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HOW EFFECTIVE ARE THE ILO'S LABOUR STANDARDS UNDER GLOBALISATION?

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Abstract

The ILO's Labour Standards have assumed increased prominence in recent years with the liberalisation of international trade and capital movements, often referred to as globalisation.

While there is general support in principle for greater international economic integration, rapid dismantling of trade protection, deregulation of the capital and financial market, outsourcing of work and relocating of plants, technological and other developments, have been associated with adverse economic and social consequences in many countries.

How to deal with these consequences without interrupting the growth in world trade, has been high on the agenda of international bodies. The 1998 ILO *Declaration of Fundamental Principles and Rights at Work* is one response with particular emphasis on Core Labour Standards. This *Declaration* has been endorsed by the WTO, the EU and the World Bank, among others[1].

This paper will consider the effectiveness of these standards in *developed* countries mainly in relation to ILO principles on trade union rights and collective bargaining. It is argued that, under the impetus of globalisation, some countries, motivated by market-oriented economic doctrine and by a perception of unions as being obstructive to economic efficiency, have adopted an unduly conservative economic policy and enacted legislation incompatible with these standards. In the

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[1] It should be noted that with the growth of multi-national enterprises (MNE's), the OECD, ILO and the United Nations have issued guidelines on labour, human rights and environmental standards ahead of the ILO's *Declaration* (Murray, 2001). This paper does not deal specifically with MNE's because the Guidelines are consistent with the Conventions dealt with in this paper (ILO, 1995:105-110).

absence of international enforcement powers, governments in these countries have chosen to ignore the requests of the ILO for adherence to its principles with impunity and have compromised the effectiveness of the CLS. This issue is discussed generally in reference to several developed countries in recent years but primarily on the experience of Australia and Europe, exemplified by Austria, to provide differing perspectives.

It is also suggested that in the interest of greater credibility and compliance, the ILO's principles on the right to strike should perhaps be more narrowly defined.

The world trade background

The issues concerning the ILO's labour standards are not new. In the international forum, they go back to the Covenant of the League of Nations of 1919 in connection with the establishment of 'fair and human' conditions in all countries to which commercial and industrial relations extend (Charnovitz, 1987). They featured in a number of countries, particularly the United States, concerned about 'unfair' competition with countries with low labour standards, as a trade protection or a 'level playing field' device. However, they have assumed greater prominence in recent years in the context of globalisation, a new term for a situation applying to the world for many decades prior to 1914. For our purposes, the term refers to the increased economic integration of countries through reduced trade barriers on goods and services and greater mobility of capital, both for direct investment and the transfer of funds.

Opening up of countries to freer trade, means increasing unprotected competition between them. This has given rise to a number of inter-related concerns – that such competition would lead to lowering labour standards and a 'race to the bottom'; that it might also be at the expense of traditional 'human rights' (OECD, 2000:18) and that it might endanger social cohesion (Commission of the European Communities, 2001:3). These concerns have fuelled interest in labour standards as a means of moderating adverse effects of globalisation.

In theory, under the assumptions of perfect competition and constant returns to scale, the opening up of trade should lead economic benefits and higher living standards all-round. In practice, the outcome for most countries may not be so simple, and the effects are a matter of controversy. Globalisation has been associated with unfavourable economic and social fall-outs for some countries and certain sections of particular countries, involving risks that economic integration may lead to social disintegration. It has been said that trade liberalisation should not be an end in itself without regards to how it effects 'broadly shared values at home' (Rodrik, 1997:48)[2].

However, it is necessary to qualify the above remarks by stating that the problems arise not so much from the liberalisation of trade as such; but rather, from the uneven degree of liberalisation, especially by the EU and USA on agricultural products, as well as from the difficulties – institutional, political and social – of speedy adjustments and the high social and economic costs of such adjustments. The latter difficulties have been experienced especially by countries without an effective institutional infra-structure or governance to deal with the problems; and also by the less

[2] The negative consequences of free movement of short-term speculative capital on exchange rate stability is well accepted (Hirst – Thompson, 1999:46). Moreover, the reduction in protection, particularly on agricultural products, has limited the benefits of globalisation, especially to developing countries. However, on present evidence, it is not clear that trade liberalisation as a feature of globalisation, by itself, leads generally to higher growth (ILO, 2001:10) or even to higher exports (Mah, 1997:783). Additionally, the widely accepted conclusion that compared to countries with restrictive trade and foreign investment policies, those with 'open' economies grow faster, has been subject to serious questioning once other relevant country characteristics are controlled for (Rodriguez – Rodrik, 1999; ILO, 2001:10).

skilled and those with less transferable skills in the labour force (ILO, 2001:5; Rodrik, 1997:3), resulting in structural unemployment, unequal income distribution and undue widening of the wage structure. The impact of radical changes in technology has added to the problems of adjustments.

A further qualification is that the unfavourable effects of trade liberalisation will be exaggerated unless it is considered in conjunction with relevant economic and social policy measures. Thus, the unemployment rates of advanced countries cannot be explained largely by trade with low–wage developing countries (Leisink, 1999:9). More important factors are to be found in the stringency of macro policies (WTO, 2001:7), the nature and extent of deregulation particularly of the labour market (sometimes, disingenuously, in the name of the requirements of effective competition in a global economy), and inadequate welfare measures (Leisink, 1999:11). Moreover, market forces on their own, cannot be relied on to produce the desired social and economic results and that appropriate macroeconomic and industrial policies are required (UNCTAD, 2001).

The ILO's core labour standards

It is in the context of these considerations that the issue of the ILO's labour standards and their effects, have come into prominence, largely as a result of pressure from the developed countries to promote a 'level playing field' and to prevent the downward harmonisation of labour standards (Gunderson, 1998:36). The focus has not been on ILO labour standards generally, of which there are about 180, but rather on what has come to be known as 'core labour standards' (CLS) which formed the basis of the 1998 ILO *Declaration on Fundamental Principles and Rights*[3] (OECD, 2000:20).

> Freedom of association and the effective recognition of the right of collective bargaining (Conventions 87 and 98);
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> elimination of all forms of compulsory labour (Conventions 29 and 105);
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> effective abolition of child labour (Conventions 138 and 182); and
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> elimination of discrimination in respect of employment and occupation (Conventions 100 and 111).

Although not binding in international law, the obligation to 'respect, to promote and to realise' the terms of this *Declaration* was not confined only to those states which had ratified the relevant Conventions but also to all members of the ILO.

[3] These principles are also in essence set out in the United Nations International Bill of Human Rights. See also Kellerson (1998).

Not only the ILO but also the WTO has been actively involved in the CLS issue, more particularly to ensure that they would not be used as a protection device. Lest the concerns about the social effects of globalisation should lead to a reversal of the trade liberalisation process, the 1996 WTO meeting of Trade Ministers in Singapore affirmed, after a heated debate (Haworth – Hughes, 1997), their commitment to the observance of core labour standards and that while the WTO would continue to cooperate with the ILO on the matter, the ILO was the appropriate body to set and deal with these standards. It maintained that increased economic growth fostered by trade liberalisation would contribute to the promotion of labour standards, but that these standards should not be used for protectionist purposes. In particular, the comparative advantage of countries, particularly the low-wage developing countries, 'must in no way be put into question' (OECD, 2000:60).

Enforcing the CLSs

Despite the substantial progress in the ratification of ILO Conventions in recent years (OECD, 2000:22), the question remains: How to enforce these standards? The EU admits that 'Existing international economic and social rules and structures are unbalanced at the global level. Global market governance has developed more quickly than global *social* governance' (Commission of The European Communities 2001:3). However, any expectation that the collaboration between the ILO and WTO would result in the latter using its more effective enforcement powers and procedures to apply trade sanctions against countries which violated the CLS, was quashed by strong opposition from certain countries (OECD, 2000:61). While affirming its continued support in the promotion of CLS – 'sustainable economic growth goes hand in hand with social cohesion, which implies respect for core labour standards' – the EU has also firmly opposed the use of trade sanctions as a method of enforcing CLS (Commission of European Communities, 2001:10-11).

