

## Globalization and decent work policy: Reflections upon a new legal approach

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From the ongoing debate on the future of work, it is becoming increasingly clear that social policies and related legislation need adapting to more open and competitive markets and to more complex, segmented and technology-driven ways of organizing production and services. Indeed, that labour law needs remodelling to adjust to the “new economy” in the broadest sense of the term can hardly be disputed. It is no longer a question of whether, but how the remodelling process will take place.

The modernization of social and labour policies calls for reconsideration of the optimum balance to be struck between workers’ protection, job creation and competitiveness – i.e. the balance between economic development and nationally or internationally recognized values and rights.

The primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. This is the main purpose of the Organization today. Decent work is the converging focus of all its four strategic objectives: the promotion of rights at work; employment; social protection; and social dialogue. It must guide its policies and define its international role in the near future (ILO, 1999, p. 3).

The concept of decent work thus embodies the expression of the ILO’s resolve to bring together all the components of harmonious economic and social development, of which regulations for the protection of labour are a key feature.

The goal is not just the creation of jobs, but the creation of jobs of acceptable quality. The quantity of employment cannot be divorced from its quality. All societies have a notion of decent work, but the quality of employment can mean many things. It could relate to different forms of work, and also to different con-

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ditions of work, as well as feelings of value and satisfaction. The need today is to devise social and economic systems which ensure basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market (ILO, 1999, p. 4; see also ILO, 2003, pp. 77-80, 91-92 and 117-119).

Hence also the need to determine the most effective ways of implementing the chosen policy, i.e. how to translate the above policy mix into outcomes that will make a real difference in workers' daily lives. Not all options involve legislation. Indeed, the potential of approaches based on political agreements, economic measures, training and information, technical "standards" and practical guidelines should not be underestimated, though their effects do tend to be circumstantial. The legal approach, by contrast, presupposes a longer-term vision. It implies a decision to make policy more durable by grounding it in legislation and, if necessary, to resort to penalties – a distinctive feature of law.

The purpose of this article is to consider the most effective ways of legislating. Though the role of judicial decision-making in the concrete application of law will not be discussed in depth here, it should be borne in mind that the judiciary plays a key part in the implementation of social policy at the micro-economic level (Servais, 2002).

From the perspective of standard-setting, the aim of the ILO's decent work policy is to satisfy all the prerequisites for ensuring that labour regulations are actually applied. In this respect, the obstacles encountered typically stem from socio-economic resistance – a problem compounded by the difficulty of measuring the cost of applying labour standards.

The very concept of "decency" suggests possible responses to these concerns. To begin with, it implies the capability of women and men at work to practice solidarity instead of seeking mutual domination. The concept thus suggests dialogue, calling for the support of the social partners in the design, drafting and implementation of labour laws; after all, the social partners would seem to be well placed to assess the consequences of such laws, including their financial implications. The concept of decent work also suggests that human relationships cannot be reduced to some utilitarian ideology: they need to embody an ethical dimension.

These prerequisites – i.e. recognition of ethical values and emphasis on social dialogue – highlight the desirability of grouping international labour standards into three categories. The first comprises fundamental rights at work; the second consists of standards concerned with more technical provisions of labour and social security laws; and the third covers rules of a programmatic nature, which typically stress the role of employers' organizations and trade unions, and indeed of other organizations.

The first section of this article examines the principal modes of social regulation. The question here is whether some are preferable to others or whether there are alternatives to legislation. We will then seek to identify the extent to which a hierarchy can be established among labour standards and the values they embody, in order to draw conclusions with respect to legislative action to be taken. Finally, we will consider the methods to be preferred in adapting labour standards to present realities, before concluding with a new vision of the State based on the outcome of this discussion.

## Autonomous standards, heteronomous standards and alternatives to social regulation<sup>1</sup>

In practice, the balance between the legal option and other means of achieving social policy objectives will depend on the level of political commitment to coercive action. This second course, which relies chiefly on persuasion and rationality, may involve the conclusion of political agreements, the adoption of economic measures, the launching of training initiatives and information campaigns, as well as the setting of “technical” (as opposed to “legal”) standards and practical guidelines. All such initiatives can be taken without recourse to measures that are binding in the legal sense, hence the ambiguity of referring to them as “soft law”. However, this in no way detracts from their usefulness, as advocated, say, by the countries of the European Union in connection with their coordinated efforts to promote employment.<sup>2</sup>

### *Implementing social policy: Choosing the right options*

The concept of law – particularly in regard to social rights – is nevertheless ambiguous and calls for some clarification. It refers primarily to a means of implementing policy, a means of enforcing a particular line of conduct subject to the threat of punishment. Of course, both policy and conduct may sometimes seem repugnant (for example, if they are imposed by a brutal dictator), but this does not necessarily affect the binding force of the legal rules in which they find expression.

This positivist conception of law is overlaid with another, whereby a specific objective is assigned to the law itself – rather than to the authority that enacts it – i.e. the pursuit of certain values, such as social justice, based on ethical or religious precepts, or on a particular conceptualization of society and relations between its members.

