ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998): A CRITICAL APPRAISAL

Dissertation submitted to Jawaharlal Nehru University in partial fulfillment of the requirements for award of the degree of

MASTER OF PHILOSOPHY

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2010

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DECLARATION

I declare that the dissertation entitled "**ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (1998): A CRITICAL APPRAISAL**" submitted by me in partial fulfillment of the requirements for the award of the degree of **MASTER OF PHILOSOPHY** of Jawaharlal Nehru University is my own work. The dissertation has not been previously submitted for any other degree of this University or any other University.

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CERTIFICATE

We recommend that this dissertation be placed before the examiners for evaluation.

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TO

AMMA, ACHAN

And

SYAMACHAYAN

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ACKNOWLEDGEMENT

I am deeply grateful to my supervisor Prof. B. S. Chimni, for his invaluable guidance, suggestions and ideas. Without his constant encouragement, this dissertation would not have been possible.

I express special thanks to all the faculty members of the Centre for International Legal Studies (CILS), Chairperson Prof. B. H. Desai, Dr. V.G. Hegde and Prof. Yogesh Kumar Tyagi for their wholehearted support and valuable guidance in various subjects particularly during my course work. I also express my sincere gratitude to Professor Emeritus Dr.R.P.Anand for his valuable suggestions and lectures at the Centre seminars. I would also like to thank staff members of CILS, especially Savitri madam for her valuable help. I take this opportunity to extend by profound gratitude to my teacher Dr. N. S. Soman, School of Legal Studies, CUSAT, whose valuable suggestions helped me a lot.

I would also like to thank the librarian and staff of Jawaharlal Nehru University, Exim Bank, Indian Institute of Foreign Trade (IIFT), Indian Society of International Law (ISIL), Indian Law Institute(ILI), the ILO Sub-regional Office for South Asia, New Delhi and Central Secretariat for their kind cooperation and assistance during my dissertation work.

I cherish the unconditional love and inspiration extended by Kavithachechi, Padmachechi, Shannuchechi, Meghachechi, Shinychechi, Shalini, Divya, Meenakshi, Anu, Elsachechi, Annschechi, Kaadambarichechi, Abhilashchettan, Reecha, Manisha and Sherin who constantly supports me and for their constructive comments and positive suggestions, which contributed significantly in improving the content of this dissertation. I also thank my classmates and my seniors for their invaluable suggestions throughout my work. I thank my dear friends Fathimachechi, Sheeja and Tincy for their support throughout my work.

I am deeply indebted to my dearest sister for her support and inspiration. I also thank my Pappa, Mummy and Unni for considering me as one of the family and supporting me in all my endeavours. Above all, I owe everything to the divine presence in and around me.

Aathira Raju

LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
AFL	American Federation of Labour
AFL-CIO	American Federation of Labour and Congress Industrial Organisations
AIR	All India Reporter
BALCO	M/s. Bharat Aluminium Company Limited
BIAC	Business Industry Advisory Committee
CCAS	The International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations
CEACR	The Committee of Experts on the Application of Conventions and Recommendations
CFA	The Committee on Freedom of Association
CLS	Core Labour Standards
ECOSOC	Economic and Social Council
ELS	Employment and Labour Sector
EPZs	Export Processing Zones
EU	The European Union
FAO	Food and Agricultural Organisation
FDI	Foreign Direct Investment
GSP	Generalised System of Preferences
HLT	High Level Team
IBRD	The International Bank for Reconstruction and Development
ICAs	International Commodity Agreements
ICCPR	International Covenant for Civil and Political Rights
ICESCR	International Covenant for Economic Social and Cultural Rights
ICFTU	International Confederationn of Free Trade Unions
ICJ	International Court of Justice
IDA	International Development Association
IFC	International Finance Corporation

IFIs	International Financial Institutions
IIs	International Institutions
ILO	International Labour Organization
IMF	International Monetary Fund
ITUC	The International Trade Union Confederation
LPG	Liberalization, Privatization, and Globalization
MERCOSUR	Market of the South
MIGA	Multilateral Investment Guarantee Agency
MNCs	Multinational Corporations
MNEs	Multinational Enterprises
NAAEC	The North American Agreement on Environmental Cooperation
NAALC	The North American Agreement on Labour Cooperation
NAFTA	The North American Free Trade Agreement
NEP	New Economic Policy
NGOs	Non-governmental organizations
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
PCIJ	Permanent Court of International Justice
SADC	South African Development Community
SADCC	Southern African Development Co-ordination Conference
SC	Supreme Court
SCC	Supreme Court Cases
SNCL	Second National Commission on Labour
TCC	Transnational Capitalist Class
TCM	Technical Cooperation Mission
TUAC	Trade Union Advisory Committee
TVA	Town and Villages Act
UDHR	Universal Declaration of Human Rights
UN	The United Nations
UNCTC	The United Nations Centre on Transnational Corporations
UNCTAD	The United Nations Conference on Trade and Development

UNESCO	The United Nations Educational, Scientific and Cultural Organisation
UNGC	United Nations Global Compact
UNICEF	The United Nations Children's Fund
US	The United States of America
WFTU	World Federation of Trade Unions
WHO	World Health Organisation
WTO	World Trade Organisation

CHAPTER I

INTRODUCTION

CHAPTER 1
INTRODUCTION

I.1. Background

Labour law has been a well-known subject since early 19th century. Though there were no codified laws at the international level, efforts had begun to formulate an international labour law regime. International associations for labour legislation, international trade union organisations, various governments, individuals and economists led these efforts. After the First World War, a consensus among victorious powers emerged to address labour problems at the international level. This consensus materialised in the form of a permanent organisation called the International Labour Organisation (hereinafter ILO or the Organisation). The ILO was created in the year 1919 by the Treaty of Versailles[1] with an objective to respond to Communism and to regulate the excess of industrial labour markets. Examining the Preamble to the Constitution of ILO, several motivations that led to the establishment of the ILO can be discerned. One of the motivations was humanitarian in nature which is clear from the wordings of the Preamble which note that "conditions of labour exist involving such injustice, hardship and privation to large numbers of people". The underlying message was not to accept the exploitation of the workers. The second motivation was political. The Preamble states that injustice would produce unrest leading to the peace and harmony of the world being imperilled. Improvements in the conditions of workers would deter them from taking a revolutionary approach. The third motivation was economic. The Preamble notes that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries". As labour power is one of the crucial components of production, its inevitable effect on the cost of production would deter countries to adopt policies of social reform for it would affect a country's competitive

[1] The Constitution of the ILO became Part XIII of the Treaty of Versailles that deals with labour matters. Article 387 of the Treaty of Versailles provides for the establishment of a permanent organization. For details see, *Treaty of Versailles* (1919), [Online: web] Accessed 10 March 2010, URL: http://www.worldcourts.com/pcij/eng/documents/1919.06.28_versailles_treaty/1919.06.28_versailles_treaty13.htm

advantage. In order to avoid such a situation the Preamble states that all countries should adopt humane conditions of labour.[2]

In short, it can be said that maintenance of world peace and improvement of the situation of workers along with trade driven motives were the main agenda of the ILO. In order to realise the objectives enshrined in the Preamble, ILO has adopted several conventions and recommendations seeking to guarantee a broad range of workers' rights. It has laid down a strong base for the international labour standards. Often these labour standards are called as 'International Labour Code'. Broadly speaking, international labour standards are legal instruments, which set out basic principles and rights at work derived by the ILO's constituents (governments, employers and workers). The ILO conventions are legally binding international treaties that may be ratified by Member States whereas recommendations serve as non-binding guidelines and deal with subjects less amenable to international supervision. In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous, i.e. not linked to any Convention (ILO 2009: 14).

Initially ILO had only 44 Member States. However, its membership grew rapidly after becoming an agency of the United Nations Organisation (UN or UNO). Now ILO has 183 States as its members.[3] Until the economic crisis of 1930s, States were more inclined towards *laissez faire* concept. However, the idea itself proved as a failure, because the social implications of such policies were very serious. The crisis also affected the standard setting arrangement of the ILO. Nevertheless, before the outbreak of the Second World War, ILO adopted 67 Conventions and 66 Recommendations. After the Second World War, States began to adopt Keynesian

[2] For details, see [Online: web] Accessed 10 June 2010, URL: http://ilo-mirror.library.cornell.edu/public/english/about/history.htm.

[3] The Republic of Maldives has become the 183rd Member State of ILO. Maldives' membership became effective on 15 May 2009. [Online: web] Accessed 10 June 2010, URIL:http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_106306/index.htm

policies, which demanded state intervention to regulate market forces. The inclination of the States towards this policy was reflected in the ILO's future instruments, especially in the 1944 Declaration of Philadelphia. The 1944 Declaration broadened the scope of ILO's standard setting activities to new areas such as human rights. Thus, the 1944 Declaration brought a unified approach by protecting economic and social rights along with civil and political rights. This approach was replicated in ILO's future legal instruments. The period between 1944 and 1969 is considered as the 'golden age' of the ILO. During this period, *inter alia* ILO came out with its World Employment Programme, which received high appreciation. This period was also marked by high economic growth in industrialised countries. In addition to this, the power of private actors was effectively countervailed by the labour unions and governments.

However, in 1970, the first oil shock affected the countries and economic growth began to slow down. After the crisis, States showed an inclination towards neoliberal policies, which is characterised by free market, free trade and strong private property rights. This situation increased the power of private actors (Multinational Corporations/ MNCs) that led to the weakening of the power of labour unions. The ideology of neoliberalism exerted its influence in almost all fields including international institutions and ILO was not an exception. In addition to this, the Organisation faced serious challenges like decolonisation, Cold War and the withdrawal of the United States (US). However, ILO coped with the situation of decolonisation by adopting flexible instruments that took cognisance of economic difficulties experienced by the newly independent States. Nevertheless, Cold War tensions along with the withdrawal of the US from the ILO had a serious impact on the functioning of the Organisation.

The 1990s was marked by series of significant world events like the end of Cold War with the end of 'actually existing socialism'. The fall of communism enabled the politicians to pursue an agenda of labour market reform. Most of the Member States of ILO began to adopt market oriented economic policies and made structural reforms in

labour market. These policies had an inversely proportional relationship with the interest of workers. States became less concerned with the protection of labour rights. This shift in the ideology of States forced the ILO to rethink its perspective. The protective standards adopted by the ILO since 1919 started to weaken. The process of globalisation also undermined the development of a comprehensive international labour law. Since the 1990s, a renaissance of interest in soft law or promotional approaches to labour rights began to occur. As far as the ILO is concerned this approach was first reflected in 1994, in the Report of the then Director General, Michael Hansenne, who proposed some differentiation among the rights promoted by the ILO and laid emphasis on a limited list of conventions. He argued that certain rights be treated as fundamental or core rights and receives greater attention. The idea of core rights brought a notion that there should be some differentiation between rights that has to be regarded as core and the rights that should be treated as non-core. The core rights which can be easily observed by the States or rather need negative intervention by States did not need a compulsory enforcement mechanism. This situation led to the hardening of a soft law regime.

In 1995, at the Copenhagen World Summit for Social Development, the transformation from a set of binding rights to soft principles began. The US wanted to link labour standards to soft forms of supervision and promotional approach. Its embrace of soft standards was followed up in the debates held within the ILO. Many of the delegations were resistant to the idea of a promotional focus on a core group of standards. The workers group argued for the strengthening of the ILO supervisory procedure rather than adopting promotional approaches. Another important event that underlined the importance of core labour rights was at the First World Trade Organisation (WTO) Ministerial Conference, which was held in Singapore in 1996 (Singapore Ministerial Conference). In this Conference, one of the Declarations adopted by the Conference is called the Singapore Ministerial Declaration. The Singapore Declaration reaffirmed the commitment to core labour standards, affirming that they belong to the competence of the ILO, which should be supported in promoting them. After Singapore Ministerial Conference, the support for ILO as the

competent body to set and deal core standards was increased. In the same year, Organisation for Economic Co-operation and Development (OECD) published a study that articulated the importance of fundamental labour rights. Likewise, the 1997 Report of the Director-General of the ILO also emphasised the importance of treating certain labour rights as fundamental rights. The Report focused on the observance of core rights by all the partners in the multilateral trading system. In 1998, emphasis on core rights was codified in the form of a Declaration, viz 'Declaration on Fundamental Principles and Rights at Work, 1998' (the 1998 Declaration). It emphasized certain labour rights as core rights. By this Declaration ILO universalized Core Labour Standards (CLS) to be observed by all Member States. The Declaration identifies four fundamental principles and rights at work:

- Freedom of association and the effective recognition of the right to collective bargaining;
- Elimination of all forms of forced or compulsory labour;
- Effective abolition of child labour;
- Elimination of discrimination in respect of employment and occupation.[4]

These four core principles are related to eight ILO Conventions.[5] The Declaration made it clear that the core principles have to be observed by all Member States, no matter whether they have ratified the respective conventions or not. This required commitment is supported by a follow-up procedure. The Declaration provides three ways to realise its objectives. Firstly, there is an Annual Review composed of reports from countries that have not yet ratified one or more of the ILO Conventions that directly relate to the specific principles and rights stated in the Declaration. The second way is the scrutiny of a Global Report. It serves as a basis for determining priorities for technical cooperation. Technical cooperation projects are the third way to

[4] For details, see Annexure II.

[5] They are Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Right to Organize and Collective Bargaining Convention, 1949 (No. 98), Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182), Equal Remuneration Convention, 1951 (No. 100), Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

give effect to the Declaration. These are designed to address identifiable needs in relation to the Declaration and to strengthen local capacities thereby translating principles into practice.

The 1998 Declaration was a turning point in the history of the ILO. Later on, several changes occurred within and outside the ILO that reflected the notion put forward by the 1998 Declaration. The remarkable events that took place within ILO include the adoption of the 1999 Decent Work Agenda and the 2008 Declaration on Social Justice for a Fair Globalisation. The Decent Work Agenda reiterated the importance of core principles. The Agenda, which takes up many of the same challenges that the Organization faced at its inception, aims to achieve decent work for all by promoting social dialogue, social protection and employment creation, as well as respect for international labour standards. The most recent initiative in this regard is the adoption of the 2008 Declaration on Social Justice for a Fair Globalization (2008 Declaration). The 2008 Declaration expresses the contemporary vision of the ILO's mandate. It builds on the values and principles embodied in the ILO Constitution and reinforces them to meet the challenges of the 21st century. It reaffirms the importance of the 1998 Declaration and the Decent Work Agenda. The Declaration institutionalizes the decent work concept by placing it at the core of the organization's policies to realize its constitutional objectives. It further provides that the four strategic objectives developed by the ILO - *employment, social dialogue, social protection, and rights at work*, are inseparable, interrelated and mutually supportive. These strategic objectives can be achieved only through the means of CLS. The 2008 Declaration is the third major statement of principles and policies adopted by the International Labour Conference since the ILO's Constitution in 1919. The other two important statements are the Philadelphia Declaration, 1944 and the Declaration on Fundamental Principles and Rights at Work, 1998.

The influence of CLS can be found not only in the instruments adopted by the ILO, but also the parallel developments that took place outside ILO. CLS has been widely used in the regional and bilateral trade agreements and in the Generalised System of

Preferences (GSP) adopted by the European Union (the EU) and US. However, they often set standards that are above the CLS level. This can be viewed as a movement towards protectionism. The other actors that are using CLS are the International Financial Institutions (IFIs) as a matter of conditionality, and various Transnational Corporations (TNCs) in the form of voluntary codes of conduct, which prefer soft laws. In addition to this United Nations Global Compact (UNGC), Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, which was revised in the year 2000, and the ILO Tripartite Declaration on Principles concerning Multinational Enterprises (ILO Tripartite Declaration) which was amended in 2000 and 2006 also speak of CLS.

Thus, these developments are an attempt to underscore the importance of CLS, hardening the soft law regime. The over emphasis of CLS creates a situation in which economic and social rights are sidelined. The marginalisation of economic and social rights will seriously affect the labourers in the developing counties as well as the development of these countries. These countries are preferred by TNCs for investment, as they are not bound to ensure the economic and social rights of the workers. TNCs can increase their profits without incurring much cost on labour.

The enforcement of labour standards is better understood by studying country specific situation. The changes that have been brought by globalisation in general and the 1998 Declaration in particular can be easily perceived. India is one of the countries whose labour laws were well appreciated. The laws of the country echoes the social justice principles incorporated in its Constitution. The Constitution of India guarantees fundamental rights. These fundamental rights are in the nature of civil and political rights that guarantees right to equality, equality of opportunity, right to form associations and unions, freedom of speech and expression, right to life. The Directive Principles of State Policy direct the state to enact legislation that ensures the welfare of people. But after 1990, India responded to globalisation by adopting liberalised policies. The New Economic Policy (NEP) adopted in the year 1991 opened up the Indian market to foreign investments. The labour laws in India were criticised as

stringent impeding Foreign Direct Investment (FDI). Several industrial forums demanded flexible labour laws for the country. They were of the view that to sustain the growth rates of close to 8-10% rigid labour laws should be amended to encourage new investments and to generate more employment.

In this background, the study will examine the changes from binding labour standards and their enforcement to certain CLS. For the purpose of this study the primary focus will be on the 1998 Declaration on Fundamental Principles and Rights at Work. The study also analyse the 1999 Decent Work Agenda and 2008 Declaration of Social Justice for a Fair Globalization. The study will also examine the influence of CLS on various non-state actors. In addition to this, the implications of CLS on various areas such as human rights, soft law regime and on developing countries will also be considered. The significance of the study is its analyses of the transformation of international labour law from a broad collection of international labour standards to CLS.

I.2. Review of Literature

The available literature shows that the adoption of CLS in the 1998 Declaration has created a heated debate in the regime of international labour law. At least two approaches can be seen. Sceptics view the move as the narrowing down of international labour standards developed by the ILO into four core principles thereby marginalizing the rest of the labour rights. They are of the view that the Declaration has created a hierarchy of rights. CLS lacks an effective mechanism that can encourage the progressive realization of social rights. On the other hand, the supporters of the CLS are of the opinion that, the Declaration made non-ratifying Member States to be bound by the respective conventions thereby setting a uniform standard for members of the international community. The literature review precisely substantiates two approaches.

Standing (2008) in his article *The ILO: An Agency for Globalisation?* explores the ILO's recent evolution in globalized economy. He argues that the ILO which was an agency that upholds social rights is now moving back from its traditional approach to a set of core labour standards. As CLS makes a difference between positive and negative rights, the author argues that it is against the principle established by the 1948 Universal Declaration of Human Rights (UDHR) which speaks that rights are indivisible and interdependent. This focus had enormous implications on social justice which the ILO was promoting from the last eighty years. The author went on to argue that CLS left space to self regulations in the form of voluntary codes of conduct and CSR.

Cleveland (2005) in her article *Why International Labour Standards?* in Robert J. Flanagan and William B. Gould IV (eds.) *International Labour Standards: Globalization, Trade and Public Policy*, mainly discuss the parallel developments in the labour law regime outside ILO. The author argues that developments occurred in various fields. In the case of regional and bilateral agreements, it started to use the concept of CLS. Sometimes the labour provisions in these trade agreements will be higher than the four core standards. The IFIs have begun to consider the impact of their lending decision on labour practices. The US by its GSP system conditions tariff benefits to developing countries on compliance with internationally recognised workers rights. The voluntary code of conduct developed by MNCs mainly relied on CLS. The author is of the opinion that international labour standards are not enough to address the problems of workers rights rather the system needs an effective enforcement machinery to deal with the subject.

Hepple (2005) in his book *Labour Laws and Global Trade* addresses the following questions: Can higher labour standards promote growth and development? Is there a role for soft as well as hard law? What is the role for the ILO in the new economy? Is the ILO's traditional method of standard setting effective in a globalized economy? Must other institutions supplement the actions of the ILO? The author is of the view that the great achievement of the ILO was to create a corpus of international labour

standards and to get many countries to accept these standards. He agrees that such standard setting is still necessary. Hepple thinks that international labour law must sometimes have direct effect or otherwise be enforceable by some sort of hard sanctions. Whereas classic international labour law left the actual regulation of labour relations exclusively to domestic law, the author see a need for enforceable standards at the regional level and possibly the global level as well. He also says about the need for private standards and private enforcement the integration of hard and soft measures, public and private norms, and various levels of governance.

Alston (2004) in his article *Core Labour Standards and the Transformation of the International Labour Rights Regime* mainly discusses the changes that have been brought in the international labour rights regime by the 1998 ILO Declaration on Fundamental Principles and Rights at Work. According to his view, the declaration is a sign of revolutionary transformation. The adoption of CLS has created a hierarchy of rights among the various rights recognized within the conventions and recommendations of the ILO. The 1998 Declaration has laid down groundwork for a decentralized system of labour standards implementation. The four core labour standards emphasis on soft promotional techniques, which will gradually downgrade ILO's enforcement mechanisms. The 1998 Declaration directly influenced various regional trade agreements and free trade agreements to incorporate the CLS model in the respective agreement. The impact of these developments on the overall labour rights regime is also discussed thoroughly.

Langille (2004) by his article *Core Labour Rights-The True Story (Reply to Alston)* gives a reply to Philip Alston's article *Core Labour Standards and the Transformation of the International Labour Rights Regime* thereby tries to defend CLS. The author says that the international consensus on CLS took shape in the 1990s, at the Copenhagen Social Summit in 1995, at the OECD in 1996 and at the Singapore Ministerial Declaration in 1996. As the WTO was reluctant to include the idea of any labour dimension within its mandate the issue went back to ILO. The result is the adoption of the Declaration of 1998. The author is of the view that the CLS are

conceptually coherent, morally salient and pragmatically vital to the achievement of the true goals including the enforceability of non core rights. He points out that declaration will rescue the ILO from its current marginalized status and will present a method for revitalizing, standard setting and monitoring.

Maupian (2004) in the article *Revitalization Not Retreat: the Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers Rights* criticizes Alston's view of CLS. He points out two important questions viz: has the Declaration strengthened or diluted the protection offered by the ILO as regards fundamental principles and rights at work? Is the emphasis on fundamental rights a boost for, or a break in the protection of other labour rights? Both these questions are positively answered by the author. The article provides evidence about the effective implementation of fundamental rights at work in the world. As these rights are enabling rights, their increased application gives greater possibilities for workers to claim other workers rights. However ILO's capacity to ensure effective implementation of other workers rights is under constraint. The author is of the view that these limitations are inherent in international labour law.

Alston and Heenan (2004) in their article *Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work* mainly discuss about the implications of CLS within and outside the ILO. They claimed that CLS replaced the broader labour rights agenda with a narrow focus on four core labour standards. They provide a historical debate over the linkage between trade and labour standards. They argue that the agenda put forward by the 2004 World Commission is a reflection of CLS. The implication of CLS is that the non state actors began to use CLS because of its soft nature and its concentration on civil and political rights.

Donoso (1999) in the article *Economic Limits on International Regulation: A Case Study of ILO Standard Setting* speaks about the history of the ILO. The article critically examines the changes in ILO's standard setting policies. The author argues

that ILO has faced many criticisms like the inflexible and excessive number of conventions it had produced. As response to these criticisms ILO changed its legislative techniques. The review of its standard setting practices started from 1970s and in the wake of globalisation ILO responded by adopting 1998 Declaration. Thus the Organisation has moved away from advocating broad social policy goals and concentrates on the protection of fundamental labour rights. The author claims that recent ILO statements express the view that market oriented principles should be central to its operations.

As far as the linkage between CLS and international trade is concerned most of the related literatures give space for its discussion. By reading the literatures it can be seen that the linkage between trade and labour is favoured by the governments and trade unions of workers of developed countries. Developed countries who are the supporters of the CLS made these provisions as a prerequisite for participation in the liberalized world trade. The initiative of developed countries to bring the labour standards within the WTO regime is opposed by the developing countries. The developing countries are of the opinion that the trade labour linkage will make the developed countries to take a stance of protectionism. The references to domestic arrangements will necessarily enhance the developed ones to use the protectionist measures against the developing countries. According to Jagdish Bhagwati, the choice of CLS reflects the fundamentally protectionist motivation of their proponents (Bhagwati 2002: 75). Thus, it could be argued that the CLS list simply reflects those labour practices in relation to which developed countries are seen to perform well and on which at least some of the major exporting countries are thought to perform poorly. From the above discussion, it can be witnessed that the idea of CLS has supporters and critics. The optimistic perception is that the implementation of CLS in all Member States will enhance workers rights. The supporters are of the view that as these core standards are in the form of civil rights that could be a means to achieve social rights. But the question here is whether these fundamental four principles have marginalized other international labour standards and replaced hard supervision with soft mechanisms.

I.3. Objective and Scope of the Study

The broad objective is to study the effects of globalization on workers rights. The study is mainly based on the Declaration of Fundamental Principles and Rights at Work, 1998 and its implications. After the adoption of the 1998 Declaration several developments took place within and outside ILO. The study examines the influence of CLS on private actors. In addition to this the enforcement of CLS is also undertaken. The study is intended to throw light upon the social rights of workers that have been marginalized with the adoption of CLS. The study excludes the ongoing debate on the linkage between labour and WTO.

I.4. Research Questions

The research questions the study examines are:

- Whether the 1998 Declaration has strengthened or weakened the protection offered by international labour standards?
- Whether CLS are complementary to international labour standards?
- Whether CLS contained in the 1998 Declaration has created a hierarchy of rights within international labour standards?
- Whether the 1998 Declaration has strengthened or diluted the enforcement mechanisms promoted by the ILO?

I.5. Hypotheses

The principal hypotheses of the study are:

- The 1998 Declaration on Fundamental Principles and Rights at Work has weakened the protection guaranteed by international labour standards.
- CLS contained in the Declaration has created a hierarchy of rights within international labour standards to the detriments of worker's rights.
- The 1998 Declaration diluted the enforcement mechanisms established by ILO.

I.6. Research Methodology

The study will use historical and analytical methods. The study will analyze the annual and global report adopted by ILO so that it helps to understand the current stance of the member countries. To have a critical insight into the related issues relevant articles from academic journals will also be used. Together with these sources the proposed study will use online papers including government documents and reports.

I.7. Outline of the Study

The study has four further chapters

Chapter II: **Historical Development of International Labour Standards**

This chapter will trace in detail the history of ILO and the development of international labour standards drawn by the ILO's constituents (governments, employers and workers) since its inception.

Chapter III: **The 1998 Declaration on Fundamental Principles and Rights at Work: A Critical Analysis**

This chapter will critically analyse the four CLS as enumerated under the 1998 Declaration that are binding on the Member States. It will also study the implications of CLS vis-à-vis international labour standards. The chapter will deal in detail about the changes that took place within and outside ILO. The heavy reliance of non-state actors on CLS, the hardening of soft law, sidelining of positive rights, implications on developing countries are other areas that will be discussed.

Chapter IV: **Enforcement of Core Labour Standards: Strengths and Weaknesses**

This chapter will deal with the enforcement of CLS besides emphasising on the advantages and disadvantages during its implementation. This chapter will develop with the discussion of the general supervisory machinery of the ILO, noting the advantages and disadvantages it has faced. The changes that took place in the labour law regime of India will also be discussed.

Chapter V: **Conclusion**

The last chapter will summarize the major findings of the present study within the broad framework of the issues analyzed.

CHAPTER II

HISTORICAL DEVELOPMENT OF INTERNATIONAL LABOUR STANDARDS

CHAPTER II

HISTORICAL DEVELOPMENT OF INTERNATIONAL LABOUR STANDARDS

II.1. Introduction

The ILO was established mainly to codify international labour standards in the form of Conventions and Recommendations. These Conventions and Recommendations, which are Directives to the Member States, uphold the idea that working class will be protected from all types of injustice. Another view regarding the founding of the ILO is that the Organization was set up to equalize conditions of competition among nations so that trade might be liberalised without any danger to standards of living. The Organization stood as an instrument to embed the economy in society. However, this view only applied to countries that were competing on industrial goods and services and not to competition between the industrialized and underdeveloped countries (Standing 2007: 355-357). Another view, similar to the above view, is that the ILO was the response of the victorious powers to the then menace of Bolshevism. By creating the ILO, the victorious power succeeded in bringing the organized labour participation in social and industrial reform within an accepted framework of capitalism. These are certain views regarding the establishment of the ILO.

This chapter analyses the historical development of international labour standards. The first part of the chapter offers an overview of the evolution of labour standards from domestic to the international arena. The second part of the chapter deals with the establishment of the ILO and the standards adopted before and after the Second World War. The third part discusses the changes after the adoption of the 1944 Declaration. The importance of the Declaration is that it widened the areas that were covered by the ILO. Another important development within the ILO was the launching of World Employment Programme in 1969. In the same year, it received the Nobel Peace Prize. However, the 'golden age' of ILO came to an end in the late 1970s. The fourth part offers conclusion to the historical analysis.

TABLE 1: EVENTS IN CHRONOLOGICAL ORDER

1919	**Establishment of ILO**
1939-1945	**Second World War**
1944	**Declaration of Philadelphia**
1969	**ILO received Nobel Peace Prize**
1969	**World Employment Programme**

II.2. Historical Background

International labour law is that part of labour law regime, which has an international source. Therefore, it covers the substantive rules of law that have been established at the international level, as well as the procedural rules relating to implementation. In order to understand the importance of international labour law, it is necessary to consider its historical development. Valticos is of the opinion that international labour law is almost as old as labour itself, because from the very beginning it was felt that national legislation on labour matters could not be effectively established in individual countries if it was not supported by parallel standards adopted internationally. Such adoption would ensure that these standards act as a guarantee against a kind of unfair competition exercised by countries with inferior conditions of work (Valticos 1979: 17).