The difficulties of applying sanctions successfully provide some justification for such opposition although a cynical view might be that the WTO and the EU find it politically more convenient to leave the matter to the ILO in the knowledge that the ILO, while being the formulator of labour standards, can only resort to 'dialogue, moral suasion and technical assistance' (OECD, 2000:52) to deal with recalcitrant members. There was also opposition from the ranks of the employer representatives on the Governing Board of the ILO as well as from member states of the developing countries, to the inclusion of the 'social clause' in the Charter of the WTO as an indirect way of requiring countries to abide by the ILO's CLS, such inclusion being seen as a form of protection (Sengenberger, 1994:8)[4]. While there is an uneasy relationship between the promotion of human rights, social cohesion and fair trade standards (Charnovitz, 1987:580), and while

[4] The hostility of employer representatives on the ILO Governing Board to such a role being foisted on the WTO, in effect making the social clause binding on member states, is bluntly stated by Myrdal (1991).

philosophically, there are important differences between WTO and ILO, one inclined to a market-oriented approach to dealing with economic and social problems and the other having fewer inhibitions about a more regulated approach (Freeman, 1992), the coming together of these two bodies clearly strengthens the basis on which CLS may be observed internationally. Although some may not be convinced that, essentially, 'the idea of fair labour standards is not protectionist. It is anti-protectionist' (Chernovitz, 1987:581), for its part, the ILO is guarded in its espousal of the case for continued liberalisation of trade as a means of raising living standards. It has said that 'the issue is not *whether* countries should try to benefit from freer trade but *how* this should be achieved' (ILO, 2001:12; Stiglitz, 2000). The pace at which protective devices are reduced and the accompanying social and economic measures put in place, are critical in minimising the adjustment costs. However, there are those who remain sceptical of the promise of long term benefits from globalisation (Leisink, 1999:20).

The issues for developing and developed countries

For the developed countries, the application of CLS has a different order of significance and relevance compared to developing countries. For the latter, despite the promise of higher productivity through what has been described as a 'virtuous circle' arising from the implementation of CLS (Martin, 2001:3; see also Stiglitz, 2000:12-16), for many, the difficulties of building the necessary institutional arrangements for applying and enforcing standards almost from scratch and from above, improving social safety nets and social insurance in a milieu of conventional social norms and institutions strange to the concepts underlying the CLS, are understandable (Cooney – Mitchell, 1997; Cooney, 1999:377; Suwarno – Elliott, 2000). In fact, in some countries, 'export processing zones' have been established, deliberately free of trade unions in order to attract foreign capital (ILO, 2000:9).

In connection with child labour, however reprehensible it may seem by civilised standards (Hagemann, 2001), the bare level of subsistence for many households, makes reliance on child labour essential for survival of families in some countries. Time and substantial technical and financial assistance from the developed countries provide the best assurance for an effective implementation of the CLS (Bhagwati, 1994).

However, for the developed countries, mostly with well established unions, collective bargaining and other labour market institutions, the affirmation of CLS, particularly those related to trade union rights and collective bargaining, comes at a time when globalisation and the competitive pressures associated with it, have borne heavily on unionism and traditional labour market arrangements (Blanchflower – Freeman, 1992; Leisink, 1999:19). The structural change of industry towards services, driven by technological developments, has impacted heavily on trade union density because the decline in the traditional areas of unionism. But government policy, more in some countries than others, has reinforced the decline of unionism. It is not too fanciful to suggest

that the support for freer trade in some quarters may have been driven partly by a desire for a less regulated and unionised labour market (Gunderson, 1998:26).

In the name of a more competitive and productive economy, governments have accepted the necessity of various developments – applying the pressure of monetary and fiscal discipline on the labour market, privatisation, deregulation and the decentralisation[5] and 'flexibility' syndrome[6] – together with outsourcing, relocation and other segmentation practices facilitated by capital mobility. The present counterpart of the beggar-my-neighbour policy of the 1930s by wage cuts as a means of exporting unemployment, appears to be a policy of frenetic productivity-competition with a view to increasing exports and minimising import competition as a means of protecting employment at home. Although these developments may lead to higher growth rates, their effect on trade unions directly and, indirectly, through increasing the sense of insecurity among employees, has been to weaken their power in nearly all countries, although to different degrees depending on the character of legislative action. Equity in income distribution becomes a casualty in such circumstances.

Economic policy and the weakening of CLS

The question may be asked whether all these self-inflicted measures, are a matter of economic imperatives or driven essentially by the ideology of market-efficiency and neo-liberal reform agenda (Du Gay, 1999; Quiggin, 1999). It is arguable that more equitable and less socially painful alternatives are available (Gahan – Harcour, 1999; Isaac, 1998).

The policy approach of say, the UK and USA, compared to that of many of the European countries (Visser, 1998), provides an illuminating contrast between forced decentralisation of industrial relations, by-passing unions wherever possible with the encouragement of the legislative framework, while in Europe, although to some extent decentralisation and loss of union power have also been a feature of industrial relations, the central union bodies are still active institutions and the 'social partnership' concept, still prevails.

Briefly put, the UK, having attempted an incomes policy and failed under a Labour Government, the incoming Conservative Government under Margaret Thatcher generated a movement away from centralised bargaining, by passing laws which weakened union power through various restrictions (Visser – Ruysseveldt, 1996:53/54) – on closed shops, picketing, lawful strikes, sympathy strikes, union recognition, union disciplinary powers on its members, check-off arrangements. Further, employers were given greater freedom to dismiss workers from taking part

[5] For the difficulties in generalising about the case for deregulation of the labour market see Freeman (1998).

[6] Encouraged by the OECD Jobs Strategy, (OECD, 1999). It should also be noted that the ILO itself has more recently passed Conventions – 171 (Night Work) and 175 (Part-time Work) – to encourage greater work flexibility. (Murray, 2001:314)

in unlawful strikes, while the longstanding provision of the Advisory Conciliation and Arbitration Service (ACAS) to encourage collective bargaining was removed, an action which, despite the finding of the ILO to the contrary, appears to violate Convention 87[7].

Although the UK was the first to ratify Conventions 87 and 98, during the regime of the Conservative government since the 1980s, in almost every year, complaints relating to non-compliance with these Conventions have been brought against the UK government. Although the complaints were upheld by the Committee on Freedom of Association, the repeated requests for a change in the legislation have been ignored by the government, leading the ILO to use uncharacteristically strong language to 'deplore' the UK action and causing it 'deep concern' (Creighton, 1994:17).

While the Blair Government has legislated to modify the Thatcher laws and philosophy, especially on union recognition, and introduced the EU Social Chapter by signing the Amsterdam Treaty, little has happened to reverse the decline in union power and collective bargaining coverage. The ACAS provision to encourage collective bargaining has not been restored and the proclamation of the concept of 'partnership' between trade unions, employers and government is somewhat ambiguous in its practical application (Hunter, 2001).

USA management has had a longstanding philosophical conflict on unionism and collective bargaining, which saw it, in the period after the 1970s, revert to the pre-1930s attitudes of anti-unionism. Indeed, the USA stands out, along with New Zealand, among developed countries as not having ratified Conventions 87 and 98[8]. While existing legislation has provided the basis for the development of unionism and collective bargaining, in recent years, the pro-employer bias in government industrial relations policy, together with the procedural tactics possible under the NLRB processes, have been applied to weaken union power and the appeal of unionism to workers in many areas (Marshall, 1992:48). Union density has declined rather more than in many other developed countries.

Despite their geographical contiguity, the contrast between USA and Canadian experience with unionism and collective bargaining is somewhat surprising. The decline in Canadian unionism and collective bargaining has been moderate by international standards (Card – Freeman, 1994). However, in the last 10 years, Canadian governments have been the subject of frequent complaints by the unions to the ILO on Convention 87, most of which have been upheld by the ILO

[7] It is interesting to note that although the ILO has repeatedly supported the concept of 'collective bargaining in good faith', somewhat inconsistently, it has stopped short of regarding a refusal for a party to bargain in good faith (the UK principle of 'voluntarism') as being a breach of Convention 87 which imposes the obligation of governments to promote collective bargaining (Creighton, 1994: 210).

[8] It should be remembered that the 1988 *ILO Declaration on Fundamental Principles and Rights at Work* was intended to apply to all member states regardless of whether they had ratified the relevant Conventions.

Committee on Freedom of association but whose requests to the government for a change in legislation have generally been ignored (Creighton, 2001).

New Zealand went further than Australia in deregulating the labour market by legislation (the Employment Contracts Act), resulting in a substantial decline of workers covered by collective agreements and a precipitous decline in union membership (Harbridge – Walsh, 2002). Not surprising, the New Zealand Confederation of Trade Unions (NZCTU) lodged a complaint to the ILO on breaches of the ILO's freedom of association and collective bargaining principles by the New Zealand Government similar to those by its Australian counterpart, to be discussed presently. The initial findings of the ILO's Committee on Freedom of Association upheld in substance the complaint of the unions. But the procedure of sending a Direct Contacts Mission to New Zealand to obtain further evidence and submissions, resulted in the Mission confirming the substance of earlier findings, although expressed in more moderate and diplomatic language. This led the Government and the employers to interpret the report, quite wrongly, as having vindicated the legislation (Haworth – Hughes, 1995). However, a change of government (a Labour Coalition) enacted new legislation in 2000 consistent with the principles underlying the 87 and 98 Conventions, although these still remain unratified (Walsh – Harbridge, 2001).

