” by some human rights organizations, it should also be noted that

a far from perfect legal environment in China cannot always justify some abusive practices by investors from countries of the North. Rather than helping China to improve the protection of workers, such abuses are downgrading working conditions there. According to the ACFTU, only one-third of 480,000 foreign ventures in China (in 2005) have established trade unions, even though Chinese law requires enterprises with 25 employees or more to establish trade unions, which have to be affiliated to the ACFTU.

As just one link in the supply chain to the global market, some suppliers have to find a way around the conflict between compliance with labour standards and the “sweat price” paid by their foreign buyers. This price is obviously insufficient to maintain production while fully respecting the labour legislation. So respect for both Chinese domestic legislation and international labour standards requires efforts from all actors directly or indirectly related to China’s labour market.

## Notes

<sup>1</sup> The NPC is the highest legislative body in the People’s Republic of China. It consists of about 3,000 delegates and meets for about two weeks each year usually in spring. Between these sessions, power is exercised by the Standing Committee of the National People’s Congress which consists of about 150 members.

<sup>2</sup> The Report on the Implementation of the Labour Code of the People’s Republic of China by the Law Application Inspection Team of the Standing Committee of the NPC, 28 December 2005.

<sup>3</sup> After the 1954 Constitution, there were the amendments in the 1975 “Cultural Revolutionary Constitution” and the 1978 “Four Modernizations Constitution”. The 1982 Constitution is rather an enactment or rewriting than an amendment of the constitution.

<sup>4</sup> Article 15 of the 1993 Constitution.

<sup>5</sup> Article 11 of the 1999 Constitution adopted on 15 March, 1999.

<sup>6</sup> Respectively on 02.11.1990, 28.04.1999, 08.08.2002, and in August 2005.

<sup>7</sup> The term is unique to China. It appears discriminatory but has recently been confirmed by the State Council as the most appropriate term to be used to describe the status of this category of worker.

<sup>8</sup> *People’s Daily*, “Unstrengthened Institution and Manpower Shortage, Labour Inspectorate’s Ability Falling Short of Wishes”, 21 Dec. 2005.

<sup>9</sup> *The Supreme Court’s Interpretation on issues with regard to Applicable Procedures for Labour Dispute Cases (2001(14))*, adopted by the Judicial Committee of the Supreme Court on 22 March 2001 and entering into force on 30 April 2001, Article 13.

<sup>10</sup> *Chinese Statistic Yearbook, 1992-2003*, China Statistic Publications.

<sup>11</sup> *Beijing Morning Post*, 1 Dec. 2003, cited by Yang Lei, 2003: *China’s Wage Arrears Memorandum*, China Labour Research and Support Network Forum 2004, No. 1.

<sup>12</sup> Ye Jingyi, Qian, W. 2005. “International Covenant on Economic, Social and Cultural Rights and the Protection of Labour Rights”, *Beijing University Journal*, No. 2.

<sup>13</sup> The right to strike was explicitly listed as fundamental right of citizens in the 1975 Constitution (art. 28), which was subject to some modifications in 1980. It completely disappeared from the 1982 Constitution. Nevertheless, article 27 of the Trade Union Law recognizes the occurrence in reality of strikes, which have to be dealt with by stipulating that “when there are work stoppages or slow-downs, the trade union should represent the workers in negotiating and consulting with the enterprise...”

<sup>14</sup> Opinion 4 of the *Opinions on the Implementation of the Labour Code*, published on 4 August 1995, MOLSS (1995), No. 309.

<sup>15</sup> MOLSS (2003), No. 180.

<sup>16</sup> *Hu* (family) *kou* (person) is a household registration system. At the birth of each person, he/she should be registered in accordance with the Hukou of his/her mother. The rural Hukou in principle cannot be transferred to an urban one except under very restrictive circumstances. The system emerged in the 1950s when China prioritized the development of heavy industry. A strategy including three components was adopted: firstly, the State monopolized the purchase and marketing of key agricultural products and obstructed the channels for the free circulation of urban and rural products in order to keep the wages and living costs of workers in industrial fields as low as possible. Secondly, the founding of agricultural cooperatives in the late 1950s hastened the process of communizing rural people, and the flow of production materials between urban and rural areas was blocked. Thirdly, the implementation of the household and residence administration system was nationalized, in order to regulate population distribution and labour deployment. It was progressively completed and became the legal basis for the establishment of other social systems. Almost all social systems are based on the Hukou system in a dual society. Treatment and benefits as regards access to employment, marriage, child care, compulsory education and social security, etc. vary in accordance with the distinct social status determined by Hukou.

<sup>17</sup> Kaiming, L. 2005. *A Social Structure of Lost Entitlements: An Investigative Report on a Case of Collective Labour Dispute*, Institute of Contemporary Society Observation, June.

<sup>18</sup> Response No. 1998-24, adopted by the Judicial Committee of the Supreme Court on 8 June 1998 and entering into effect on 9 September 1998.

<sup>19</sup> *The Supreme Court's Interpretation on issues with regard to Applicable Procedures for Labour Dispute Cases (2001(14))*, adopted by the Judicial Committee of the Supreme Court on 22 March 2001 and entering into force on 30 April 2001.

<sup>20</sup> The arbitration committee *may* make an adjudication within 60 days of receiving the application. Upon receipt of the adjudication, the party may bring the lawsuit to court within 15 days. If the simplified procedure applies, it takes three months; if the ordinary procedure applies, it takes six months, which may be extended by three months with the approval by the Chief of the court and six months more with the approval of the superior court; an appeal is possible within 15 days of receiving the judgement, and the appeals procedure takes three months, with the possibility of a three-month extension.

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