



International
Labour
Organization

Executive Summary

International and comparative labour law

Current challenges

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Until at least the mid-1970s labour law was understood to be an integral part of an overall system of social justice and industrial democracy. The post-war period, with unprecedented growth and development and ample full employment, had created a climate that led to the establishment of a “standard” or “typical” employment relationship. Labour law grew around this relationship and remained stable and straightforward. Since then, however, there have been significant changes in the world of work, largely due to the digital revolution, the delocalization of production throughout the world and the increasing competition between high-wage and low-wage countries as a consequence of the globalization process. The most challenging elements of this new context are the following:

- **Atypical employment:** Part-time work, fixed-term employment, extended probation terms, on-call work and temporary work are examples of atypical forms of employment. Generally, the status of atypical workers in the standard employment relationship is unfavourable as atypical work tends to be associated with precarious work, although this is not always the case.
- **Scope and application of labour law:** Whether de facto or de jure, labour law is not applied within the informal economy. The informal economy’s share in the overall labour market worldwide is increasing, thus proportionally reducing the scope of application of labour laws. Self-employment and other categories of non-subordinated albeit economically dependent work are on the rise, and very few workers who fall under such patterns of work can claim labour law protection.
- **Decentralization:** Decentralization is a new phenomenon in the workplace where non-core activities are outsourced to external suppliers. In a decentralized organization, a parent company does not assume the responsibilities and risks of the employer in relation to its subsidiaries or contractors.
- **Effectiveness of state action:** In the current climate of globalization, the effectiveness of national law is decreasing. Apart from some exceptions, national labour law is applicable only within the political boundaries of a given state; however, with the opening of

international trade, capital and technology tend to “jump” national borders, whereas labour laws do not and cannot.

- **Ideological challenge:** Neoclassical thought has challenged the welfare state approach. The ideology advocates for the market’s capacity for self-regulation and suggests that labour law should be limited to the setting up of a threshold of basic rules. State protection of the worker through labour law is compromised as neoclassical thought sees “labour rights” as “labour costs”, workers are regarded as human resources rather than as human beings and labour law is called “labour market regulation”, despite the fact that labour is not a commodity.

Security of employment

The ILO Termination of Employment Convention, 1982 (No. 158), states that a worker’s employment shall not be terminated unless there is a valid reason. Yet, protection against dismissal still remains a disputed issue. Protection against dismissal not only guarantees the worker against financial consequences (in the case of dismissal) but also protects the employment relationship against abuse by the employer. However, business circles maintain that, along with increasing labour costs, protection against dismissal imposes constraints on the ability of enterprises to react rapidly to market fluctuations and technological change, thus limiting their productivity and competitiveness, and that the legislation actually prevents employers from creating jobs.

In response to the controversy, many countries have introduced labour law reforms providing exceptions, such as relaxed dismissal protection legislation for small enterprises; extension of the length of probation; and increased use of fixed-term contracts that come to an end on the expiry of the agreed term. Countries implement dismissal protection labour laws in a variety of ways and offer different remedies, such as reinstatement or financial compensation. Reinstatement is increasingly used when the court is satisfied that the dismissal is in breach of the employee’s fundamental rights, for example in the case of a discriminatory dismissal.

Global trade and labour laws

There has always been a connection between international trade and labour standards. This link, only tenuous in past decades, has attained prominence in today’s climate of unprecedented growth of trade between countries with different labour standards and labour costs. Traditionally, “North” countries with high labour costs offered high value-added production while “South” countries offered raw materials and low value-added production with low labour costs, so that the North–South gap in labour costs did not affect international trade competition. However, this gap has started to close over the last few decades as “South” countries have begun to also compete internationally in the high bracket of the market – the “assets” apparently giving these countries the edge being low wages and weak labour regulations, including, in some cases, severe restraints on freedom of association.

There are several strategies that can help protect workers’ fundamental rights without putting pressure on global trade. The approaches vary in their scope and efficiency and include:

- **International labour standards:** Conventions impose on ILO Members the obligation to guarantee minimum rights and conditions of work to their workers. However, member States are bound to the Convention only upon its ratification, which is not mandatory. Indeed many ILO Members, including some that have considerable weight in international trade such as Brazil, China, India, the United States and Viet Nam have not yet ratified all of the fundamental Conventions. Even upon ratification, the application of the Convention varies at national level and the breach of a Convention is internationally

reprimanded only through moral sanctions. Despite these shortcomings, this strategy is supported by a wide international consensus.

- **Supranational law:** Supranational law is the establishment by an international authority of labour standards that would be directly binding on each State without need for ratification. In cases of conflict, supranational law would take precedence over national law. So far only the European Union has set up and proceeded to work with supranational laws and regulations, the interpretation of which is also entrusted to a supranational judiciary body.
- **Social clauses:** A social clause with a unilateral or multilateral source may be part of a treaty or international trade agreement. It may include mechanisms to investigate, and if appropriate, impose fines or trade restrictions on countries in breach of respecting workers' rights. A state can also provide for a social clause in its national law on foreign trade. Some national and international schemes like the Generalized System of Preferences in the United States or the European Union provide interesting examples of how a country can tie customs advantages to the respect of international workers' rights in the countries with which they enter into trade relations.
- **Corporate social responsibility (CSR):** CSR initiatives are developed on the basic assumption that corporations are obliged to consider the interests of customers, employees, shareholders and communities, as well as the environment. CSR initiatives bring together multiple stakeholders, i.e. multinational enterprises (MNEs), organized labour, consumers and non-governmental organizations in the pursuit of a common goal without the participation of the state. CSR instruments are essentially "soft laws" to be considered as an addition rather than an alternative to state action.