The contrasting experiences of the UK and USA on the one hand, and Continental Europe on the other, have been the subject of copious commentary (For example, Ferner – Hyman, 1998). Recent Australian experience and its inconsistency with this country's ratification of Conventions 87 and 98 further highlights the limits of the ILO's authority to persuade recalcitrant governments to uphold its *Declaration on Fundamental Principles and Rights at Work*. In what follows, we will first examine the Australian experience and by way of contrast, compare it with the Austrian story.

Australian experience

Background

Globalisation began to affect Australia in the mid-80s with the floating of the exchange rate, deregulation of the financial market, and rapidly lowering of trade protection. This was done in the context of a centralised system of wage fixation, sustained by an Accord between the Government and the trade union movement on an incomes policy operating through the federal wage fixing mechanism, the Australian Industrial Relations Commission (AIRC), (Chapman, 1998). The sharp adverse movement in the terms of trade called for an improvement in productivity to withstand competition in a more open economy.

To that end, wage policy was directed to an enterprise-oriented focus although being managed centrally, not unlike the European model. Thus the central trade union body, the ACTU, and its constituents, the main employer organisations and the federal Government, all had an important

role in the wage policy and wage fixing process through the Commission. However, the degree of centralisation gradually waned, resulting in a loosening of the authority of the Commission on agreements. The Act under which the Commission operated was amended to facilitate a more structured approach to collective bargaining while, for the first time in the history of the system, giving legal protection to a limited right to strike/lockout in the course of collective bargaining.

A change of government from Labour to a conservative coalition in 1996, introduced legislation which effectively reduced the jurisdiction of the Commission further and gave added weight to bargaining at the enterprise level. It also introduced individual bargaining through Australian Workplace Agreements (AWAs) and reduced the positive legal support for trade unions which had been a feature of the industrial relations system for almost a century[9].

The introduction of individual contracts without trade union participation, known as Australian Workplace Agreements (AWAs) and its active promotion by the Government in public employment, could fairly be regarded as a policy to discourage collective bargaining[10]. The 'unfriendly' nature of the legislation towards unionism was further reflected in the prohibition of preference to unionists in employment under awards and agreements, making union access to workplaces more difficult, tightening up on penal action against strikes and the deletion from the Act of the traditional objective 'to encourage the organisation of representative bodies of employers and employees' in favour of a more neutral objective: the 'rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association'. As will be seen later, this 'neutrality' was not reflected in the behaviour of the Government in other ways.

Apart from ideological reasons and whatever the perceptions, it is difficult to see the changes in the Act as having much to do with promoting greater productivity or work flexibility (Briggs – Buchanan, 2000; Campbell – Brosnan, 1999). The facilities existed within the existing arrangements for such objectives; the longstanding feature of the system was its flexibility to meet changing social and economic requirements (Isaac, 1989). Nor could it be said that industrial peace was an issue; strikes and other forms of industrial action were at record low levels. The comparatively high unemployment level and the greater insecurity of employment generated by the competitive forces of an open economy and the tendency to outsource work to smaller non-union workplaces, were imposing strong restraint on union power. For employers, the inducement for productivity increases came not from the changes in the Act but rather from the competitive pressure of an open and cooled economy.

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[9] As will be seen later, the Government's intention was to go much further in reducing the authority of the Commission and weakening trade unions; but it was prevented from doing so by not having a majority in the Senate.

[10] Thus one of the principal objectives of the Act is 'ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace at the enterprise level' (Section3(b)).

Although unions have enjoyed legal status from the inception of the Act almost a century ago, severe legal limitations have existed on their right to strike. Further restrictions on the right to strike and other provisions in the Workplace Relations Act 1996 (the Act), and the Government's role in a major dispute in the maritime industry, led the unions to lodge complaints with the ILO in 1997 and 1998 for consideration by the Committee of Experts on the Application of Conventions and Recommendations (CEACR, 'the Committee'). The records relating to these complaints provide a useful basis for demonstrating how ratified CLSs can be undermined by a government determined to pursue its political agenda in defiance of its obligations as a member of the ILO. And this, ironically enough, despite the fact that the objectives of the Act includes 'assisting in giving effect to Australia's international obligations in relation to labour standards'.

The Workplace Relations Act 1996

The complaints to the ILO against the Workplace Relations Act were mounted by the ACTU and responded to by the Federal Government and Australian Chamber of Commerce and Industry[11]. For our purposes, it is sufficient record the main findings of the ILO's Committee of Experts on the Application of Conventions and Recommendations[12] on the compatibility of certain sections of the Act with the Articles of the ILO's Conventions (87 and 98) relating to freedom of association and collective bargaining

It is necessary to emphasise that the right to strike/lockout[13] is inherent in the ILO's concept of collective bargaining[14]. Any limitation on it, other than those permitted by the Conventions[15], and on any issues raised for collective bargaining, violates the Conventions. Moreover, 'the right to join a trade union does *not* carry the correlative right not to belong' (Creighton, 1998:247). Thus closed shop and other such union security arrangements are not prohibited by Convention 98 and, by the same token, any legislation against such arrangements would not be inconsistent with the Conventions.

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[11] The complaints on similar issues were also directed at some of the States and Territories.

[12] Members of the Committee are appointed by the Governing Board 'in a personal capacity among completely impartial persons of technical competence and independent standing' drawn from all parts of the world.

[13] In what follows, references to strikes should be taken to include any coercive industrial action including lockouts.

[14] Although not spelled out in the Convention, the right to collective bargaining has been held to include the right strike/lockout and other forms of industrial action in pursuit of legitimate social and economic interests. Without such a right, collective bargaining would have little practical meaning. The ILO Supervisory bodies have gone further by stating that these interests go beyond the pursuit of collective demands of an occupational nature to seeking solutions to economic and social policy questions (Creighton, 2001:256).

[15] Members of the police and armed forces, but other categories of public servants may also be excepted.

The findings of the ILO Committee

On the arguments and evidence presented by the parties, the Committee determined that the following provisions in the Act were inconsistent with the terms of the Conventions (ILO, 2000C)[16].

- The Act effectively denies the right to strike in the course of negotiations for multi-employer, industry-wide and national agreements. Strikes in pursuit of such agreements are not protected from common law[17] and statutory sanctions; while the employer is entitled to dismiss workers involved in such strikes[18]. These restrictions do not comply with the requirement under the Conventions that the choice on the level of bargaining be left to the parties.

  Further, even where no strike is involved, the certification of a multi-employer agreement is left to the discretion of the Commission to decide whether it is in the 'public interest' for the agreement to be certified. The Committee expressed the view that such a condition is contrary to the principle of voluntary bargaining contemplated by the Convention (ILO, 2002) 31.01.02, CEARC, 1997/68th Session 8.

  These restrictions are intended to confine collective bargaining to the enterprise level where limited protection from legal sanctions is given during the 'bargaining period'. However, it should be noted that there is no requirement under the Act for 'good faith' bargaining by either party and, as under the 'voluntarism' principle of the UK system, there is no obligation to negotiate for a collective agreement even if one party desires to do so.

- Even under enterprise bargaining, the immunity afforded during the bargaining period may be terminated not only where industrial action may 'endanger the life, the personal safety or health or the welfare, of the population or part of it; but also where it may cause 'significant damage to the Australian economy or an important part of it' (s. 170MW(3)). This limitation goes beyond the 'essential services' restriction allowed under the Convention, i.e., services which, if interrupted, 'would endanger the life, personal safety or health of the whole or part of the population'. While the interpretation of 'public interest' is subject to the discretion of the Commission to determine in light of the particular circumstances, the wording of the Act narrowly limits such discretion.

- There is no right to strike on demarcation or jurisdictional disputes between unions; nor on strikes to pressure employers to compensate employees for loss of pay while on strike. Such a legal limitation on the issues which may be the subject of collective bargaining is inconsistent with the Convention.

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[16] See also Creighton (1997). This paper also deals with an issue of complaint upheld by the Committee not discussed here: the limitations on the rights of certain groups of employees to protection from unlawful termination.

[17] For breach of contract and/or liability in tort. See Creighton (1997:43).

[18] In connection with a complaint by the unions in the UK, the ILO Committee determined that dismissing and refusal to re-employ striking workers is in breach of Convention 87 (Creighton, 1994:12).