There is a general understanding that the ILO was the first forum that addressed labour problems. In fact, the Paris Peace Conference of 1919 took up the ideas, which were already formulated in detail by various agencies for past 100 years. The 1919 Peace Conference presented them in a form, which would be acceptable to the victorious powers participating in the Conference (Raman 1978: 6).

The efforts made prior to the Peace Conference could be divided in four stages-

a) Efforts of individuals, philanthropists and economists
b) Inter-governmental efforts
c) The role of International Association of Labour Legislation
d) The role of international trade union organizations

II.2.1. Efforts of Individuals, Philanthropists and Economists

Robert Owen, an idealistic British mill owner advocated in the nineteenth century that all countries should protect the working class from miseries (Hepple 2005: 25). He had introduced new methods of industrial management in his textile mills at New Lanark in Scotland (Johnston 1970: 5). Owen imagined a world filled with model communities like his own New Lanark. In 1818, he presented two memorials to the Plenipotentiaries of the Conference of the European Powers meeting at Aix-La-Chappelle, pleading for international regulation of legal limits of the normal working day for the industrial workers of Europe. His mission in Europe failed, but he was successful in securing the enactment in 1819 of a British bill limiting the working hours of children in cotton factories. This was the real beginning of industrial legislation (Hepple 2005: 25).

The idea next emerged in France. In 1839, Villerme, a French economist, raised voice against various malpractices and maltreatment of workers in textile industries. He argued that governmental legislation could act as a safeguard against the exploitation of workers. In addition to this he also argued for international agreements necessary to combat the sufferings of the workers. The views of Villerme were endorsed by the French liberal economist Je'rone Blanqui, who proposed that international treaties should be concluded to regulate and improve labour conditions. He was of the view that the severity of international competition would deter individual employers to observe the labour standards (Johnston 1970; Raman 1978: 7- 8, 5). During the same period, Daniel Legrand, a Swiss national, approached the French, British, Russian and Swiss Governments to adopt international legal regulation for the protection of the

working class especially against the exploitation of child labour and long working hours. In his note to these governments, he observed that an international law that governs industrial activities was the only possible solution to combat these social problems (Raman 1978: 8). Legrand was one of the few protagonists of international labour standards to link the economic and political case (Hepple 2005: 26).

With Legrand the period of the precursors comes to an end. Their conception of international labour legislation was based on humanitarian and religious principles. Desire for social peace was the key factor that led them to take a reformist attitude towards the problems of workers. However it was not revolutionary and was in no way an expression of class struggle (Johnston 1970: 6). These efforts of philanthropists and economists exerted a good effect that brought forth the urgent need for international legislations that could take care of the weaker section of the working class. Thus the workers would get adequate protection against severe competition among industrialists and manufacturers who tried to increase profit at the cost of labour power (Raman 1978: 9).

The idea of international labour legislation could not be realized until the doctrine of economic liberalism proved a failure. This happened in the second part of the nineteenth century. By the 1848 revolutionary movements[6] in many European countries a social consciousness was evolved that led to the weakening of the doctrine of *laissez faire*. There were demands for national legislation for the protection of workers and some countries actually enacted such legislations. These developments led to the growth of international labour legislation (Johnston 1970: 6).

[6] From 1848 to 1852, Europe was convulsed by a series of Revolutions which all ultimately failed by 1852 with the restoration of either dictatorship or the reestablishment of conservative rule. The revolutions started in a part of Italy in 1848, but the real spark was in France in 1848. From there, as news spread, revolutions broke out in other parts of Italy, Prussia, Austria and the German Confederation. However, internal divisions based on nationalism and on a radical/liberal split soon weakened the revolutionaries. By 1852 conservatives had taken advantage of the weaknesses and regained power. [Online: web] Accessed 11 June 2010, URL: http://www.cusd.chico.k12.ca.us/~bsilva/projects/revs/1848essy.html).

II.2.2. Intergovernmental Efforts

It became clear that no practical results could be achieved without inter-governmental action. In this direction, several efforts were made in the latter half of the nineteenth century. The first official move towards international action in the field of labour was taken in the year 1855. The Canton of Glarus in Switzerland, for the first time, elaborated its factory legislation, wrote to the council of state of the Canton of Zurich, asking it to agree to a plan for labour protection upon an international basis. But since nothing materialised, the idea got weakened (Johnston 1970: 6).

The second official move in the direction of international labour legislation was made in the year 1876 by Swiss National Council. Colonel Frey, President of the Council, proposed that the Swiss Federal Council should enter into negotiations with the principal industrial States with a view to adopting a uniform policy concerning the working conditions in factories and for accomplishing this purpose suitable international legislation should be adopted. The proposal was accepted and the concerned governments were in fact consulted; but their replies were by no means encouraging. In 1880, Colonel Frey took further action and proposed that the Federal Council should enter into negotiations for bringing about international factory legislation. Later the Federal Council had carried out efforts to obtain information, which would make it possible to know which States in Europe would co-operate in international regulation of labour. The attempt was however unsuccessful (Johnston 1970; Raman 1978: 7, 9-10).

France was the next country that showed a practical interest in this regard. A Bill was submitted by a group of French Deputies indicating willingness on the part of the French government to comply with the efforts made by the Swiss government. The bill also contained a suggestion regarding the establishment of an international labour office. However, it was not accepted. In Germany, members of the German Social Democratic Party in 1886 passed a resolution asking that the Imperial Chancellor convene a Conference of the principal industrial States with a view to formulating a uniform basis for an international agreement for the protection of labour. Even though

the resolution was defeated, the heated discussion gave wide publicity to the idea of international labour legislation. In 1889, the Swiss government considered the time ripe for further action. In a circulated note to the government of Europe, the Swiss government proposed that an international conference should be convened to deal solely with questions of Sunday work and the work of women and children. The Swiss government sent an invitation to the preparatory conference to the various governments. It was to be held in 1890 at Berne. France, Belgium, Great Britain, and The Netherlands had accepted the invitation, while Germany did not reply. Before this Conference materialized, a dramatic development took place. The German Emperor, Kaiser William, instructed Chancellor Bismarck to approach foreign governments and invite the Conference to meet in Berlin. The programme of the conference was the same as that of the one which the Swiss Federal Council had proposed to call. The conference lasted for 15 days. It was attended by delegates from the then twelve chief industrial States of Europe. The conference covered all aspects of labour matters. In addition to this, it also discussed all labour legislations that were in force in the countries represented. However, the result of the conference was very little. But the conference gave wide publicity to the cause, which attracted the attention of all people and led them to approach the subject in a new way (Johnston 1970; Raman 1978: 7, 9-10).

Besides these international efforts, some of the countries entered into bilateral agreements. In 1904, the French and Italian governments entered into a Treaty guaranteeing equal benefits of legal protection and privileges to the workers of both the countries residing in either country. Similar agreements were signed between Italy and Germany and Italy and Switzerland. Treaties were also signed between Germany, Austria and Hungary, guaranteeing reciprocity of protection of labour. Belgium and Luxemburg also entered into a bilateral treaty. Thereafter international treaties were signed year after year, at least among three or four States (Raman 1978:10-11). Thus, it was realized that for any action at the international level the participation of the government was necessary.

Between the Berlin Conference in 1890 and the establishment of the ILO in 1919, the idea of international labour legislation was brought to practical realization by two series of efforts. On the one hand, International Association for Labour Legislation was created, and through its conferences took effective steps to adopt international labour legislation. On the other hand, various international worker's conferences were convened that informed the workers to understand the importance of international solution of labour and industrial difficulties. These two developments ran on parallel lines.

II.2.3. The Role of International Association for Labour Legislation

The International Association for Labour Legislation took up the work left incomplete by the Berlin Conference. The Association was formally established in Paris in the year 1900. It was as an outcome of the International Congress on Labour Legislation held at Brussels in 1897 and was composed of intelligentsia and others. The Association was unofficial in character, but governments were invited to appoint a representative on the Committee of the Association, which was the representative body through which the Association acted internationally. The Association took effective steps in formulating international labour legislation. It selected a few subjects on labour matters for intensive study rather than dealing with the whole of labour legislation. The Association set up an International Labour Office at Basle, and also decided to set up autonomous national sections. In addition to this it also decided to convene the International Congress on Labour Legislation. The Association adopted two draft Conventions in Berne in 1906; one on the prohibition of the use of white phosphorus in the manufacture of matches and the other on the prohibition of night work for women. As a result, for the first time, the principle of international agreement for the regulation of labour conditions was accepted by a number of industrial States. At a technical Conference held in Berne in 1913, the Association adopted two more draft Conventions. The first one provided for the prohibition of night work by young persons less than sixteen years of age, and an absolute prohibition of employment of all young persons under the age of fourteen. The second Convention was concerned with the length of the working day for workers under sixteen and women. These

Conventions were to be placed before the Diplomatic Conference, which was proposed to be convened in 1914. Unfortunately, this did not materialize because of the outbreak of First World War. However, the terms of these conventions provided the basis for in-depth deliberation at the Washington Conference of 1919 (Raman 1978; Johnston 1970: 12-13, 9).

Even though the Berlin Conference was unsuccessful in bringing the ideas of international labour legislation to full realization, the Berne Conference succeeded in bringing this idea to fruition. While drafting the constitution of ILO, the work of the International Association for Labour Legislation proved to be of great assistance to the drafters. The Constitution of ILO had incorporated three ideas directly from the work of the Association, namely, (a) periodical Conferences for the conclusion of international agreements; (b) a central organ of information and preparation; and (c) supervision over the observance of Conventions (Raman 1978; Johnston 1970: 12-13, 9).

II.2.4. The International Workers' Movement

The International Workers' Movement had exerted great influence which led to the ultimate creation of the ILO. Earlier the movement was an organized and articulate body of opinion. After the formation of International Working Men Association (known as the First *Internationale*) in 1864, the International Worker's Movement actually materialized. In 1872, the Association was disunited and its activities were disrupted. In 1889, the Second (socialist) *Internationale* was constituted in Paris. One of its immediate aims was to unite the workers internationally to gain legal support for their demand for an eight- hour day. In addition to this, another *Internationale* was set up in 1898, viz, the International Federation of Trade Union, since the second *Internationale* concerned itself with the political aspirations of the workers, rather than with their trade union demands. This federation adopted resolutions relating to those aspects of the improvement of conditions of labour, which had an international bearing. The International Workers Conference held during the First World War in Leeds, Stockholm and Berne had urged and resolved that the terms of Peace should

ensure the workers the minimum guarantees in regard to labour legislation and trade union right in recognition of the signal service rendered by the workers both in the factories and on the battle fields during the war. The last of the Pre Peace Treaty Conferences of the International Workers Movement, namely 'International Labour and Socialists Conference' which was held in February in 1919 in Berne, was the only Conference which included the representatives of workers from Allied, Neutral and Central powers. They took effective steps to consolidate the position of the international socialist labour parties by reviewing the Second *Internationale* and giving it a distinctly socialist flavour and colouring. Their demands include the incorporation of a Labour Charter in the Peace Treaty and the creation of permanent machinery in the shape of a League of Nations and an International Labour Office to protect the interest of labour. The achievement of the Conference was the adoption of a detailed Labour Charter, which was later considered by the Labour Commission, appointed by the Labour Peace Conference.

Before the establishment of the ILO, the principal objective of the labour movement was to propagate the idea of a permanent organization for the promotion of international regulation of labour conditions. The members of the movement agreed that their aim would be realized only through negotiation and implementation of international Conventions. They advocated for the adoption of principles that uphold human values, mitigate human sufferings, and promote peace. The members of the movement desired that the permanent organization would prefer human values instead of fulfilling the competitive aspirations of the countries (Raman 1978; Johnston 1970: 14-16, 10-11). However, ILO took a position that preferred to respond for the economic cries of the countries competing on industrial goods and services.

Thus before 1919, over a period of 100 years, all these efforts formed a strong base for international action to regulate labour conditions. Long before the Peace Conference, the governments of the belligerent countries had realized that the needs of the workers and employers could be better addressed through Peace Treaties. The contribution of the earlier Conferences and of the various other organizations active in the field was

recognized by the Peace Conference of 1919 (Raman 1978; Johnston 1970: 14-16, 10-11).

II.3. The 1919 Peace Conference and the Establishment of the Commission on International Labour Legislation

According to Hepple

> "The first world war had led to a split in the international socialist and trade union movements between revolutionaries who advocated international class struggle to overthrow capitalism, and reformers who favoured the gradual introduction of democratic socialism or simply an extension of workers rights under capitalism. The shock caused by October 1917 revolution in Russia convinced industrialists and most conservative liberal and democratic socialist politicians that class collaboration was essential" (Hepple 2005: 29).

Thus during the First World War, the trade union organizations of both sides, as well as those of neutral countries insisted that their voice be heard at the time of the settlement of peace and that the Peace Treaty contain clauses for improving the conditions of workers. Various trade union congresses also expressed a similar desire. The Allied governments gave due regard to these demands. In particular, Great Britain and France elaborated the drafts aiming at the establishment of an international regulation of labour matters. One of the first acts of the Peace Conference was to appoint in 1919 a "Commission on International Labour Legislation".[7] The Commission started its work on February 1919 and adopted its report at its thirty-fifth sitting on 24 March 1919. The Commission was entrusted to enquire into the conditions of employment from the international aspect, to consider the international means necessary to secure common action on matters affecting conditions of employment, and to recommend the form of a permanent agency to continue such enquiry and consideration in co-operation with, and under the direction of the League of Nations (Raman 1978; Johnston 1970: 17, 12-13).

[7] The Commission was composed of representatives from nine countries, Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States, under the chairmanship of Samuel Gompers, Head of the American Federation of Labour (AFL). For details, see [Online: web] Accessed 7 Nov. 2009, URL: http://www.ilo.org/public/english/ about/ history .htm

However, the Commission faced several difficulties with respect to the representation of groups or interest in the International Labour Conference and Governing Body and the obligations of States in relation to the decision of the Conference. However, the Commission successfully overcame these difficulties and a complete agreement was reached. Although the Commission dealt with many important points, one main contribution made was its proposal to amend the second clause of the Preamble to Part XIII of the Treaty of Versailles.[8] After the amendment, it reads as "whereas the League of Nations has for its object the establishment of universal peace and such a peace can be established only if it is based on social justice". Thus, the significance of the amendment lies in the introduction of the two words "social justice" which came to symbolize the main objective of the ILO (Johnston 1970: 13). "Thus, following a global conflict, social justice was seen as a prerequisite for the maintenance of the peace that had only just been restored" (Humblet and Zarka 2002: 1).

The Report of the Commission on Labour Standards consisted of two parts: containing the constitution of the proposed Permanent International Labour Organization and the Labour Clauses enumerating the principles to be incorporated in the Peace Treaty. These texts, after the adoption by the Peace Conference in April 1919, were embodied in the Treaty of Versailles, as Part XIII, commonly known as the Labour Section. The Constitution provided for the establishment of a permanent organization for the promotion of the objectives set forth in the Preamble. Thus the ILO came into being as the culmination of endeavours spread over a century (Raman 1978: 18).

II.4. The Establishment of the International Labour Organization

The Allies created the ILO during the negotiations leading to the Treaty of Versailles in 1919. The organization was set up mainly to bring fair competition among nations. The motivation for its establishment was purely trade driven (Alston and Heenan 2004: 225). ILO was entrusted with several objectives. One of the fundamental objectives entrusted to the ILO was to abolish the social injustice suffered by workers

[8] The original draft of the Preamble says that: "whereas the League of Nations has for its object the establishment if universal peace and such peace can be established only if it is based upon the prosperity and contentment of all classes in all nations" (Johnston 1970: 13).

and to guarantee fair and humane conditions of work. To this end, the "Labour Charter" in the treaty formulated nine principles to guide the social policy of the Member States of the League of Nations.[9] The principles are (1) labour is not a commodity or article of commerce; (2) the right of association; (3) payment of a wage adequate to maintain a reasonable standard of living in one's country; (4) an eight-hour day and a 48-hour week; (5) weekly rest of 24 hours; (6) the abolition of child labour and limitations on the work of young persons; (7) equal remuneration for work of equal value for men and women; (8) laws on conditions of labour that have due regard to the equitable economic treatment of all lawfully resident workers; and (9) an adequate system of inspection to enforce the laws and regulations for the protection of the employed.[10] These principles are humanitarian in nature. It encompassed a mixture between the goals to be achieved and the ways to achieve them (Trebilcock 2009: 5).

Another important objective of ILO is to encourage human rights goals in order to promote political stability. It was expected that the international coordination of labour standards would effectively address the problems associated with the extreme working conditions thereby promoting the human rights objectives of ILO. In effect, the ILO was part of response to the Russian Revolution and the socialist ideals that inspired it. Finally, the ILO was also intended to serve important economic aims. Governments feared that unilateral improvement of labour standards would increase labour costs, exposing their goods to competition from foreign producers with lower labour costs. By harmonizing standards, socially advanced countries could avoid competition and economic disadvantages from cheaper goods produced in countries with weaker labour standards (Donoso 1999: 194-195). Writing in a critical view, Cox connects Gramscian category of hegemony[11] to the institutional arrangement of ILO. In the

[9] When the Commission on Labour Legislation met in Paris in 1919, it originally considered nineteen principles, but later reduced the list to nine (Cordova 1993: 139).

[10] Supra note 1

[11] According to Cox "Antonio Gramsci used the concept of hegemony to express a unity between objective material forces and ethico-political ideas-in Marxian terms, a unity of structure and superstructure-in which power based on dominance over production is rationalized through an ideology incorporating compromise or consensus between dominant and subordinate groups. In the hegemonic consensus, the dominant groups make some concessions to satisfy the subordinate groups, but not such as to endanger their dominance. The language of consensus is a language of common interest expressed

words of Cox, "ILO has been the expression of a global hegemony in production relations. During the making of the Versailles Treaty in 1919, the ILO was the response of the victorious powers to the menace of Bolshevism. By creating the ILO, they offered organized labour participation in social and industrial reform within an accepted framework of capitalism. Between the two World Wars, the ILO was nourished by the spirit of reformist social democracy yet ever heedful of the practical limits imposed by dominant conservative forces" (Cox 1977: 387). In order to understand more about ILO and its standard setting arrangements it is pertinent to look into the Preamble and the main features of its Constitution.

II.4.1.The Preamble to the ILO Constitution

The Preamble to the ILO Constitution states that universal and lasting peace can be established only if it is based on social justice. The idea of peace and justice especially social justice is prevalent throughout its four paragraphs.[12] This idea is placed against injustice, hardship, privation and unrest (Trebilcock 2009: 5). In comparison to many Preambles to other major international treaties, the Preamble to the ILO constitution is quite economical (Langille 2003: 89). Langillie reviews two propositions in the Preamble to show the exact purpose of the ILO: (1) universal peace can be established only if it is based upon social justice, (2) the failure of any nation to adopt humane conditions of labour [i.e., social justice] is an obstacle in the way of other nations, which desire to improve the conditions in their own countries. According to him,

> "A familiar and straightforward interpretation is that the second proposition stood as a justification for the creation of ILO rather than the first one. This is because, the second one poses a claim about the interactions of nations. Therefore, this is an issue that a nation cannot address alone and which requires international coordination for its resolution. Whereas the first proposition clearly fall under the domestic politics. Clearly speaking, the second proposition deals with the failure of one state to enact and enforce adequate social policies and labour laws. This failure leads to a collective action problem, specifically a "race to the bottom" in labour law policy, because other nations would be forced to lower their standards to compete in order to attract new, and retain existing, capital investment, jobs and tax revenues. The result of this race is

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in universalist terms, though the structure of power underlying it is skewed in favour of the dominant groups" Cox (1977: 387).

[12] Constitution of ILO (1919), [Online: web] Accessed 19 Oct. 2009, URL: http://www.ilo.org/ilolex/english/iloconst.htm. For details see Annexure I.

> that all States end up with lower labour standards but with no gain or change in investment because other state has made the same move" (Langille 2003: 91).

This will lead to a situation of social injustice that will ultimately undermine the very purpose of ILO. The claim put forward by Langillie is well fitted to the contemporary context of trade liberalizations and idolization of market forces. However, the second proposition cannot be read in isolation from the other paragraphs which focuses on the link between social justice and world peace (Trebilcock 2009: 6). Therefore, the objectives of the ILO include not only promotion of social justice and world peace but also to ensure that labour standards are respected during the time of trade liberalisation.

II. 4.2. Main Features of ILO's Constitution

The Constitution sets out the structure of the Organization and its powers. The ILO Constitution upholds certain principles such as principle of tripartism, creation of international labour standards, universality and flexibility of labour standards and the effective supervisory machinery for monitoring the international labour standards. These features of the ILO have also influenced the development of other international institutions (Raman 1978: 41). Briefly explaining the features:

Tripartism: Article 2 of the Constitution states that the permanent organization shall consist of: (a) a General Conference of representatives of the Members; (b) a Governing Body as described in Article 7; and (c) an International Labour Office controlled by the Governing Body. The members of the ILO are sovereign States and they meet at least once in a year at the Conference. The Conference is composed of four representatives of the members, of whom two shall be government delegates and the other two shall be delegates representing the employers and the employees of each of the Members.[13] Each delegate would be entitled to vote individually on all matters, which are taken into consideration by the Conference.[14] Thus, the unique feature of the

[13] Article 3(1) of the ILO Constitution. For details, see Annexure I.
[14] Article 4 of the ILO Constitution. *Ibid*

ILO is its tripartite structure.[15] In the opinion of Wilfred Jenks "the real meaning of the tripartite structure is that industrial management, industrial labour and the community as a whole must all be represented by whoever is best qualified to represent them under whatever happens to be the economic and social structure of the country from which they come" (Jenks 1970: 18). James Shotwell observed that "For the first time in the history of international law, it was proposed to permit unofficial delegates, mere citizens of different countries representing home interests in labour and capital, to vote with similar representatives citizens of other countries independently of action of the representatives of their governments, and so to help actually bind those governments towards certain international policies and treaties" (Quoted from Raman 1978: 47). Thus, ILO stands as the best example, which represents occupational interests in an inter-governmental organization. It is the only international forum which gives an opportunity for the workers and employer's organizations to express their views through their representatives of their own choosing of equality with those of their governments (Raman 1978: 46).

With respect to the *creation of international labour standards,* there was a growing international concern that action needs to be taken on a particular issue, for example providing working women with maternity protection, or ensuring safe working conditions for agricultural workers. A unique legislative process is involved in the creation of international labour standards by considering the views of the representatives of governments, workers and employers from around the world. As a first step, the Governing Body agreed to put this issue on the agenda of a future International Labour Conference. The International Labour Office prepares a report that analyses the laws and practices of Member States with regard to the issue at stake. The report is circulated to Member States and to worker's and employer's organizations for comments and is discussed at the International Labour Conference. A second report is then prepared by the Office with a draft instrument for comments and is submitted for discussion at the following Conference, where the draft is

[15] The Conference adopted a Resolution in 1964 affirming the principle of tripartism within the ILO. The resolution stated that the scrupulous observance if the tripartite structure of the ILO constituted the best means of ensuring the work of the ILO which aimed at securing social justice (Raman 1978: 46).

amended as necessary and proposed for adoption. This 'double discussion' gives Conference participants sufficient time to examine the draft instrument and make comments on it. A two-thirds majority of votes is required for a labour standard to be adopted (ILO 2009: 16).

Universality and Flexibility: Within ILO, the Principle of Universalism has two roles, i.e. universality of membership and universal application of the Conventions and Recommendations adopted by the ILO. Firstly, the universality of membership may be analyzed. One of the salient features of the ILO is the universality of its membership. Since its inception, the ILO aimed at the widest participation of governments, employees and workers. Though it was assumed that the membership of the ILO and the League of Nations would be identical, in practice ILO's membership has always been wider than that of the League. The ILO always aspired for universality and was always willing to admit new members. Speaking about the second role of universalism, the standards set in the form of Conventions and Recommendations are for universal application (Raman 1978: 41-43). As standards are adopted by a two-thirds majority vote of the ILO's constituents, it is an expression of universally acknowledged principles. These standards are minimum standards that are uniformly applicable to all Member States (ILO 2009: 18). "This approach was designed to overcome economic concerns associated with unilateral improvement of domestic laws, thereby being more respectful of domestic sovereignty than proposals for fully executor international labour legislation" (Donoso 1999: 195). This minimum standard approach takes into consideration its member country's diverse cultural and historical backgrounds, legal systems, and levels of economic development (ILO 2009: 18).

From this universality flows the flexibility approach. Most of the ILO standards have the nature of flexibility, so that these standards can be easily translated into national law and practice with due consideration of the differences in national circumstances. For example, standards on minimum wages do not require Member States to set a specific minimum wage but to establish a system and the machinery to fix minimum wage rates appropriate to their economic development. Other standards have

'flexibility clauses' which allow States to lay down standards that are temporary and lower than the normally prescribed standards, to exclude certain categories of workers from the application of a convention, or to apply only certain parts of the instrument. As reservations to ILO conventions are not permitted, ratifying countries using the flexibility options are usually required to make a Declaration to the Director General of the ILO and to make use of such clauses only in consultation with the social partners (ILO 2009: 18). At the same time, the ILO founders authorized the Organization to give precision to labour standards. These standards were intended to assist governments on correcting degrading working conditions. Thus ILO and its Member States preferred detailed standards than general principles thereby providing a comprehensive approach. This policy became a basic characteristic of the ILO standard setting (Donoso 1999: 196-197).

As far as the *implementation*s of the ILO Conventions are concerned in the provision for regular reporting by ILO Member States should be the appropriate mechanism.[16] Article 19 and 22 provides that the Member States shall submit a report to the Director General of the International Labour Office regarding the initiatives adopted by them with respect to a particular standard. These provisions also provide the possibility for organizations of employers and workers to raise concerns. Such concerns could be raised within the reporting framework of Arts. 19 and 22, as well as through the representation and complaint procedures of Arts. 24 and 26. These provide regular opportunities for dialogue. Article 33 and 37 provides for orderly means of resolving disputes. In its original version, the Constitution provides for the establishment of a Commission of Enquiry to examine allegations of non-observance of a ratified Convention. This Commission could recommend economic measures against a defaulting Government, which other Governments would be justified in adopting against a defaulting Government.[17] If the matter were referred to the Permanent Court

[16] For a detailed study of the implementation of the ILO standards, see Chapter IV.

[17] Article 414 of the Treaty of Versailles: When the Commission of Enquiry has fully considered the complaint, it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken. It shall also indicate in this report the measures, if any, of an economic character against a defaulting Government, which it considers to be appropriate, and which it considers other Governments

of International Justice (PCIJ) then the court could also indicate such measures (Trebilcock 2009: 8).

However, the Constitutional Amendments of 1946 replaced these references. After the amendment, Article 33 empowered the ILO Governing Body to "recommend to the Conference such action as it may deem wise and expedient to secure compliance" with recommendations of a Commission of Inquiry.[18] Thus, Article 33 confers wide powers on the Conference to suggest Member States to take economic sanctions, among a range of other possible measures. However, it is certainly a less direct approach (Trebilcock 2009: 8).

The Conventions and Recommendation adopted by the Conference together constitute the international labour standards. Broadly speaking, international labour standards are legal instruments, which set out basic principles and rights at work drawn up by the ILO's constituents (governments, employers and workers). Conventions are legally binding international treaties that may be ratified by Member States whereas Recommendations serve as non-binding guidelines and deal with subjects less amenable to international supervision. In many cases, a Convention lays down the basic principles to be implemented by ratifying countries, while a related Recommendation supplements the Convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous i.e. not linked to any Convention (ILO 2009: 14).

II.5. Objectives of International Labour Standards

According to Valticos, the international labour standards have three main aims. The instinct for justice is one of the prominent aims, which the founder States proclaimed in the Preamble to its Constitution. The wordings read as follows, "they were moved

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would be justified in adopting. Article 419 of the Treaty of Versailles: In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Enquiry, or in the decision of the Permanent Court of International Justice, as the case may be, any other Member may take against that Member the measures of an economic character indicated in the report of the Commission or in the decision of the Court as appropriate to the case. Supra note 1.

[18] For details, see Annexure I.

by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world." It was this concern with justice, which led the ILO to adopt various Conventions and Recommendations. Along with this fundamental aim of the Organization, the other aim which was prominent at the time of the establishment of ILO was the amount of contribution that international regulation of labour could make to the maintenance of peace. The argument was based on the belief that social injustice endangers peace throughout the world and the ILO serves the cause of peace by combating injustice. This idea is interpreted in a broader and indirect way as:

> "Social justice helps to strengthen democratic governments, and democracy is essential to peace; by contributing to social peace it abolishes a cause of tension or the danger of military adventures being used as a diversion from domestic difficulties; peace is not a purely negative matter of absence of war but a positive concept requiring stable, just and balanced relationships both within and between countries; and lastly, the setting of rules to better the lot of mankind develops a sense of international solidarity and fosters a general climate of co-operation and understanding" (Valticos 1996: 395).

Another aim of the labour standards was to ensure a fair competition between employers and countries. Valticos opines that, "historically international regulation of labour was also put forward as a counter-argument to those who opposed the introduction of protective measures in their own countries on the ground that such measures would affect their competitive advantage in the international market. Thus, it was argued that international agreements to set labour standards would ensure that competition was not at the worker's expense and would ensure a kind of fair competition between employers and countries" (Valticos 1996: 396). In addition to these three aims, the international labour standards also served certain other functions like contributing towards the concerted policy of social and economic development, enhancing the stability of national legislation and providing a guarantee against backsliding. Mainly, while framing social policies governments relied on recommendations in order to provide workers with a sound basis for making demands. These standards have evolved as international common law in labour matters (Valticos 1996: 395-397).