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<sup>1</sup> On this subject, see also Servais (2001).

<sup>2</sup> See Borstlap, 1999, pp. 365-382; Pedersen, 1999, pp. 383-401; Chozas Pedrero, 1999, pp. 403-418; Biagi, 2000, pp. 155-173; Sciarra, 2000, pp. 209-229; Goetschy, 2003, pp. 281-301.

It may seem eminently reasonable and often highly desirable to invoke principles and set social objectives when designing and implementing policy. Yet the affirmation, in this context, of moral “rights” that everyone should enjoy does not automatically turn them into actual rights that they *do* enjoy. To proclaim, say, the right to work without an accompanying penalty for its non-realization is tantamount to expressing a wish or a political message which is certainly important but devoid of legal force.

Again, these remarks do not in any way detract from the usefulness or persuasive power of such proclamations. Indeed, socio-economic conditions often preclude the adjunction of the legal dimension that would give them permanence and coercive effect. But when they are given the force of law – and only then – the lawmaker’s intent may be discerned from the specific legislation adopted and the latter may be interpreted in the light of that intent.

If the legal option is chosen as the sole means, or as one of the means, of implementing social policy, a decision must then be taken on the most appropriate form of regulation. Regulation can be left to voluntary private initiative (self-regulation); or it may be enforced by the State, thereby giving it permanence (see, however, Perrocheau, 2000, pp. 11-27), transparency and binding force; or it may result from an agreement negotiated by the social actors concerned. Achieving a satisfactory mix of these three approaches will depend on national circumstances and, particularly in a democratic society, on the degree of social consensus that can be attained. In considering these different options for implementing a social policy, it should be borne in mind that the preference given to one or more legal instruments over others will ultimately depend on each country’s socio-political context.

A crucial first step is to decide which regulatory functions concerning employment and work are to remain in the hands of the State and which are to be devolved to the private sector. In particular, this question arises in respect of employment services and agencies; social protection (i.e. social security, social insurance, social welfare); the settlement of labour disputes (individual or collective; conflicts of law or of interest); and even inspection of working conditions. As will be seen below, the state authorities may prefer to focus on poverty reduction and the promotion of employment, while leaving the regulation of working conditions largely up to the main social stakeholders.

Another option is to distinguish, in those areas left to private regulation, between the sphere falling to commercial actors (e.g. the multinationals) and the sphere devolved to actors that are not directly profit-seeking (e.g. employers’ associations, trade unions, etc.). The first would include company-level collective agreements and codes of conduct adopted unilaterally by management; in the case of such unilateral initiatives, the legal status and duration of the employer’s

commitment need to be ascertained – not necessarily an easy matter – together with the procedure for checking its effective implementation. The second sphere comprises, in particular, regulation by collective agreement at levels higher than the enterprise. A supplemental option here centres on whether or not to include new actors in the bargaining process: e.g. global, regional or local institutions; other organizations representing civil society, etc.

This raises yet another issue: while there have been many appeals for the conclusion of a new “social pact”, few of the advocates of this course have stated clearly or realistically who would be the parties thereto. The natural way to seek consensus would seem to lie in a return to the principles of freedom and democracy on which modern societies were built. Indeed, freedom of association, expression and assembly afford people confronting common problems the opportunity to set up institutions to act as intermediaries between citizens and the State. In France, there has been talk of an “explosion” in the number of non-governmental social organizations (Maurie, 1999, pp. 22 et seq.). In effect, three types of organization have taken on a significant role in the design and implementation of social policy, namely: employers’ and workers’ organizations, social and labour groups that do not fit into the previous category, and other NGOs pursuing social aims (ILO, 1997, pp. 51 et seq.).

### *Social organizations, social partners*

The expression “employers’ and workers’ organizations” is standard ILO terminology that refers to professional organizations whose aims are to promote and defend the interests of employers and workers, respectively.<sup>3</sup> The concept is a broad one. On the workers’ side, it covers trade unions and, whatever the actual terms used, any associations of wage earners or self-employed workers pursuing similar aims. Associations representing the most underprivileged sections of the population – particularly informal-sector organizations in developing countries – now also seem to have gained widespread acceptance alongside traditional trade unions (ICFTU, 1996, p. 81).

The second type of organization that plays a part in social policy-making consists of associations established to pursue more narrowly focused social objectives, such as the promotion and defence of women, consumers, the environment, small business, civil liberties, local or neighbourhood interests, students, school children’s parents, specific

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<sup>3</sup> Particularly in terms of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Rural Workers’ Organisations Convention, 1975 (No. 141).

communities or ethnic minorities. Some of these groups take the form of cooperatives. Like workers' and employers' organizations, such associations act as intermediaries between their members and the public authorities or intergovernmental institutions. They have several characteristics in common with professional organizations. For example, they are democratically created (by the association of their members) and take decisions through democratic processes. This usually ensures transparency and facilitates verification of their representativeness, objectives, the provenance of their financial resources and the accountability of their leaders. It also provides a basis for building trust both in relations among the various groups and in their relations with trade union federations. There are in fact countless examples of alliances formed for specific industrial-action campaigns or for wider purposes.