Fundamental rights of the person

Conflicts arising between the fundamental rights of the employee and the employer's rights and prerogatives at the workplace are common. On the one hand, freedom to work, non-discrimination, protection of privacy and freedom of religion and expression are fundamental rights of the person which must be protected in general and at the workplace. On the other hand, property rights, freedom of trade and freedom to contract are rights an entrepreneur needs to be able to run a business. Employers have the right to refuse a job applicant, assign tasks, take management decisions which have a bearing on a worker's career and conditions of work, and impose disciplinary penalties including dismissal.

Considering the inherent conflict, the challenge is to find a way to contain the employer's power so that it does not undermine an employee's fundamental rights. Issues between employers and employees are oftentimes brought to court, and many countries have adopted laws that address this conflict. There is an increasing number of judicial decisions that have carefully weighed respect of the fundamental rights of the employee against the employer's rights and prerogatives.

When it comes to discrimination, be it gender, race or other kinds, attitudes have changed greatly. Laws banning discrimination in employment exist in most countries now, yet many challenges remain, such as guaranteeing equal pay for men and women and curbing racial, sexual and other types of harassment at the workplace. The adoption of affirmative action stems from the observation that the legal banning of discrimination is not enough to eliminate it in practice. Affirmative action, frequently associated with quotas, usually targets specific groups, which commonly include women, minorities and people with disabilities. The system is very controversial and has been challenged primarily on grounds that it conflicts with the equal treatment principle by giving preferential treatment to specific groups.

Workers' rights also include the right to privacy, though new information and communication technologies are making it easier for the employer to intrude into workers' private lives and to exercise control both at and outside the workplace. An increasing number of national laws and case laws carefully address this complex issue.

Regional perspectives

Europe

The development of European Community (EC) law has contributed to both political and legal aspects of the body of labour. As the economic area of the EC expanded to include societal values and labour regulations, workers' rights and collective bargaining have benefited from both institutional and political support within the European Union. From the legal side, EC law covers a range of topics in the field of individual employment relations, such as contracts, equal pay and non-discrimination, as well as occupational safety and health and information and consultation of workers' representatives. However, what is most remarkable in Europe is the sweeping change in labour law and labour relations practices that has occurred in the former communist countries of Central and Eastern Europe.

Latin America

Many Latin American countries, in particular Argentina, Chile, Colombia and Peru, have implemented reforms which have brought about the "flexibilization" of labour law, while some others such as the Dominican Republic, El Salvador and Venezuela (now the Bolivarian Republic of Venezuela) have on the contrary furthered and enriched existing labour rights. Some countries, for example, Argentina and Chile have first deregulated but more recently re-regulated the labour market. National courts have also taken efficient measures to better protect the workers' fundamental rights. Despite this, labour law in Latin America today faces a number of challenges: (a) the scope of labour law has narrowed as a result of the frequent use of labour under civil and commercial law agreements; (b) unionization rates have decreased and, with a few exceptions, collective bargaining has lost its strength; (c) labour inspection and law enforcement in general are not effectively applied; (d) labour law is rarely if ever implemented to protect workers in the informal economy.

Asia

Labour challenges in Asia and the Pacific are difficult to characterize because of the region's diversity of history, culture, social structure and economic development. Countries such as Australia and Japan have a longstanding industrial tradition, with established labour laws and industrial relations institutions. By contrast the economic growth of Hong Kong (China), the Republic of Korea, Malaysia, Singapore, Taiwan (China) and Thailand began only in the 1970s, and India and Viet Nam's economies have only recently taken off. The People's Republic of China, with its rapid growth rates, international investment opportunities and one-party political system, sits in a category of its own.

South Africa

Tripartite negotiations as a component of labour relations emerged in the post-Apartheid period. The 1995 Labour Relations Act restructured the legal and institutional basis of collective labour law and unfair dismissal law and created for the first time a single legal framework for labour relations applicable to all sectors of the economy. However, since 1994, unemployment and informal employment have significantly increased. The rate of unemployment is still racially skewed. There has also been an increase in outsourced work and temporary employment services (TES).

Conclusions

Every period of history brings changes and these come with their share of promises and hopes, risks and anxieties, challenges and answers. It is possible to look at the world today and find that labour law has met with some success. Firstly, it has gained ground for freedom of association in many parts of the world where democracy has returned. Secondly, there is an acknowledgement that the relationship between international trade and labour law must be considered so that global competition does not override workers' rights and overall living and employment conditions. There has been significant progress in the recognition of the fundamental rights of the worker: non-discriminatory policies as well as protection of workers' privacy and freedom of thought and expression have been put in place in many workplaces. More remarkably, apartheid has been outlawed. There is still a long way to go as labour law has undergone deep and extensive changes. Dependent work conditions continue to exist and the worker is still vulnerable. The question we face today is how to render labour law more effective so that it can continue to benefit all workers who need protection.

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