During its initial period the Organization's competence to deal with certain questions and certain classes of persons were challenged. In 1922, the PCIJ was called upon to decide on matters pertaining to ILO's competence. The court besides deciding in favour of the most comprehensive definition opined that ILO's competence could be extended to "all labour problems". Scelle supported this view whereas Jean Morllet concluded that the Organization itself was a "continuous creation". According to Wilfred Jenks the organization seemed on the way of becoming the "chief coordinator of social policies throughout the world" (Quoted from Valticos 1996: 397-398).

Having drawn the formation of labour standards, it is essential to study the standard setting arrangement of the ILO. The period could be divided as inter-war period and post Second World War period.

II.5.1. Standards Adopted Between 1919 and 1939

During the inter-war period, the ILO was mainly concerned with immediate problems of conditions of work and employment. In its first session, the ILO adopted its first Convention, which dealt with the eight-hour day and forty-eight hour week in industry. The other Conventions adopted at that session dealt with unemployment, night work by women, night work by young persons, the minimum age for industrial employment, and the employment of women before and after confinement. The second session was held in 1920 and mainly dealt with maritime employment. In the third session of the Conference seven Conventions and eight Recommendations were adopted dealing with weekly rest in industry, various aspects of employment in agriculture, and the employment of young persons at sea and the use of white lead in painting (Valticos 1996: 400).

Thus, in two years 34 international instruments which included 16 Conventions and 18 Recommendations were adopted. However after 1921, there was a decline in the adoption of standards and 1925 onwards, the pace quickened once more. Thus between 1925 and 1931, 15 Conventions and 18 Recommendations were adopted. These included the first Conventions on social insurance, methods of fixing minimum

wages and a number of Conventions on industrial safety. In 1930, the ILO adopted one of the major Conventions on forced labour. It had far-reaching effects, especially in colonial territories. However, an attempt to adopt a Convention on freedom of association proved unsuccessful. It took another twenty years to adopt a Convention on freedom of association.

In 1930, the world witnessed the Great Depression through economic crisis, which had serious social effects especially in terms of labour market. The standard setting arrangements of the ILO started to fell down. Conventions that were adopted to regulate hours of work were unsuccessful. Nevertheless, the work of setting standards went on. In 1933, a series of major instruments were adopted on social insurance. Thus by 1939, the International Labour Conference adopted 67 Conventions and 66 Recommendations in various fields. The first phase of ILO's standard setting process came to end with the outbreak of the Second World War.

II.5.2. Post Second World War Period

The ILO was also not immune from the consequences of outbreak of the Second World War. Its activities came to a pause. This period was characterized as one of the institutional concern. "The sense that much of its standard setting objectives had been achieved during the previous twenty years, coupled with the demise of the League of Nations, left the organization in a somewhat precarious situation" (Valticos 1996: 397). After the Second World War, the restructuring of state forms and international relations was designed to prevent a return to the capitalist order. Internationally, a new world order was constructed through several agreements and institutions (Harvey 2005: 10). Some of these agreements set out the guiding principles for national and social policies for a world order. The adoption of the Atlantic Charter, 1941 by the Allied governments had earlier announced eight common principles for the national policies. The fifth of these principles addresses the "desire to bring about the fullest collaboration between all nations in the economic field with the object of securing for all improved labour standards, economic development and security" (Principle 5,

Atlantic Charter, 1941).[19] Parallel developments like the formation of the United Nations and the Bretton Woods Institutions, defined the framework for the post-war international political and economic system (Lee 1994: 468). These institutions were set up to help stabilize international relations (Harvey 2005: 10).

During this period, the ILO embarked on a series of meetings where it endeavoured to lay down a strategy for linking its activities to the nascent UNO and define its role for the future (Donoso 1999: 199-200). The ILO became a specialized agency of the UN under Article 57 of the UN Charter[20], preserving its independence and tripartite structure. At this time, ILO made an important move with the adoption of Declaration of Philadelphia in 1944. This document became the fundamental expression of the ILO's mandate for the Post Second World War era (Donoso 1999: 200).

II.5.3. The Declaration of Philadelphia, 1944

The 26th Session of the International Labour Conference held in Philadelphia in 1944 unanimously adopted a Declaration titled 'Declaration of Philadelphia'. After the adoption of this Declaration, Article 1 of the Constitution of the ILO reads as follows: "a permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purpose of the International Labour Organization adopted at Philadelphia on 10 May 1944 the text of which is annexed to this Constitution". The Declaration of Philadelphia widened the mandate of the ILO as defined in the Treaty of Versailles, 1919 and in the Preamble to the Constitution of the ILO to the areas beyond conditions of work. The need for such a broadening of the mandate was already felt within a decade of the ILO's foundation. The Great Depression of 1929 had already created

[19] For details, see *Atlantic Charter* (1941) [Online: web] Accessed 10 July 2010, URL: http://usinfo.org/docs /democracy/53.htm.

[20] Article 57 (1) of the UN Charter reads as follows: The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. 2)Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies. For details, see, *Charter of the United Nations* (1945), [Online: web] Accessed 11 Jan. 2010, URL: http://www.un.org/en/documents/charter/index.shtml.

mass unemployment and poverty, which illustrated the pervasive impact of economic policies on labour conditions. In 1930 Harold Butler, the then Director of the ILO put forward the view that the ILO's work should extend to national as well as international economic policies affecting employment and the welfare of workers. This view was reinforced in the 1941 Report by the then Director. The general acceptance of these ideas paved the way for the adoption of the 1944 Declaration (Lee 1994: 467-470). The 1944 Declaration reaffirmed the 'fundamental principles' on which the ILO is based, in particular that -

- Labour is not a commodity;
- Freedom of expression and of association are essential to sustained progress and;
- Poverty anywhere constitutes a danger to prosperity everywhere (Hepple 2005: 32).

Its hallmark elements were the proposal of an ambitious social policy function for the ILO and a commitment to protecting basic human rights (Lee 1994: 467). This was spelt out in Para II(a) as a right of all human beings, irrespective of race, creed, or sex, 'to pursue both their material well-being and their spiritual development in conditions of freedom, and dignity, of economic security and of equal opportunity' (Hepple 2005: 32). In the realm of social policy, the Declaration of Philadelphia authorizes the ILO to involve itself directly in guiding the economic and social policies of Member States. This new role envisioned the ILO as advocate of certain core objectives: achievement of full employment; extension of social security to all persons requiring a basic income; a comprehensive medical care; child welfare and maternity protection; and housing and recreation facilities.[21] The 1944 Declaration represents a forward step initiated by ILO. In its mandate, it encompassed not only social justice principles but also human rights concepts that got impetus after the Second World War. This dynamic, policy oriented mandate contrasts with the ILO's initial task of using its Conventions to protect workers from the worst abuses of power. According to

[21] Para III(a),(f),(h),(i) of the Declaration of Philadelphia. For details, see Annexure I.

Ghebali, the Declaration has "proclaimed for the first time the principle of international protection of human rights, foreshadowing both the Charter of the UN and the Universal Declaration of Human Rights (UDHR)" (Ghebali 1989: 63 quoted in Donoso1999: 200, Footnote: 42). The Declaration of Philadelphia provides the idea that labour rights could not be enjoyed without protection of civil liberties. "Accordingly, it guarantees not only basic labour rights, but also protects freedom of expression and equality. The framers of the Declaration regarded both freedoms as essential to sustained progress. The Declaration is thus a noteworthy instrument because it envisions a unified approach to protecting economic, social and cultural rights (which includes basic labour rights) and civil and political rights" (Donoso 1999: 199-200).

The aims and purpose of the ILO were significantly expanded by the 1944 Declaration. The new goals that went beyond the original mandate include international economic and financial practices and measures, international trade, expansion of production and development, child welfare, nutrition, health etc. The authors of the Declaration visualized the ILO as an all-purpose organization capable of dealing with a diversity of subjects and more attuned to social and economic policy than to the sphere of labour (Cordova 1993: 140).[22]

According to Hepple,

> "The Declaration of Philadelphia reflects the Keynesian view characterized by a policy emphasis on full employment and social welfare. During this period, the organized labour and its political allies enjoyed unprecedented power in western countries. There was a widespread political consensus to avoid a return to the economic depression of capitalism in the 1930s, and a commitment to guarantee human rights. Politicians were pledged to provide a broad range of social and economic rights as well as the more traditional civil liberties. These rights were seen

[22] It should be noted that the Declaration was adopted a year before the establishment of the UN. Overtime most of the non-labour questions mentioned in the Declaration of Philadelphia were entrusted to other agencies of the UN: economic and financial policies to the Economic and Social Council (ECOSOC) and the Bretton Woods institutions, health matters to World Health Organisation (WHO), child welfare to the United Nations Children's Fund (UNICEF), nutrition to the Food and Agricultural Organisation (FAO), education and culture to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and international trade to the United Nations Centre for Trade and Development (UNCTAD) (Cordova 1993: 141).

as being collective and substantive rather than being individual or procedural" (Hepple 2005: 33).

II.5.4. Standards Adopted Between 1944 and 1969

After the Second World War, the adoption of international standards was resumed in 1944. Thereafter, the standards adopted by the ILO departed from its original mandate in three respects: regarding the scope and coverage of the standard, a broader approach to the subjects dealt by the instruments and greater flexibility in the formulations of standards. While continuing with its previous efforts, the standards have extended the coverage to new subjects and new categories of persons. The new categories of persons include groups such as indigenous and tribal populations (in 1957), plantation workers (in 1958), fishermen (in 1959 and 1966) and tenants and share-croppers (in 1968). The Conference adopted new instruments on subjects like hours of work, holidays with pay, weekly rest and wages. In addition to this, it adopted new standards on occupational safety and health. The standards adopted during this second period increasingly emphasized on the promotion and protection of certain fundamental rights designed to safeguard the values of freedom, equality and dignity. For instance basic Conventions on freedom of association were adopted in 1948 and 1949. With respect to the abolition of forced labour, a Convention was adopted to supplement the 1930 instrument. Another Convention and Recommendation was adopted in 1958 to promote equality of treatment between men and women workers. These instruments mainly relied on the general spirit of the 1944 Declaration. Thus from 1944 to 1969, the Conference adopted 63 Conventions and 68 Recommendations making a total of 130 Conventions and 134 Recommendations (Valticos 1996: 399-401).

II.5.5. World Employment Programme, 1969

In 1969, ILO received Nobel Prize for Peace. Followed by this in the same year the ILO had launched the World Employment Programme (WEP) at its fiftieth anniversary Conference. The WEP could be considered as a giant leap. The main objective of WEP was eradication of poverty and solving the problem of unemployment through government led activities in the labour market. It was inspired

by the realization that economic growth itself did not necessarily lead to an improvement in the living standards of the great majority of the population. The programme mainly focused on employment-oriented research programmes. Asserting the relationship of employment with all aspects of economic and social policy, the programme in effect sponsored research on poverty eradication, employment promotion and economic growth. In addition to research, the WEP organized inter-agency employment missions to selected countries. It also gave technical assistance to countries on formulating and implementing employment intensive strategies and policies.[23]

Scarcity of finance in conducting further activities in grandiose became a problem especially when the US stopped payment of annual contributions which amounts to 25 per cent of the ILO's primary budget in November 1970. Hence, WEP had to opt for alternative sources of funding, so-called 'soft money'. Various agencies and governments (notably in 'northern' Europe) were looking for ways of confronting the Chicago Law-and-Economics School that was pushing for a market society. ILO's World Employment Conference in 1976 marked a great success. It showed that the ILO was trying to become a development agency, rather than one dealing with purely labour matters, such as labour law, labour regulations and addressing the interests of employers and employees within formal labour markets (Standing 2007: 361-362).

At the end of 1970s, ILO like any other international organisations had to face many challenges in the form of decolonization and Cold War. In addition to these challenges, the organization faced criticisms regarding its standard setting activities.

II.6. Challenges Faced by the ILO

The ILO meanwhile was moving in the line of neoliberalism. During this period, some of its members were experiencing political turmoil. This period was marked by the beginning of Cold War. The tensions of the Cold War affected the ILO. In addition to

[23] Ghai, Dharam (1999), "Building Knowledge Organizations: Achieving Excellence", [Online: web] Accessed 22 Dec. 2009, URL: http://www.ilo.org/public/english/century/information_resources/download/wep.pdf

this, the withdrawal of the US from the activities of the Organization between 1977 and 1980 made ILO to face serious financial and political consequences.[24] The withdrawal created immediate difficulties for the ILO, since the US was the major contributor of the ILO's regular budget, had declined to pay its huge backlog of financial dues (Standing 2008: 359). Decolonization was another challenge faced by the ILO.

II.6.1. Decolonization and the Cold War

Nevertheless, ILO faced a series of challenges, which threatened its survival. The first was decolonization, which had barely begun when the war ended from elite of 52 mainly western industrial States in 1946. In 1958, 80 newly independent States joined the organization. In 1960 alone 15 new African countries joined the organization. The mass admission of developing countries had profound repercussions. Their main preoccupation was with technical co-operation, such as assistance with the drafting of labour codes, which would help them to claim compliance with international standards, although the reality was often much different. These new nations demanded greater representation in the ILO bodies. The great disparities in economic and political conditions between the new developing States and older industrial States led to pressure for greater flexibility in standard setting (Hepple 2005: 34).

A second challenge was the Cold War. The Soviet Union, which had lost its ILO membership when it was excluded from the League of Nations in 1939, was readmitted in 1954, and it was followed by other communist States. Nevertheless, ILO was an ideal forum for political and ideological conflicts between communism and capitalism. This was exacerbated by the split between western lenient International Confederation of Free Trade Unions (ICFTU), which enjoyed close relations with the ILO and the communist-led World Federation of Trade Unions (WFTU). After the collapse of Communism in the Soviet Union and Central and Eastern Europe, these

[24] The United States government on November 5, 1975, gave notice of withdrawal from the ILO, of which the US has been a member since 1934. The period of notice is two years, after which the US will cease to be a member of the ILO unless the government meanwhile decides to withdraw its notice. A principal reason given in the US letter of withdrawal was "fundamental concern" with the "erosion of tripartite representation" (Cox 1977: 386).

ideological divisions have been replaced by common concerns as to how to meet the major new challenges of globalization (Hepple 2005: 34-35).

II.7. Conclusion

On the establishment of ILO, there are different views. Some authors pointed that it was to liberalize trade and to equalize competition among the industrialized countries. Some are of the view that it is a response to communism. The ideology preferred by the ILO changed with the circumstances. Until 1930, most of the industrialized countries relied on *laissez faire* concept, but after the economic crisis in 1930, States inclined towards Keynesian theory, which demands state regulation of market forces. This was reflected in the work of ILO.

ILO's initiative to structure labour standards, since 1919, in the form of Conventions and Recommendations are well documented. Initially the Organization handled purely labour related matters. With the adoption of 1944 Declaration, ILO enlarged its scope by trying to incorporate human rights issues within its ambit. The labour standards the Organisation adopted was comprehensive in the sense it covered almost all areas which need attention. The standard setting arrangements of ILO received appreciation from various forums. The major achievement bestowed upon ILO when it became a Nobel Prize winner in 1969 for its commitment towards the achievement of social justice. The WEP launched by the ILO was one of the remarkable achievements. However, ILO faced serious challenges during the period of decolonization and Cold War. The withdrawal of US from ILO and its activities put the Organization to face serious financial and political crisis and adverse consequences. In the following years, ILO faced serious criticisms for its standard setting arrangements. As a response to these criticisms, ILO had adjusted its policies, which reflected neoliberal ideology.

CHAPTER III

THE 1998 DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A CRITICAL ANALYSIS

CHAPTER III

THE 1998 DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK: A CRITICAL ANALYSIS

III.1. Introduction

Globalisation and its impact on labour market led the ILO to adopt in 1998 a Declaration titled the Declaration on Fundamental Principles and Rights at Work (1998 Declaration or the Declaration). The 1998 Declaration, which brought many changes in the labour rights regime, reflected a neoliberal economic view propounded by world's powerful countries. Its concentration on four rights as Core Labour Standards (CLS) was an attack on the traditional approach to the ILO's standard setting system. The four rights as per CLS are (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour and (d) the elimination of discrimination in respect of employment and occupation which focused on civil and political rights. It sidelined social and economic rights developed by the ILO from 1919 onwards. In fact non-state actors rely heavily on CLS because these standards are rather easy to apply and do not incur any cost of application.

This chapter critically analyses the 1998 Declaration. The first part of this chapter deals with the historical background of the 1998 Declaration and the main features of the Declaration following a discussion of the views expressed by the supporters of the Declaration. The second part mainly explores the question as to how CLS became the bottom line of several legal instruments. In order to answer this question the influence exerted by this Declaration and its CLS within and outside the ILO is analyzed. In this part, the measures adopted by the ILO after 1998, in the form of Decent Work Agenda, 1999, Report of the World Commission on the Social Dimension of Globalization, 2004 and the Declaration on Social Justice for a Fair Globalization, 2008 are studied. This part will also analyse the developments occurring outside the ILO, which include the adoption of UNGC, various voluntary codes of conduct and

reference to CLS in various regional and bilateral trade agreements and the conditionalities of IFIs. The third part will deal with the implications of CLS on human rights, on developing countries and on the nature of labour law. The chapter excludes the ongoing social clause debate within the WTO.

TABLE 2: EVENTS IN CHRONOLOGICAL ORDER

1973	**First Oil Shock**
1979	**Report of the Working Party of the ILO Regarding Classification Among Conventions and Recommendations.**
1989	**Washington Consensus**
1990	**Globalisation**
1994	**Report of the Director General**
1995	**World Summit for Social Development**
1996	**OECD Study on Trade and Labour**
1996	**Singapore Ministerial Conference**
1997	**Report of the Director General**
1998	**The Declaration on Fundamental Principles and Rights at Work**
1999	**Decent Work Agenda**
2004	**World Commission Report**
2008	**Declaration on Social Justice for a Fair Globalisation.**

III.2. Historical Background of the 1998 Declaration

The period between the Second World War and the first oil shock of 1973 was a phase of steady and rapid economic growth in the industrialized countries. This period was called the 'golden age'. During this period, several States adopted social security and health measures thereby establishing a welfare state. These States mainly relied on Keynesian policies[25] to guide them as they sought to keep the business cycle and recessions under control (Harvey 2005: 20-21).

Due to these measures, the working class got significant gains in real wages and welfare benefits (Haque 2004: 6). National governments and labour unions provided effective countervailing voice to the power of the private sector. After 1970s, both had lost authority whereas the power of MNCs has grown (Kobrin 2005: 232). [26] Incidence of the oil shock in 1973 became a blow to the economic growth as it began to slow down both in the developed and developing countries. High inflation, unemployment, weak economic growth and enormous external debt burdens were ancillary to this problem (Donoso 1999: 207). Most of the States responded to this crisis by adopting neoliberal policies.[27] The implications of adoption of these policies were deregulation, privatization, and withdrawal of state from many areas of social provision. According to Harvey, "neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating

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[25] This theory is formulated by the UK economist John Maynard Keynes (1883-1946) which was developed by his followers. The theory got an impetus in 1936, at the time of great depression. The business dictionary defines Keynesian theory as "the aggregate demand created by households, businesses and the government and not the dynamics of free markets is the most important driving force in an economy. This theory further asserts that free markets has no self-balancing mechanisms that lead to full employment. Keynesian economists urge and justify a government's intervention in the economy through public policies that aim to achieve full employment and price stability". The Keynesian idea have greatly influenced governments the world-over in accepting their responsibility to provide full or near-full employment through measures (such as deficit spending) that stimulate aggregate demand". [Online: web] Accessed 8 Feb. 2010, URL: http://www.businessdictionary.com/definition/Keynesian-economics.html.

[26] Since 1970, the relative importance of MNCs in the world economy has dramatically increased. In 1960s the number of MNCs with headquarters in 15 advanced countries were responsible for 7,000 FDI. Whereas in the late 1990s it has increased to 40,000 (Kobrin 2005: 220).

[27] In 1978, Communist ruled China took steps towards the liberalization of its economy under the leadership of Deng Xiaoping. In 1979,Margret Thatcher came with a mandate to curb trade union power and put and end to the inflationary stagnation. In 1980, Ronald Reagan adopted the policies that curb the power of labour, deregulate industry, agriculture, and resource extraction (Harvey 2005: 1).

individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade" (Harvey 2005: 2). The advocates of neoliberalism have influenced all fields including education, media, corporate boardrooms and financial institutions (Harvey 2005: 3). In the labour law regime, accepting the neoliberal policies meant to weakening the labour and strengthening the capital (Haque 2004: 6).

In the ILO, these events acted as a signal to the beginning of a period of criticism and self-evaluation for the Organization. The ILO faced mounting disapproval for, among other matters, the unmanageable number of instruments it had produced especially Conventions, which were inflexible, and lacked in terms of taking into account the economic implications of those Conventions once integrated into domestic legislation. In many respects, these criticisms reflected a need for the ILO to adapt its Conventions and operations to changing economic conditions. However, these criticisms did not challenge the ILO's role in protecting basic labour rights (Donoso 1999: 207-209).

In response to the criticisms directed towards the ILO, the Organization tried to determine the proper subjects of its standards. In the early 1970's, the ILO began a reappraisal of its standard setting activities. A working party was convened in 1977, which presented a Report in 1979. The Report classified Conventions and Recommendations into three categories. The first category consisted of 78 Conventions and 76 Recommendations that were considered to deserve promotion on a 'priority basis'. This pre-eminent group included the basic human rights Conventions, as well as other instruments, which defined objectives of universal significance. The second category comprising of 16 Conventions and 14 Recommendations, required appropriate revision due to evolving economic and social changes since their adoption. Finally, 63 Conventions and 81 Recommendations were combined into third category titled 'other existing instruments', which were found not to deserve priority or attention. Another working party was established following the 1984 conference. It was entrusted with the work of reviewing of classification system developed in 1979. In 1987 the working party made its final Report to the Governing Body with the findings that the earlier classification as adequate. However, there was a

strong difference of opinion between governments, workers and employer groups. The employer groups favoured minimum standards whereas the representatives of the employee groups argued for more Conventions and high standards regardless of their acceptance by Member States. The ILO's hesitancy to confront these problems directly coincided with two other conflicting trends. On the one hand, the ILO continued to adopt detailed Conventions with ambitious social policy objectives. On the other hand, the Member States took unilateral action denouncing ratified Conventions, which they considered obsolete (Donoso 1999: 221-224). The after-effect of these problems was the deregulation and decentralization of the ILO standard setting arrangements.

III.3.2 Washington Consensus

The year 1989 marked a turning point in the history of world affairs. The Washington Consensus[28] which came into being in this year, parallely witnessed the downfall of the second world. According to Standing, "the World Bank came out with adjustment strategies, which were a repudiation of the ILO's perspective. The Bank advocated deregulation of labour market, proposed dismantling of protective regulations and a substitution of pro-individualistic, pro-market regulations" (Standing 2007: 364). Towards the end of the twentieth century, more new labour market regulations were introduced across the world in an unprecedented manner. During that period, the ILO's contribution was minimal and was only to the extend of expressing unease about the direction of the reforms. This was a critical moment for the Organization, for it had to decide whether to take a position on the Bank's pro-market attitude towards labour and social policies. The ILO's silence on these reforms was evident. One of the reasons may have been lack of confidence at senior level, which was associated with a view that the capacities of the professionals in the Bank, IMF and OECD were superior (Standing 2007: 364).

[28] In 1989 John Williamson coined the term Washington Consensus to describe a set of ten specific economic policy prescriptions that he considered should constitute the "standard" reform package promoted by Washington, D.C.-based institutions such as the International Monetary Fund (IMF), World Bank, and the US Treasury Department which was for crisis-wracked developing countries. It is often seen as synonymous with "neoliberalism" and "globalization." [Online: web] Accessed 12 June 2010, URL: http://www.cid.harvard.edu/cidtrade/issues/washington.html

III.4. Transformation of the ILO from 1990s

The 1990s began with a series of significant world events, which changed the international landscape. The disintegration of the Soviet Union and the east bloc brought the Cold War to an end. The notion that Communism was not economically viable made the liberal politicians to pursue neoliberal agenda of labour market reform (Alston 2004: 463). There was an ideological consensus among nations in favour of market oriented economic policies. This consensus promoted the progressive relaxations of trade barriers and inaugurated the use of export led development strategies (Donoso 1999: 224-225). At the ILO the West got a strong stake in maintaining its policies in order to demonstrate its commitment to the social justice principles and to highlight the deficiencies in the approach championed by the Communist countries (Alston and Heenan 2004: 225). This period was marked by another development, the emergence of globalization. Globalization as per Santos was,

> "Whether new or old, the processes of globalization are a multifaceted phenomenon with economic, social, political, cultural, religious and legal dimensions, all interlinked in a complex fashion. It seems to be related to a vast array of transformations across the globe, such as the dramatic rise in inequality between rich and poor countries and between the rich and the poor in each country, environmental disasters, ethnic conflicts, international mass migration, the emergence of new States and the collapse or decline of others, the proliferation of civil wars, ethnic cleansing, globally organized crime, formal democracy as a political condition for international aid, terrorism, and militarism, etc." (Santos 2006: 394).

Nader observes that globalization represents an institutionalized "global economic and political structure that makes every government increasingly hostage to a global financial and commerce system engineered through an architect of international governance that favours corporate interests" (Quoted in Kobrin 2005: 222). According to Kobrin; Marx and Engels themselves argued that globalization was a consequence of capitalism's need for constantly expanding markets. Globalization became synonymous with neoliberalism, deregulation and the extension of markets to virtually all areas of social life including health care, education and consumer protection (Kobrin 2005: 230).

Under the labour law regime, the two major challenges that globalization poses for protection of labour rights are; first, it reduced labour rights to an economic question, and second, the enforcement of labour rights through legalized means was threatened.[29] These dramatic changes at the international level raised questions over the ILO's role in the new era. The ILO responded to the new situation by adopting a neoliberal attitude in its transactions. Its inclination towards a neoliberal agenda was reflected at the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work. This Declaration sets out four rights as fundamental principles and called these four principles as CLS which should be observed by all Member States irrespective of the fact of their ratification to the related Conventions. However, the origin of the 1998 Declaration could be traced back to several steps taken by the ILO before 1998. Foremost among this was the 1994 Report of ILO's Director-General. Followed by the 1995 Copenhagen Summit for Social Development, which came up with the idea of a set of labour standards that should be fundamental. In 1996, OECD brought out a study that speaks about certain standards that should be treated as core standards. The Singapore Ministerial Conference of 1996 accepted the idea of core standards. In 1997, the Report of the Director-General also underlined the importance of CLS. In addition to this, the role played by the US in adopting soft promotional techniques is also worth mentioning.

III.4.1 Report of the Director-General, 1994

In 1994, Michel Hansenne the then Director-General of the ILO presented a Report under the title *Defending Values, Promoting Change: Social Justice in a Global Economy- An ILO Agenda*[30] and proposed some differentiations among the standards promoted by the ILO and emphasized on a limited list of seven Conventions.[31] In the

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[29] Eren, Ozen (2008), "Labour Rights and Economic Globalization", [Online: web] Accessed 10 Jan. 2010,URL:http://www.allacademic.com//meta/p_mla_apa_research_citation/2/5/0/7/2/pages250729/p250729-15.php.

[30] *Report of the ILO Director General* (1994), "Defending Values, Promoting Change: Social Justice in a Global Economy- An ILO Agenda", [Online: web] Accessed 7 March 2010, URL: http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm.

[31] In 1994, in the resolution concerning the 75th anniversary of the ILO and its future orientation the International Labour Conference expressed a view to revitalizing the ILO and adapting its means of action to the changing world environment. The Conference mainly relied on the proposals made by the

Report there were proposals for new soft law norms, the possibility of replacing the ILO's traditional 'maximalist' approach with Conventions that aim to define a general framework, expansion of Committee on Freedom of Association to cover additional standards, to strengthen the supervisory arrangements, which applied to those standards, rather than to develop a promotional option (Alston 2004: 464-465). The main theme of the future of the Report was the need to adapt the ILO's standard setting objectives and methodology to the globalization and liberalization of international trade. The proposals reflected many of the criticisms that had dogged the ILO over the previous decades. The Report also served to signal a move away from the broad social policy objectives that had characterized ILO in its previous decades. The Director-General explicitly recognized that such matters are the prerogative of domestic governments. Moreover, the global nature of the economy makes it difficult for governments to exert exclusive influence in socio-economic conditions. The Report thus acknowledged the existence of important limits on ILO objectives and standard setting operations (Donoso 1999: 225-226).

III.4.2. Copenhagen World Summit for Social Development, 1995

"In 1995 the World Summit for Social Development was held in Copenhagen where 117 Heads of State committed themselves to pursuing the goal of safeguarding the basic rights and interests of workers and to this end, freely promote respect for relevant the ILO Conventions, including those on the prohibition of forced labour and child labour, the freedom of association, the right to organize and bargain collectively, and the principle of non-discrimination.[32] This lead to a consensus on the identification of CLS" (Trebilcock 2001: 256-257).

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action to the changing world environment. The Conference mainly relied on the proposals made by the Director General in its 1994 Report. For details, see, *Report of the ILO Director General* (1997), "ILO, standard setting and globalization", ILC 85th Session,[Online: web] Accessed 7 March 2010, URL: http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm.

[32] Para J of Part B of the Copenhagen Declaration on Social Development, 1995 states, "to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all, including the right to development; promote the effective exercise of rights and the discharge of responsibilities at all levels of society; promote equality and equity between women and men; protect the rights of children and youth; and promote the strengthening of social integration and civil society".