The socially-oriented non-governmental organizations (NGOs) that make up the third category do not, strictly speaking, function like associations. They range from churches, charitable organizations and mutual assistance networks (particularly for the unemployed) to projects for technical cooperation, development assistance or occupational safety and health. Their staff typically includes experienced professionals who devote themselves, in a personal capacity, to training, placing and rehabilitating people at risk of social exclusion (e.g. the long-term unemployed, the homeless, welfare recipients, over-indebted households, illegal immigrants, drug addicts or, simply, the destitute). These institutions often work together with local authorities and their social workers. But compared with the second type of organization outlined above, they tend to lack transparency in terms of representativeness and resources. This can make it more awkward to deal with them, though they have at times proved to be useful partners.

Organizations in the second and third categories – particularly those with supranational, regional or global outreach – have recently had a visible impact on national and international policy-making. Yet their operations are often erratic or unpredictable because they are subject to the vicissitudes of media coverage and financial sponsorship. This stands in sharp contrast to the permanence and genuine representativeness of professional organizations whose institutionalization makes them a force to be reckoned with in the field of social policy. Indeed, even when union members account for only 10 to 15 per cent of a country's working population, trade unions usually have a membership base that is proportionally much stronger than that of other organizations.

Against this background, a few general questions need to be addressed. In particular: how much scope for action do these "civil society organizations" really have? What can they contribute to social policy and on what terms can they do so? These questions have already

generated an abundant literature.<sup>4</sup> Other issues that arise in this connection could be summed up as follows:

- (a) Can a better match be found between the applicable legal framework and the work of these organizations? Those that operate primarily “in the field” have occasionally taken part in genuine negotiations (e.g. in South Africa, Ireland, Italy and Latin America), with outcomes which may be purely political but which can also have legal implications, i.e. provision for sanctions;
- (b) Could labour regulations not be reframed – along more programmatic lines – so as to promote recognition of social actors and give them a freer hand, while channelling their efforts towards objectives predetermined by the public authorities?

Returning to the subject of state regulation, the first step is to decide who is going to make the rules: parliament, government, the judiciary, some administration (centralized or otherwise), local authorities, etc. Then, consideration also needs to be given to the extent – in terms of criteria, means and institutions – to which the public authorities should proceed, either in laying down binding rules or in encouraging or assisting citizens and civil society organizations to work out their own self-regulatory solutions, in which case legislation would essentially provide a framework for private initiative.

The appeal of these various options will depend on the kind of policy chosen by the State, ranging from a “hands-off” approach to centralization of decision-making power. Dialogue can take on an almost infinite variety of forms. There is hardly any need to elaborate on this point, except perhaps to stress the need for broadening the basis of social consensus to encompass all social actors, including organizations representing the most underprivileged.<sup>5</sup>

## Fundamental, technical and promotional standards

Analytically, the labour standards adopted by the ILO and the values they embody can be classified into three categories (Servais, 1991, pp. 449 et seq.; but see also Jenks, 1963, p. 103). The proposed classification is based not only on their fundamental aims and, therefore, prioritization of their provisions, but also on the type of obligations they entail. The first category concerns the fundamental rights of men and women at work; the second relates to the more technical provisions of

<sup>4</sup> See, for example, the special issue of *Esprit* (March-April 1998), entitled “A quoi sert le travail social?” (“What is the point of social work?”).

<sup>5</sup> Another issue – essential to the credibility of any system – centres on the manner in which the regulations adopted are implemented. Specifically, this concerns the role of the labour judiciary and how the administration of justice is viewed.

labour and social security legislation; and the third comprises standards of a programmatic nature. This classification may also provide a useful framework for broader discussions on the future of labour regulation not only internationally, but also at the national and regional levels. In particular, more frequent recourse to programmatic standards could result in fewer deadlocked situations.

### *Fundamental standards*

The provisions of standards in the first category may be either technical or programmatic. What distinguishes them is the pre-eminence which they are clearly accorded by the ILO's executive bodies. In most countries, they find expression in basic constitutional principles concerning public freedoms or social rights. They are concerned with the right of freedom of association and collective bargaining, the abolition of child labour and forced labour, and equal opportunities and treatment in employment. Their fundamental nature is almost universally recognized, and they are reflected in a number of instruments, including the United Nations' International Covenant on Civil and Political Rights and, in particular, its International Covenant on Economic, Social and Cultural Rights. Other examples are the ILO's Constitution, several of its Conventions, and the Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference in June 1998. These succinctly worded instruments embody general principles that can be applied in a number of different ways. As a result, they sometimes give rise to the same difficulties of interpretation as do national constitutional provisions, because of the need to steer a middle course between extremes of laxity and prescriptiveness.