- There is a general prohibition on boycotts and sympathy strikes which invite punitive damages under s 45D of the Trade Practices Act. Further, a strike 'prejudicing or threatening trade or commerce with other countries or among the states' is prohibited under s 30j and k of the Crimes Act. These limitations have repeatedly been held to be inconsistent with the principles of freedom of association[19].
- In 'greenfields agreements', the employer is given the option of coming to an agreement with a particular union prior to any employees being engaged. Whilst this gives the employer the opportunity to choose the union with which it will deal, since the term of the agreement may be as long as 3 years, it prejudices the potential choice of union by the employees concerned. This violates the principle under the Convention that the choice of union or bargaining agent should be made by the workers themselves.
- The AWAs displace awards and those terms which are inconsistent with those in certified agreements[20]. By giving primacy to individual over collective bargaining, the AWA procedures are inconsistent with Article 4 of Convention 98 ' to encourage and promote collective bargaining'.

In the light of its findings, the Committee requested the Government to amend various sections of the Act 'to bring it into conformity with the requirements of the Conventions'. The formal response of the Government was to argue that the provisions of the Act are 'reasonable and appropriate in the context of the national system'[21]. The Minister for Workplace Relations response was more explicit: 'In requesting the government to amend federal legislation, the ILO needs to realise that it is the federal Parliament, elected by the Australian people, who decide Australian law – not the ILO', (Reith, 2000)[22]. Moreover, the Government does not appear to have resiled from its aim to enact

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[19] These matters had also been raised some years earlier with the same verdict by a differently constituted Committee.

[20] Subject to the No Disadvantage Test determined by the Commission to ensure that on balance the AWA settlement did not fall below the standard set by relevant awards. However, a close study of the subject concluded the Test did not achieve the degree of employee protection intended and that flexibility was achieved at the expense of equitable and fair conditions for workers (Merlo, 2000).

[21] In relation to the provision in the Crimes Act mentioned above (which has rarely been invoked), the CEARC noted that the Government appeared to have given it low priority in view of the fact that the CEARC's request had not been acted upon for over 40 years. However, although there have been many direct requests and observations as well as 13 complaints since the early 1950s, none of these could be said to indicate significant non-compliance with the relevant standards (Creighton, 1998:261).

[22] The Minister drew particular comfort from the words (underlined) in Article 4 of Convention 98 'Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers and employers' organisations and workers' organisations, with a view to the regulation of the terms and conditions of employment by means of collective agreement'. Such a narrow interpretation of the Article, out of context of other Articles, would provide an escape clause for many of other Articles of the Conventions. Thus, Article 8 (2) of Convention 87 specifies that 'The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.' The same considerations apply where the ILO principles support sympathy strikes provided the initial strike is itself lawful.

even more stringent provisions on collective bargaining. Its policy is to further limit the jurisdiction of the AIRC and weaken union bargaining power (Isaac, 1999).

The maritime dispute

This is a complex story about a bitter dispute in 1998 between the Maritime Union of Australia (MUA) and one of two main stevedoring (longshoring) companies, the Patricks group of companies. Although the dispute was ultimately settled, the issues were taken to the ILO by way of a complaint against the Australian Government by the International Confederation of Free Trade Unions (ICFTU), the International Transport Federation (ITF), the Australian Council of Trade Unions (ACTU) and the MUA. Before reporting on the outcome of the complaint, an outline of the circumstances and the course of the dispute is necessary.

In brief[23], the Patricks group comprised a dozen or so of interlocking companies, some of which undertook stevedoring operations, employing union labour for this purpose. The industrial relations history in this industry had been one of frequent conflict between the two main employers and a powerful union with close to 100 percent membership on the waterfront. This virtual monopoly position of the MUA was the result of amalgamation and inter-union agreements ratified by the AIRC under earlier legislation. The immediate source of the dispute with Patricks related mainly to changing work practices and increased productivity being demanded by the employers involving substantial labour redundancy, the extent of such redundancy being resisted by the MUA.

To escape Union resistance, Patricks, with the support of the Government, as was revealed later, embarked on a strategy to eliminate the Union from the waterfront and to employ non-union labour. This strategy involved two actions. One was to restructure the companies by making four of them, the employers of stevedoring labour to be hired under contract to one of their sister companies which would have the necessary equipment, warehousing facilities, etc. to engage in the stevedoring operations. Since they were now simply labour hiring companies, the four companies, were stripped of their assets which were transferred to the other companies in the group in a manner allowed under Australian corporations law. Their agreement with their stevedoring sister-company included a clause permitting the latter to terminate the contract should the supply of labour be interrupted for any reason. All this was kept secret from the unions until the strategy unfolded later.

The interruption came in the form of a strike; this triggered the application of the termination clause. There being no work for the employees of the hiring companies and not having any assets to meet any of their financial obligations, they were declared insolvent. An Administrator was appointed to handle their affairs and some 1,400 employees, all members of the MUA, were

[23] For a fuller account, see Dabschek (1998) and Glasbeek (1998).

sacked. Workers reporting for duty on the night of 7 April 1998, were unceremoniously removed from the docks by the security men wearing masks and accompanied by guard dogs[24].

It is important to note that under Australian corporations law, each of the companies in the group enjoyed a separate legal entity, a fact which was critical to the Patricks strategy of bringing about the sacking of union labour while isolating the financial obligations of the companies from each other (Glasbeek, 1998). The MUA had had no inkling of this plan until it came into effect.

The other part of the strategy was to find a source of non-union labour to replace the sacked workers. To this end, months before the projected dismissal of its union workers, it recruited former members of the Australian Defence Force for training in stevedoring operations in the Emirates city of Dubai; until, when the matter came to light, under pressure from the MUA and the ITF, the Dubai authorities stopped the operation. The plan was for these and other non-union workers were to be offered employment under AWAs, individual contracts noted above and earlier declared by the ILO Committee of Experts to be in violation of Convention 98. This part of the strategy failed to come to full fruition because of the timing and circumstances which led to legal proceedings.

Further, the action by the MUA to obtain sympathetic support from the ITF and other unions, violated sections of the Trade Practices Act relating to boycotts and sympathy strikes; as a result of which the MUA and its leaders were threatened with legal action by the Australian Consumer and Competition Commission (ACCC), facing the prospect of being liable for substantial punitive damages. As noted earlier, the ILO Committee of Experts had found these sections of the Act offended Convention 87.

Following the companies' action, in the course of legal proceedings, persuasive evidence came to light to show that the Government, if not actually implicated in the operation as an active facilitator, was well informed about the operation and appeared to have given the companies encouragement before the event and probably also after the event. Furthermore, it is noteworthy that the Government did not intervene in the legal proceedings which followed to support the MUA despite the fact that one of the main union allegations before the Court, later sustained by it, was that the companies had breached the Act. Its explanation for any of its part in the dispute was its concern for effective workplace reform and improved productivity on the waterfront. The details, alleged and factual, of the Government's involvement in the planning of the action as well as the outcomes of the various legal actions, are recorded in some detail in the ILO Committee of Experts' Report (ILO, 2000B)[25].

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[24] The Government's assistance in this venture was reflected in the fact that the sacked workers would be entitled to redundancy pay, to be met in the first instance by the Government and later to be covered by a levy on the stevedoring companies.

[25] See also Murray (2000).

The outcome of legal proceedings, in short, was that the High Court upheld the reinstatement of the sacked workers ordered by the Federal Court against the companies on the grounds of non-compliance with the freedom of association and prohibition of discrimination against unionists provisions of the Workplace Relations Act, ironically enacted by the very Government which appeared to condone its violation by a group of employers and, may even have been both 'ringmaster and cheer leader of the campaign against the MUA' (Dabschek, 1998).

Thanks to the Courts but no thanks to the Government, the MUA had won the fight[26]. Although the Government continues to claim that it had been responsible for 'cleaning up the waterfront', it is arguable that the rationalisation of work practices, involving a reduction of 600 workers, could have been achieved substantially without the trauma described above. Because the dispute was ultimately settled by agreement between the parties, the actual complicity of the Government was not tested in Court. However, as in the matter of the Workplace Relations Act 1996, the complaint taken to the ILO illustrates both the strictures of the relevant conventions and the ability of the Government to ignore them at will.

The findings of the ILO Committee

The following findings of the ILO Committee of Experts (ILO, 2000B) are worthy of note:

- The Committee noted the importance of the principle that 'no person shall be prejudiced in his or her employment by reason of trade union membership or legitimate trade union activities' (para 226). It found that a motive for the restructuring of the labour hire companies was to bring about the replacement of the union workforce on the waterfront by a non-union workforce; and that the Government had become aware that the Patrick companies were planning this displacement before the industrial action by the MUA began (para 225).