According to Tapiola, Copenhagen determined both the contents and the *modus operandi* by reminding that these standards are based on the ILO Conventions and that even those countries which had not ratified the relevant Conventions should take action to respect their principles.[33] The Social Summit though significant, excluded factors such as minimum wages, maximum hours of work and the like (Fields 2004: 62).

III.4.3. OECD Study on Trade and Labour, 1996

Parallel to these developments, the OECD[34] decided to launch its first study on trade and labour standards, which was launched in 1996.[35] The Employment, Labour and Social Affairs Committee and the Trade Committee of the OECD drew a number of conclusions later endorsed by OECD Ministers. This study defined labour standards as "norms and rules that govern working conditions and industrial relations" (OECD 2000: 17). The study brought forth a series of findings that are closely related to the race to the bottom argument (Gould IV 2004: 90). It analyzed the impact of core standards on the position of the countries concerned in the light of international trade.[36] A principal finding of the study was absence of evidence that countries with low core labour standards enjoy a better global export performance than high-standards countries (OECD 2000: 33). Additionally, the Report suggested that improved enforcement of non-discrimination standards, and the elimination of forced and child labour might raise economic efficiency (Hepple 1997: 359). The study

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For details, see *Copenhagen Declaration on Social Development* (1995), [Online: web] Accessed 12 Jan. 2010, URL: http://www.un.org/esa/socdev/wssd/

[33] Tapiola, Kari (2002), "Core Labour Standards and Globalization", [Online: web] Accessed 11 Nov. 2009, URL: http://www.adb.org/socialprotection/tapiola.pdf.

[34] OECD is an exclusive club of members who produce two-third of the world's goods and services. It is called the Rich Man's Club. In the labour area, OECD has created two non governmental partners: the Trade Union Advisory Committee(TUAC) and the Business Industry Advisory Committee(BIAC). TUAC is the formal representative of labour organizations to the OECD (Salzman 2000: 776, 785).

[35] The Report of the study came under the title "Trade, Employment and Labour Standards: A Study of Core Worker's Rights and Labour Standards (1996)". OECD conducted a second study on the same issue in the year 2000.

[36] *Report of the ILO Director General* (1997), "ILO, standard setting and globalization", ILC 85th Session, [Online: web] Accessed 7 March 2010, URL: http://www.ilo.org/public/english/standards/relm/ilc/ilc85/dg-rep.htm.

concluded that the respect for CLS did not have negative consequences for the economies and trade of developing countries.[37]

III.4.4. Singapore Ministerial Conference, 1996

The ILOs new focus received strong support in December 1996 at the Singapore Conference of the nascent WTO (Trebilcock 2001: 656). One of the Declarations adopted by the conference is called the Singapore Ministerial Declaration. Regarding the importance of CLS and ILO, the Declaration pointed out two important elements.[38] Firstly, it reaffirmed the commitment to CLS, affirming that they belong to the competence of the ILO, which should be supported in promoting them. Secondly, labour standards should not be used for protectionist purposes and particularly not for denying the comparative advantage of developing countries from lower wages.[39] After the Singapore Ministerial Conference, the support for ILO as the competent body to set and deal core standards was increased. This paved the way for intensified negotiation regarding CLS within the ILO.

III.4.5. Report of the Director-General, 1997

In 1997, the Director-General dedicated his entire Report to the issue of ILO standard setting operations. As in the 1994 Report this document also focussed on ILO's response to trade liberalisation. In the Report, it was argued that "all the partners in the multilateral trading system must guarantee certain fundamental rights, without which workers cannot be assured of receiving their fair share of the fruits of economic

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[37] *Ibid.*

[38] Para 4 of the 1996 Singapore Ministerial Declaration reads as follows: We renew our commitment to the observance of internationally recognized core labour standards. The ILO is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration. [Online web] Accessed 12 June 2010, URL: http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htma.

[39] *Singapore Ministerial Declaration* (1996), WT/MIN(96)/DEC, [Online: web] Accessed 12 June 2010, URL: http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf

progress generated by the liberalization of trade".[40] The Report enlisted certain rights that should be observed by all the partners in the multilateral trading system. These rights are freedom of association and collective bargaining; the prohibition of forced labour, including forced labour of children; and non-discrimination.[41] The Director-General criticized the ILO's large number of conventions and recommendations, overlapping instruments and the inflexible nature that those instruments possessed instruments possess due to the excessive details applied in ILO Conventions. The Report reflected the views proposed by employer groups stating that ILO standard setting practices should concentrate on achieving real impact domestically rather than supporting unattainable ideals. The Report called for the aggressive use of Article 19(5) (e) for countries that have not yet ratified fundamental human rights Conventions. The Report also proposed the idea of creating a Charter or Declaration, which emphasises on the ILO's basic goal of social progress that could be achieved by Member States. Such Charter or Declaration would reflect the principles expressed in various ILO's instruments, as well as highlight ILO's role in protecting basic labour rights (Donoso 1999: 228-229).

III.4.6. Role of the US

At the ILO annual Conference in June 1996 the US, along with other industrialized States, underlined the importance of the concept of CLS and linked it to a form of soft supervision, which would be applicable to all the ILO Member States. The US approach towards embracing soft standards was followed up in the debates held within the ILO Governing Body's Committee on Legal Issues and International Labour Standards. However, no consensus was reached on this subject. Many of the delegations were against the idea of a promotional focus on a core group of standards. The workers' groups indicated that their demands included the strengthening of the supervisory procedures rather than replacing them with promotional approaches, whereas the employers' groups indicated that, the discussion should focus on

[40] Supra note 36.
[41] *Ibid.*

'promotion of the core Conventions as well as on the fundamental rights expressed in those Conventions and the Constitution of the ILO (Alston 2004: 466-470).

The US since its joining in the ILO in 1934 has played a significant role in the ILO. From then on, it took the lead in shaping hegemonic consensus in the ILO. In 1944, by sponsoring a major ILO Conference in Philadelphia, the Roosevelt administration appeared to encourage the organization to take on a prominent role in post-war international social policy (Cox 1977: 387). However, the US refused to ratify even a single ILO convention. "The standards adopted by the ILO after the Second World War provoked the major business enterprises in the US. These standards were criticized as being a threat to free enterprise and as an attempt to impose 'Western European Socialism' on the US" (Alston 2004: 468).

III.5. The Declaration on Fundamental Principles and Rights at Work, 1998

On 18 June 1998, the Eighty-Sixth Session of the International Labour Conference adopted the ILO Declaration of Fundamental Principles and Rights at Work.[42] The Declaration together with its follow-up procedures were adopted by the ILO Governing Body on 19 November 1998. According to Donoso, "like the Declaration of Philadelphia, the 1998 Declaration redefines the ILO's functions for the years to come" (Donoso 1999: 230). The Declaration obligates the Member States to adhere to the four fundamental principles of labour and employment law. The fundamental principles in the 1998 Declaration resembles in many respects the rights incorporated under UDHR, 1948,[43] International Covenant on Civil and Political Rights (ICCPR),

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[42] *Declaration on Fundamental Principles and Rights at Work* (1998), Document CIT/1998/PR20, [Online: web] Accessed 22 Aug. 2009, URL: http://www.ilo.org/ilolex/cgilex/pdconv.pl?host=status01&textbase=iloeng&document=2&chapter=26 For details, see Annexure II.

[43] *Universal Declaration of Human Rights* (1948), GA Resolution 217 A(III), [Online: web] Accessed 15 May 2010, URL: http://www.ohchr.org/EN/UDHR/Documents/60UDHR/bookleten.pdf

1966,[44] and International Covenant Economic Social and Cultural Rights (ICESCR), 1966[45] (Trebilcock, Michael and Robert 2005: 263).

The debate that ensued at the ILO's Conference in 1998 derived a consensus on the softness of the Declaration (Alston 2004: 470). The employers' approach to the Declaration and its follow-up was based on the following six criteria: (i) the Declaration should embody fundamental values and principles of the ILO that were inherent in membership of the Organization. It should establish no new legal obligations on Members, but rather reflect policy obligations incurred by virtue of their membership; (ii) the Declaration should not go beyond the present text of the ILO Constitution in terms of follow-up mechanisms. It should impose no new reporting obligations on Member States; (iii) the Declaration should not impose on Member States detailed obligations arising from Conventions they had not freely ratified, nor should it impose on countries which had not ratified the fundamental Conventions the supervisory mechanisms that applied to ratified Conventions; (iv) the application of the principles of the Declaration should not be concerned with technical and legal matters but only with making an overall policy assessment of whether Member States were achieving the goals and objectives of the fundamental principles and values of the ILO; (v) the Declaration should not result in new complaints based bodies such as the Committee on Freedom of Association; (vi) no links should be made with questions of international trade, and the follow-up mechanism should be limited to the ILO.[46] These views of the representatives of the employers were squarely addressed by the 1998 Declaration.

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[44] *International Covenant on Civil and Political Rights* (1966), GA Resolution 2200A (XXI), [Online: web] Accessed 19 April 2010, URL: http://www2.ohchr.org/english/law/ccpr.htm.

[45] *International Covenant on Economic, Social and Cultural Rights* (1966), GA Resolution 2200A (XXI), [Online: web] Accessed 19 April 2010, URL: http://www2.ohchr.org/english/law/ccpr.htm.

[46] ILO (1998), "Report of the Committee on the Declaration of Principles", [Online: web] Accessed 12 Feb. 2010, URL: http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decl.htm

III.5.1 Main Features of the Declaration

The 1998 Declaration contains a Preamble, a text of five Paragraphs, and an Annex describing the follow-up to the Declaration, which is an integral part of the Declaration itself. The Preamble of the Declaration states that the fundamental principles and rights enshrined in the Constitution of ILO should act as a basis for promoting universal application. According to Trebilcock, the Declaration through its Preamble introduced,

> "A particular significance of the guarantee of fundamental principles and rights at work. It also highlights how they enable people to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate and to achieve fully their human potential. The competence of the ILO in setting and dealing with international labour standards is recalled by the Preamble, along with universal support for the promotion of fundamental rights at work as the expression of constitutional principles. The Preamble also refers to growing economic interdependence, the need for economic and social policy to be mutually reinforcing components to create broad-based sustainable development, the importance of job creation, and the special attention that should be devoted to the problems of persons with special social needs" (Trebilcock, A. 2001: 657).

Para VI of its Preamble states that ILO is the competent body to set and deal with international labour standards. This statement recalled the consensus reached in the Singapore Ministerial Conference.

The Declaration sets out four fundamental rights, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.[47]

The Declaration does not point out the specific Conventions that are related to the four fundamental principles. The ILO's Governing Body has however identified eight Conventions as "fundamental", covering subjects that are considered as fundamental

[47] Para II of the 1998 Declaration. For details, see Annexure II.

principles and rights at work (ILO 2009: 14).[48] The eight fundamental Conventions are:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

These fundamental rights were to be respected, promoted and realized by all members of the ILO, even if they had not ratified these Conventions. According to Hassel, "by doing so, the ILO theoretically expanded the spread of important labour standards to all its Member States, with the quality of these rights remaining on a lower standard than ILO Conventions" (Hassel 2008: 236-237).

It is the duty of the Organization "to assist its members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resource including the mobilization of external resources and support, as well as by encouraging other International Organizations with which the ILO has established relations, pursuant to Article 12 of its Constitution".[49] According to Trebilcock, "Paragraph III of the Declaration sets out three forms of such support: by (a) offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental

[48] At the time of the adoption of the Declaration, seven Conventions were considered fundamental. In June 1998 the Worst Forms of Child Labour Convention, 1999 (No. 182) was adopted unanimously which came into force on 17 November 2000.
[49] Paragraph III of the 1998 Declaration. For details, see Annexure II

Conventions; (b) assisting those members not yet in a position to ratify some or all of these Conventions in their efforts to respect, promote and realize the principles concerning fundamental rights which are the subject of those Conventions; and (c) helping the members in their efforts to create an environment for economic and social development" (Trebilcock 2001: 658).

Paragraph IV of the 1998 Declaration integrates the follow-up, which is to be "meaningful and effective". Retrieving the conclusions adopted by the 1996 Singapore Ministerial Conference, the final Paragraph "stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes". Nor should the comparative advantage of any country be called into question by the Declaration or its follow-up.[50] Thus more than three decades after commencing its analysis of obsolete standards, the ILO finally granted itself the power to rewrite the International Labour Code (Trebilcock 2001: 658-659).

The Declaration brought two diverging perspectives. The following section discusses briefly the views of those who supports the Declaration and of those who oppose it. The major supporters of the Declaration are the international corporate community. Writers, especially Maupian and Langille are also ardent supporters of the Declaration. Before analyzing the criticisms that raised against the Declaration, lets discuss the supporting views to the Declaration.

III.6.The 1998 Declaration as Significant Normative Developments

According to Langille, "the 1998 Declaration for the first time declares that even those States that have not ratified the relevant conventions are bound, simply by virtue of membership in the organization, to promote and realize the basic principles concerning the four core labour rights" (Langille 2005: 415). This is an expansion and not a contraction of labour rights. Maupian opines that, the Declaration is one of the significant normative developments that have taken place over the last decades. It can

[50] For a detailed discussion see Chapter IV

be described as "a decisive departure from the ILO's 'cafeteria approach' to workers' rights, i.e. the freedom left to members to pick and choose those conventions which they are prepared to implement through ratification or otherwise" (Maupian 2005: 444). The Declaration states that all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution the principles concerning the fundamental rights' relating to freedom of association, the elimination of forced labour and abolition of child labour, and the elimination of discrimination.[51]

The Declaration is not, it is contended by the supporters of the Declaration, creating a hierarchy of rights and identifying CLS do not imply that other rights particularly economic and social rights, are relegated into second class rights. Moreover, CLS helps to create an impact on the achievement of other rights. These four rights are 'enabling rights' or process rights which empower workers with the tools that are necessary for achieving other rights. This idea is clearly reflected in two significant paragraphs in the Preamble to the Declaration. One is the fifth preambular paragraph: "Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely, and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential".[52] The last paragraph of the Preamble says "Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application"[53] (Maupian 2005: 447-448).

Langille differentiates rights as substantive entitlements and procedural protection. He views the 'other rights' as substantive entitlements. To clarify the term 'other rights',

[51] Paragraph II of the 1998 Declaration. For details see Annexure II.
[52] For details, see Annexure II.
[53] *Ibid*

he identifies rights such as maximum hours, vacations, minimum wages, health and safety regulations as substantive entitlements. According to him, these substantive standards are imposed upon the parties whether they like it or not. Whereas, freedom of association and collective bargaining stand as procedural protection. By legally protecting freedom of association and collective bargaining, justice can be secured at work. Moreover the procedural protection guarantees freedom of contract and self determination (Langille 2005: 428-429). The outcome of this process rights/procedural protection is the substantive standards. In the words of Langille, "the four rights are preconditions to real market participation. These rights do not guarantee any substantive outcome, but gives a chance to get to the bargaining table. These standards are a set of constraints on the other party's freedom to contract with whom it pleases. It also acts as restrictions on the rights of the other party to the bargain as to whom it will bargain with. But not their freedom of contract regarding the substance of any resulting deal" (Langille 2005: 430). These standards are the four specific ways in which bargaining power of the employer can be restrained. The four standards are the possible means to achieve true ends, i.e the substantive entitlements (Langille 2005: 432-433).

The Declaration received wide support from the international corporate community, because the Preamble to the Declaration states that the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards.[54] This paved off stronger action at the WTO. Moreover, the supporters to the Declaration are of the opinion that the standards under the Declaration are not economic and social rights that depend on a country's level of development and ability to pay. Even the poorest countries should be able to afford the core rights (Compa 2002: 20).

Thus, it is revealed that different arguments were put forward by various foras to support the 1998 Declaration. However, the supporting arguments can be viewed as opportunistic rather than having an in-depth perspective about the implications of the

[54] Paragraph VI of the 1998 Declaration. For details, see Annexure II.

1998 Declaration. The argument put forward by the supporters tends to neglect the role of non-state actors.

III.7. Position of the US with respect to the 1998 Declaration

As the US has played an important role in the formulation of the Declaration, the position of the US after the adoption of 1998 Declaration is worth mentioning. At the time of the adoption of the Declaration US had ratified only one of the eight Conventions dealing with the relevant rights. Since the ratification of the ILO Convention No.182, i.e. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 1999, it has now brought its record to two of the eight Conventions. Despite its role as the champions of 'internationally recognized workers rights', the US has failed to ratify the core Conventions dealing with freedom of association, the right to bargain collectively, non-discrimination in the work place, and child labour in general. According to Alston, "the proposed Declaration and its soft monitoring system provided the US to escape from the dilemma of not having ratified the key Conventions itself while applying sanctions in its domestic legislation and seeking them to at the WTO level for other country's violations of CLS. The views of the US has more impact in the ILO as it contributes one quarter of the budget and this amount would be deficited if the ILO fails to make a case for its continued relevance" (Alston 2004: 467). The failure of the US to ratify most of the CLS related Conventions has shielded the US government and thus American Corporations, from most forms of ILO supervision regarding labour relations and employment practices within the US (Coxson 1999: 471).[55]

III.8. Influence of the 1998 Declaration

The influence of the 1998 Declaration can be studied from two perspectives (1) within the ILO and (2) outside the ILO (parallel developments).

[55] Failure of US to ratify Core Conventions would not exclude the US Corporation operating in Countries, which ratified the fundamental Conventions (Coxson 1999: 471).

III.8.1. Developments within the ILO

Within the ILO, the key developments that took place in ILO after 1998 include the adoption of the Decent Work Agenda, 1999, the adoption of the Report of the World Commission on the Social Dimension of Globalization, 2004 and the 2008 Declaration on Social Justice for a Fair Globalization. All these documents emphasized the 1998 Declaration as a key factor to achieve the desired result engraved in each document.

III.8.1.1. Decent Work Agenda, 1999

The Decent Work Concept was launched in 1999, in the Report of the Director-General to the International Labour Conference meeting in its 87th Session. ILO Director-General Juan Somavia proposed, "the primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".[56] Decent work has four strategic objectives: fundamental principles and rights at work and international labour standards; employment and income opportunities; social protection and social security; and social dialogue and tripartism.[57] The reach of this objective is significantly large: it includes all workers, wherever and in whatever sector they work; not just workers in the organized sector, nor only wage workers, but also unregulated wage workers, the self-employed, and the home workers (Sen 2000: 120). Thus, it covers both quantitative and qualitative dimensions of employment. Social security and income security are also essential components – defined according to each society's capacity and level of development. The two other components emphasize the social relations of workers: the fundamental rights of workers (freedom of association, non-discrimination at work, and the absence of forced labour and child labour); and social dialogue, in which workers exercise their right to present their views, defend their interests and engage in discussions to negotiate work-related matters with employers and authorities (Ghai 2003: 113).

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[56] *Decent Work Agenda* (1999), [Online: web] Accessed 25 March 2010, URL: http://www.ilo.org/global/About_the_ILO/Mainpillars/WhatisDecentWork/lang--en/index.htm.
[57] *Ibid*

"After the adoption of Decent Work Agenda, the ILO had reasserted its position as the primary international agency for defining social rules which was already recognized at the 1995 World Social Summit and the 1996 Singapore Ministerial Conference" (Hepple 2005: 64). Later the agenda has been embraced by various international and regional organizations. In 2004, the World Commission on the Social Dimension of Globalization recommended that "Decent work for all should be made a global goal and pursued through more coherent policies within the multilateral system." By 2007, a host of international and regional fora had endorsed the Decent Work Agenda in particular, the UN Millennium Summit of 2005 that contains a commitment to "make the goals of full and productive employment and decent work for all." The following year, a Ministerial Declaration by the ECOSOC encapsulated decent work as "opportunities for men and women to obtain productive work in conditions of freedom, equity, security and dignity" (Trebilcock 2009: 22-23).

III.8.1.2. Report of the World Commission on the Social Dimension of Globalization, 2004

The Governing Body of the ILO appointed a Commission in 2001 called World Commission on the Social Dimension of Globalization (the Commission). According to Alston, "the Commission was entrusted with the mandate of preparing a major authoritative report with a particular emphasis on the interaction between the global economy and the world of work" (Alston 2005: 9). The Commission submitted its Report in February 2004. The Commission endorsed the ILO's action on fundamental rights at work, basic income and social protection. It concluded that CLS must be a key part of the broader international agenda for development. To promote such standards, it called for the reinforcement of the capacity of the ILO. The Commission proposed a four part agenda to promote the worthy goals of development. The Commission agenda in relation to labour standards consists of: (1) mainstreaming (2) technical assistance, (3) increased resource for the ILO; and (4) possible sanctions in response to persistent violations of labour rights. To achieve these agendas the Commission addresses all relevant international institutions to promote CLS (Alston 2005: 9). This could be done by increasing coherence between the ILO and the World

Bank, the WTO, the IMF and other relevant UN bodies (Torres 2008: 18).[58] The heavy emphasis on the 1998 Declaration reflected the idea that CLS should be the focal point rather than the broad international standards adopted by the ILO since 1919 (Alston and Heenan 2004: 221-222). The Commission also failed to elaborate socio-economic ideas. Its Report strictly adheres to generalizations on fundamental rights at work, the combating of social exclusion and social protection. The Commission was of the view that the socio-economic floor has to reflect national circumstances but would need international support (Hepple 2005: 65).

III.8.1.3. Declaration on Social Justice for a Fair Globalization, 2008

Within the ILO, there was a proposal for a new Declaration on Decent Work. This was followed by intense consultations and discussion by the International Labour Office over several years with governments, employers' and workers' representatives. In this background, on 10 June 2008, the International Labour Conference unanimously adopted the 'Declaration on Social Justice for a Fair Globalization' (2008 Declaration). This is the third major statement of principles and policies adopted by the International Labour Conference since the ILO's Constitution of 1919. It builds on the Philadelphia Declaration of 1944 and the Declaration on Fundamental Principles and Rights at Work of 1998 (Preface to the 2008 Declaration).[59] It claimed that the Declaration was ILO's response to the impact of globalization on the world of work (Trebilcock 2009: 23). In the words of Maupian, "since 1944, after the adoption of the Declaration of Philadelphia, this was the first time the ILO had carried out such a broad review of the relevance of its objectives and its capacity to achieve them in the current global context" (Maupian 2005: 824). The 2008 Declaration builds on the

[58] Hector Torres argues that it would be reasonable for the IMF to consult with the ILO before putting forward advice on labour practices. However IMF prefer to give advice on labour without consulting the ILO.

[59] *Declaration on Social Justice for a Fair Globalization* (2008), [Online: web] Accessed 2 April 2010, URL: http://www.ilo.org/wcmsp5/groups/public/dgreports/cabinet/documents/publication/wcms_099766.pdf

values and principles embodied in the ILO Constitution and reinforces them to meet the challenges of the 21st century (Preface to the 2008 Declaration: 3).[60]

Its focus was on enhancing the capacity of the Organization to meet contemporary challenges (Trebilcock, Anne 2009:23). The 2008 Declaration contains method of implementation and an annex that speaks about the follow-up to the Declaration. The Declaration expresses the universality of the Decent Work Agenda: "all Members of the Organization must pursue policies based on the strategic objectives – *employment, social protection, social dialogue, and rights at work"*. The Declaration calls for an integrated approach by recognizing that these four objectives are "inseparable, interrelated and mutually supportive", ensuring the role of international labour standards as a useful means of achieving all of them (Para IB of the 2008 Declaration).[61]

According to Trebilcock "the 2008 Declaration places responsibility on Member States to achieve the decent work goals taking into account national needs and priorities and in consultation with representative organizations of employers and workers" (Trebilcock 2009: 24). The 2008 Declaration mentions that the decent work goals can be achieved by relying on the earlier key authoritative documents especially the 1944 and 1998 Declarations. It reiterates the importance promoting employment by creating a sustainable institutional and economic environment in which individuals could develop. The 2008 Declaration calls all public and private enterprises to enable sustainable growth by generating employment and income opportunities. It also speaks about the importance of developing and enhancing social protection measures that are sustainable and adapted to national circumstances. This includes the health and working conditions, the extension of social security measures to all, adoption of policies concerning wages and earnings, hours and other conditions of work. Social dialogue and tripartism are seen as methods for adapting the implementation of the strategic objectives; translating economic development into social progress and vice versa; consensus building on relevant national and international policies; making

[60] Supra note 58.
[61] *Ibid*

labour law and institutions effective; respecting, promoting and realizing the 1998 Declaration for the full realization of the strategic objectives. The 2008 Declaration states that freedom of association and collective bargaining are important for the attainment of the four strategic objectives (Para I A of the 2008 Declaration).[62]

From the above discussion, it is evident that the 1998 Declaration was fast becoming a common denominator of ILO instruments. This approach was confined not only within ILO but also outside ILO. The following section looks into this dimension.

III.8.2. Parallel Developments; Labour Standards in Various Forums

Before the advent of globalization the terms and conditions of work has fallen to the domestic policies of sovereign States. The autonomy of sovereign States came to be limited because of the emergence of International Institutions (IIs) in the economic, political and social spheres (Chimni 2004: 2). Under the regime of international labour law, the last century has witnessed enormous activities seeking to regulate labour conditions at the transnational level (Cleveland 2004: 129).

At the institutional level, IIs began to occupy economic, political and social spheres thereby limiting the autonomy of sovereign States. In the case of ILO, it had responded to the globalized economy by adopting CLS approach through its 1998 Declaration. According to Alston and Heenan, the CLS approach could be traced back from the aborted Havana Charter of 1947, through the various GSP schemes and industry codes of conduct, to the rules adopted by regional trading blocs such as the EU, North American Free Trade Agreement (NAFTA) and Common Market of the South (MERCOSUR). This approach was not developed from any labour movement. This minimalist approach is the result of globalization and neoliberal agenda that made trade as the most important item on the international agenda. In recent years, IFIs have integrated CLS into their policy analysis, partner dialogues, and, in some cases, into lending conditionality. Both the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) now use child labour and

[62] Supra note 58.

forced labour conditionality. In the social development sphere, for instance in the UNGC Initiative 1999, CLS are key factors along with environment and human rights (Alston and Heenan 2004: 231-232).

Some of these developments were already existed. However, most of these agreements started to incorporate CLS as an authoritative bottom line only after the adoption of the 1998 Declaration. Occasionally these agreements also set standards that are above CLS, which at times led to protectionism.

In the following section, the setting of labour standards by various regional blocs in their trade agreement is discussed. These regional blocs were using labour standards as condition to participate in trade. However, it should be noted that these standards were higher than CLS. The setting of 'higher standards' was a means to raise protectionism rather than ensure protection of rights of workers. Even though CLS became the common denominator only after 1998 that does not affect the higher standards already set by these regional trade agreements especially by the EU and the NAFTA.

III.8.2.1. Regional and Bilateral Labour Standards

The EU

Regional and bilateral mechanisms have been established for developing transnational labour standards and encouraging compliance. EU has taken the most advanced steps toward regional economic integration, and has established a regional framework for the definition and enforcement of labour standards, establishing community wide standards in a range of workers rights areas. Through the European Works Council of 1994, the EU required Multinational enterprises (MNEs) operating in the EU to establish workers' councils to address questions such as working conditions. The EU also has negotiated industry wide codes of conduct in a range of industrial sectors. It has also taken steps to promote labour rights compliance abroad. The EC reached an agreement with the African, Caribbean and Pacific (ACP) countries reaffirming the signatories' commitment to the Core ILO Conventions (Cleveland 2004: 131). A similar agreement was concluded in 1999 between EC and South Africa which is

called Agreement on Trade, Development and Cooperation and it also reaffirms the importance of CLS (OECD 2000: 67).

The NAFTA

The NAFTA was negotiated between the US, Canada and Mexico entered into force on January 1 1994.[63] The pressure from the American Labour Unions led to the adoption of The North American Agreement on Labour Cooperation (NAALC), 1994[64] and its attachment to NAFTA (Leary 2004: 193). The primary objective of the NAALC is the improvement of working conditions in each party's territory and obligates members States to enforce their own domestic labour law in eleven areas such as freedom of association, employment discrimination, minimum wages, and forced and child labour. It does not argue for harmonization labour standards (Cleveland 2004: 131). It goes beyond the CLS recognized by the 1998 Declaration. However, emphasis is not upon the application and enforcement of internationally recognized labour standards but on the application of each country's own labour laws (Leary 2004: 193). The three States must enforce their own laws in relation to eleven different areas of labour law. Alston claims that the term 'principles' which is used in the 1998 Declaration might have been used because it had been adopted in the NAALC. NAALC uses the phrase guiding principles to describe its eleven labour standards, but the reason behind the use of such term in NAALC is to avoid the references to international labour standards (Alston 2004: 479). It was criticized for not providing any sanctions in the case of violations of these rights, the absence of reference to international labour standards, the reliance upon the governmental institutions to take the initiative (Alston 2004: 500).

[63] The NAFTA has two supplements, the North American Agreement on Environmental Cooperation (NAAEC) and the NAALC. For details, see [Online: web] Accessed 29 May 2010, URL: http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta

[64] The NAALC was signed on September 14, 1993, by the Presidents of Mexico and the United States, and the Prime Minister of Canada. It entered into force on January 1, 1994. For details, *see The North American Agreement on Labour Co-operation* (1994), [Online: web] Accessed 29 May 2010, URL: http://www.dol.gov/ilab/regs/naalc/naalc.htm

MERCOSUR

In 1998, members of the MERCOSUR[65] adopted a Declaration on social and labour issues. The Declaration is grouped in three sections, which dealt with individual rights, collective rights and procedures addressing the implementation and follow-up (OECD 2000: 62). By this Declaration the Member States have to promote the ILO's CLS, the rights of migrant workers, health and safety standards, and other work place rights (Cleveland 2004: 132). Members States of MERCOSUR States are obliged to promote the Declaration's principles according to their national legislation and practice as well as per collective Conventions and agreements (OECD 2000: 62).