Of all the international instruments mentioned above, however, the ILO Declaration (ILO, 1998) is the one with the greatest potential for transcending the strictly inter-governmental framework, even though it is primarily directed at ILO member States. Indeed, while covering the entire range of workers' fundamental rights, it spells them out without detailing any specific implementation procedures. Its binding force is thus limited, and its follow-up procedures are considerably less demanding than those of the ILO's traditional supervisory machinery. Although it is aimed primarily at the Organization's member States, inviting them to adopt appropriate implementing measures, the general terms in which it is worded make it a framework of reference that can readily be used by the new global actors as well. In particular, it can serve to define the common rules to be observed by the ILO and the major international financial institutions in the actions they take at country level. Its provisions can be transposed into the social charters adopted by regional bodies, such as the European Union, the Council



of Europe, NAFTA and MERCOSUR. In most cases, in fact, such regional instruments are already strongly influenced by the ILO's fundamental standards. The ILO Declaration can also be invoked by NGOs advocating the establishment of a list of basic principles to be respected in the making of social policy. Multinational corporations, too, can turn to the Declaration for inspiration in drawing up their codes of conduct or in determining the criteria to be observed in their industrial relations or social audits. Private initiative can thus supplement national legislation on such issues or – as is more often the case – ensure better compliance.

Drawing on notions of freedom and democracy, fundamental labour standards embody basic principles of public policy which give workers themselves an opportunity “to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential” (ILO, 1998, p. 6). Incorporating these standards into constitutional instruments affirms their pre-eminence; transposing them into legislation can make their infringement subject to penalties. Without prejudice to the usefulness of such other, non-legal measures as may be adopted to promote the application of standards in specific socio-economic circumstances, the significance of legal measures appears to be both unquestioned and unquestionable.

### *Technical standards*

Most labour standards belong in this second category, which is characterized by its more specifically technical content. They deal with conditions of work and employment in a broad sense, labour administration and social security.<sup>6</sup> They are the focus of most of today's debate over the future of statutory protection for labour. Here, lawmakers, both national and international, are sometimes faced with conflicting interests, with tensions between the divergent concerns of employers and wage earners – not to mention other interest groups – and with the need to reconcile them with the public interest. Choices have to be made. Sometimes those choices are the fruit of more or less formal negotiations involving reciprocal concessions; at other times, they are the result of a delicate process of arbitration. In democratic

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<sup>6</sup> Examples include the Weekly Rest (Industry) Convention, 1921 (No. 14); the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124); the Part-Time Work Convention, 1994 (No. 175); the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No. 173); and the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180).

societies, the legislative authorities typically endeavour to secure some basic consensus as a means of guaranteeing that the standard will be effective.

It is easier to reach agreement on a subject like, say, occupational safety and health than on many of the other issues on the social agenda. This is indeed an area where employers and workers broadly share the same concerns – often centring on technological change – though their views may well differ on practical aspects of application or on the pace of planned reforms. It is much harder to achieve consensus on issues over which the parties stand divided between proponents of regulatory rigour and advocates of flexibility. Working time is a case in point, with heated debate on how to adapt the old rules on hours of work to new technical constraints and contemporary social aspirations. Such deadlocks as do occur, however, owe less to bureaucratic wrangling or lack of flexibility in national procedures than to the sheer difficulty of reconciling varied and divergent points of view on substantive issues.

Often lacking today is basic agreement on the underlying principles of regulation. As a result, entire sections of labour law are being laid open to question. The difficulty of working out compromise solutions is compounded by the fact that trade union federations and even employers' federations find it more difficult than in the past to speak out on behalf of all those they are supposed to represent. Technical standards tend to focus discussions on how to strike the best possible balance between economic considerations and the protection of labour. Hence the value of investigating the significance and potential of a third category of standard whose binding force may be less immediate.

### *Programmatic standards*

The standards in this category are designed to organize and prompt action: they set goals to be achieved through promotional action. Their implementation requires the adoption of a variety of measures, not necessarily of a legal nature, such as political projects, economic measures, information and training campaigns, non-legal “regulation”, etc. In brief, programmatic standards seek to regulate by setting objectives in the way that modern human resource management methods do. Such standards tend to be worded in general and flexible terms. They place no immediate obligation on the employer or any other party to achieve a particular result, but rather they lay down an obligation of means, as the case may be, on the part of States themselves, to adopt measures, to carry out certain activities, to design or implement certain projects, to promote certain approaches, etc.

These standards apply primarily to employment, vocational training and discrimination. By way of illustration, excerpts from two ILO Conventions are given in boxes 1 and 2, respectively the Employment

**Box 1. Employment Policy Convention, 1964 (No. 122) (excerpts)***Article 1*

1. 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.

2. The said policy shall aim at ensuring that –

- (a) there is work for all who are available for and seeking work;
- (b) such work is as productive as possible;
- (c) there is freedom of choice of employment and the fullest possible opportunity for each worker to qualify for, and to use his skills and endowments in, a job for which he is well suited, irrespective of race, colour, sex, religion, political opinion, national extraction or social origin.

3. 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.

*Article 2*

Each Member shall, by such methods and to such extent as may be appropriate under national conditions –

- (a) decide on and keep under review, within the framework of a co-coordinated economic and social policy, the measures to be adopted for attaining the objectives specified in Article 1;
- (b) take such steps as may be needed, including when appropriate the establishment of programmes, for the application of these measures.