  Accordingly, the Committee requested the Government to ensure that, in future in the case of corporate reorganisation of the kind undertaken by Patricks, 'there will be a dialogue between the parties to the collective agreement and that the obligation under Convention 98 are respected' (para 241(b)).

  The Committee also requested the Government 'to take measures preventing in future the training of persons to replace workers taking legitimate strike action' (para 227).

- In response to the Government's defence of its and Patricks action that, consistent with the provisions of the Workplace Relations Act, a strike in this 'key area' of the economy would seriously 'harm the well-being of the Australian population and inflict significant damage on

[26] Its members were paid in full from the time of their dismissal; the boycott/sympathy strike action against the MUA initiated by the ACCC in relation to beaches of the Trade Practices was discontinued while Patricks agreed to pay $5m to a trust fund to be made available to small businesses adversely affected by the dispute.

the Australian economy', the Committee pointed out that no such crisis had arisen and that the activity of the stevedoring industry did not constitute 'essential services' in the sense of the term as defined by the ILO referred to earlier (paras 224, 229).

The Committee noted 'with concern' that the Act by linking restrictions of strike action to interference with trade and commerce, could impede a broad range of legitimate strike action; and it requested the Government to amend the existing legislation in this respect (para 230).

- In connection with the threatened action take by the ACCC to prosecute the MUA on its boycott/sympathy strike action in association with the ITF, the Committee asserted that the particular sections of the Trade Practices Act 'contains provisions that are not in conformity with freedom of association principles'. It requested the Government to amend the Trade Practices Act 'to ensure that workers are able to take sympathy action provided the initial strike they are supporting is lawful (para 235).
- On the matter of AWAs and collective bargaining rights, the Committee repeated the concern of the Committee of Experts referred to earlier, that the Act 'gives primacy to individual over collective relations'. Accordingly, it requested the Government to take steps to review and amend the Act to ensure that collective bargaining will not only be allowed, but encouraged at the level determined by the bargaining parties' (para 237).

The Austrian experience

Reduced union power

The impact of globalisation on Austria made itself felt in the early 80s. With budget deficits and current account deficits reaching unsustainable levels, the restructuring of nationalised industries, acquired by the State following the end of World War II, could no longer be postponed. These industries were the stronghold of the Social Democratic Party (SPÖ) and the unions. The ensuing privatisation of nationalised industries set the scene for the weakening of union power in Austria (Pollan, 1997). Overall, unionisation declined from 52 percent 1980 to 39 percent 1998[27]. This fall reflected the decline in the private sector (1980: 40 percent to 30 percent 1998) as a result of industrial restructuring and employment growth in SMEs relative to large scale industries[28]; union density in the public sector remained unaffected (1980: 68 percent to 69 percent 1998;

[27] These figures are taken from Boeri et al. (2001), in order to ensure international comparability. The membership data published by the Austrian trade union congress does not distinguish between employed and retired members, thus not allowing a meaningful calculation of union density. The Austrian number of members, which is published by the ÖGB, would suggest a union density of 47 percent.

[28] Union density is clearly increasing with firm size; it is particularly high in the manufacturing sector, in construction industries and transport services, all of which experienced substantial job losses in the last 20 years.

Ebbinghaus – Visser, 1996; Boeri et. al, 2001), but the proportion of the work force working in the public sector has declined significantly. Increased integration into the EU brought about a liberalisation of money and goods markets and thus an end to protection of certain former public services like transport and telecommunications, and most recently also utilities. Privatisation of public or semi-public sector industries[29] and deregulation of public services like the employment service, reduced the number of civil servants. Furthermore, unions have not been able to attract members to any significant extent in the new areas of private sector employment growth, in particular business oriented services.

However, the bargaining power of unions does not only depend on union membership. The bridge between private enterprises and unions are the works councils which can be established in firms with more than 5 employees upon the request of the work force[30].

Austrian works councils have extensive rights, similar to those in West Germany[31]. They have the right to be informed and consulted on issues which entail organisational or structural changes in the enterprise; they may object to changes and refer the matter to an arbitration board. However, they do not have the right, at least according to the Industrial Relations Act, to enter into enterprise bargaining on wage and salary rates (including bonuses and allowances). Collective agreements on pay rates, on working hours and working conditions by sector and region come within the province of the social partners in the collective bargaining process. This is consistent with the ILO Convention principles (ILO, 1986).

In spite of this formal division of functions, it has been common practice, at least since the 70s, for works councils to enter into wage negotiations with management at the conclusion of collective agreements, in order to obtain improvements in pay and conditions beyond the sectoral minima in exchange for better productivity performance. This practice, in the main in large enterprises (in which nationalised industries feature prominently), has resulted in a significant positive wage drift and a widening of wage differentials for the same skills by industry, resulting in Austria being

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[29] In 1946 and 1947 the largest enterprises in the basic goods industries, large firms in other manufacturing branches, the three largest banks and all utility companies had been nationalised. This step shifted power away from business to labour as Katzenstein (1984, pp. 136-7) pointed out: "The nationalisation of most of the large industrial and financial corporations has shifted power away from Austria's business community toward a trade union eager to share in the exercise of power." The nationalisations provided the socio-economic foundation for Austria's Social Partnership.

[30] In 1999, about 63 percent of the work force in the private sector were working in an enterprise which had a works council (ÖGB, 1999A). Bearing in mind that about 90 percent of the works counsellors, who are elected by the employees, are union members, the influence of unions on the shop floor is higher than the union density suggests. Work councils are the backbone of the unions; they collect the union membership fees, explain the strategies of the unions to the workers and inform union officials about the shop floor. They also recruit new union members and elect the union representatives. Flecker – Krenn (1999) note that a certain erosion of union power has taken place as a growing number of independents is being elected as works counsellors. These independents, i.e., persons without any political party affiliation, are not entitled to be elected as representatives of the ÖGB, the central trade union body.

[31] Works Councils were established in 1920 in an attempt to defuse the revolutionary spirit of the working class after WWI.

amongst countries with the highest wage differentials in Europe (Steindl, 1977; Pollan, 1980/1990; Guger, 1995/1998; OECD, 1997; Freeman, 1988; and Rowthorn ,1992).

The view that Austria has a highly centralised collective bargaining system is only valid if the formal structures of collective bargaining and industrial relations regulations are considered. In actual practice, especially if proper weight is given to the role of the works councils, a picture of significant decentralisation emerges. The impression of a high degree of centralisation is reinforced by the belief in the continued importance of the social partners in the formulation and execution of macroeconomic and social policies in Austria (Lehmbruch, 1982). In fact the influence of the social partners has waned as a result of Austria's membership to the EU[32]. Since 1995, the socio-economic policy agenda is increasingly set by the EU, thus shifting the power of policy formulation from the social partners to the government. Furthermore, although the legally guaranteed right of the social partners[33], in particular the unions and the chamber of commerce, to be consulted on socio-economic policy developments remains untouched, the consultative procedure has changed recently[34]. The current government limits the influence of the social partners in legislative reform by initiating amendments, with the assistance of expert consultants, and giving the social partners little time to respond to legislative proposals[35]. This was the case in the latest reform of labour law and social security law (Talos – Kittel, 2001).

As for the process of collective bargaining, the central partners tend to delegate their right of collective bargaining to subdivisions of their associations[36]. The central bodies on both sides decide on agreements of general coverage, while matters specific to sectors are determined by the particular subdivisions. Sectoral agreements may include opening clauses which give management and works councils, within a given overall framework of minimum standards, flexibility on working hours, opening hours and wage rates. These 'enterprise agreements' came into vogue in the 80s

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[32] The policy of the social partners was oriented towards the protection of the interests of the groups they represent, with the chamber of labour representing the interests of workers in small and medium enterprises (SMEs) and the unions those of large scale industry.

[33] The members of the social partnership are the central bodies of the trade unions (ÖGB), the Chamber of Labour (BAK), the Chamber of Commerce (WKÖ) and the Chamber of Agriculture (PKLWK).

[34] The role of social partners in socio-economic policy making is well documented in Talos – Kittel (1999) and Traxler (1998); both point to the changes in the 90s as a result of Austria's integration into the EU, i.e., to the increasing emancipation of government from the social partners.

[35] Instances of non-integration of the social partners in legislative reform processes go back to the 80s, however, i.e., to coalition governments of social and christian democrats. The latest case was the reform of the pension system by the late government headed by Chancellor Klima.