SADC

The fourteen-member South African Development Community (SADC)[66] in 1996 established the Employment and Labour Sector (ELS). ELS took steps to formulate a Social Charter of Fundamental Rights. The Social Charter commits the SADC Member States to observe a number of basic rights and principles. It also commits Member States to observe ILO's CLS (OECD 2000: 62).

In addition to all these developments, certain *commodity agreements* have contained labour rights protections for a number of years. The International Commodity Agreements (ICAs) contain clauses pertaining to 'fair labour standards' which requires Member States to guarantee a minimum standard of living to workers. Chimni

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[65] MERCOSUR is a trading bloc in Latin America comprising Brazil, Argentina, Uruguay and Paraguay. It has Chile and Bolivia as its associate members. MERCOSUR was formed in 1991 with the objective of facilitating the free movement of goods, services, capital and people among the four member countries. For details, see [Online: web] Accessed 5 June 2010, http://commerce.nic.in/flac/india_mercosur_pta.htm.

[66] SADC was originally known as the Southern African Development Co-ordination Conference (SADCC). The organisation was formed in Lusaka, Zambia on 1 April 1980, following the adoption of the Lusaka Declaration. The Declaration and Treaty establishing the Southern African Development Community (SADC) which has replaced the Co-ordination Conference was signed at the Summit of Heads of State or Government on 17 August 1992, in Windhoek, Namibia. Member States of SADC are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. For details, see [online web] Accessed on 15 June 2010. URL: http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm

opines that "the nature and content of 'fair labour standards' has not been dilated in any ICAs" (Chimni 1987: 120). He further argues that "in practice there has been no impact of including a 'fair labour standards clause' in ICAs" (Chimni 1987: 121). More recently, labour rights provisions have reappeared in *bilateral trade agreements.* Canada and Chile have reached an agreement on labour cooperation with provisions similar to the NAALC. The US reached an understanding with China regarding the use of prison labour in 1992, and it has entered into bilateral agreements with Jordan and Cambodia that expressly require respect for labour rights. The Trade Act of 2002, which granted the President, trade promotion authority, directs the President to promote respect for workers rights in the negotiation of new trade agreements (Cleveland 2004:132).

III.8.2.2. Unilateral Measures

Since 1980, the promotion of labour rights in developing countries has become an important part of the US trade policy. In 1984, the first labour rights amendment to the US GSP was adopted by the US congress. The labour rights provisions prohibit access to US market to any country that are not observing internationally recognized workers rights (Hepple 2005: 90). Since 1984, forty-seven countries have been cited in petitions challenging their GSP status for workers rights violations (Cleveland 2004: 133). The US statutes promoting respect for human rights abroad include a number of laws that condition economic assistance, trade and investment on worker rights compliance. For instance, Section 307 of the US Tariff Act of 1930 bars the importation of goods produced with convict, forced, or indentured labour. An executive order issued in 1999 bars agencies of the US government from purchasing product made with forced or indentured child labour. The US representatives to the Multilateral Investment Fund, the IMF, and other financial institutions are directed to use their "voice and vote" to encourage respect for internationally recognized workers rights (Cleveland 2004: 133). In 1985, the Congress amended the legislation governing the Overseas Private Investment Corporation (OPIC) requiring OPIC to withhold investment measures from projects in countries that fail to adopt internationally recognized workers rights (Hepple 2005: 91). The US GSP legislation

does not use the ILO Concept of CLS. Instead, it applies 'internationally recognized workers rights'.

The direct link between trade and CLS was established in the 1994 GSP of the European Communities. This was reaffirmed in 1998 and amended in 2001. The EU system ties additional tariff reduction beyond the GSP baseline to developing countries that can demonstrate that they effectively implement the CLS related Conventions. The EU GSP benefits may be suspended for the use of slavery, forced labour, or the exports of foods made with prison labour, and the EU has suspended tariff benefits to Burma in response to that States forced labour practices (Cleveland 2004; OECD 2000: 134, 69).

Thus it is seen that some regional trade agreements and the US GSP scheme place labour rights above the level of CLS. This could be viewed as a movement towards protectionism.

III.8.2.3. International Financial Institutions (IFIs)

After years of resistance, the World Bank,[67] the IMF,[68] the Inter- American Development Bank, the African Development Bank, and other finance and development institutions have begun to consider the impact of their lending decisions on labour practices (Cleveland 2004: 133). The IMF and the World Bank are enforcing CLS through its conditionality principle. If a state is receiving loans from IFIs, it has to comply with the conditionalities prescribed by these institutions. These conditionalities cover a variety of policies such as trade, fiscal and labour. Chimni argues that "these conditionalities are imposing the goals of liberalization, privatization and deregulation on its users (mostly third world States) which would

[67] The Bank began when one of its two primary lending organs, the International Bank for Reconstruction and Development (IBRD), was created in 1945 to help finance European reconstruction. Its mission soon broadened into supporting development investment. The Bank's second lending institution; the International Development Association (IDA) was created in 1960 to assist the Bank's poorest clients (Garcia 2008: 24).

[68] The IMF was created to bring stability to the exchange rate system and cooperation on international monetary matters in the aftermath of the Great Depression. The IMF engages in lending hard or trade currencies in response of balance of payment difficulties with accompanying IMF conditions involving domestic policy reforms (*Ibid*).

help the transnational capital to take over the public sector assets at throwaway prices and avoid regulation of its activities in public interest"(Chimni 2004: 8). Hector Torres, the Alternate Executive Director at the IMF says, "to IMF, labour regulations are obstacles for hiring and firing workers. Normally in its policy advices it uses the word additional flexibility, which is a code word equals to reducing labour rights" (Torres 2008: 19). The ideological bias prevents the IMF from taking a more balanced approach to labour matters. Torres goes on to argue that he never read a report in which IMF touches on labour matters and recommends members to respect CLS and other ILO Conventions ratified by the country, or to duly enforce their own labour legislation (Torres 2008: 19-20). In the case of World Bank, it had established a Labour Market Group within its Social Protection Network in 1998. Later on, a commitment was incorporated for the systematic consideration of CLS, with the cooperation of the ILO, in the preparation of the Country Assistance Strategy of borrowing countries (OECD 2000: 58). In addition to this, the Inter-American Development Bank Group also requires the borrower to comply with all domestic labour legislation, including those that enforce CLS. The African Development Bank conducted an extensive review on how to incorporate CLS into its policies and programmes. From the recommendation derived from this review the bank had begun to implement CLS in its governance policies (OECD 2000: 59). TNCs' that participate in the development projects sponsored by the IFIs' are expected to observe these standards (Meyer and Stefenova 2001: 505). Thus CLS legitimizes the operation of development projects of these IFIs' which otherwise have been criticized.

III.8.2.4. The UN Global Compact (UNGC)

By promoting in recent decades the interests of Transnational Capitalist Class (TCC), UN has adopted a neoliberal agenda in its transactions. This is evident from approach of the UN towards the private corporate sector. The private corporate actor plays an active role within the UN system. The invasion of the UN system by the corporate sector started way back in the 1970s and 1980s, which according to Chimni, is evident from the following developments: "abandonment of attempts to adopt a code of conduct for TNCs, the shutting down of UN Centre on Transnational Corporations

(UNCTC), the repositioning of UNCTAD, and the marginalization of the development issues in the UN system" (Chimni 2004: 15). The GC, which was launched by UN Secretary-General Kofi Annan in 1999, was a product of cooperation between UN and corporate actors (Chimni 2004: 2). Many efforts were already in place at the time when GC was proposed. Some of these efforts came from the IFIs and from ILO. Firms which sign with the GC make a commitment to comply with the 10 principles, which it has established, and have to provide evidence of such compliance. The 1998 Declaration had formed a basis for the adoption of GC.[69] The set of global standards created by the Declaration have to be observed by the TNCs. This is explicit from the reference point 4 of the 10 principles, but as a soft instrument. The GC is a voluntary initiative that deliberately refrains from monitoring firms. The GC itself does not verify the information (Meyer and Stefanova 2001:504). According to Hassel, "the UNGC was designed not to replace civil society activities by state regulations, such as the ILO, but rather to integrate private actors into an arena that was exclusively dominated by state governments" (Hassel 2008: 241-242). However, it cannot be neglected that GC is an attempt to *bluewash* the image of TNCs (Chimni 2004: 14).

III.8.2.5. Non Legally Binding Standards of International Organizations

The focus in international law on state action alone fails to address the influence of the activities of non-state actors, such as MNEs' on labour and social issues. This focus only on state activity led to the increased adoption of voluntary non-legally binding guidelines and codes aimed at influencing corporate activities (Leary 2004: 194). Because of the growing multinationals investment abroad, the trade unions in US promoted alternative methods of regulating the labour and employment practices of multinationals through two international labour codes- the 1976 OECD's Declaration on International Investment and Multinational Enterprises which was revised in 2000

[69] The UN Global Compact's ten principles in the areas of human rights, labour, the environment and anti-corruption enjoy universal consensus and are derived from: 1)the Universal Declaration of Human Rights; 2) the International Labour Organization's Declaration on Fundamental Principles and Rights at Work; 3)the Rio Declaration on Environment and Development and 4)the United Nations Convention Against Corruption. The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. For details, see, [Online: web] Accessed 20 June 2010, URL: http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

and the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy which was amended in 2000 and 2006 (Coxson 1999: 475-476). Another reason for the adoption of such guidelines was the growing illegal activities by MNCs. This made ILO, OECD, UN and the national governments to focus on the means to influence the behaviour of TNCs (Salzman 2000: 788).

The ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy,1977

In the 1960s-70s, the International Labour Conference had been unable to adopt a Convention covering the activity and development of MNE's even though this was urgently needed. The ILO Governing Body at the time preferred to adopt a soft law instrument, the aim of which was to encourage the positive contribution of multinationals to economic and social progress (Duplessis 2008: 7). Thus in 1977, the ILO adopted the *Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy*[70] (the ILO Tripartite Declaration), which specifically addresses labour issues. It was adopted not by the annual ILO Conference, but by the Governing Body with a limited number of governments and workers and employers organizations. This gives the Declaration a lesser standing than ILO Convention. Its principles are intended to guide the governments, employers, and workers organizations and multinational enterprises in adopting social policies. Paragraph7 states that the principles are recommended for observation on a 'voluntary basis'. The adoption of the Declaration as a voluntary nonbinding instrument was essentially due to political obstacles. The regulation of MNCs remains today a controversial subject in which it is difficult to obtain agreement. Legal difficulties also created obstacles to adoption of a binding agreement. The definition of "multinational enterprise" was

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[70] *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (1977). For details, including the amendments of 2000 and 2006, see [Online: web] Accessed 15 May 2010, URL:http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

deliberately left vague. The Declaration was amended by the ILO in 2000 (Leary 2004: 194-195).

The OECD's Declaration on International Investment and Multinational Enterprises, 1976

The OECD with its thirty-three Member States forms the rich man's club. In 1976, the OECD adopted the *OECD's Declaration on International Investment and Multinational Enterprises*[71] (the OECD Guidelines for Multinational Enterprises). As its name suggests the main purpose of the Declaration was the promotion of international investment (Salzman 2000: 788). However, it also contained a section setting forth voluntary codes of conduct for MNEs. The guidelines have been amended four times in 1979, 1984, 1991, and more completely revised in the year 2000.[72] The revised guidelines affirms that they are Recommendations jointly addressed by governments to multinational enterprises.

Section IV of the guidelines states that "enterprises should within the framework of applicable law, regulations and prevailing labour relations and employment practices , respect freedom of association, contribute to the abolition of child labour, the elimination of all forms of forced labour, and non discrimination against employees on grounds of sex, race, colour, religion, political opinion, national extraction or social origin (Leary 2004: 196-197). It is provided that the observance of the Guidelines is voluntary and not legally enforceable. According to Coxson, "even though OECD lacks authority to impose sanctions, the publicity surrounding the review of these guidelines constitutes a form of "enforced international regulation of multinationals. It is a soft law having hard consequences for MNCs" (Coxson 1999: 479).

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[71] *The OECD Guidelines for Multinational Enterprises* (1976). For details, including the revised guidelines, see [Online: web], Accessed 18 May 2010, URL: http://www.oecd.org/document/28/0,3343,en_2649_34889_2397532_1_1_1_1,00.htm

[72] The new guidelines in its preamble explicitly refer to the ILO Declaration on Fundamental Principles and Rights at Work (Salzman 2000: 795).

III.8.2.6. Corporate Codes of Conduct

International organizations, regional and national governments, non-governmental organizations (NGOs), and private corporations all have been involved in drafting voluntary codes of conduct or guidelines on corporate behaviour. Most of the international or regional institutions have already put in place programmes entirely dedicated to creating and promoting an ethical code for MNCs. The ILO Tripartite Declaration and OECD Guidelines for Multinational Enterprises have been revised and strengthened. UN Secretary General Kofi Annan, as we have seen, convened a GC setting forth general guidelines for corporate responsibility in the labour rights area, The EU had taken steps towards developing a model Code of Conduct, and the European apparel and construction industries have adopted codes of conduct addressing labour standards in cooperation with trade union representatives (Cleveland 2004: 135). Similarly, the Summit Declaration from the 2007 G8 Summit in Heiligendamm reaffirms the principles promoted by the ILO and States that it is vital to strengthen the principles of Corporate Social Responsibility (CSR) by promoting international labour standards, high environmental standards and better governance. In order to achieve this, the Declaration stresses the importance of cooperation between the OECD, the ILO and the UNGC in order to give more visibility and more clarity to the standards relating to CSR (Clavet 2008: 1-2).

MNC's largely complied with Codes of Conduct because of awareness of reputation and crisis management. There are several reasons for the adoption of voluntary codes of conduct. Pressure from NGOs and consumer campaigns lead the private actors to develop codes of conduct. Fearing that consumers might reject products made under poor conditions, major corporations, such as Levi Strauss, Reebok, Liz Claiborne, and later Nike, decided to address the labour standards problem. Levi Strauss was the first company to develop a comprehensive code of conduct in 1991.[73] Later more and more firms committed themselves to ensuring consistent application of labour norms to

[73] The significance of the Levi Strauss example was that it was the first code of conduct on labour practices for suppliers, which were independent business partners that supply a brand name with products or services (Hassel 2008: 239).

workers, regardless of where they do business and whether they directly own the operation. Most of these codes of conduct were introduced unilaterally. A survey of the ILO evaluating 215 codes in 1998 found that 80% of the codes were set up unilaterally. A similar study by the OECD in 1999 counted 182 codes, of which 98 were unilateral, 59 from business associations, 22 from stakeholder partnerships, and 3 based on NGO model codes. These codes varied widely with regard to content and procedure. Only 122 of the 182 codes covered fair employment practices and labour standards (Hassel 2008: 239). According to an international survey conducted in 2002 by Price Waterhouse Coopers, 70 per cent of executive directors of global corporations believe that CSR is vital to their company's profitability (Standing 2007: 4).

However, the commitment of these firms respecting human rights through their voluntary code of conduct is a matter to be viewed with suspicious eye. Corporate performance is measured in terms of profits, which are reported in major economic magazines. According to Richard Falk, "the incentives to maximize profits, regardless of human and environmental consequences remains high" (Falk 2002: 66). MNCs believe in self-implementation of codes of conduct and are strongly resistant to the establishment of enforcement or even accountability or transparency procedures. Such resistance is due to non-compatibility of public sector regulations within the framework of neoliberal agenda (Falk 2002: 66).

In sum, international labour standards have been incorporated into a decentralized global network of international, regional, national, and private efforts to promote labour rights. The ascending level of activity suggests that international labour standards especially CLS are serving as an increasingly important function in the global economic system (Cleveland 2004: 136). Thus it can be rightly said that a minimalist approach in the form of CLS had been used in trade agreements, financial institutions and in the social development sphere thereby covering almost all areas that deal with human development.

III.9. The Implications of 1998 Declaration

The transitional shift in the ideology of the Declaration to uphold a neoliberal economic view of protective regulations is visible (Standing 2008: 367). Alston and Heenan, who are the main critiques of CLS observes that,

> "CLS approach has facilitated a consensus, a consensus among different spheres, around international labour regulation that (1) is based on a core set of concerns; (2) defines those core concerns in terms of broad principles, rather than human rights; (3) allows various actors including governments, MNE's, trade and industry groups, and even NGO coalitions to define and enforce standards and (4) de-emphasizes legal enforcement in favour of promotional techniques, dialogue, and technical assistance. This new consensus formed in favour of CLS approach stands in marked contrast to the ILO's traditional international labour standards system. Under the traditional ILO standard setting, the system was characterized by precise standards, a forum capable to provide interpretative clarification thereby generating a gradually cumulating jurisprudence, a medium in which different actors' views were aired, and had a supervisory mechanism to promote compliance. Under the new system, the links between the traditional ILO system and the new core standards approach is not clear. It should be noted that CLS is not a substitute for the internationally accepted rights. Nevertheless, by giving CLS the connotations of legitimacy, determinacy, and solidarity, these approaches generally reduce the role of national governments and the responsibilities of other governments working through the international community. CLS approach is building a system that mainly relies on actions by non-state actors" (Alston and Heenan 2004: 233, 240).

Alston and Heenan identified three principal problems to this approach. These are, first, the 1998 Declaration speaks of only a small group of standards; second, the identification of standards that are considered as CLS; and third, the content attributed to a particular standard such as non-discrimination or forced labour.

The first problem concerns the singling out of only four core standards in the 1998 Declaration. Before the Declaration's adoption, the ILO system did not differentiate between standards. After the adoption of the Declaration, the ILO gave prominence to certain standards by stating that these are fundamental principles of the Organization. As there is no mention in the Declaration about the Conventions that are related to these fundamental principles, the Governing Body of the ILO has identified eight fundamental Conventions. But these Conventions are covered by human rights law as identified in the two international human rights covenants, the ICCPR and ICESCR. The notion that a small set of four principles could ensure all working conditions

globally is antithetical to the conception of international standards in the ILO system. The certainty provided by the ILO system was its global application, settled definitions, and clarity of obligations. Still this certainty was lost because the CLS was adopted without a view beyond the interests of single actors, and often without any deep understanding or expertise in the issue of labour standards (Alston and Heenan 2004: 243).

The second problem concerns the ad hoc way in which the trade-based CLS approach arrived at definitions of core standards. Various actors such as the MNEs, international and regional organizations, industry groups, NGOs and governments have developed their own sets of core standards in the form of CSR, or international or regional agreements have used ILO standards as a basis for choosing and defining core rights. While defining these core rights self-interest came to the fore and coherence disappeared. The main factor in setting and defining standards became the interest of the promoter. At a broader level, MNCs had little interest in promoting freedom of association, but they were increasingly interested in encouraging the perception that they were addressing labour issues. As a result, they adopted codes of conduct that committed themselves to a safe workplace but stay silent on the right to form unions.[74] Thus, CLS was defined according to the regime in which it operates and could vary in its meanings (Alston and Heenan 2004: 244).

The third problem concerns the content of the standards. The new actors in the scene define the standards without defining the content of each of those standards.[75] The

[74] "In 1998, the ILO compiled a database of approximately 215 separate corporate social responsibility initiatives and its survey of their content confirmed the dominance of self-interest in identifying core labour standards. In a report issued 5 years later, in 2003, the database had expanded to 300 initiatives, but the ILO concluded that the corporate codes and policies that it surveyed "contain relatively few references to the fundamental international labour standards" (referring presumably to the CLS rather than to any broader understanding). While some of the codes and polices referred to the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (adopted in 1977 but updated in 2000 to incorporate a reference to the CLS contained in the 1998 Declaration), most of them do not. Finally, the report noted that some of them even contain language that could be interpreted as undermining international labour standards" (Quoted from Alston and Heenan 2004: 243).

[75]For example, although some 33% of multi-stakeholder initiatives surveyed by the ILO in 2001 contain some reference to freedom of association, a great many corporate social responsibility codes and policies are content to describe their commitment in rather bland and imprecise language, such as "recognizing the right of employees to freely associate.

question of defining or not defining the content of standards presents problems for the coherence in international labour law. By defining the content of standards without reference to a broader definition (such as ILO Conventions), the right is liable to be circumscribed. This broader nature of the principles can make the standard potentially meaningless and leaves its definition open to be abused by the more powerful party in a dispute. These developments would lead to the formation of a system that allows the expansion of a lowest common denominator approach. The result would be a tendency towards a decrease in the level of protections and obligations.

III.9.1. Emergence of a Soft Law Regime

There is no precise definition for soft law and its distinction from hard law makes its relevance prominent in international law. The best example of hard law is an existing piece of legislation in any country. The legislation is characterized by a clear definition, specifies some standards, and articulates penalties for failure to comply with the provisions of such legislation. Thus, hard regulation is always 'compulsory' and binding on the populations covered by it. On the contrary, soft law is characterized as a set of minimum standards which are not compulsory, that provides scope for multiple interpretation. In the case of enforcement, it depends upon the actor, which implements it (Kuruvilla and Anil 2006:51-52). Chimni argues that, "soft law are norms having vague and general character and are not intended to be enforced. This does not mean that a norm having soft nature ceased to be a legal norm. A rule can be either hard or soft, but does not affect its normative character" (Chimni 1987: 254). According to Weil, "the proliferation of soft norms or 'hortatory' or 'programmatory' law does not strengthen international normative system" (Weil 1983: 415).

Since 1990, an interest in soft promotional approaches to labour rights began to be considered both at the national and international level. At the national level, social rights were deconsitutionalised and voluntarised (Alston 2004: 464). The ILO largely held a monopoly over the setting, implementation and supervision of international labour standards throughout the 20th century. The monopoly of ILO is vanishing. The

proliferation of new actors who lead globalization took over the charge of defining and implementing the labour standards (Gravel 2008: 79). The use of substantive soft law in the realm of international labour law was criticised in connection with precarious employment. A study of the provisions of three Conventions adopted in succession in the 1990s shows a rapid shift towards soft law and a resulting reduction in the protection of workers' rights (Duplessis 2008: 28).[76] The shift towards softness on a formal level was also criticised when the International Labour Conference adopted its 1998 Declaration. The 1998 Declaration gave rise to concerns within the ILO about the effectiveness of hard rules in international labour law. During the negotiation of the 1998 declaration there were differences among the ILO constituents regarding the role of international labour standards within the context of globalization (Gravel 2008: 87). Subsequent developments within and outside ILO reinforced the conviction that the soft law play an important role in the labour rights arena. The 1998 Declaration is mainly addressed to the Member States urging them to implement enacting measures, but the general way of its formulation meant that it could be used by the new world actors. It has helped to define the principles to be followed both by the ILO and the major financial institutions (Gravel 2008: 88).[77]

Supiot argues that in the social field, the notion of hard law is a disputed factor unlike in the area of international trade law regime where mandatory rules are the governing factor. Soft law should not be seen as an alternative but rather as a supplement to hard law. If a free market was to be introduced in a sustainable way, it requires a legal framework that takes account of its economic as well as its social dimensions. As history reveals, neglecting either of these dimensions could lead only to disaster. It would be true of a world legal order where trade in goods were subject to a 'hard' law

[76] The Part- Time Work Convention, 1994 (No 175) provides that measures must be taken to ensure that part-time workers receive the same protection as that afforded to full-time workers, while the Home Work Convention, 1996 (No 177) provides for a national policy on home work which promotes, as far as possible, equality of treatment between home workers and other wage earners, taking into account the special characteristics of home work. There is then a clear slide towards softness in the Private Employment Agencies Convention, 1997 (No 181), which abandons the aim of parity pursued by the earlier conventions, and merely promotes the adequate protection of workers employed by private employment agencies.

[77] See also Mundlak (2004: 245).

and the fate of men to a 'soft' law. The economic and social questions are not independent from one another; each should take account of the needs of the unity and diversity of human societies (Supiot 2006: 116-117).

III.9.2. CLS and Human Rights

The 1998 Declaration's selection of a small number of standards as 'core' and 'fundamental' is inconsistent with the principle established by the 1948 UDHR and the 1993 Vienna Declaration and Programme of Action,[78] which states that rights are indivisible and interdependent.[79] By focusing on civil rights, the Declaration neglected economic rights, such as economic security, work safety and health, maternity provision, pensions and disability benefits. The emphasis on negative rights and the sidelining of positive rights is the outcome of the Declaration. Banning 'the worst forms of child labour', banning 'forced labour', campaigning against gender discrimination and defending freedom of association are matters of common and civil law. They do not constitute a strategy or a progressive agenda. Standing raises the doubt " whether the Declaration has actually had any positive effect, other than to bring in millions of dollars to the ILO from the US Administration to support it" (Standing 2008: 367).

The CLS are homogeneous in one respect; their nature as civil or political rights. Freedom of association, non-discrimination, and freedom from forced labour and child labour are the four standards contained in the 1998 Declaration, which could be termed as 'negative' rights in the sense that they require governments to refrain from certain activities and to prevent others from engaging in them. Additionally the list

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[78] *Vienna Declaration and Programme of Action* (1993), A/CONF.157/23 12 July 1993, [Online: web], Accessed 20 May 2010, URL: http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en.

[79] Even though the UDHR speaks about the inalienability of rights, a distinction was brought between civil and political rights and economic, social and cultural rights through two international human rights instruments, the ICCPR and ICESCR, which was adopted in 1966 and came into force in 1976. The distinction between these two rights was deepened with the cold war (Fudge 2007:35). See also Marauhn (2004: 298) and (Krebber 2004: 200).

contains no reference to the so-called 'positive' rights, or economic and social rights, that require the governments to actively promote certain minimum standards. This has enormous implications. Through its body of Conventions and Recommendations created over the previous eighty years, the ILO had built a model of social justice that had not prioritized any rights for political convenience. The various 'social rights' were part of an interdependent whole. The Declaration turned the ILO away from that position. It removed the transformative character of international labour standards (Alston and Heenan, 2004: 253, 367-368).

Deciphering CLS in the context of international human rights instruments, it could be understood that CLS are rights that need negative state interference. This heavy reliance on CLS reveals the interests and the ideological preferences of the key actors who had taken the lead in promoting the concept of CLS. Alston and Heenan further argues that this twist in favour of civil and political rights is the antithesis of the ILO approach, which led the way in the promotion of a non-discriminating approach to the two sets of rights, based on an overarching commitment to social justice. Thus, the core approach undermined the indivisibility of the International Labour Code. If a TNC or government could satisfy its (international) labour obligations by abiding by a vague set of core standards promoting selected civil and political rights, what incentive has it to accept with respect to the non-core ILO standards relating to economic and social rights? Could a system that does not address economic and social rights rightly be termed an international labour standards system? The ILO has historically championed the interdependence of civil and political and economic and social rights at work, arguing that the traditional categories used within the UN made little sense in relation to the labour market. Freedom of association and the right to collective bargain may give workers a voice, but, by themselves, they will not redress the power imbalance between capital and labour (Alston and Heenan 2004: 253-255).[80]

The categorization of rights promoted by ILO can be well understood from the following two arguments.

[80] See also Mundlak (2004: 258)

FDI and CLS: MNCs Role

The non-state actors welcomed the CLS approach because observance of these rights does not incur any cost so that it is very easy to apply. Probable reasons for this approach could be studied by understanding the relationship between CLS and FDI. An empirical study conducted by the OECD shows that MNCs invest in countries where CLS are prescribed. Thus, CLS became a bottom line on the basis of which MNCs could justifiably invest, thereby implying that their obligations extended to the observation of negative rights. They were exempted from observing the so called positive rights. These MNCs are in many ways the world's most powerful economic actors. As of 2000, there were only 44 nations in the world whose GDP was larger than the value added of any single MNC (Goodwin 2005: 135). Hence, the main aim of these MNCs is profit maximization. The question here is whether these MNCs would use their profits for ensuring the health and safety of workers, whether these workers will get pension or disability benefits? It should be noted that labour rights regime is not confined to a special category of rights like CLS or can be called as negative rights but it encompasses positive rights namely economic and social rights. Thus it becomes the obligatory on the part of these MNCs who uses the labour power to ensure the indivisible rights of workers as well.

Right to Development: A CLS Perspective

According to Sen's conception of development, a country's development could be determined not only in terms of its GNP growth or industrialization, but also on the basis of the freedom enjoyed by its citizens. Those freedoms are both the means and ends of development. In conceptualizing rights in relation to development, both the positive and negative rights are significant (Sen 1999, quoted in Chimni 2008: 5-6). The indivisibility of rights is embodied in the 1948 UDHR and the Declaration on Right to Development[81] which was reaffirmed in the 1993 Vienna Declaration and

[81] Article 1(1) of the DRD explicitly states that 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental

Program of Action on Human Rights (Chimni 2008: 13).[82] Since 1919, the ILO has played a pivotal role by guaranteeing the labourers both these rights, i.e. negative and positive rights, but after the adoption of the 1998 Declaration, ILO differentiated rights as core and non-core rights. According to Langille, the Preamble to the ILO Constitution laid down the complex and mutually supporting interconnections between economic, political and social freedoms (Langille 2003: 95). This differentiation between rights will eventually affect development.

III.9.3. Implications for Developing Countries

CLS applies to all Member States irrespective of the fact that the Member States are developed, developing or least developed. The claim that the implications of CLS are the same in all countries regardless of the level of a country's economic development is difficult to be accepted (Alston and Heenan 2004: 255), "because Article 19(3) of the Constitution states that while framing a draft Convention or Recommendation of general application, due regard shall be given to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different[t]. Earlier, to meet the disparate social and economic circumstances of the newly independent States, the ILO adopted Conventions together with Recommendations, the former formulating the underlying general principles and the latter embodying the more detailed regulations" (McMahon 1966: 17). The ILO also adopted specific Conventions that addressed developing countries for the improvement of labour standards. After 1998, the ILO moved away from its earlier attitude of considering the developing countries on the basis of its economic development (Helfer 2006: 691).