Policy Convention, 1964 (No. 122), and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

These standards seek to make the public authorities' action more consistent and systematic on the issues they address. To that end, they establish such procedures and machinery as will enable a given programme to be implemented, occasionally specifying concrete labour market policy measures and means of evaluating their effectiveness. With regard to employment, for example, some of the specified measures appear to be aimed at achieving immediate results – e.g. exemption from social security contributions to boost recruitment of young people at a particular time – whereas others aim to lay the foundations of a strategy to combat unemployment (e.g. reform of the vocational training system or, more simply, incentives for geographical or occupational mobility).

Again, a single legal instrument may contain both directly binding provisions and programmatic standards. Legislation on equal opportunity and equal pay provides a good illustration of this point as it typically combines provisions for promotional measures with rules that invalidate acts of discrimination falling within its particular scope. Furthermore, programmatic and technical standards on a given subject

**Box 2. Discrimination (Employment and Occupation) Convention, 1958 (No. 111) (excerpts)**

*Article 2*

Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

*Article 3*

Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice:

- (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
- (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
- (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
- (d) to pursue the policy in respect of employment under the direct control of a national authority;
- (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority;
- (f) to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.

like, say, occupational health can be interrelated, as in the case of so-called framework legislation and regulations made hereunder. Here, the basic principles laid down in the legislation are supplemented by specific provisions in its implementing regulations. This, incidentally, suggests a possible way of modernizing the ILO's standard-setting activities.

The concept of programmatic standards also extends to provisions aimed at facilitating communication between social groups and institutions so as to help them work out their own solutions to problems that have been identified (Hepple, 1986, p. 10; Habermas, 1986; Treu, 1994, pp. 461 et seq.; Barnard and Deakin, 2000, pp. 340 et seq. and 2002, p. 139). They have been described in terms of "coaching a process". Many of the provisions concerning industrial relations fall into this category. Programmatic standards thus clearly combine features of both regulation and prescriptiveness.

Supervision of the application of such standards raises specific issues because it needs to focus on the deployment of means rather than the attainment of end results. As a legislative option, however, the adoption of a programmatic standard does not amount to "deregulation". Nor can it be equated with a strictly "voluntarist" approach that would leave it entirely up to individuals and the social partners to determine their industrial relations (Wedderburn, 1991, pp. 3-4; de Munck, Lenoble, Molitor, 1995, pp. 20 et seq.; Antoine Lyon-Caen, 1995, pp. 176

et seq.). On the contrary, the parties are required to interact within a given framework and in pursuit of given objectives that are specified by legal rules, i.e. with provision for penalties in the event of any breach. Nevertheless, when such rules do call upon workers' and employers' organizations to play a part, they presuppose a reasonable balance of bargaining power between them – i.e. that they be capable of acting on a relatively equal footing – lest they should exacerbate inequalities between the parties. This is why States also need to equip themselves with a firm base of fundamental standards such as those described above (Barnard and Deakin, 2002, p. 146).

In European and international law, promotional standards appear to be commonly used as a means of influencing state action. European Union directives are a good example of this approach, though further illustrations can also be found in national legislation. Japanese law, for instance, lays down obligations “to do one’s best” to adopt particular measures instead of a downright obligation to adopt them. It is then up to the administrative authorities – usually the Ministry of Labour, often acting in collaboration with the trade unions and employers’ organizations – to convince enterprises to do all they can to translate the spirit of the law into action. In 1986, for example, an amendment to Japan’s Old Persons’ Employment Stability Act required employers “to do everything within their power” to postpone the mandatory retirement age to 60 years or later (it was previously well below 60). Pursuant to a further amendment introduced in 1990, employers came under an obligation “to do their best” to re-employ retired workers who so wished until they reached the age of 65. The Ministry of Labour ordered action programmes to be drawn up accordingly. Nevertheless, the Government subsequently found it necessary to increase the impact of the measures that had been taken and, in 1994, legislated a compulsory retirement age of 60 years. The law thus enacted also provided for stronger incentives to encourage employers to keep their workers until the age of 65 (ILO, 1995, pp. 91-92). While the policy of raising the age of retirement may well change because of momentary economic difficulties, the regulatory approach taken by the Government seems to be deeply rooted in Japan’s legal tradition.

The adoption of promotional standards tends to cause little controversy. They are generally well accepted, except when they increase the burden of administrative constraints on enterprises. Yet their potential for reconciling workers’ protection with today’s overriding economic considerations has so far not received the consideration it deserves. More so than fundamental standards, they allow for regulations – on, say, occupational health – to be updated to keep pace with scientific and technological developments (Servais, 1997, pp. 87 et seq.).

Such standards also give the parties directly concerned, at all levels, the responsibility both for adjusting their conditions of work in the light

of their day-to-day experience and for finding the most appropriate balance between economic efficiency and safeguards for workers. Admittedly, the transfer of these responsibilities to actors at the grassroots level should not be taken too far: a sense of the general interest should be retained. Yet there appear to be many labour and employment regulations that could be adapted to changing economic conditions in this way.