[36] In the case of the unions, 14 union branches are incorporated under the central trade union body, the ÖGB; on the employers side, the chamber of commerce (WKÖ) is subdivided into 136 industrial sectors and 9 regions (the 'Bundeslaender'), with compulsory membership of all enterprises in Austria. The individual subdivisions of the union federation apply only to blue collar workers organised by industrial sectors (8 in all); white collar workers are organised in one large private sector union (GPA), while the public sector unions are subdivided into 4 separate bodies. The central trade union body has the financial control (Pollan, 2000 and 2001).

(Tomandl – Vogt – Winkler, 1992), in the wake of enterprise restructuring and economic reform, and have became more common since the 90s.

This increasing tendency for such enterprise agreements, which are at times not backed up by sectoral collective agreements (so-called free enterprise agreements), is becoming a matter of concern for the central trade union body (ÖGB, 1999B)[37] which sees this practice as weakening the power of central governing bodies of the social partners. This is, however, the deliberate objective of the current government as expressed in the Government Programme 2000[38]. Its intention is to transfer rights of collective bargaining from the sectoral level to the enterprise level, in order to promote flexibility of working time and other elements of collective agreements[39].

All that said, while decentralisation and reduced union power are a feature of industrial relations in Austria since the 1980s, the central trade union body remains an active and powerful institution and the 'social partnership' concept prevails. There is no question of challenging the freedom of association and the effective recognition of collective bargaining, which has been a feature of Austrian law for more than a century. The freedom of association of employers and in principle also of workers was established in Austria in 1867 (Strasser, 1990:8), the right to enter into collective agreements and the abolition of penal sanctions against strikes dates back to 1870. Works Councils came into being in 1920. Although changes in the ideological orientation of government had an impact on industrial relations legislation between 1933 and 1945 (Strasser, 1990:19), resulting in the abolition of the right to collective bargaining and the freedom of association, these rights were re-established after WWII and have not been questioned since then.

It is important to note that the right to strike, contrary to many other EU countries, is not explicitly regulated by law. There is no right to any specified type of strike action in Austria's constitution or civil law, but there is also no prohibition of any specific strike action, neither in criminal nor civil law. However, the constitution (Art. 6 STGG) implicitly sets limits to political strike action, i.e., in the case where it might jeopardise the state. Further, unlike many other European countries, Austrian law does also not provide for compulsory arbitration in case of disagreements between employers

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[37] The Central Trade Union Body voiced its concern at the 14th Federal Congress in October 1999: "The increasing trend towards enterprise collective agreements, which do not act as unifying elements ('sectoral cartels'), does not contribute to social justice, but fosters enterprise egotism and causes wages and working hours to become part of the game of supply and demand". Biffl translation; http://www.oegb.or.at/bundeskongress/inhalte.html. At the end of the 90s about 1,300 collective agreements were in place, covering more than 90 percent of the work force. The average annual amendments to agreements amounts to some 500, about half being federal agreements, 150 were specific to the region and about 50 were enterprise agreements (ÖGB, 1999B).

[38] The Austrian government states in its programme of February 2000 that it wants to reform the social partnership in Austria, in particular bring about reforms of the associations themselves but also in matters of collective agreements. http://www.austria.gv.at/bundesreg/REGPRG.PDF

[39] If works councils enter into agreements with management, which are not backed up by a collective agreement, i.e., they decide on a so-called 'free enterprise agreement', it does not have the same legal status as industrial relations law (Arbeitsverfassungsrecht), but may be enforced through the normal procedures of civil law (Ullman, 1997:28).

and employees on issues of rights arising from existing agreements on pay and conditions of work. The settlement of industrial disputes, both of interest and rights, is up to the collective bargaining partners. The central trade union body (ÖGB) has traditionally resisted any legal regulation, regarding it as impinging on the autonomy of the unions. The unions affiliated to the central trade union body have the right to determine strike action.

Following that logic, the Industrial Relations Act (§39/1 ArbVG) acknowledges inherent differences of interest between employers and employees; but the collective partners are required to abstain from coercive action and to find a solution on a co-operative basis (betriebsverfassungsrechtliche Friedenspflicht) before taking industrial action. Bans on strike action during the life of an existing agreement may be made explicit within collective agreements. The law also requires that in case of strike action the provision to the general public of goods and services for its basic needs is assured §176f StGB. These legal provision have not been the subject of observation by or complaint to the supervising committees of the ILO; and it may be inferred that they are not inconsistent with Conventions 87 and 98.

None of the international agreements which Austria has signed, include regulations on industrial disputes which would in any way bind Austria. The regulation of the Council of Europe (Art 6/4 of the European Social Charter) concerning strike action has been formulated in such a way, on Austria's insistence, that it does not infringe on national regulations (Strasser, 1990:178, Greif, 2000:7). Strikes occur very rarely in Austria and account for only seconds lost in annual working hours[40].

Thus, the Austrian dual system of industrial relations, i.e., the works councils together with the collective bargaining partners (the unions and the chamber of commerce), while maintaining general consistency in minimum pay and conditions, ensures flexibility of work place regulations and quick adaptability to new workplace challenges. This is particularly relevant in the context of industry restructuring under the impetus of globalisation and technical change and the new political agenda of the government arising from EU integration.

The emergence of a supranational Industrial Relations System in the EU and the declining role of social partners in socio-economic policy formulation

The process of European integration, in particular the establishment of a Single Market and the prospect of a Monetary Union, brought three supranational associations of employers and employees together to promote a model of social partnership on EU level – UNICE (Union of Industrial and Employers' Confederations of Europe, created 1958), CEEP (European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest, founded in

[40] In the recent past, strikes have occurred in the public sector (in particular teachers in tertiary and upper secondary education) and in the airlines industry arising from of restructuring.

1961) and ETUC (European Trade Union Confederation, founded 1973). They decided on a protocol of social policy as early as 1991, which was attached to the Maastricht Treaty of 1992[41]. As a result, these supra-national associations could pursue their interests as NGOs, i.e., they had the right to be heard and consulted. However, under the Amsterdam summit of 1997, they were granted the right of active decision making in the area of labour and social policy (Article 138 and 139 of the Amsterdam Treaty).

According to Article 138, the Commission is required to promote the integration of the social partners in decision making on socio-economic policy issues. On the basis of this legislative power, the ETUC has signed three cross-sectoral European framework agreements with the European employer counterparts: on parental leave (1996), on part-time work (1997), and on fixed-term contracts (1999). These agreements have been ratified by the Council of Ministers and are now part of European legislation. These EU guidelines have to be incorporated into national law. In case of non-compliance, the European Court of Justice has the right to enforce European law.

The legislative power of the social partners at the EU level is thus greater than that of their national counterparts in many EU member states. In Austria, for example, the social partners only have the right to be consulted. In the case of a social partner agreement on a legislative proposal, the government is free to undertake changes to that agreement. The current government has done just that in its latest amendment to labour and social security law, in contrast to past practice.

This is but another example of the declining state support of the social partnership and thus continuity of political exchange between the interest groups and the government in Austria. It can be taken as an indication of the discrepancy between the political affiliation of the social partners and their policy, on the one hand, and that of the government on the other. The Chambers of Labour[42] and Commerce tend to be linked to the SPÖ (Social Democrats) and the ÖVP (Christian Democrats); the central trade union body is dominated by the SPÖ; Christian Democrats only play a role in public sector unions; all the other political parties carry little weight in the unions[43]. The political will of the present Government is, however, guided by the neo-liberal credo of the Freedom Party and thus not ready to accept corporatist solutions.

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[41] It could not become part of the Maastricht Treaty because the United Kingdom refused to sign the Social Charter.

[42] The Chambers of Labour are public-law entities with compulsory membership of all wage and salary earners (with the exception of civil servants, senior management staff in enterprises, employees in agriculture and forestry and persons in casual employment). They have the same legal status as the Chamber of Commerce and date back to 1921. Their duty is to consult the government on labour and social policy and of representing employees on advisory and administrative committees.

[43] The political spectrum changed in the course of the 80s, exemplified by the emergence of the Green Party, the Liberal Party and by a significant rise in the popular vote of the Freedom Party (FPÖ). In the hope of being able to organise the discontented workers, the freedom party founded a union in 1997, which is not under the parent organisation of the ÖGB. But their membership has remained rather limited.

However, while Austrian politics has moved somewhat away from traditional corporatist policies, in order to avoid social disintegration in a world of increasing economic integration and competition, the European Union has offset this change of policies by promoting a process of social dialogue between the social partners and the government. This has been done by giving the social partners on the national level an explicit role to play in the promotion of employment and economic growth within the framework of the co-ordinated EU Employment Policy. At the European Council meeting on employment in Luxembourg (November 1997) the heads of state and governments endorsed the co-ordination of national employment policies on four pillars, each with a set of employment guidelines. The social partners are active players in pillar three, which is to bring the organisation of work in line with the needs of an information and knowledge society. Within this pillar, as with the others, guidelines have been developed. These have to be implemented by the member countries and measures have to be adopted with the required outcomes; a monitoring and reporting system ensures transparency of the steps taken by the various countries and enforcement procedures are at hand to ensure compliance (Biffl, 2000).