Moreover the absoluteness of civil and political rights conceals the fact that the majority of those rights assume a very different meaning from one society to another.

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freedoms can be fully realized'. *Declaration on the Right to Development* (1996), A/RES/41/128, [Online: web], Accessed 20 May 2010, URL: http://www.un.org/documents/ga/res/41/a41r128.htm

[82] Vienna Declaration and Program of Action on Human Rights, 1993 adopted by the World Congress on Human Rights notes that 'all human rights are universal, indivisible, and interdependent and interrelated'

Similarly, civil and political rights are often said to be cost-free in terms of their impact on production costs. The implications of CLS in developing countries could be understood from the activities supported by TNCs and the international economic institutions.

TNCs and Working Class in Developing Countries

The neoliberal pursuit of third world countries lead to the opening of their markets and adoption of liberal investment regimes has paved way for increase in the presence of TNCs (Chimni 2010: 70). TNCs became one of the major players in these countries. The voluntary codes of conduct adopted by these actors had generally taken the CLS approach. The soft nature of other instruments such as UNGC increased the legitimacy of CLS. These soft instruments allow TNCs to justify their actions very easily. The cost free nature of the civil and political rights had helped the TNCs rather than the developing countries. Generally speaking, the working class of the developing countries are denied their basic economic and social rights such as safety and health in the workplace, maternity provisions, pension entitlements, disability arrangements, and leave.

Global Economic Institutions and the Working Class in Developing Countries

The policies of global economic institutions encourages countries of the global South to open their markets to trade and investment. The loan conditions enforced by the World Bank and IMF on developing countries prevented governments from regulating wages and enforcing workers rights. The study shows that because of the IMF policies there was a shift of income from workers to owners of capital (Smith 2006: 875). According to Chimni "even when there is a willingness of third world States to provide adjustment assistance to workers, they simply lack the resources to do so. Moreover, international economic law is not geared to address the problems of dislocation and alienation of the working classes, especially in the third world" (Chimni 2007: 8). The developing countries are losing their policy making space in

social, economic and environmental fields and this power is grabbed by international economic institutions which frame rules that govern critical areas (Chimni 2010: 73).

III.10. Conclusion

With the shift towards neoliberalism, most of the States began to adopt those policies. States started to preach free trade and free market rather than enacting social policies for the welfare of workers. The influence of these policies was also reflected in the institutional level. The 1990s was a period marked by the emergence of globalization. Globalization reduced labour rights to an economic question. The ILO too responded to this situation by adopting neoliberal agenda. Its inclination towards neoliberal policies finally culminated in the adoption of 1998 Declaration.

The 1998 Declaration, on the one hand speaks about labour rights in a minimal form and economic growth on the other. This instrument eclipses the international labour standards with its idea of CLS and overemphasis is given to trade and economic growth. From the above discussion, it could be witnessed that the 1998 Declaration has brought forth a conflicting opinions. The scholars who are the proponents of CLS are of the opinion that CLS will prevent the race to the bottom in labour standards in the global economy, encourage the pursuit of high wages and high productivity economic development strategies. They envision that CLS are the means through which economic and social rights would be achieved. These supporters completely neglect the role of non-state actors in a globalised economy. However, the sceptics are of the view that the Declaration has sidelined the existing standards adopted by the ILO from 1919 onwards. The Declaration in effect had lead to the privatization of social security measures.

The overemphasis of CLS on civil and political rights as fundamental make the economic and social rights of the worker subsidiary. Earlier ILO addressed the concerns of developing countries by prescribing specific standards by taking into consideration their economic status. By adopting CLS as fundamental ILO has placed both the developed and the developing ones at par. CLS also empowered a variety of

new actors such as MNCs and trade groups. This would lead, not only to a heterogeneous outcome, but also stand in stark contrast to the International Labour Code's reliance upon a single, global institutional framework to set standards. MNC's welcomed CLS approach because of the fact that it is easy to apply. The reinforcement of soft law regime is another critical point. The CLS approach began to be used by various actors without having an obligation to observe such standards. Unlike hard law, which demands the strict observance of its provisions, the CLS as a soft law instrument leaves it to the actors discretion to comply with such standards or not.

CHAPTER IV

ENFORCEMENT OF CORE LABOUR STANDARDS: STRENGTHS AND WEAKNESSES

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IV.1. Introduction

The mandate of the ILO since its creation in 1919 has included adopting international labour standards, promoting their ratification and application in its Member States and the supervision of their application as a fundamental means of achieving its objectives. In order to monitor the progress made by Member States, the ILO has developed a supervisory mechanism. The supervising machinery of ILO is accepted as one of the most advanced of its kind. The various Committees constituted for this purpose regularly examines the reports submitted by the Member States of ILO.

The 1998 Declaration through its follow-up mechanism created a new monitoring procedure to review the conduct of its Member States. The purpose of the follow-up is to achieve full respect for CLS, including the ratification of all the CLS related Conventions. It helps to identify the areas where Member States need technical assistance. It is provided under the follow-up that it is not a substitute for the established supervisory mechanisms and it shall not impede the functioning of those supervisory mechanisms. The specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of the follow-up. Nonetheless, there are chances that the existing supervisory machinery would be eclipsed by the 1998 Declaration's follow-up.

This chapter will discuss the strength and weakness of enforcement of CLS. The first part of the chapter gives an overview of ILO's supervisory mechanism, which discusses the functions of various supervisory bodies under ILO and the advantages and disadvantages of this supervisory mechanism. The second part of the chapter analyzes the follow-up to the 1998 Declaration, its advantages and the criticisms. The third part explores a country specific situation to understand the enforcement procedure of CLS. India is one of the countries whose labour laws were well

appreciated. The changes that have been brought by globalization in general and the 1998 Declaration in particular are dealt in detail in this section.

IV.2. Implementing International Labour Standards: Obligations of Member States

The relationship between ILO and its Member States could be derived from Article 19 of the Constitution. "This Article endowed the Member States to submit Conventions and Recommendations adopted by the Conference by a two third majority for the consideration of the national authorities, which should be embodied in the law and practice of member countries. By this legislative technique, state sovereignty was respected.[83] Thereby asserting that the International Labour Conference have no legislative power rather it was endowed with powers of merely advisory character and gave it a supra-national authority" (McMahon 1966: 2-3).

Article 19(5) of the Constitution of ILO accentuates that the Conventions and Recommendations adopted by the Conference must be submitted within a year or in exceptional cases within 18 months to the authorities within whose competence the matter lies for the enactment of legislation or other action. However, during the early days observance of these rules was unsatisfactory. The novelty of this rule in international law leads to difficulties in application. Albert Thomas, the then Director-General opined that this provision is "of capital importance to the working and the future of ILO" (Quoted from Valticos 1996: 405). In 1946, a clause was added stipulating that information on compliance with this obligation must be communicated to the Director-General of the ILO. The remarkable work done by the ILO supervisory bodies improved the situation and the Member States began complying with their obligations to submit instruments to the national authorities within the prescribed time limits (Valticos 1996: 405-406).

[83] Article19 of the Constitution of ILO. For details, see Annexure I.

In addition to this, the Member States are required to make an annual report on all Conventions and Recommendations, which the Conference had adopted[84]. With respect to ratified Conventions, Article 22 of the ILO Constitution says that each member has to submit an annual report to the International Labour Office on the measures, which it has taken to give effect to the provisions of Conventions to which it is a party.

With regard to non-ratified Conventions Member States are obliged to report to the Director-General of the ILO on its position of law and practice on matters that are dealt within the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislative, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention. The Report should be at appropriate intervals as requested by the Governing Body. Except this, no further obligation lies upon the Member States.[85] In the case of Recommendations Article 19(6d) of the Constitution provides that Member States have to report to the Director-General the position of its law and practice with regard to the matters dealt within the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them. In order to ensure the application of standards, the organization has built up diversified forms of supervision.

IV.3. Supervision on the Application of International Labour Standards.

An appropriate supervisory body is necessary for the proper implementation of legislation. In international law, States are expected to carry out their obligation in good faith[86] and the principle *pacta sunt servanda*[87] has long been considered as a

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[84] The Constitutional amendments of 1946 obliged the Member States to supply reports on non-ratified Conventions and Recommendations.

[85] Article 19(5e) of the Constitution of ILO. For details, see Annexure I.

[86] This principle is enshrined in the UN charter. Article 2(2) of the charter provides that "all members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present charter" (Shaw 2003: 97).

fundamental rule of international law. The system of supervision enunciated by the ILO is considered as one of the most advanced of its kind (Vaidyanathan 1977: 6). The events, which led to the establishment of the ILO, clearly illustrate that the adoption and enforcement of international instruments for the protection of workers was the principal objective of those who propagated the idea of establishment of the ILO. Regardless of whether their motives were primarily humanitarian or economic, they agreed that the aim could be effectively and durably secured only through the negotiation and implementation of international Conventions. The ILO Constitution devotes 24 out of its 40 Articles to the preparation, adoption, and implementation of international labour standards (Landy 1966: 10).

In order to monitor the progress of Member States in the application of international labour standards, the ILO has developed supervisory mechanisms, which are unique at the international level.[88] This supervisory mechanism helps to ensure that countries implement the Conventions, which they had ratified. The ILO regularly examines the application of standards in Member States and points out areas where they could be better applied. If there are any problems in the application of standards, the ILO seeks to assist countries through dialogue and technical assistance.[89]

The ILO has developed various means of supervising the application of Conventions and Recommendations after their adoption by the International Labour Conference and ratification by States. There are two kinds of supervisory mechanism:

- The regular system, and
- Special procedures.

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[87] It means that international agreements are binding. The law of treaties rests upon this principle since the whole concept of binding international agreements can rest upon the presupposition that such instruments are commonly accepted as possessing that quality.(*Ibid*)

[88] *Report of the Committee of Experts on the Applications of Conventions and Recommendations* (2010), ILC 99 III (1A), [Online: web] Accessed 7 May 2010,URL:http://www.ilo.org/wcmsp5/groups/public/---ed_norm/relconf/documents/meetingdocument/wcms_123424.pdf

[89] For details, see [Online: web] Accessed 12 May 2010, URL: http://www.ilo.org/global/what_we_do/InternationalLabourStandards/Applying and Promoting International Labour Standards

IV.3.1. The Regular System for Supervising the Application of Standards

The regular system of supervision is conducted by two bodies called 1) The Committee of Experts on the Application of Conventions and Recommendations (CEACR/ Committee of Experts) which is an independent technical body; and 2) The International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations(CCAS/ Conference Committee), a political body. These committees examine the reports sent by the Member States regarding the application of the Conventions and Recommendations. They also examine the observations sent by workers' organizations and employers' organizations in this regard.[90]

Origin

During the early years of the ILO, both the adoption of international labour standards and the regular supervisory work were undertaken within the framework of the plenary sitting of the annual International Labour Conference. However, with the rapid increase in the number of ratifications of Conventions there was a significant increase in the number of annual reports submitted. It soon became clear that the plenary of the Conference would not be able to examine all of these reports at the same time as adopting standards and discussing other important matters. In response, the Conference in 1926 in its eighth session adopted a resolution establishing on an annual basis a Conference Committee (subsequently named the Conference Committee on the Application of Standards) and requesting the Governing Body to appoint a technical committee (subsequently named the Committee of Experts on the Application of Conventions and Recommendations) which would be responsible for drawing up a report for the Conference. These two committees have become the two pillars of the ILO supervisory system (Sampson 1979: 569).

[90] Supra note 88.

IV.3.1.1.Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts is composed of 20 members, who are outstanding legal experts at the national and international levels drawn from all regions of the world. The members of the Committee are appointed by the Governing Body upon the proposal of the Director-General.

The Committee of Experts meets annually in November–December. In accordance with the mandate given by the Governing Body, the Committee is called upon to examine the following: the annual reports under Article 22 of the Constitution on the measures taken by Member States to give effect to the provisions of the Conventions to which they are parties;[91] the information and reports concerning Conventions and Recommendations communicated by Member States in accordance with Article 19 of the Constitution;[92] and information and reports on the measures taken by Member States in accordance with Article 35 of the Constitution.[93]

The task of the Committee of Experts is to point out the extent to which each member State's legislation and practice are in conformity with ratified Conventions and the extent to which Member States have fulfilled their obligations under the ILO Constitution in relation to standards. In carrying out this task, the Committee adheres to its principles of independence, objectivity and impartiality.[94] If the Committee of Experts notes problems in the application of ratified Conventions, it may respond in two ways. The responses are either in the form of *observations* or *direct requests.* Observations contain comments on fundamental questions raised by the application of a particular convention by a state. These observations are published in the Committee's annual report. Direct requests relate to more technical questions or

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[91] Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

[92] Article 19(5) (a-e) speaks about obligations of members in respect of Conventions and Article 19(6) (a-d) deals with obligations of members with respect to Recommendations.

[93] Article 35 addresses application of Conventions to non metropolitan territories.

[94] Supra note 88.

requests for further information. They are not published in the report but are communicated directly to the governments concerned.[95] As a result of its work, the Committee produces an Annual report. This report consists of three parts. Part I contains a General Report, which includes comments about Member States' respect for their Constitutional obligations and highlights from the Committee's observations; Part II contains the observations on the application of international labour standards, and Part III is a General Survey.

IV.3.1.2. Committee on the Application of Standards of the International Labour Conference

The Conference Committee on the Application of Standards is one of the two standing committees of the Conference. It is tripartite and therefore comprises of representatives of governments, employers and workers. The Conference Committee meets annually at the June session of the Conference. Pursuant to Article 7 of the Standing Orders of the Conference, the Committee shall consider, measures taken to give effect to ratified Conventions under Article 22 of the Constitution; reports communicated in accordance with Article 19 of the Constitution and measures taken in accordance with Article 35 of the Constitution. It examines the report in a tripartite setting and selects from it a number of observations for discussion. The governments referred to in these comments are invited to respond before the Conference Committee and to provide information on the situation in question. In many cases, the Conference Committee draws up conclusions recommending that governments take specific steps to remedy a problem or to invite ILO missions or technical assistance. The discussions and conclusions of the situations examined by the Conference Committee are published in its report. Situations of special concern are highlighted in special paragraphs of its general report.

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[95]For details, see [Online: web] Accessed 21 may 2010, URL: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CommitteeofExperts/lan.

IV.3.2. Special Procedures

Unlike the regular system of supervision, special procedures are based on the submission of a representation or a complaint.

IV.3.2.1. The Representation Procedures

The representation procedure is governed by Articles 24 and 25 of the ILO Constitution. It grants an industrial association of employers or workers, the right to present to the ILO Governing Body a representation against any Member State which in its view, "has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party." A three-member tripartite committee of the Governing Body may be set up to examine the representation and the government's response. The Report that the committee submits to the Governing Body states the legal and practical aspects of the case, examines the information submitted, and concludes with Recommendations. Where the government's response is not considered satisfactory, the Governing Body is entitled to publish the representation and the response.[96]

IV.3.2.3. The Complaints Procedure

The complaint procedure is governed by Articles 26 to 34 of the ILO Constitution. Under these provisions, a complaint may be filed against a member State for not complying with a ratified convention by another member State, which has ratified the same convention, a delegate to the International Labour Conference or the Governing Body in its own capacity. Upon receipt of a complaint, the Governing Body may form a *Commission of Inquiry*, consisting of three independent members, which is responsible for carrying out a full investigation of the complaint, ascertaining all the facts of the case and making Recommendations on measures to be taken to address the problems raised by the complaint. Commission of Inquiry is the ILO's highest-level investigative procedure, which is generally set up when a member state is accused of committing persistent and serious violations and has repeatedly refused to address

[96] Supra note 88.

them. In respect of the alleged violations of the freedom of associations, the procedure was used in the 1970s against Chile, in the 1980s against Nicaragua, and in the 1990s against Nigeria.[97]

When a country refuses to fulfil the Recommendations of a Commission of Inquiry, the Governing Body can take action under Article 33[98] of the ILO Constitution. In 1996, 25 workers delegates set the procedure in motion against Myanmar for violation of convention No.29 on forced labour. Thus in June 2000, for the first time in ILO's history, by invoking Article 33 of the Constitution, the Governing Body asked the International Labour Conference to take measures to compel Myanmar to end the use of forced labour. Article 33 was invoked for the first time in ILO history in 2000, when a complaint under Article 26 had been filed against Myanmar in 1996 for violations of the Forced Labour Convention (No. 29), 1930, and the resulting Commission of Inquiry found 'widespread and systematic use' of forced labour in the country (Hepple 2005: 50).

IV.4. The Committee on Freedom of Association

Freedom of association and collective bargaining are among the founding principles of the ILO. Soon after the adoption of Conventions Nos. 87 and 98 on freedom of association and collective bargaining, the ILO came to the conclusion that the principle of freedom of association needs a further supervisory procedure to ensure compliance with it in countries that had not ratified the relevant Conventions. As a result, in 1951 the ILO set up the Committee on Freedom of Association (CFA) for examining complaints about violations of freedom of association, whether or not the country concerned had ratified the relevant Conventions. Complaints may be brought against a member State by employer's and worker's organizations. The CFA is a Governing Body committee, and is composed of an independent chairperson and three representatives each of governments, employers, and workers. If it decides to receive the case, it establishes the facts in dialogue with the government concerned. If it finds

[97] Supra note 88.
[98] For details, see Annexure I.

association standards or principles, it issues a report through the Governing Body and makes Recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its Recommendations. In cases where the country has ratified the relevant instruments, legislative aspects of the case may be referred to the Committee of Experts. The CFA may also choose to propose a "direct contacts" mission to the government concerned to address the problem directly with government officials and the social partners through a process of dialogue. Analysing 50 years of work, the CFA has examined above 2,300 cases. More than 60 countries on five continents have acted on its Recommendations and have informed it of positive developments on freedom of association during the past 25 years.[99]

In terms of volume, the most comprehensive review of Conventions is conducted under the regular system of the supervision. The workload of the system increased with the growing number of ratifications by the Member States. As a result, the ILO's Governing Body made the decision to adopt a staggered schedule of reporting requirements on the application of Conventions. Generally, countries that have ratified a particular convention are requested to submit a report every two to five years; the reporting schedule has been adjusted several times over the years. In the case of special supervisory mechanisms, it is invoked relatively frequently. The ILO generally receives each year only a few representations on the basis of Article 24. The number of complaints under Article 26 is even smaller. The CFA, on the other hand receives numerous complaints (OECD 2000: 44-45).

IV.5. Evaluation of the Supervisory Mechanism of the ILO

In order to ensure the protection of workers, there was a proposal to create a true international legislature with the authority to promulgate rules that would automatically bind each member State. However this proposal was rejected by the founding governments, revealing their opposition to delegating substantial legislative authority to the nascent Organization. Thus, the ILO's supervisory system came out

[99] Supra note 88.

with two distinctive features to ensure the protection of workers: i.e. tripartism and reliance upon voluntary action by Member States. The tripartite membership structure of the ILO ensures that non-state actors with a direct stake in the industrial workplace are involved in creating and monitoring international labour rules. To provide a counterweight to this tripartite treaty-making structure, Member States reserved to themselves the discretion to ratify or reject any convention that the Organization adopted. Nevertheless, States were not entirely free to ignore treaties they disfavoured. Rather, the ILO Constitution required all Member States to submit the treaties to their respective political branches, which would then consider "the enactment of legislation or other action." If, however, the state ultimately refused to ratify the treaty, "no further obligation would rest upon the Member." This would lead to a situation that helps the non-ratified States to exploit its competitive position to the detriment of other Member States, which led to the race to the bottom that the ILO's founders had feared.

The ILO Office responded to this threat by adopting two procedural innovations that encouraged treaty ratifications. First, the Office acquired an informal power of interpretation, which it used to reassure States that had refrained from ratifying Conventions whose provisions were ambiguous. From 1921, the ILO Office responded to the queries raised by then and published them for the benefit of other Member States. However, the Office had no authority to interpret labour Conventions because it was the function that was entrusted to the PCIJ.[100] The result was a substantial expansion of the initial delegation to ILO officials. With this new de facto power, the Office published interpretations that removed the obstacles inhibiting ratification of ILO Conventions. ILO officials used a second procedural innovation to encourage treaty ratifications while simultaneously expanding their own authority. They collected and published information on compliance with non-ratified

[100] Article 423 of the Treaty of Versailles. For details see *Treaty of Versailles* (1919), [Online: web] Accessed 10 June 2010, URL: http://www.worldcourts.com/pcij/eng/documents/1919.06.28_versailles_treaty/1919.06.28_versailles_treaty13.htm

Conventions and nonbinding Recommendations. The Office justified this practice on functional grounds, as a way to improve the legal and technical assistance it provided to the entire ILO membership. Over time, however, this information gathering exercise blurred the distinction between ratified and non-ratified treaties (Helfer 2008: 197-198).

IV.5.1. Strengths of the ILO supervision

Foremost among the elements that give strength to the supervisory system are the legal obligations on which its structure and operation depend. The supervisory machinery scrutinizes the annual report received from Member States. After that, the machinery can send questionnaires to governments requiring them to answer the queries and comments made by the ILO's committees so that the supervisory process can proceed on the basis of up to date information. The combination of technical and political stages in the machinery of supervision is another organic source of strength of the supervisory machinery. In addition to the periodic supervision procedure involving the two committees, there also exists the possibility of representation and complaints lodged by virtue of the ILO Constitution. The final element of intrinsic strength in ILO supervision is the organic participation of non-governmental elements in the examination of reports particularly in the discussions of the conference. In addition to these positive factors, certain additional elements, which evolved over the years, have also reinforced ILO supervision. Foremost among these is the growing interdependence of two committees' i.e Committee of Experts and the Conference Committee. Uniformity of approach is another element that gradually tended to strengthen supervision. "Although neither of the Committee of Experts nor the Conference Committee has been given any powers of interpretation, the rulings which emerged from many years of supervision make up a sort of 'case law' which embodies consistent criteria applicable to all countries. This mixture of firmness and realism lead the supervisory mechanism to be more effective" (Landy 1966: 199-201).

IV.5.2. Weaknesses of ILO Supervision

One of the basic weaknesses of ILO supervision is its reliance of what has been called as 'sociological sanctions'. Another factor is that ILO supervision cannot work effectively without the collaboration of the offending State. Technical examination depends on the supply of the reports. Supervision is seriously impeded if the government concerned fails to participate in the conference. However, this case is an exceptional one. Limited use of the formal representations and complaints procedure is another drawback. The principle of tripartism, which is usually described as 'social dialogue', becomes a fiction if independent trade unions or employers organizations, at the national level are weak or non-existent (Hepple 2005: 53). Moreover, if the workers and employers minimize the importance of international standards and of their implementation, the impact of the ILO supervision will inevitably be weakened (Landy 1966: 202).

IV.6. The Follow-up to the 1998 Declaration

The 1998 Declaration states that Member States are under an obligation to observe the four fundamental standards namely- freedom of association, the elimination of forced labour, the abolition of child labour, and non-discrimination in employment. These four standards are related to eight specific Conventions adopted by the ILO. It requires Member States "to respect, to promote and to realize, in good faith the principles concerning fundamental rights".[101] The obligation to observe these fundamental rights and its related Conventions are arising from the Constitution. Thus even if a Member State has not adopted the respective conventions; they are under an obligation to observe. Regarding the implementation of the principles contained in the Declaration, it provides a follow-up to the Declaration.

In addition to its normative provisions, the Declaration creates a new monitoring procedure to review government and private-sector conduct. The ILO has given this "follow-up mechanism" a high degree of institutional support and funding (Helfer

[101] Paragraph II of the 1998 Declaration. For details, see Annexure II.

2008: 205). The Declaration and its follow-up provide three ways to help countries, employers and workers to achieve the full realization of the Declaration's objective. Firstly, there is an Annual Review composed of reports from countries that have not yet ratified one or more of the ILO Conventions that directly relate to the specific principles and rights stated in the Declaration. This reporting process provides Governments with an opportunity to state what measures they have taken towards achieving respect for the Declaration. It also gives organizations of employers and workers a chance to voice their views on progress made and actions taken. Each year the Annual report will cover the four areas of fundamental rights. Secondly, an annual Global Report provides a dynamic global picture of the current situation of the principles and rights expressed in the Declaration. The Global Report is an objective view of the global and regional trends on the issues relevant to the Declaration and serves to highlight those areas that require greater attention. It serves as a basis for determining priorities for technical cooperation. Each year the report deals with one of the four categories of fundamental principles. Technical cooperation project is the third way to give effect to the Declaration. These are designed to address identifiable needs in relation to the Declaration and to strengthen local capacities thereby translating principles into practice.[102]

IV.6.1. Advantages of the Follow-up to the 1998 Declaration

The Declaration and its follow-up are designed to promote the principles and rights it embodies and to facilitate the ratification of the fundamental Conventions through dialogue and technical assistance. The purpose of the Declaration and its follow-up is not to create a parallel set of standards; rather, it is to assist Member States to achieve full respect for the fundamental principles and rights at work, including ultimate ratification of all the fundamental Conventions. Once this is achieved, all Member States will have been brought under the regular ILO supervisory system with respect to these instruments (ILO 2009: 93).

[102]For details, see [Online: web] Accessed 15 March 2010, URL: http://www.ilo.org/Declaration/theDeclaration/lang--en/index.htm

In operational terms, the follow-up means a significant strengthening of ILO technical cooperation, pursued through various avenues, aimed at achieving greater respect for fundamental principles and rights at work. The overall aim of the follow-up is to encourage the efforts of ILO Member States to promote the fundamental principles and rights reaffirmed in the Declaration. Of a strictly promotional nature, the follow-up is to allow identification of areas in which ILO assistance through technical cooperation may help Member States to implement these principles and rights.[103] The follow-up "is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of the follow-up".[104] This provision reflects a two-fold concern: to avoid weakening the existing ILO supervisory machinery as well as possible 'double scrutiny' for Member States (Trebilcock 2001: 659).

Under the Annual Review, countries for which ratifications of any of the fundamental Conventions have not yet been registered by the Director-General are required to provide reports as requested under Article 19, Paragraph (5)(e) of the ILO Constitution. In this way, the Declaration follow-up illustrates innovative use of a previously existing obligation, i.e. for countries to report on the position of their law and practice concerning matters dealt with by a Convention they have not ratified.[105] The reports under the Declaration follow-up are to be based on forms drawn up "so as to obtain information from governments on any changes which may have taken place in their law and practice".[106] In addition, annual reports are to be provided "taking due account of Article 23 of the Constitution and established practice" (Trebilcock 2001: 659). This reference to Article 23 evokes the obligation on Member States to send copies of reports they submit to the ILO to the most representative organizations of employers and workers. The term "established practice" includes the right of employers' and workers' organizations at the national, regional or international level

[103] Paragraphs I.1 and I.2 of the Follow-up to the 1998 Declaration. For details, see Annexure II
[104] Paragraph I.2 of the Follow-up to the 1998 Declaration. *Ibid*
[105] ILO Constitution, Article 19(5) (e). For details, see Annexure I.
[106] Follow-up to the 1998 Declaration, paragraph II.B.1. For details, see Annexure II.

to make their views known about the efforts being made by Member States within the framework of the Declaration follow-up (Trebilcock 2001: 659).

Under the follow-up, the International Labour Office compiles the reports, which are reviewed by the Governing Body of the Organization. A group of experts are named by the Governing Body "with a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion."[107] Seven distinguished, independent ILO Declaration Expert-Advisers were initially appointed for a two-year period in November 1999. The Expert-Advisers functions are quite different from those of the members of the Committee of Experts on the Application of Conventions and Recommendations. The ILO Expert-Advisers have made a series of Recommendations[108] to the ILO Governing Body in relation to the Declaration and its follow-up, which it has endorsed.[109]

The Annual Review discussion in the Governing Body is to permit Members to "provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports".[110] The Annual Review covers all four categories of principles and rights at work every year. Within each category includes reports from countries that have not yet ratified all of the Conventions in that category. For example, if a member State has ratified the Equal Remuneration Convention, 1951 (No. 100), but not the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), it would

[107] Paragraph II.B.3 of the Follow-up to the 1998 Declaration.

[108] For instance, in 2005 Expert-Advisers made the following recommendation to the governing body: "The ILO should step up its help to countries to assess and monitor their progress in moving towards fuller realization of fundamental principles and rights at work. This will involve reflecting the baseline information on countries and developing the information further where required. To complement this, we recommend more in-depth case studies of selected volunteering countries to show different approaches and their impact in achieving respect, promotion and realization of fundamental principles and rights at work. This work should be carried out in close collaboration between the Office and the country in question, with the government and employers' and workers' organizations running and owning the process"(Report of the Expert-Advisers, 2005: 9)

[109] From 2000 to 2008, the compilation of annual reports was accompanied by an introduction by a group of Independent Expert–Advisers. However, the mandate of this group expired in 2008. In 2009 the compilation is presented by the Office. For details, see [Online: web] Accessed 17 June 2010, URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/relconf/documents/meetingdocument/wcms_103351.pdf

[110] Paragraph II.B.4 of the Follow-up to the 1998 Declaration

be requested to provide an annual report under the Declaration follow-up in relation to efforts made in relation to the elimination of discrimination in employment and occupation.