## Labour standards for a globalizing economy

The point of the foregoing discussion is to facilitate the search for the most appropriate way of addressing recurrent questions on the relationship between the quality of work and the quantity of employment in any given society and at any given time in its history. In particular, labour standards should not hamper change from one production system to another. Rather, their purpose should be to minimize the adverse human consequences of such change, to ensure that the transition from the old system to the new is as harmonious as possible in social terms.

### *The diversification of work*

Most research on labour and its regulation has been based on the labour market model or paradigm. This conceptual framework has certainly been appropriate for explaining the exchange between work and wages that takes place within the employment relationship, particularly when the latter is characterized by some stability over time. But this model becomes less effective if more precarious forms of employment – which have recently proliferated – and self-employment are factored in. It is similarly ill-suited to analysis of other activities such as voluntary work or very low-paid work, whether it is done individually (e.g. childcare or care of the elderly or disabled) or within an institution or association; training and retraining; or leave taken for family reasons (maternity leave, parental leave, etc.) or to perform civic duties (e.g. military service). Although many of these activities are socially useful, they do not really fit into the paradigm of exchange for profit.

Efforts have been made to take fuller account of these contingencies in socio-economic analysis. Examining labour market flexibilization, some researchers (e.g. Schmid and Auer, 1998; Gautié, 2003) have observed that new institutional arrangements increasingly take account of the need for ongoing training, that the diversity of individual needs requires greater flexibility in the organization of work, and that atypical forms of employment call for reconsideration of the relationship between paid work and other socially useful activities. These researchers have put forward the concept of “transitional labour markets” as a

framework for identifying the main features of the implementation of these new arrangements (in terms of organization, income policy, social and labour policy and their tax implications).

Some take a very pessimistic view of the future of the labour market – stressing its rapid “informalization” in the industrialized and developing countries alike – in order to justify, *inter alia*, the payment of a guaranteed citizenship income (Standing, 1999).

Others, particularly from the French school of thought (e.g. Supiot, 1998 and 1999), have more clearly distanced themselves from the labour market framework. They stress the wide variety of occupations that can be pursued in the course of a working life: employment, self-employment or entrepreneurship; voluntary and paid work; work in the public service or in the private sector; training courses, internships or retraining; private pursuits (e.g. housekeeping) or public duties (military service, political activities). These researchers highlight the ambiguity of the legal criterion of subordination, a crucial feature of the employment relationship.

Taking this perspective, they have come up with ideas that envisage working-life scenarios based on “modules” to be coordinated, whereby work would alternate with retraining and leave, e.g. maternity or parental leave, leave for military service, etc. (Commissariat général du Plan, 1995; Valli, 1988, pp. 13-38 and pp. 177-197; Ladeur, 1995, p. 143).

Improved qualifications and greater independence – the two being inextricably linked – would not only ensure more satisfactory coordination between the various individual activities (e.g. professional work, training and retraining, leave for specific reasons, voluntary or poorly paid but socially valuable work, like childcare or care of the elderly, assistance for the victims of abuse, etc.), but they would also make it possible to plan for those activities over an entire lifespan. Such arrangements would help to resolve conflicts of interests, both those experienced by workers personally and those arising in their relations at work, and thereby help to strike a satisfactory balance between private (family) life and professional activities.

These proposals offer a fresh perspective on the fragmentation of people’s working lives observed in the industrialized countries. They also provide a better framework for understanding the various occupations people pursue in developing countries, particularly in the informal sector. Admittedly, they could serve to justify payment of a minimum income, or even the granting of some limited credit for certain purposes (e.g. training, care for people in need, social work within an organization, etc.).

In practice, however, the application of those proposals would come up against a number of serious obstacles. First, labour force statistics indicate that traditional wage employment is far from being a thing of the past; in fact, it still offers the best possible guarantee of

income security (Castel, 1999, pp. 438-442; Jacobs, 2000, pp. 55 et seq.). Second, it would be difficult to separate income from work and reach a consensus on how to finance a subsistence allowance in the absence of paid employment (through income tax? turnover tax? VAT?). Besides, would it truly be practicable to map out a person's "career" in this way? The answer may lie in the difference between insecurity and uncertainty. Indeed, social protection aims to alleviate the *insecurity* experienced by those who work or want to work in that it covers contingencies that may jeopardize their lives, their health, their livelihoods and those of their dependents. It is certainly not intended – how could it be? – to provide for every single event or to organize people's lives down to the last detail. In short, it was never meant to eliminate *uncertainty*. In fact, uncertainty is one of the incentives that drive achievers to create, to innovate, to be enterprising, and is therefore a factor of progress.

### *Innovative approaches*

As these observations suggest, it might be preferable to consider a more down-to-earth approach – one in which every effort is made to ensure a closer match between the social guarantees envisaged and the workings of today's economy. Earlier in the discussion, it was suggested that programmatic standards should be used more often to encourage individual and collective players – who *are* familiar with day-to-day realities – to assume greater responsibility for the implementation of labour policies whenever they have not already done so. But outside this category of standards, there are also new forms of security that are more compatible with the increased instability of employment. Here again, the challenge is to identify or design the most appropriate structures and institutions. This point will be illustrated with a few examples.