As a result tripartite territorial employment and social pacts are developing in certain EU member countries, which never had a tradition of corporatism, e.g, Spain, Portugal, Italy or Ireland. Freyssinet – Seifert (2001:619) provide insight into employment pacts, which integrate the regional economic actors on a tripartite basis in "an effort to introduce modernisation, increased efficiency and structural reorganisation of the economy". These arrangements affect pay, working time arrangements and the organisation of work. It appears that the European Monetary Union (EMU) project was also a contributory factor for the establishment or revival of a tripartite social dialogue in the member states. They helped to achieve the Maastricht criteria for membership, i.e., low inflation, low deficit spending and low public debts, without compromising on the employment front (Visser, 1998B).

The Amsterdam Treaty of June 1997 did not only promote tripartite decision making in the member states but established social partnership on a supranational level. In this sense, the EU has developed a new platform for industrial relations. This is an important step towards preserving social cohesion, since EU integration is globalisation on a regional scale. As might be expected, the liberalisation of markets has contributed to increasing conflict within the Austrian interest groups[44]. The encompassing organisation of employers in the Austrian chamber of commerce (WKÖ), for example, belies the fact that the interests of SMEs are diverse. Their interests had coincided on the common denominator of protection of their local markets; but once markets became liberalised conflicts emerged. Thus the WKÖ operates not only as an employers'

[44] Increasing internal dissent in the various associations of the social partners allows the government to set the political agenda on socio-economic issues (Crepaz, 1994). However, this has not infringed on the role of the social partners in their core functions as collective bargaining partners.

association representing business interests in the labour market but also as a trade association concerned with business interests in the product market[45].

On the labour front, the changing pattern of work (Biffl, 1999), i.e., the departure from the former norm of full-time employment, the rise in unemployment and casual labour, has increased conflict between the different factions of the unions, which has forced institutional reforms on unions (ÖGB, 2001). These reforms have been accompanied by Austrian associations, both worker and employer, joining their counterparts at the EU level[46]. This is a step towards the creation of an industrial relations system at the EU level, within which the national interests are accommodated. The national members of the EU-wide associations have the opportunity to influence EU regulations and thus, indirectly, legislation at home.

The ETUC seeks to establish fully-fledged industrial relations with the employers at European level through the 'European social dialogue'. However, so far, the social partners may only propose legislation; and the unions at this level have no right to authorise strike action. Nor do the social partners at EU level have the right to decide on matters concerning wages – this remains the prerogative of the national collective bargaining partners.

Under the Charter of Fundamental Rights, proclaimed in Nice in December 2000[47], the EU is required to promote the application of the CLS. Of particular relevance in this context is Chapter IV on solidarity, Article 28 on the right of collective bargaining and action (similar to ILO Convention 87 and 98), Article 30 on the protection in the event of unjustified dismissal, Article 31 on fair and just working conditions (similar to ILO Conventions 100 and 111), Article 32 on the prohibition of child labour (similar to ILO Convention 182) and Article 5 of Chapter 1 on dignity (CEC, 2001). The decision on a Bill of Rights, which was to have CLS as an integral part in the EU Treaty was taken at the EU Summit in Cologne in 1999[48]. The eventual outcome of that decision was the

[45] A recent example of a conflict of interest between farmers and small manufacturing and trade is the (half-hearted) amendment to the law on business establishments in 1997 (Gewerberecht); this amendment granted farmers (limited) access to markets formerly only open to members of the WKÖ.

[46] The Austrian chamber of commerce can not join UNICE, even though it is the legal collective bargaining partner in Austria. The latter accepts only associations with voluntary membership as member. This dilemma was resolved in December 1998, when UEAPME, the European Association of Craft, Small and Medium Sized Enterprises, of which Austria has been a longstanding member, became a member of UNICE. Thus the Austrian chamber of commerce could indirectly gain access to UNICE, the collective bargaining partner of the unions on EU level.

[47] As regards action at the European level, the proclamation suggests that CLS will play a role in its bilateral agreements with third countries. The Generalised System of Preferences (GSP) of the EU provides preferential market access to developing countries, provided they employ CLS. The EU also promotes a high level international dialogue to help to identify best practices and policies to foster trade and improve social governance at the same time (with ILO, WTO, United Nations Conference on Trade and Development – UNCTAD, The World Bank and United Nations Development Programme – UNDP).

[48] A group of independent experts was charged with establishing the status of basic social rights in the various EU treaties, in particular the Amsterdam treaty, and to point out inconsistencies and needs for specification. The expert group came to the conclusion that the EC should go beyond referring to human and social rights agreed upon in the various

Charter of Fundamental Rights (KOM, 2000:559), which was proclaimed in Nice. It did, however, not go beyond the regulations already in place in the various treaties, to the disappointment of unions, which had hoped that the Charter would provide the legal ramifications for collective bargaining on a supra-national EU level, including the right to strike (IUF, 2001).

The enforcement power of the European Court on EU legislation, ensures compliance with the principles of its Charters. This is in stark contrast to ILO's lack of enforcement powers. Several examples illustrate this point. Thus the ILO has criticised Austria for some time to no avail for not allowing foreign workers to run for office as a works counsellor (referred to as 'passive' voting right, not to be mistaken for the 'active' voting right, which foreign workers have). Now that the European court has taken up this case as one of non-compliance with the EU Social Charter, Austria may be expected to implement the 'passive' voting right to foreign workers before long allowing them to run for office. On the issue of fair and just working conditions, the EU has specified the legislative content by drawing up an anti-racism guideline (GL 2000/43/EC). Accordingly, all member states are required to put comprehensive anti-discrimination legislation in place. Austria is complying with this guideline by implementing a law in 2003, according to which access to social security, health services and goods and services may not be denied to persons on the basis of race and ethnic origin. In the labour market, protection against discrimination on the basis of gender, disability, age, race and ethnic origin, religion and beliefs, sexual orientation will be a legal requirement. It has to be noted that the rights extend to legal residents of third country (non-EU) origin, not just to citizens of an EU member state. This aspect is of particular importance for Austria, with its relatively high proportion of migrants of third country origin in the work force and resident population.

These two cases show that, on the basis of its enforcement powers, the EU has the capacity to enforce the observance, effectively of the ILO's CLS, by specific legislation and harmonising the instruments.

Another interesting case is the prohibition of night work for women in manufacturing industries which was an ILO Convention (No. 89, 1948), which Austria had signed and put into practice (BGBl No. 237/1969). However, this law does not conform to the equal opportunities regulations of the EU of 1976. When Austria joined the EU, it was granted a transition period until 2001 to abolish gender differentiation in night work. In the meantime, the ILO had adopted a gender-neutral principle on night work. The Austrian regulation, which was meant to protect women, was in effect discriminatory against women in respect of employment and earnings opportunity. The law abolishing the ban of night work for women is in the final round of consultation and should come into effect by the end of July 2002.

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treaties (European Human Rights Convention of 1950, European Social Charta of 1961 and 1989, etc.) and to concentrate the information in a Charter of Fundamental Rights (EK, 1999).

Evaluation

It will be evident from the foregoing that the picture which emerges about the Austrian and European situation on the application of CLSs is distinctly different from that of the Anglo-Saxon countries discussed and Australia in particular. There is in Europe a much clearer commitment to these standards, especially those covered by Conventions 87 and 98, and that this commitment is sustained by the EU Social Charter and Charter on Fundamental Rights and various Agreements. Importantly, this commitment is backed by the EU's power of enforcement through the European Court of Justice. The EU in effect makes up for what the ILO lacks in authority. This contrasts with the implicit approach of the Anglo-Saxon countries which maintain the right to secure greater international competitive power by weakening union influence in the labour market, even if such action violates ILO standards.

Of course, labour standards are only a part of social and economic elements for which a harmonisation process exists to bring about, as far as possible, a level playing field within the EU. An important explanation for the inclusion of labour standards in this process is that the concept of social partnership is well ingrained in the psyche of most European countries. Thus, despite the reduction in union density, a greater diffusion of union power arising from decentralisation of bargaining processes, and a dilution of the corporatist philosophy, the strength of the social partnership at the EU level has offset its weakness at the national level, to ensure that labour standards, especially freedom of association and collective bargaining, are generally maintained. For the present, at any rate. What will happen with European enlargement remains to be seen.