In contrast, the Global Report submitted by the Director-General to the International Labour Conference each year addresses only one of the four categories. The topics are dealt with in the order in which the principles and rights appear in Paragraph 2 of the Declaration. As noted in the overall purpose of the follow-up, the Global Report "will serve to obtain the best results from the procedures carried out pursuant to the Constitution". [111] According to Trebilcock, the more specific purpose of the Report is threefold:

"a) to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period";

b) to serve as a basis for: "assessing the effectiveness of the assistance provided by the Organization"; and

c)determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out" (Trebilcock 2001: 661). [112]

According to Helfer, the Declaration had expanded the powers of the ILO, which the States had previously delegated to the ILO. This power the ILO got through by augmenting the Constitutional commitments of the States and by establishing new mechanisms to scrutinize their compliance with these commitments (Helfer 2008: 207).

[111] Paragraph I.3 of the Follow-up to the 1998 Declaration. For details, see Annexure II.
[112] Paragraph III.A.1 of the Follow-up to the1998 Declaration. *Ibid*

IV.6.1.1. The Case of Myanmar

ILO's successful attempt in the case of Myanmar was one of the remarkable achievements of its procedures in ensuring a balanced implementation of its Conventions. According to Maupian, "the Myanmar case was very unusual. On the one hand, the Commission of Inquiry reached devastating conclusions about the gravity of the violations of Convention on Forced labour. On the other hand, ILO faced uncooperative and highly critical attitude of the national authorities and no sign that a change would occur. ILO was in a dilemma because it does not have power to expel or suspend a member from membership. Therefore, the Organization relied on Article 33, one that was unexplored until then, to take actions against Myanmar" (Maupian 2005: 95-97).

Background of the case

Until 1948, Burma was part of the British Empire. It was granted independence in 1948, but the military assumed power in 1962. British legislation , including the Penal Code and the Town and Villages Act (TVA) remained in force, although the Penal Code makes forced labour unlawful, the TVA allow village heads to requisition forced labour for a variety of purposes. Britain never ratified ILO Conventions 29 on Forced Labour in respect of Burma, but during a short period of civilian rule, independent Myanmar did so. From 1964 onwards, the Committee of Experts consistently pointed out that the TVA was not complying with the convention. The military junta that took over in 1988 and used forced labour on an unprecedented scale, not limited to the TVA. This led to the complaint by workers delegates to the ILO 1996, and the establishment of a Commission of Inquiry.

The government refused to accept a visit from the Commission, which revealed, on the basis of evidence from victims, 'a saga of untold misery and suffering, oppression and exploitation of large sections of the population' (Hepple 2005: 51). The government did not appeal to the ICJ against the Recommendations of the Commission of Inquiry. A resolution adopted by the ILC in 1999 imposed a ban on technical cooperation with

Myanmar and in 2000, the Governing Body placed on the agenda of the ILC the question of implementing Article 33 of the ILO Constitution. This prompted the government to accept a Technical cooperation Mission (TCM) in May 2000. In June 2000, the ILC adopted a resolution calling on ILO members and international organizations to review their relations with Myanmar to avoid abetting the practice of forced labour and contributing to the implementation of the Commission's Recommendations. In 1999 and 2000, the government adopted two orders making the requisition of forced labour illegal and subject to penal sanctions. The Governing Body decided that this was not sufficiently concrete and detailed as a response to the Commissions Recommendations and activated the International Labour Conference Resolution. After lengthy negotiations, the government accepted a far-reaching understanding under which an international High Level Team (HLT) would carry out an independent evaluation of implementation. The HLT found that the orders were not being adequately enforced, not least because of the absence of an independent judiciary and the disproportionate size of the military. In March 2002, as recommended by the HLT the government agreed to the establishment of an ILO Liaison officer in Myanmar to assist on the elimination of forced labour. In May 2003, agreement was reached on a Joint Action Plan for the Elimination of Forced Labour Practices. This includes provision for a 'facilitator', an independent person who is a Swiss national, who will receive complaints and determine whether they represent any prima facie case of forced labour. If these complaints are not settled, they will be referred to the judiciary for prosecution. The process was, however, interrupted as a result of the suppression of the democratic movement following the 'massacre' of 30 May 2003 (Hepple 2005: 51-52).

Elliott argues that enforcement of law, standards and norms either at the international or at the local level, relies on three basic tools – sunshine, carrots, and sticks. The ILO has traditionally relied on sunshine, through its elaborate supervisory mechanisms, and carrots in the form of technical assistance. Until the Burma forced-labour case, the use of sticks was limited primarily due to peer pressure. In recent years, the ILO has

moved to strengthen all three of these tools.[113] The Myanmar case is one of a kind in the history of ILO. For preventing forced labour in Myanmar, ILO stopped its technical cooperation and called upon Member States and other international organizations to contribute to the implementation of the Commission's Recommendations. Even though ILO took a long time to bring actions against Myanmar, the 'sticks' which ILO used is highly appreciable.

IV.6.2. Criticism to the Follow –Up to the 1998 Declaration

Since the Declaration expands the ILO's authority, a difficult issue to be addressed is why Member States would, once again, augment the Organization's authority to monitor its members' compliance with non-ratified treaties. Divergent opinions arose with regard to this question. For international-law optimists and ILO enthusiasts, the Declaration reflects "a moment of renewal and reaffirmation of basic Constitutional values and commitment to social justice on the basis of economic progress" (Standing 2008: 367). For skeptics and realists, The Declaration further weakened the ILO by making even CLS subject only to monitoring by means that were 'strictly promotional', that could include offers by the ILO of technical assistance to improve implementation. This is what the Employers and the US Administration had wanted. The latter hailed the Declaration as 'a big step forward' and the American Federation of Labour and Congress Industrial Organisations (AFL-CIO) President described it as 'an historic breakthrough' (Standing 2008: 367).

According to Helfer "the US backed the Declaration for two reasons: first, to highlight its domestic protection of labour rights while obscuring its failure to ratify all but a handful of ILO Conventions, and second, to legitimize its promotion of workers' rights in other countries through the imposition of unilateral trade sanctions and the inclusion of labour-protection clauses in bilateral and regional trade pacts. Worker groups, by contrast, emphasized the document's focus on membership wide

[113] Elliott, Kimberly (2000), "The ILO and Enforcement of Core Labour Standards", [Online: web] Accessed 15 Dec. 2009 URL: http://www.iie.com.

obligations and hoped that its follow-up mechanism would evolve into a more legalistic, complaints-driven process, as did the CFA before it" (Helfer 2008: 208).

The follow- up mentioned that the new mechanism "is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up".[114] Alston and Heenan are of the opinion that "there is a dual track system and the Declaration was neither to degenerate into a serious monitoring mechanism nor be infected by the ongoing activities under those other mechanisms" (Alston and Heenan 2004: 248). Instead, the follow-up is to be confined to the preparation of two annual reports. The first concerns the implementation of the CLS by those ILO Members who have not ratified one or more of the eight Conventions, which are linked to the four core standards. The outcome is an annual report, prepared under the auspices of "a group of experts appointed for this purpose by the Governing Body". However the annual report is purely descriptive and devoid of any significant interest. The reports provide very limited information. It rarely goes beyond descriptions of legislation and keeps silent about the application of the law. The result is that the utility of the report of the Expert-Advisers is greatly reduced. In providing an overview, the report is reminiscent of the worst of United Nations-style reviews of country practices (Alston 2004: 513). Moreover, the mandate given to the Expert-Advisers expired in 2008. In 2009, the Annual report was compiled by the International Labour Office. This may lead to a situation in which International Labour Office being overburdened with works. This will affect the purpose of the follow-up to the 1998 Declaration.

In addition, the ILO Director-General prepares annually a Global Report dealing with one of the four principles. Most of the observers agree that Global Reports by the Director-General are substantive. Nevertheless, it is in the form of analyses of the major issues and challenges rather than a review of the progress made by Member States. The first Global Report, released in May 2000, focused on freedom of association. The initial results from this new mechanism are mixed. While only a little

[114] Para 2 of the Follow-up to the1998 Declaration. For details, see Annexure II.

over 50 percent of the required country reports were received in time to be reviewed by the Committee of Expert-Advisers, that figure probably exaggerates the degree of wilful non compliance. The laggards, who are clearly identified in a table in the experts' introduction, are overwhelmingly countries with the fewest resources, those involved in internal conflicts, or those lacking a functioning central government. Among the reports submitted, however, the experts noted that many are inadequate to provide a baseline against which progress can be measured, as was intended, and they lamented the fact that so few employer and worker groups chose to comment on the reports. Overall, the experts' introduction to the compilation of country reports was clearly written, frank in identifying weaknesses in the reporting process, and provided useful suggestions for improving it. In future reports, however, they should go further in identifying those countries whose reports are inadequate or where particular problems are evident.[115]

While specific countries are named, the reports have been criticized for failing to distinguish between fundamental or major violations on the one hand, and more technical legal obligations on the other. Nevertheless, as the critics acknowledge, "going beyond naming countries to more clearly prioritizing violations or putting countries in categories by degree of violation is politically sensitive and unlikely to occur in the foreseeable future".[116] As for the reports submitted by governments under the follow-up mechanism and the use made of them by the ILO, it does not provide grounds for much optimism that a serious monitoring mechanism is emerging.

It is already discussed in chapter III the Declaration has influenced non-state actors. The concept of CLS was being used by the private actors through adopting voluntary codes of conduct. These decentralized private governance institutions suffer from proper implementation and monitoring procedures (Hassel 2008: 244). Many private sector initiatives have no supervision or enforcement mechanisms at all. The

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[115] *Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work - Introduction by the ILO Declaration Expert-Advisers to the Compilation of Annual Reports* (2005), GB 292/4, [Online: web] Accessed 26 May 2010, URL: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/meetingdocument/wcms_097741.pdf

[116] *Ibid*

enforcement in this area is largely limited to monitoring of standards, either internally (by the industry group or company), or by external private groups (professional auditors, NGOs, trade unions or alliances). The voluntary nature of this system greatly limits public involvement. This lack of country-based public supervision, which is the basis of enforcement of ILO standards, typifies the problems with enforcement of private sector initiatives. In short, as Chimni argues, "the enforcement of labour standards is moved from States and international organizations to market actors through the idea of CSR" (Chimni 2010: 73).

Moreover, corporate initiatives are usually designed to avoid stronger supervisory measures either under national law or pursuant to international supervisory procedures. It is not surprising that corporations prefer to adopt their own codes of conduct, or to rely on Guidelines for Multinational Enterprises adopted by the OECD, or to become a partner in the UNGC Initiative. However, in order for the latter forms of accountability to work, we must assume that consumer protests would be there and that extraordinary efforts to protect the integrity of a given brand will occur. It is claimed that even though TNCs cannot be brought under public supervision, there is an option to bring host country's government before the ILO Committee on Freedom of Association at the instigation of a trade union, or before the Committee of Experts. However, taking India as an example, most of the industrial areas are being converted into No-Trade Union zones even if they are not declared to be SEZs, are like SEZ and No-Protest Zones.[117] Thus in India, trade unions to an extent are denied of the power to give voice to the plight of workers.

[117] In India, the Central Government has enacted the Special Economic Zone Act in the year 2005. Speaking about the labour law in this zone, apparently there is no difference between the laws prevailing inside and outside the Zones. However, by a close scrutiny it becomes evident that within SEZs labour is subject to a new and modified regime aimed at non-implementation of any labour law. The report of a survey performed by The International Trade Union Confederation (ITUC) states that trade unionists are not able to enter the EPZs/SEZs in India because entry in to the zones is restricted to the workers who are transported in by their employers, making it is very hard to organise workers and rendering union activity virtually non existent. The survey proceeds to note that the bulk of the employment in these zones is confined to young women who are too frightened to form unions. These women are subjected to bad working conditions and compulsory overtime. It is also reported that workers face the constant threat of immediate sacking if they make demands to implement labour laws. Studying firms in Cochin Special Economic Zone and NOIDA yet other studies repeat precisely these

ILO's focus on promotional nature of principles is reflected in its future instruments also. One of the main instruments in this regard is the 2008 Declaration. The 2008 Declaration also emphasizes certain promotional techniques to achieve its objectives. The 2008 Declaration includes a follow-up mechanism to ensure the means by which the Organization will assist the Members in their efforts to promote the Decent Work Agenda, including a review of the ILO's institutional practices and governance; regular discussion by the International Labour Conference responding to realities and needs in Member States and assessing the results of ILO activities; voluntary country reviews, technical assistance and advisory services; and strengthening research capacities, information collection and sharing. In 2010 CEACR published its first General Survey linked to the follow-up of the 2008 Declaration. The promotion of employment, which is the first of the four strategic objectives in the 2008 Declaration, is the theme of the General Survey. In 2010, the general survey dealt with employment instruments.[118]

IV.7. Indian Scenario

The enforcement of labour standards is better understood by studying country specific situation. The changes that have been brought by globalisation in general and the 1998 Declaration in particular can be easily perceived. India is one among those countries whose labour laws were well appreciated. However, with the advent of globalisation, India took an inclination towards neoliberal policies and the country opened up its markets thus becoming one of the favourite sites of MNCs.

IV.7.1 India and the ILO

India is one of the founding members of ILO. The approach of India with regard to International Labour Standards has always been positive. In India, the ILO instruments have provided guidelines and useful framework for the evolution of legislative and

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patterns and findings – no unions, poor working conditions, a largely female work force and threats of being sacked if moves are made to demand the implementation of labour laws (Singh, Jaivir 2009: 13).

[118]For details, see [Online: web] Accessed 12 March 2010, URL: http://www.ilo.org/global/What_we_do/InternationalLabourStandards/WhatsNew/lang--en/docName--WCMS_125008/index.htm

administrative measures for the protection and advancement of the interest of labour. India used the ILO Conventions as a standard for reference for labour legislation and practices rather than as a legally binding norm. It had ratified Conventions only after making its laws and practices in conformity with the Conventions. The country relied on the progressive implementation of the standards, leaving the formal ratification for consideration at a later stage when it became practicable. The country has so far ratified 39 Conventions of the ILO, which is much better than the position in many other countries. Even when India may not be in a position to ratify a Convention, it has generally voted in favour of the Conventions reserving its position as far as its future ratification is concerned.[119]

IV.7.2. Labour Laws in India

Tracing back the history of Indian labour law in brief, labour laws in India springs from the random mixture of statutes and judicial decisions. The earliest statutes such as the Workmen's Breach of Contract Act,1859, the Employers and Workmen's (Disputes)Act, 1860, and certain provision of the Indian Penal Code 1860 hardly protects the interest of workers. The position has changed since 1919, when two major developments took place, namely (i) the Enactment of Government of India Act 1935 and (ii) the establishment of ILO, in which India was one of the founding members. A number of legislations were enacted in line with the Conventions and Recommendations adopted by the ILO. In 1936 Trade Union Act was passed. In 1929, the Trade Disputes Act was enacted. This Act was amended in 1938. Later this Act was incorporated in the Industrial Disputes Act, 1947. A year prior to the adoption of the Industrial Disputes Act, the Industrial Employment Act, 1946 was enacted. The three enactments namely, the Trade Unions Act, 1926, Industrial Employment (Standing Orders) Act, 1946, and Industrial Disputes Act, 1947 govern the labour law and relations with employers and government in India (ILI 2007: 1-2).

[119]Ministry of Labour and Employment, Government of India, "India and the ILO", [Online: web] Accessed 19 April 2010, URL: http://labour.nic.in/ilas/indiaandilo.htm

IV.7.3. Constitutional Framework

The growth of labour law and industrial jurisprudence in India subsequent to 1950 bear close resemblance to the growth of Constitutional law. The Constitution of India through its directive principles of state policy and fundamental rights provide safeguards to protect the interest of weaker and disadvantaged class of labour. Apart from this, the Supreme Court in the process of judicial interpretation has played a creative role in protecting the interest of bonded labour, child labour, contract labour, women workers. The court has elaborated the notion of social justice and sought to ensure just and humane conditions of work (ILI 2007: 3).

Fundamental Rights Guaranteed in Part III of the Constitution

The whole object of Part III is to provide the protection for the freedom and rights mentioned therein against the arbitrary action against the state. Thus any law including labour legislation contravening any fundamental right is void. Any citizen affected by such a law has a right of access to the Supreme Court or High Courts under Article 32 and 226 respectively, to enforce fundamental rights by issuing writs or suitable orders or directions. The fundamental rights likely to affect labour legislations are Article 14, Article 16, Article 19, Article 21, Article 23 and Article 24. Article 14 of the Constitution says that "state shall not deny to any person equality before law or the equal protection of the laws within the territory of India". Article 16 guarantees equality of opportunity in matters of public employment. Further, Article 19 guarantees the rights to freedom of speech and expression, to assemble peacefully without arms, to form association or unions, to practice any profession, or to carry on any occupational trade or business. However, these freedoms are subject to certain limitations. Article 21 speaks about right to life, Article 23 prohibits traffic in human beings and beggar, and Article 24 prohibits child labour.[120] These constitutional guarantees have a great practical significance in the field of labour management relations (ILI 2007; Srivastava 2007: 33-34, 13-14).

[120] For details, see *Constitution of India* (1950), [Online: web] Accessed 22 May 2010, URL: http://india.gov.in/govt/documents/english/coi_part_full.pdf.

Directive Principles of State Policy and Welfare Provisions

The Directive principles the state has been directed to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which justice which is social, economic and political shall conform all institutions of national life.[121] Further the state has been directed to strive to secure, an adequate means of livelihood; the proper distribution o f ownership and control of the material resources of the community so that it may sub-serve the common need; the prevention of the concentration of wealth and means of production; equal pay for equal work for men and women; the health and strength of workers; right to work, to education, and to public assistance in cases of undeserved wants; just and humane conditions of work and for maternity relief; living wage and decent standard of life of labourers; the participation of workers in the management of undertakings or industrial establishments by suitable legislation or otherwise and higher level of nutrition and standard of living and improving public health.[122] These socio-economic objectives of the national policy are to be realized by legislations. These are the directives to the legislature and executive organs of the state that are committed to make, interpret and enforce law (Srivastava 2007: 12-13).

Premised in the framework of the directive principles labour laws can be classified into labour relations; wages; social security; and conditions of work.[123] India is being viewed as a society where labour is over protected through law. However, the cases of labour violations are many (Sreeramalu 2002: 8).

IV.7.4. India and Globalization

After independence, Indian economic regime has experienced two radical transformations. First, with the establishment of the Planning Commission in 1950, India launched a unique experiment in state-led growth with social justice within its

[121] Article 38 o f the Indian Constitution. Supra note 120.
[122] *Ibid*
[123] A recent study by the Federation of Indian Chambers of Commerce and Industry and All India Organisation of Employers points out that there are more than 55 central labour laws and over 100 state labour laws.

Constitutional framework. However, this policy matrix came under significant pressure in the 1980s, which culminated in the balance of payment crisis in 1990-91. The Indian government responded to the crisis by adopting a policy regime grounded in a reform trinity popularly referred to as 'Liberalization, Privatization, and Globalization (LPG). These three necessitated policy reforms in central and state governments (Singh 2009: 72). In 1991, New Industrial Economic Policy (NEP) was adopted by the Indian parliament. It was the response of India's coping up to the globalization process. Under this policy, globalization was expected to promote foreign investments, enable the use of advanced country's technology, help increase exports, hasten the diffusion of knowledge and reduce the costs of transport and communication. Thus Indian economy was opened to foreign investments, removed obstacles to the entry of MNC's, allowed Indian companies to enter into foreign collaborations, began an import liberalization programme and permitted the free flow of capital, technology, goods and services (Singh. 2009: 73). It is argued that the NEP was the product of conditionalities imposed by the IMF and World Bank. The greater role given to the private sector resulted in the privatization of many sectors.

IV.7.5. Globalization and Labour law Regime

After the announcement of NEP, the Government of India has been proposing changes in labour laws. The common presumption is that the existing laws are blocking the employer restricting his choice in employing (Sreeramalu 2002: 8). This was confirmed by various forums including the World Bank 2008 report and 2007 OECD Economic Survey and according to a 2008 World Bank Report, "India's labour regulations - among the most restrictive and complex in the world - have constrained the growth of the formal manufacturing sector where these laws have their widest application. Better designed labour regulations can attract more labour- intensive investment and create jobs for India's unemployed millions and those trapped in poor quality jobs. Given the country's momentum of growth, the window of opportunity

must not be lost for improving the job prospects for the 80 million new entrants who are expected to join the work force over the next decade".[124]

In 2007, OECD conducted an economic survey of India. This study states that "in labour markets, employment growth has been concentrated in firms that operate in sectors not covered by India's highly restrictive labour laws. In the formal sector, where these labour laws apply, employment has been falling and firms are becoming more capital intensive despite abundant low-cost labour". The study founds that for reaching GDP growth of 10% in 2011 which government of India is targeting; reforms are needed in this area. India's labour market stands as a barrier to growth, where reform is needed both at the central and state levels. However the Special Economic Zones in India aim to reduce a number of these barriers (OECD 2007: 2, 5).

The pro-worker developments that happened since independence are now identified as areas of rigidity and in the name of flexibility there is pressure on the government of India to repeal or amend all such laws. Interestingly, if such a proposal is fully implemented, labour law, especially for the organised sector, will go back to the colonial framework where state intervention was meant primarily to discipline labour, not to give it protection.[125] The three main labour laws that are said to need immediate reform are Industrial Disputes Act (1947), the Contract Labour Act (1970) and the Trade Union Act (1926).

Recommendations by the Government

The government had come up with certain Recommendations to reform labour laws, first in 2001 in its Report on Task Force on Employment Opportunities, by the Planning Commission of India and again in 2002 when the Second National Commission on Labour (SNCL) came up with its Recommendations. The task force points out the various problem areas in the labour legislation where immediate reforms are needed. It focuses on the three main Acts and their features and suggests changes.

[124] World Bank (2008), "India Country Overview", [Online: web] Accessed 10 March 2010, URL: http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0
[125] Sharma, Parul (2007), "Split Legal Regime in India's Labour Laws", [Online: web] Accessed 16 Feb. 2010, URL: http://www.southasiaexperts.se/pdf/Indian%20Labour%20Law%20PDF.pdf

Other than Chapter V-B in the Industrial Disputes Act which is a major cause of concern, another area it emphasizes was Section 9A which concerns the job content and the area and nature of work of an employee. It states that in case the job content or the nature of work is to be changed of an employee or group of employees, a 21-day notice has to be given to the employee and in practice require the consent of the employee.

> "This proves to be a serious impediment in case of a firm trying to introduce a new technology where some workers need to be retrenched. If the employers want to redeploy the workers, it becomes virtually impossible if the employee or employees do not give their consent. Had the process of retrenchment been easier to be implemented, the workers would have been willing to accept redeployment in order to avoid retrenchment. Apart from retrenchment the task force also points out another problem of dismissal of any worker. It says that though in case of dismissal no prior government approval is needed, yet in practice it is difficult because of unions, which lead to protracted litigation. It mentions that this inflexibility proves to be severe for smaller establishments that are more labour intensive and other establishments with large number of workers because the transactions cost involved in such cases are too high".[126]

IV.7.6. Indian Courts and Labour Laws

The Indian courts have been for long appreciated for their pro labour approach. In various cases, the Supreme Court and various High Courts of India have delivered judgements that brought relief/remedy to the working class. However, in recent years, the approach of the courts has changed and they have accepted the justification for institutionalising a flexible labour law regime. In this section, some of the notable decisions rendered by various courts in India, before and after the emergence of globalisation are analysed to understand the changes in the approach of the courts towards the working class.

The pro-labour approach of the court could be inferred from the judgement delivered by the Supreme Court of India in *People's Union for Democratic Rights* v. *Union of India.*[127] This judgement made a distinct contribution to labour law. The judgement showed the creative attitude of judges to protect the interests of weaker

[126] Datta, R. C. and Milly, Sil (2007), "Contemporary Issues on Labour Law Reform in India: An Overview", [Online: web] Accessed 21 Feb. 2010 URL: http://sites.google.com/site/atlmri/RCD_MILI.pdf?attredirects.
[127] (1982) 3 SCC 235.

sections/working class of the society. The first petitioner in this case wrote a letter to Justice Bhagwati complaining of violation of various labour laws by the respondent's and/or their agents in various Asiad Projects. The letter sought the interference by the Supreme Court to render social justice by means of appropriate directions to the affected workers. The Supreme Court treated the letter as a writ petition on the judicial side and issued notice to the Union of India, Delhi Administration and the Delhi Development Authority.

The letter informed the court that the workmen were denied protections guaranteed under the Minimum Wages Act, 1948; Equal Remuneration Act, 976; Article 24 of the Constitution of India; Employment and Children Act, 1938; and Contract Labour and (Regulation of Employment and Conditions of Service) Act, 1979. While delivering judgment in favour of the working class, Justice P N Bhagwati observed:

> "Large numbers of men, women and children who constitute the bulk of an population are today living a sub human existence in conditions of object poverty; utter grinding poverty bas broken their back and sapped their moral fibre. They have no faith in the existing social and economic system. Nor can these poor and deprived sections of humanity afford to enforce their civil and political rights. The only solution of making civil and political rights meaningful to these large sections of society would be to remake the material conditions and restructure the social and economic order so that they may be able to realise the economic, social and cultural rights."[128]

The judgment identified the importance of economic, social and cultural rights and their role in removal of poverty in the society.

The law that governs the employer-employee relationship could be found primarily in service rules and regulations, standing orders or contract of employment. The service rules and regulations empowers the employer to terminate the service of the employee by giving three months notice on either side by making payment in lieu of notice, without assigning a reason and without providing any hearing opportunity to the employee before passing the order or termination of service (Srivastava 2007: 24). The validity of these rules and regulations were challenged in number of cases before the Supreme Court. The Supreme Court in *West Bengal State Electricity Board & others*

[128] *Ibid*

v. *Desh Bandhu Ghosh & Others*[129] held that any provision in the regulation enabling the management to terminate the services of a permanent employee by giving three months notice or pay in lieu thereof, would be considered as violative of Article 14 of the Constitution of India. Such a regulation was held to be capable of vicious discrimination and was held to be naked 'fire and hire' rule. This rule was reiterated by the Supreme Court in *Central Inland Water Transport Corporation Ltd. & others* v. *Brojo Nath Ganguly*[130]. During this period, most of the service cases were decided by the court by applying the principles of natural justice (*audi alterm partem*). However, the Court started showing an inclination towards liberalisation policies after the emergence of globalisation. The court began to deviate from the application of principles of natural justice. This trend is evident from the following cases. In *Syndicate Bank* v. *General Secretary, Syndicate Staff Association & Another*[131] and *Aligarh Muslim University & others* v. *Mansoor Ali Khan,*[132] wherein the Supreme Court of India held that undue reliance on the principles of natural justice lead to injustice. The court added that the principles of natural justice and duty to act in a just, fair and reasonable manner have to be read in certified standing order or statutory rules. The court in the latter case also held that mere violation of principles of natural justice does not entitle any relief to the affected party unless the affected party satisfies the court that non-observance thereof has prejudiced his cause (Srivastava 2007: 27-28).

Since 1990s, successive governments of India have adopted disinvestment policies to disinvest various public sector undertakings. The governments were more concerned about the benefits that can be accrued from these disinvestments. The effect of these policies on the rights of the workers was a neglected subject. For instance, government's decision to privatise M/s. Bharat Aluminium Company Limited (BALCO), a public sector undertaking was challenged in *BALCO Employee's Union*

[129] AIR 1985 SC 722.
[130] AIR 1986 SC 1571.
[131] (2000) 5 SCC 65.
[132] (2000)7 SCC 529.

(Regd.) v. *Union of India & Others.*[133] The primary issue in the case was the validity of the decision of the Union of India to disinvest and transfer 51% shares of BALCO. The BALCO Employees & Union challenged the decision of the Government. The case was first filed before the Delhi High Court. Upon a transfer petition filed by the Union of India before the Supreme Court, the case was transferred to the said court. The senior counsel representing the BALCO Employees & Union submitted that,

> "The workmen have been adversely affected by the decision of the Government of India to disinvest 51% of the shares in BALCO in favour of a private party. He contended that before disinvestment, the entire paid-up capital of BALCO was owned and controlled by the Government of India and its administrative control co-vested in the Ministry of Mines. BALCO was, therefore, a State within the meaning of Article 12 of the Constitution. He also contended that by reason of disinvestment the workmen have lost their rights and protection under Articles 14 and 16 of the Constitution. This is an adverse civil consequence and, therefore, they had a right to be heard before and during the process of disinvestment. Referring to the averment of the Union of India to the effect that interest of the employees has been protected; the learned senior counsel submitted that in fact there was no effective protection of the workmen's interest in the process of disinvestment."[134]

The Supreme Court held that it could not consider the relative merits of economic policies decided by government. While delivering this judgement the court cited several precedents. For instance, in *Premium Granites* v. *State of T.N.* [135] it was observed that, "it is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be". Thus, the court made it clear that it cannot adjudicate upon the question whether a particular public policy is wise or whether better public policy can be evolved. The court showed its reluctance to interfere in the economic policies framed by the government thereby supporting the privatization of public sector undertakings.