First, let us consider cases where programmatic standards appear to have been implemented with success. One such case concerns the reform of the Dutch system of sickness benefits: the amounts are determined by law, but it is up to individual employers to decide how the benefits are provided, e.g. by acting as their own insurance company, by taking out individual insurance, by setting up a joint scheme with other employers, etc. (Auer, 2000, p. 63).

In the United States – to give another example – social insurance is mostly company-based and, in principle, forfeited if workers leave their job (hence the question of the portability of acquired rights). In Silicon Valley, the showcase of the "new economy", Amy Dean, the local representative of the AFL-CIO, has been pleading for her organization to provide health insurance, unemployment insurance and ongoing training to workers who have become freelancers so as to offer a substitute for the single-employer link that firms have severed (*Le Monde*, 2000, p. 15). Significantly, the trade unions in several northern



European countries continue to manage the payment of unemployment benefits – either alone or jointly (ILO, 1997, p. 26-27).<sup>7</sup>

The explanation for this practice is historical: trade unions were the first to help the jobless, long before the State took over this responsibility. The history of social security offers plenty of examples of institutions in Western countries that developed from private initiatives to meet the new and urgent needs arising from the industrial revolution and its social consequences. Something similar is happening today: in many cases private organizations are stepping in to fill a social policy vacuum in order to meet an unsatisfied collective need.

The diversification of employment situations has led lawmakers in countries such as Belgium, France and Italy to authorize derogations from labour law on issues – particularly working time flexibility – to be settled by collective agreement (Gérard Lyon-Caen, 1995, pp. 41 et seq.; Revet, 1996, pp. 61 et seq.). In such cases, the law merely sets a framework and the limits of flexibilization, i.e. conditions, possible compensation, and the extent of the exceptions permitted. Along the same lines, the law can specify the circumstances – and limits – within which the public authorities may allow labour disputes to be settled by private conciliation, mediation or arbitration.

There is another subject that the social actors and public authorities could usefully reflect upon, namely, official recognition of socially useful activities and of those who engage in them. Such activities include assistance to the most disadvantaged, but they should be understood in a broader sense too. Obviously, the point is not merely to delegate public service responsibilities to private organizations;<sup>8</sup> this might simply open up a new market for commercial interests or result in a bureaucratic mire. Socially useful activities also include schemes such as Italy's "time bank" or France's "SELs" (local exchange schemes), i.e. networks of private individuals who exchange services, e.g. babysitting for minor house repairs. Clearly, many of these activities strengthen the social cohesion of local communities. Their official recognition ought to be accompanied by payment of a decent wage provided by the beneficiaries or by government agencies, as is already the case in the arts and in scientific research. Incidentally, this would also lead to reconsideration of the analytical frameworks traditionally applied to the informal sector and, again, to inclusion of the activities of private organizations.

The idea behind this latter proposition is ultimately to broaden the scope of operative legislation so as to provide for new forms of security compatible with even the most precarious forms of employment. With

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<sup>7</sup> These countries – namely, Belgium, Denmark, Finland, Iceland and Sweden – are also among those with the highest rates of unionization.

<sup>8</sup> See the March-April 1998 issue of *Esprit*, pp. 108 et seq. (see note 4 supra).

self-employment and precarious forms of wage employment on the increase, workers' protection can hardly remain conditional upon a permanent employment relationship. Indeed, the right to health care and to a basic pension should be extended to all, irrespective of employment status. In poor countries, this should be a top priority. But in the industrialized countries too, there is an urgent need to set up or revive institutions that can serve as anchor points in today's context of increased occupational mobility (from one company, employment relationship or activity to another). That the idea is not purely speculative or unrealistic is illustrated by the following two examples.

The first of these is the Netherlands' system of so-called "flexicurity", which seeks to reconcile job flexibility with income security. Following broad consultations among the parties concerned, a law was passed on 1 January 1999 to set up a new scheme for temporary workers: after working for an employment agency for a certain period of time (basically 26 weeks, subject to extension by collective agreement), workers are deemed to have an employment contract with the agency (Heerma van Voss, 1999, pp. 419-430). This "anchors" their entitlement to more comprehensive protection under labour and social security laws, while maintaining their employment mobility. This scheme seems to have found acceptance among all those concerned.

The second example is from France, where a principal and a subcontractor may be held jointly liable for ensuring that wages are paid and that the "obligation to provide security" is discharged in respect of their workers. A similar arrangement is also in operation in Canada.

## Concluding remarks: The roles of the State and labour courts

Government authorities have a social duty to implement "decent work" policies which not only mitigate the adverse human consequences of economic change, but which also strengthen its positive outcomes for peoples' lives and their work. In some cases, such policies may involve no more than slowing down the pace of change to the point where it becomes humanly tolerable (Polanyi, 1957, pp. 33 et seq.).