Concluding observations

The prevailing international interest in the ILO's CLS arises, in essence, from a desire to temper efficiency objects with considerations of equity by minimising adverse social consequences of globalisation; and, in so doing, encouraging the WTO's promotion of reduced trade protection. How effective have these standards been, particularly in relation to the ones this paper has focused on, namely, freedom of association an the effective recognition of the right of collective bargaining? The short answer is that it has depended partly on how closely governments have been willing to abide by them, and partly on the existence of the necessary institutional infra-structure to enable these standards to operate meaningfully.

It is arguable that the widespread ratification of ILO Conventions in recent years belies the extent of their effectiveness in practice. And to give a complete answer to this question would require at least a detailed analysis of the outcomes of all the observations made by and the complaints lodged with the ILO's Committee on Freedom of Association in the last 10 to 20 years. To our knowledge this has not been done but the best work on this subject concludes that, in general, the record of compliance with Conventions 87 and 98 appears to be satisfactory, with law and practice being adjusted to their requirements (Creighton, 2001:259). Since 1951, when the ILO's Committee on

Freedom of Association[49] was established, a great majority of complaints considered by it have been fully or partly upheld (Creighton, 2001:243/44).

Nevertheless, for many of the developing countries, the application of these standards, let alone the others, is problematical in their stage of economic development. The lack of an effective institutional infrastructure, including trade unions, and the necessary culture and political will to press for their application may be expected to constitute barriers to rapid implementation of the CLS.

However, while some of the ILO's Conventions may be unrealistic for many countries in their present state of development, they can fairly be regarded as accepted best practice benchmarks and, in some sense, as aspirational norms. Cognisant of the difficulties of implementation, the ILO has been active in providing educational and technical assistance to facilitate the application of the CLS in such countries. The ILO's follow-up and supervisory procedures requiring member states to give an account of their legislation and activities to meet the requirements of the Conventions, provide useful pressure for the principles of the Conventions to be applied[50]. Any judgements about the effectiveness of the labour standards should be qualified by these considerations. It has even been said that 'the normative effects of the principles of freedom of association are such that some commentators have suggested they have acquired a status akin to the rules of customary international law'[51] (Creighton, 2001:259).

On the other hand, the extent to which the standards relating to freedom of association and collective bargaining are compromised by economic policy and legislation in many developing countries, seems to arise, at least partly, for doctrinal and political reasons associated with the object of weakening the power of trade unions. In the absence of international authority to enforce the standards, countries are able to pursue such legislation with impunity. As was noted earlier: 'Global market governance has developed more quickly than *social* governance.' (Commission of the European Communities, 2001:3) Although this paper has focussed on recent Australian experience, much the same could be said about other Anglo-Saxon countries, in contrast to the European countries with their emphasis on social partnership as reflected particularly in the case of Austria.

An economic policy which maintains undue slackness in the economy and thereby weakens the power of unions vis-à-vis employers, has an outcome similar to that arising from direct legislation limiting union power and collective bargaining. And although such policy may be said to go against the ILO's espousal of the objective of full employment under Convention 122, it cannot

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[49] Made up of equal representatives of governments, employers and workers, chaired by an independent person. For a celebration of Convention 87, see ILO (1998).

[50] Oates (2001).

[51] In Australia, before the Equal Pay Convention 100 was ratified by the Government, the Conciliation and Arbitration Commission was influenced by it when it applied the equal pay principle to its awards.

reasonably be said that it violates the CLS. However, in the case of Australia, we have argued that not only has unemployment been kept at a higher level than might be thought to be necessary[52], legislation has also been used to weaken union power and to limit the scope of collective bargaining in defiance of Conventions 87 and 98. Although motivated mainly by market-oriented economic doctrine and by perceptions of undue union obstruction of market forces, the fact of being in a globalised market has undoubtedly provided added impetus to such a policy.

It is difficult to dispute the ILO's concern, in reference to Australia and to a lesser extent, the UK, about the inadequate immunity against strike action arising from the hostility of the common law against all strikes and any form of industrial action[53], with the prospect of crippling civil damages attendant on such action. Although it seems that such a doctrine continues to have strong public support in Australia, it should not require much argument to establish that such law, drawn from ancient times when the power balance between the individual worker and the employer may have been more or less equal, is outmoded in this age of large employers and corporations (Kahn-Freund, 1972: Ch. 2). For collective bargaining to operate without the individual worker being completely overwhelmed by the power of the employer, the right of organised employees to withdraw labour from employers in order to improve their bargaining power, needs to be recognised by the law. Further, as the Committee has pointed out, the right to strike should extend to any level of collective bargaining and to any issues relating the terms of employment. This is not to deny the wisdom of providing mediation/arbitration arrangements to facilitate settlement without strike action.

However, the ILO's Committees have gone beyond these limits. While the action of Australia and other countries which flout the CLS, undeterred by the recommendations and requests of the ILO, is a source of disquiet, if only because it sets a bad example for other countries and weakens the authority of the ILO, nevertheless, the question arises as to whether Conventions 87 and 98 have been given an unduly broad meaning. If it is accepted, as we do, that 'the principal purpose of labour law . . . is to regulate, to support and to restrain the power of management and the power of organised labour' (Kahn-Freund, 1972:4-5), a number of pertinent questions need to be asked in connection with the present definition of the ILO principles.

Thus, is it reasonable for the right to strike to be restricted only in essential services as defined by the ILO[54]? Do unshackled secondary boycott and sympathy strikes not give an undue degree of

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[52] Although official figures shows that unemployment rate has been around 7 percent in recent years, this is based on the international statistical convention that any one with more than an hours paid employment in the last week, is regarded as being employed. Such a definition grossly understate the actual unemployment level, bearing in mind also that in Australia a substantial proportion of part-time employees desire fuller employment.

[53] References to strikes, lockouts and industrial action generally in this paper are confined to interest disputes and exclude disputes on rights.

[54] Interference with the right to strike is apparently also justified for reasons of 'compelling national economic interest', but only for a reasonable period and related to the situation at hand (Creighton, 2001:255).

power to unions, which may not necessary benefit to workers generally or the public interest? Should industrial action relating to demarcation and other inter or intra-union disputes not be proscribed and such matters dealt with by compulsory conciliation and/or arbitration? Should the right to strike affecting employers also be available in pursuit of 'economic and policy questions and to labour and policy problems which are of direct concern to the workers'? (Creighton, 2001:256.) Surely, there is a very fine difference between this kind of strikes and 'purely' political strikes which are not within the ILO principles. Although the Committee of Freedom of Association has provided certain procedural requirements for the exercise of the right to strike (Gernigon – Odero – Guido, 1998)[55], and while it is difficult to establish a direct connection between the rigours of the law on strike action and the incidence of strikes, nevertheless, these questions deserve consideration.

It should further be borne in mind that although the right to strike was included in the ILO's International Covenant on Economic, Social and Cultural Rights of 1966 (Article 8), the principles on strikes are not specified in the Conventions 87 and 98 but have been articulated by the supervisory bodies as a kind of 'case law' drawn from an implicit assumption of the meaning of freedom of association and collective bargaining; although they have been affirmed in resolutions of International Labour Conferences, including regional conferences, as well as by other international bodies[56] (Gernigon – Odero – Guido, 1998). And it is arguable that these bodies may have been unduly zealous in their concept of the right to strike. The danger of what some would regard as an overkill, is that the credibility of their more pertinent and reasonable criticisms and requests on departures from the Conventions may be reduced. This is not so suggest that threats of countries to withdraw from membership[57] should be taken too seriously. Nor should the Conventions be diluted to the lowest common denominator in order to secure universal application. However, in view of its lack of enforcement powers, to be more effective and to avoid rebuffs of the kind meted out by the Australian and other governments in recent years, the ILO's principles of permissible strike action may need to be revisited and adjusted to a more realistic level.

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[55] Such as prior notice, recourse to conciliation, strike decisions being taken by secret ballot, etc.

[56] The European Court of Human Rights and the Supreme Court of Canada have not accepted this inference; on the other hand, many others, including Ireland and Germany, have. The distinction may be said to be a matter of legal pedantry (Jacobs, 1998:483). A number of countries, e.g., Austria, UK and Denmark, provide for ***freedom*** to strike rather than the ***right*** to strike.

[57] On the matter of the Committee of Experts' pronouncements on the right to strike, the present Prime Minister of Australia, John Howard, in his role as Shadow Minister of Labour some years ago when in Opposition, went as far as to say that his Party would be prepared to 'cut ties, with the ILO (Creighton, 1997:32). A similar sentiment was expressed by New Zealand Labour Ministers in response to adverse findings by the CFA (Haworth – Hughes, 1995:157).

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