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[133] 2001 Indlaw SC 20366. The case was decided by the Bench comprising Justice B. N. Kirpal, Justice P. Venkatarama Reddi & Justice Shivaraj V. Patil. The judgment was delivered in 10- 12-2001.
[134] The learned senior counsel cited the following decisions: *Ajay Hasia* v. *Khalid Mujib Sehravardi*,1980 Indlaw SC 244; *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, AIR 1986 SC 1571.
[135] 1994 Indlaw SC 1453

The inclination towards the 1998 Declaration or civil and political rights can be inferred from the following observation made by the court. The court upheld the collective bargaining rights of the BALCO employees by observing that "the BALCO management will be required to enter into bipartite/tripartite agreements with the workmen through unions, and, the terms and conditions in the agreement would be always governed by the practices and procedures applicable under collective bargaining."[136] Regarding the social security measures that have to be extended to the employees the court said that,

> "Providing social security to the BALCO employees at par with government employees, it is to be noted that as a matter of principle, no industrial establishment has any right to be compared with a government establishment. Hence the issue of guaranteeing the social security to the BALCO employees at par with the employees of the Government establishments may not be possible any time before or after the disinvestment."[137]

These observations made by the court clearly show its leniency towards accruing civil and political rights to the working class rather than economic and social rights. This trend of the Supreme Court is contrary to the findings that were made by Honourable Justice P N Bhagwati in the *Asiad* case.

IV.7.7. India and the 1998 Declaration

India has ratified only two standards out of the four CLS. The ratified Conventions include the Conventions relating to the elimination of forced labour[138] and the elimination of discrimination in respect of employment and occupation.[139] India had not ratified the Conventions relating to the freedom of association and collective bargaining (Conventions no. 87 and 98) and the abolition of child labour.[140] The requirement of furnishing details for Annual Reviews began in the year 2000, and

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[136] 2001 Indlaw SC 20366
[137] *Ibid*
[138] Forced Labour Convention, 1930 (Convention no. 29), which was ratified in the year 1954 and Forced Labour Convention, 1957 (Conventions no.105), which was ratified in the year 2000.
[139] Equal Remuneration Convention, 1951 (Convention no. 100), which was ratified in the year 1958 and Discrimination (Employment and Occupation) Convention, 1958 (Convention no. 111), which was ratified in the year 1960.
[140] India has ratified neither the Minimum Age Convention, 1973 (No.138) (C.138), nor the Worst Forms of Child Labour Convention, 1999 (No.182) (C.182).

since then India has been regularly submitting its reviews. Until 2007, it is ironic that the reviews were submitted without any change.[141]

Freedom of Association and Collective Bargaining

The Government of India in the 2008 Annual Review observed that India would ratify the ILO Conventions only when the national legislations and practices have achieved full compliance with the provisions of the international standards. At the current stage, the ratification of C.87 and C.98 is not possible. In addition to this, the Government indicated that ratification of these Conventions would involve granting certain rights that are prohibited under the statutory rules for government employees, namely the right to conduct strike and criticize openly the government policies, the right to accept freely financial contribution, and the right to join freely foreign organizations, etc.

There are so far no direct enactments that address freedom of association and collective bargaining, however, the following enactments indirectly refer to these two rights which include Article 19(5) of the Constitution of India; the Trade Unions Act, 1926 (which allows industrial workers to form trade unions). Also the Industrial Disputes Act, 1947; and the Trade Unions Act, 2002[142] recognizes agreements between employers and workers. However, it is admitted that in order to establish a worker's organisation or to conclude collective agreements the authorization of government is not required. Freedom of association and the right to collective bargaining can be exercised at enterprise, sector/industry, national and international levels by the following categories of persons, namely, medical professionals; teachers; agricultural workers; workers engaged in domestic work; workers in Export Processing Zones (EPZs) or enterprises/industries with EPZ status; migrant workers; workers of all ages; and workers in the informal economy. However, persons employed in the armed forces, paramilitary forces, police service and prison, cannot

[141] *Country Baselines under The 1998 ILO Declaration Annual Review: India* (2000-2008), [Online: web] Accessed 21 June. 2010 URL http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_facb_ind.pdf

[142] The Trade Unions Act was amended in 2002 to authorize a trade union to register only if there is a minimum of 100 members or 10 per cent of the workforce, subject to a minimum of 7 workers members, whichever is less, per establishment or industry. Supra note 131.

exercise this principle and right. Nonetheless, there is as yet no central law that enables trade unions a regular recognition, but many state governments have enacted such laws, in the context of the multiplicity of trade unions or for the purpose of facilitating collective bargaining.[143]

The government has taken the following measures to implement or to promote the rights: (i) legal reform, (ii) inspection/monitoring mechanisms, (iii) penal sanctions, (iv) civil or administrative sanctions and (v) special institutional machinery. Moreover the government also took effort to promote: (i) capacity-building of responsible government officials (ii) capacity-building for employers' and workers' organizations and (iii) to educate and motivate employers and workers to have a collective approach to dispute settlements and differences.[144]

Even though the government had made efforts to promote freedom of association and collective bargaining, there are several challenges to enforce it. According to the worker's organizations, the main difficulty lies in the informal economy and poverty is still the prevalent in India. The barriers to the organizing of trade unions continued in law and practice, and the government maintained strong restrictions on the right to conduct strike in 2006.[145] The government remains committed to a policy of creating greater flexibility in labour law, which would be detrimental to workers and their trade unions. In the absence of a statutory right to collective bargaining, employers are reluctant to negotiate with the unions of the workers' choice. Many restrictions on the exercise of this right are imposed in the public service sector, like the construction and ship breaking industries and EPZs.[146]

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[143] Supra note 141.
[144] Supra note141.
[145] For instance, the Trade Union Act does not apply in Sikkim where workers do not enjoy trade union rights; the Delhi State has exempted EPZs from most labour legislation and there is a ban on the formation of trade unions; employers have a hostile attitude towards trade unions, which discourages workers from organizing. *Ibid.*
[146] Supra note 141.

Abolition of Child Labour

From the government's viewpoint, "the state is firmly committed to the elimination of all forms of child labour and particularly the worst forms of child labour. The matter of ratification of C. 182 will be considered once the national laws are in conformity with the requirements of the Conventions. As far as Convention No. 138 is concerned the Government states that its ratification will be considered after enactment of central legislation for fixing the minimum age for admission to employment."[147]

Basic legal provisions that governs the abolition of child labour include (i) the Constitution of India (Articles 21, 24, 39, 45 and 51); (ii) the Child Labour (Prohibition and Regulation) Act, 1986; (iii) the Factories Act 1948; (iv) the Mines Act; (v) the Motor Transport Worker's Act; (vi) the Immoral Trafficking Prevention Act (ITPA) 1956; (vii) the Indian Penal Code (IPC); (viii) Act No. 45 of 1860; (ix) the Code of Criminal Procedure, 1883; (x) the Evidence Act, 1872; (xi) the Juvenile Justice Act (JJA), 2000; and (xii) the Indian Information Technology Act 2000.

In India, worst forms of child labour are believed to exist for both boys and girls in the following ways: (i) sale and/or trafficking; (ii) debt bondage, serfdom, (iii) forced or compulsory labour; (iv) prostitution; and (v) pornography. To tackle this problem, the Government of India has taken special efforts to combat the trafficking of women and children. These include measures like (i) drawing up of a National Plan of Action (1998) and constitution of a National and State Advisory Committees to combat trafficking; (ii) review of the legal framework; (iii) awareness raising of government departments, police and civil society; (iv) assistance schemes to NGOs to work in areas of origin and destination; (v) enhanced rescue operations since 2001; and (vi) signing of the SAARC Convention against trafficking for prostitution.

However, the major obstacle in enforcing the abolition of child labour is poverty. The other challenge is the inadequacy in the existing laws to address the problem of child labour in the agricultural sector and the informal economy.

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[147]Supra note 141.

From the above inferences, it can be deciphered that India is reluctant to ratify Conventions relating to freedom of association, collective bargaining and abolition of child labour. The government is of the view that the country would ratify the ILO Conventions only when the national legislations and practices have achieved full compliance with the provisions of the international standards. However, from the workers' perspective, it can be said that the Government of India is adopting flexible labour policies that may be detrimental to workers' rights.

IV.8. Conclusion

The procedure of ILO's supervisory mechanism is highly complex and extensive. The regular procedures done by the CEACR and CCAS include the examination of the reports sent by the Member States regarding the application of the Conventions and Recommendations. They also examine the observations sent by workers' organizations and employers' organizations in this regard. The CCAS, which is of tripartite structure, ensures that the voice of the workers and employers organization is properly considered. However, it is to be noted that the supervisory machinery of the ILO is contaminated by the weakness and genuine independence of the national organizations.

With the adoption of the 1998 Declaration and its follow-up, the focus of the ILO shifted from the traditional broad area of ILO standards to a set of four CLS. The follow-up to the Declaration is strictly promotional in nature. The criticism over ILO was that it lacks strict enforcement machinery, the follow-up to the Declaration adds up to that criticism. Moreover, the soft law regime that is generating parallel obligations is devoid of an effective enforcement mechanism. The major players in the global economy are the TNCs rather than the States. The ILO's enforcement mechanism failed to address the activities of TNCs effectively. The Myanmar experience appeared that ILO has moved forward from its so called 'social sanctions' to the use of 'sticks' to bring actions against the violators but it is not expected that ILO would take similar steps in the case of countries who are "powerful" and who are the violators of CLS.

In the case of India, labour law regime in India upholds social welfare measures. The Constitution of India in its fundamental rights and Directive Principles of State Policy, guarantees negative and positive rights. With the emergence of globalisation, India adopted liberalization policies in the form of NEP. By NEP India opened up the market for foreign investors. The labour laws in India were criticized by these investors as inflexible. There was a move to adopt amendment to the existing labour laws. In the case of SEZ the government was successful in adopting flexible labour law. The courts in India were once appreciated for its pro labour attitude. However, after globalisation the courts also began to respond in a positive manner. This led to a situation where courts showed reluctancy to apply natural justice principles while deciding service cases. Moreover the Indian judiciary stood away from deciding the viability of economic policies of the state which promoted privatisation. The judiciary also showed an interest in civil and political rights of the workers rather than promoting their economic and social rights. With respect to the 1998 Declaration, India ratified four Conventions which are related to two standards of CLS. India is reluctant to adopt the Conventions regarding freedom of association and collective bargaining and abolition of child labour.

CHAPTER V

CONCLUSION

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The ILO was established primarily as a response to the Russian Revolution and the socialist ideals it put forward. Two other factors that led to the establishment of the ILO were humanitarian and economic. The significance of these economic and humanitarian factors can be seen in its standard setting arrangements. Firstly, the Organization started to adopt Conventions and Recommendations that addressed several issues such as an eight-hour day and forty-eight hour week in industry, night work by women and young persons, and the minimum age for industrial employment. These needed immediate action. Secondly, labour standards were used to ensure fair competition between countries and employers. Thirdly, the Organisation acted as an important source of guidance to governments in framing social policies, thereby advocated social and economic development of member countries. The Conventions and Recommendations formed a common standard to be observed by all member countries. This common standard helped the ILO's member countries to carry out fair competition. However, it should be noted that during the early years of ILO, competition was among the industrialised countries producing industrial goods and services and not between industrialized and underdeveloped countries.

The economic crisis of 1930s brought a realization among industrialised States that the *laissez faire* principle would no longer work. Thus, the States inclined towards Keynesian theory, which called for government intervention in economy through public policies. After the Second World War, there was a wilful attempt on the part of States to reform capitalism. This need to reform capitalism can be seen at the institutional level also. In the ILO regime, an important change occurred with the adoption of the 1944 Declaration of Philadelphia, which broadened the area of ILO's standard setting arrangements. Thus, ILO addressed economic issues especially fair competition, labour issues, and human rights issues. In 1948, the UDHR was adopted by the Member States of the UN. The UDHR speaks about the indivisibility and inalienability of human rights. Most of the labour rights are covered by the UDHR.

ILO through its instruments also started to address human rights in the form of safeguarding values of freedom, equality and dignity. Thus, the indivisibility and inalienability addressed by UDHR found its expression in ILO's standard setting practices. In 1969, ILO launched its WEP mainly to eradicate poverty and to generate employment, which was greatly appreciated. In same year, the ILO won the Nobel Peace Prize for its valuable commitment to social justice. This period is viewed as the 'golden age' of the Organization. ILO thus emerged as an all-purpose Organization. However, the golden period came to end with the first oil shock.

After the oil shock in 1973, the world witnessed high inflation, unemployment and weak economic growth. Many States responded to this shock by adopting neoliberal policies. Neoliberalism advocated free market and free trade policies. During this period, ILO faced many challenges. The US withdrawal from ILO made it to face serious financial consequences. The Cold War also affected the ILO. After the collapse of the Soviet Union, the ideological divisions between communist and capitalist States that existed in the ILO came to an end. The ILO started to act in conformity with the neoliberal policies. It should be noted that with the changing pattern of the ideology of its influential members, the ILO also changed its policies. The year 1989 witnessed the acceleration of globalization process with powerful States and MNCs playing a major role. These major players influenced almost all the international institutions to enlarge their neoliberal ideology. ILO was not an exception. A change in the focus of its standard setting arrangements began with the 1994 Director-General Report, which emphasized that certain rights should be treated as core rights. This will lead to a situation that the other rights might be marginalised. Later the 1995 World Social Summit also addressed the same issue that underlined the importance of core rights. After that, 1996 Singapore Ministerial Conference highlighted the importance of core labour standards. Later on, a study conducted by OECD also came out with the importance of core rights. After that in 1997, the Director-General of the ILO brought forth a report that laid down the importance of core rights in a new globalised economy.

The year 1998 saw the 'Declaration on Fundamental Principles and Rights at Work'. This Declaration identified four rights as core rights or CLS, which are related to eight ILO Conventions. The Declaration obligates member countries to observe CLS regardless of their ratification. The supporting argument is that these standards are rather easy to apply, as these incur no cost. This move to CLS was a blow to the traditional ILO standard setting system. CLS differentiated rights as core and non-core rights. Thereby, it sidelined the standards that had been adopted by the ILO since its creation. The nature of CLS shows that these are civil and political rights, which can be used against the arbitrary action against the state. However, these could not be effectively used against the arbitrary action of MNCs, who are the major controllers of the world economy. MNCs are major employment providers have mainly relied on CLS to legitimize their conduct. In order to show compliance MNCs adopted voluntary codes of conduct. But, behind the code of conduct veil, they continue to violate labour rights. Some MNCs have thus been reluctant to adopt provision for freedom of association, whereas some failed to ensure health and safety of workers.

In addition to this, IIs also started to respond to the conduct of MNCs by adopting soft instruments in the form of OECD Guidelines, ILO's Tripartite Declaration and UNGC. Some of these instruments made CLS as the bottom line thereby ensuring that MNCs need not look into other 'positive rights'. The IFIs especially IMF made the observance of CLS as a conditionality. It should be noted that before 1998, IMF was the institution, which showed reluctance to address labour rights issues. The same was in the case of World Bank. However, after 1998, World Bank started to observe CLS. This is because CLS are rights that can easily be observed. On the other hand there are no hard laws which will make MNCs answerable to the violations of labour rights.

The absence of reference to positive rights is a serious challenge to the human rights notion of the indivisibility and inalienability of rights. CLS has created a climate that made all the actors to observe only those standards which falls under CLS. The social and economic rights of labourers are becoming a marginal issue. The corporate world is increasing profits at the expense of the working class. For facilitating MNCs

activities, States and IIs are making all the arrangements, which is favourable to those actors.

Regarding the enforcement of CLS, the Declaration provided a follow-up, which is of strictly promotional nature. The follow-up speaks about Annual Review of the improvements achieved by the member countries with respect to the non-ratified conventions related to CLS. This mechanism is only a replica of the existing supervisory mechanism, which is provided under Article 19(5e) of the ILO Constitution. Thus, the follow-up demands the supervision of CLS within the purview of same provision. Even though the follow-up says that it does not replace the existing supervisory mechanism, there is a chance that it will eventually eclipse the existing supervisory mechanisms of ILO. The Global Report provision under the follow-up mechanism obligates the Director-General to come out with a report dealing each standard in a year. Thus to have a report on a particular standard, four years of waiting is necessary. Moreover, the Annual Review of non-ratified conventions shows that States are facing several difficulties to apply the standard set out by the Declaration. Some of the difficulties faced by these countries include lack of public awareness and support, lack of information and data, social values and cultural traditions, economic, political and legal situations in these countries.

The changes that have been brought by globalization in the labour law regime can be better understood with the help of country specific situations. For instance, in India the labour laws are well appreciated for its protection of labour rights. However with the advent of globalization, the state is instituting a flexible labour regime. To attract more foreign investments the state has also enacted the Special Economic Zone Act, 2005. The concept of SEZ has been highly criticized for curtailing the protective labour legislations. Rapid changes are occurring at the policy level and the courts in India are reluctant to handle these economic policies which have an adverse impact on the rights of the workers.

Thus, the 1998 Declaration brought two diverging opinions. Even though the supporters to the Declaration claims that CLS are means to achieve economic and

social rights. However, the views of the sceptics are found to be more acceptable than the supporters' views. Because the implications of the 1998 Declaration is that CLS will marginalise the economic and social rights of the working class.

From this study, certain recommendations can be derived. Some of the recommendations include (1) CLS should be expanded to include some of the basic social and economic rights; (2) The 1998 Declaration should also address the role of non-state actors who are the major users of CLS; (3) In the case of violation of 'expanded CLS', sanctions should be effectively enforced. Like Myanmar, there are several countries, which persistently violate labour rights including powerful States. Sanctions can be in the form of naming and shaming of countries.

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ANNEXURES

ANNEXURE- I

THE CONSTITUTION OF ILO, 1919

REFERRED PROVISIONS

Preamble

Whereas universal and lasting peace can be established only if it is based upon social justice;

And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;

Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;

The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization:

Article 1

1. A permanent organization is hereby established for the promotion of the objects set forth in the Preamble to this Constitution and in the Declaration concerning the aims and purposes of the International Labour Organization adopted at Philadelphia on 10 May 1944 the text of which is annexed to this Constitution.

2. The Members of the International Labour Organization shall be the States which were Members of the Organization on 1 November 1945 and such other States as may become Members in pursuance of the provisions of paragraphs 3 and 4 of this article.

3. Any original member of the United Nations and any State admitted to membership of the united nations by a decision of the general assembly in accordance with the provisions of the charter may become a member of the International Labour Organization by communicating to the director-general of the international labour office its formal acceptance of the obligations of the constitution of the International Labour Organization.

4. The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two-thirds of the delegates attending

the session, including two-thirds of the Government delegates present and voting. Such admission shall take effect on the communication to the Director-General of the International Labour Office by the government of the new Member of its formal acceptance of the obligations of the Constitution of the Organization.

5. No Member of the International Labour Organization may withdraw from the Organization without giving notice of its intention so to do to the Director-General of the International Labour Office. Such notice shall take effect two years after the date of its reception by the Director-General, subject to the Member having at that time fulfilled all financial obligations arising out of its membership. When a Member has ratified any international labour Convention, such withdrawal shall not affect the continued validity for the period provided for in the Convention of all obligations arising thereunder or relating thereto.

6. In the event of any State having ceased to be a Member of the Organization, its readmission to membership shall be governed by the provisions of paragraph 3 or paragraph 4 of this article as the case may be.

Article 2

The permanent organization shall consist of:

(a) a General Conference of representatives of the Members;

(b) a Governing Body composed as described in article 7; and

(c) an International Labour Office controlled by the Governing Body.

Article 7

1. The Governing Body shall consist of fifty-six persons

Twenty-eight representing governments,

Fourteen representing the employers, and

Fourteen representing the workers.

2. Of the twenty-eight persons representing governments, ten shall be appointed by the Members of chief industrial importance, and eighteen shall be appointed by the Members selected for that purpose by the Government delegates to the Conference, excluding the delegates of the ten Members mentioned above.

3. The Governing Body shall as occasion requires determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are considered by an impartial committee before being decided by the Governing Body. Any appeal made by a Member from the declaration of the Governing Body as to which are the Members of chief industrial importance shall be decided by the Conference, but an appeal to the Conference

shall not suspend the application of the declaration until such time as the Conference decides the appeal.

4. The persons representing the employers and the persons representing the workers shall be elected respectively by the Employers' delegates and the Workers' delegates to the Conference.

5. The period of office of the Governing Body shall be three years. If for any reason the Governing Body elections do not take place on the expiry of this period, the Governing Body shall remain in office until such elections are held.

6. The method of filling vacancies and of appointing substitutes and other similar questions may be decided by the Governing Body subject to the approval of the Conference.

7. The Governing Body shall, from time to time, elect from its number a chairman and two vice-chairmen, of whom one shall be a person representing a government, one a person representing the employers, and one a person representing the workers.

8. The Governing Body shall regulate its own procedure and shall fix its own times of meeting. A special meeting shall be held if a written request to that effect is made by at least sixteen of the representatives on the Governing Body.

Article 12

1. The International Labour Organization shall co-operate within the terms of this Constitution with any general international organization entrusted with the co-ordination of the activities of public international organizations having specialized responsibilities and with public international organizations having specialized responsibilities in related fields.

2. The International Labour Organization may make appropriate arrangements for the representatives of public international organizations to participate without vote in its deliberations.

3. The International Labour Organization may make suitable arrangements for such consultation as it may think desirable with recognized non-governmental international organizations, including international organizations of employers, workers, agriculturists and co-operators.

Article 20

Any Convention so ratified shall be communicated by the Director-General of the International Labour Office to the Secretary-General of the United Nations for registration in accordance with the provisions of article 102 of the Charter of the United Nations but shall only be binding upon the Members which ratify it.

Article 22

Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is

a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

Article 23

1. The Director-General shall lay before the next meeting of the Conference a summary of the information and reports communicated to him by Members in pursuance of articles 19 and 22.

2. Each Member shall communicate to the representative organizations recognized for the purpose of article 3 copies of the information and reports communicated to the Director-General in pursuance of articles 19 and 22.

Article 24

In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit.

Article 25

If no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement, if any, made in reply to it.

Article 26

1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles.

2. The Governing Body may, if it thinks fit, before referring such a complaint to a Commission of Inquiry, as hereinafter provided for, communicate with the government in question in the manner described in article 24.

3. If the Governing Body does not think it necessary to communicate the complaint to the government in question, or if, when it has made such communication, no statement in reply has been received within a reasonable time which the Governing Body considers to be satisfactory, the Governing Body may appoint a Commission of Inquiry to consider the complaint and to report thereon.

4. The Governing Body may adopt the same procedure either of its own motion or on receipt of a complaint from a delegate to the Conference.

5. When any matter arising out of article 25 or 26 is being considered by the Governing Body, the government in question shall if not already represented thereon, be entitled to send

a representative to take part in the proceedings of the Governing Body while the matter is under consideration. Adequate notice of the date on which the matter will be considered shall be given to the government in question.

Article 27

The Members agree that, in the event of the reference of a complaint to a Commission of Inquiry under article 26, they will each, whether directly concerned in the complaint or not, place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint.

Article 28

When the Commission of Inquiry has fully considered the complaint it shall prepare a report embodying its findings on all questions of fact relevant to determining the issue between the parties and containing such recommendations as it may think proper as to the steps which should be taken to meet the complaint and the time within which they should be taken.

Article 29

1. The Director-General of the International Labour Office shall communicate the report of the Commission of Inquiry to the Governing Body and to each of the governments concerned in the complaint, and shall cause it to be published.

2. Each of these governments shall within three months inform the Director-General of the International Labour Office whether or not it accepts the recommendations contained in the report of the Commission; and if not, whether it proposes to refer the complaint to the International Court of Justice.

Article 30

In the event of any Member failing to take the action required by paragraphs 5 (b), 6 (b) or 7 (b) (i) of article 19 with regard to a Convention or Recommendation, any other Member shall be entitled to refer the matter to the Governing Body. In the event of the Governing Body finding that there has been such a failure, it shall report the matter to the Conference.

Article 31

The decision of the International Court of Justice in regard to a complaint or matter which has been referred to it in pursuance of article 29 shall be final.

Article 32

The International Court of Justice may affirm, vary or reverse any of the findings or recommendations of the Commission of Inquiry, if any.

Article 33

In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

Article 34

The defaulting government may at any time inform the Governing Body that it has taken the steps necessary to comply with the recommendations of the Commission of Inquiry or with those in the decision of the International Court of Justice, as the case may be and may request it to constitute a Commission of Inquiry to verify its contention. In this case the provisions of articles 27, 28, 29, 31 and 32 shall apply, and if the report of the Commission of Inquiry or the decision of the International Court of Justice is in favour of the defaulting government, the Governing Body shall forthwith recommend the discontinuance of any action taken in pursuance of article 33.

Article 36

Amendments to this Constitution which are adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organization including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance in accordance with the provisions of paragraph 3 of article 7 of this Constitution.

Article 37

1. Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.

2. Notwithstanding the provisions of paragraph 1 of this article the Governing Body may make and submit to the Conference for approval rules providing for the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention which may be referred thereto by the Governing Body or in accordance with the terms of the Convention. Any applicable judgement or advisory opinion of the International Court of Justice shall be binding upon any tribunal established in virtue of this paragraph. Any award made by such a tribunal shall be circulated to the Members of the Organization and any observations which they may make thereon shall be brought before the Conference.

Annex

Declaration concerning the aims and purposes of the International Labour Organization

The General Conference of the International Labour Organization meeting in its Twenty-sixth Session in Philadelphia, hereby adopts this tenth day of May in the year nineteen

hundred and forty-four the present Declaration of the aims and purposes of the International Labour Organization and of the principles which should inspire the policy of its Members.

I

The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that-

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

II

Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that lasting peace can be established only if it is based on social justice, the Conference affirms that-

- (a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity;
- (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy;
- (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;
- (d) it is a responsibility of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of this fundamental objective;
- (e) in discharging the tasks entrusted to it the International Labour Organization, having considered all relevant economic and financial factors, may include in its decisions and recommendations any provisions which it considers appropriate.

III

The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;
- (d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;
- (e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;
- (f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;
- (g) adequate protection for the life and health of workers in all occupations;
- (h) provision for child welfare and maternity protection;
- (i) the provision of adequate nutrition, housing and facilities for recreation and culture;
- (j) the assurance of equality of educational and vocational opportunity.

IV

Confident that the fuller and broader utilization of the world's productive resources necessary for the achievement of the objectives set forth in this Declaration can be secured by effective international and national action, including measures to expand production and consumption, to avoid severe economic fluctuations to promote the economic and social advancement of the less developed regions of the world, to assure greater stability in world prices of primary products, and to promote a high and steady volume of international trade, the Conference pledges the full cooperation of the International Labour Organization with such international bodies as may be entrusted with a share of the responsibility for this great task and for the promotion of the health, education and well-being of all peoples.

V

The conference affirms that the principles set forth in this Declaration are fully applicable to all peoples everywhere and that, while the manner of their application must be

determined with due regard to the stage of social and economic development reached by each people, their progressive application to peoples who are still dependent, as well as to those who have already achieved self-government, is a matter of concern to the whole civilized world.

ANNEXURE II

International Labour Conference 86th Session

Geneva, June 1998

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, 1998

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace;

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference,

1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective

bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

(a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;

(b) by assisting those Members not yet in a position to ratify some or all of these

Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and

(c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

Annex

Follow-up to the Declaration

I. Overall purpose

1. The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration.

2. In line with this objective, which is of a strictly promotional nature, this follow-up will allow the identification of areas in which the assistance of the Organization through its technical cooperation activities may prove useful to its Members to help them implement these

fundamental principles and rights. It is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.

3. The two aspects of this follow-up, described below, are based on existing procedures: the annual follow-up concerning non-ratified fundamental Conventions will entail merely some adaptation of the present modalities of application of article 19, paragraph 5(e) of the Constitution; and the global report will serve to obtain the best results from the procedures carried out pursuant to the Constitution.

II. Annual follow-up concerning non-ratified fundamental Conventions

A. Purpose and scope

1. The purpose is to provide an opportunity to review each year, by means of simplified procedures to replace the four-year review introduced by the Governing Body in 1995, the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions.

2. The follow-up will cover each year the four areas of fundamental principles and rights specified in the Declaration.

B. Modalities

1. The follow-up will be based on reports requested from Members under article 19, paragraph 5(e) of the Constitution. The report forms will be drawn up so as to obtain information from governments which have not ratified one or more of the fundamental Conventions, on any changes which may have taken place in their law and practice, taking due account of article 23 of the Constitution and established practice.

2. These reports, as compiled by the Office, will be reviewed by the Governing Body.

3. With a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion, the Office may call upon a group of experts appointed for this purpose by the Governing Body.

4. Adjustments to the Governing Body's existing procedures should be examined to allow Members which are not represented on the Governing Body to provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports.

III. Global report

A. Purpose and scope

1. The purpose of this report is to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period, and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out.

2. The report will cover, each year, one of the four categories of fundamental principles and rights in turn.

B. Modalities

1. The report will be drawn up under the responsibility of the Director-General on the basis of official information, or information gathered and assessed in accordance with established procedures. In the case of States which have not ratified the fundamental Conventions, it will be based in particular on the findings of the aforementioned annual follow-up. In the case of Members which have ratified the Conventions concerned, the report will be based in particular on reports as dealt with pursuant to article 22 of the Constitution.

2. This report will be submitted to the Conference for tripartite discussion as a report of the Director-General. The Conference may deal with this report separately from reports under article of its Standing Orders, and may discuss it during a sitting devoted entirely to this report, or in any other appropriate way. It will then be for the Governing Body, at an early session, to draw conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period.

IV. It is understood that:

1. Proposals shall be made for amendments to the Standing Orders of the Governing Body and the Conference which are required to implement the preceding provisions.

2. The Conference shall, in due course, review the operation of this follow-up in the light of the experience acquired to assess whether it has adequately fulfilled the overall purpose articulated in Part I.

The foregoing is the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up duly adopted by the General Conference of the International Labour Organization during its Eighty-sixth Session which was held at Geneva and declared closed the 18 June 1998.

IN FAITH WHEREOF we have appended our signatures this nineteenth day of June 1998.

The President of the Conference,

Director-General of the International Labour Office.