States continue – and should continue – to have recourse to legal means of implementing their social policies. However, there is scope for change in the way States view their role and legislative capacity. As the foregoing discussion suggests, they could give the social actors – as defined above – a more significant part to play in the regulatory process. This, in turn, calls for programmatic rather than purely prescriptive standards.

In every concrete situation, the key role of the State – or, more specifically, of the national, regional and local authorities – should consist in identifying and recognizing the social actors, promoting their

development and access to information (by removing obstacles such as anti-union practices), recognizing the institutions they set up (for example, by taking part in their establishment) and facilitating relations between them. In short, the State should be not so much a “tutor” as a source of inspiration and a mediator in creating an environment conducive to dialogue. Its aim should be to set up such communication mechanisms as may be needed to facilitate concerted action (Supiot, 1999, pp. 270-271; Durán López, 1998, pp. 869-888; Evans, 1997, pp. 62-87). The various representative actors must also be invited to take part in the work of the agencies that implement policies in the areas of vocational training, credit, social security, etc. The scope of their autonomous negotiations should be broadened; or they may be called upon to participate systematically in the making of social policies and in the drafting of laws that translate them into long-term and (more or less) binding measures. The same applies to inter-governmental institutions.

The State’s role needs to be specially focused when it comes to certain kinds of activities, such as those of the informal sector or small and medium-sized enterprises, where social dialogue is more difficult to get going. Here too, however, there have been successful attempts to set up a conducive framework. For example, the achievements of the districts of Emilia Romagna in Italy have been the subject of numerous case studies on this point (Pyke, Becattini and Sengenberger, 1990; Cossentino, Pyke and Sengenberger, 1996). The informal sector also has its success stories (see ILO, 1997, pp. 187 et seq.).

Strengthening the capabilities of social negotiators should, if the process is properly managed, lead to a consolidation of the State’s own position in today’s globalized world. To that end, the State should not only promote these new forms of participative decision-making, but also ensure smooth coordination between the different levels involved.

Many countries have long given a special role to the social partners in the judicial settlement of labour disputes. Indeed, labour tribunals appear, more than any other social institution, to be above controversy. There are exceptions, of course, but they are rare (Blouin, 1996). It may therefore be useful to consider what it is that has so far enabled labour jurisdictions, minor incidents notwithstanding, to steer clear of the social crisis marking the start of the new millennium. The answer probably lies in their capacity to come up with workable means of reconciling the two key dimensions of progress, namely, productivity and human welfare. Of course, they are not always successful, but they never stop trying. At all events, no better system appears to have been found to work out the delicate compromises that need to be reached in that respect. That the labour jurisdictions have been so successful no doubt owes much to the contributions of representatives of the parties concerned, i.e. workers’ and employers’ organizations. Another factor in their success is the balance they have managed to strike between the

dispassionate administration of justice, on the one hand, and relative informality coupled with speedy decision-making, on the other hand. Yet another lies in the system's provisions for ensuring genuine equality between litigants, including legal aid, the ease with which professional associations can institute proceedings and the flexibility of the rules on evidence. And lastly, there is of course also the very way in which labour courts are organized and the efforts made to improve the way they are managed. These factors also help explain their success.

In today's difficult circumstances, these distinctive features of labour courts give their judges a renewed role in the implementation of social policies. Indeed, the extent to which those policies are meaningful ultimately depends on the effect they are given at the grass-roots level – i.e. in respect of each and every enterprise, of each and every individual. As a result of the quiet diligence with which judges perform their duties, however, their fundamental role often tends to get overlooked in public debate. This may be yet another advantage they enjoy.

Current changes in the world of work could well upset this equanimity because of the reduction in the number of workers in regular (wage) employment as compared with the number of those working under precarious contracts – workers who are legally independent but economically fragile or “parasubordinate”. Yet it is the latter's status that raises the most questions about the relevance of labour law and, sometimes unintentionally on their part, about the representativeness of workers' organizations – often the very ones that sit on labour courts. Admittedly, there are a few cases in which labour court officers have been elected by self-employed workers (as in Belgium, with respect to social security litigation), but such cases remain exceptions. The way in which the courts adapt to these changes is bound to have a huge impact on their future.

Finally, the ultimate aim of any social policy and its implementation remains unchanged: it is to help men and women cope with the contingencies of the market economy. Spinoza once wrote that fear made people weak of mind. The democratic States of the world have established procedures whereby their citizens are represented in decision-making processes. These include not only parliamentary systems, but also the workings of social dialogue in the broad sense. But more open borders and the accelerated internationalization of economic exchanges have reduced the capacity of all nation States – and of their participatory bodies – to control economic and social policy. The greatest challenge for the twenty-first century – and at the same time the most pressing need – is thus to make good the resulting democratic deficit (ILO, 2001, pp. 81-83; Mazur, 2000, pp. 79-93), to invent new institutions offering all those concerned a chance to participate, at any level whatsoever, in designing and implementing policies and programmes that will provide them with decent work, i.e. jobs performed in condi-

tions that respect human dignity, with social protection covering work-related risks.

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