

**INCORPORATING**  
**THE CORE INTERNATIONAL LABOUR STANDARDS ON**  
**FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING**  
**INTO VIETNAM'S LEGAL SYSTEM**

A Thesis Submitted for the Degree of

**Doctor of Philosophy**

by

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## ***Abstract***

*This Dissertation evaluates the potential opportunities, challenges and outcomes attendant on Vietnam's modernisation effort through the incorporation of International Labour Organisation (ILO) Core International Labour Standards (CILS) on freedom of association and collective bargaining into Vietnam law. The Dissertation shows that although Vietnam is likely to benefit from incorporating the CILS on freedom of association and collective bargaining into its legal system, its constitutional value system is not currently consistent with those of particular ILO CILS. It offers recommendations on pre- substantive and procedural measures necessary to ensure the successful reception of ILO CILS on freedom of association and collective bargaining into Vietnam legal practice.*

### **Keywords:**

International Labour Organisation (ILO); International Labour Standards (ILS); Core International Labour Standards (CILS); Freedom of Association and Collective Bargaining; Vietnam Law; Vietnam's Legal System.

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## List of Abbreviations

ACFTU	All China Federation of Trade Unions
ADB	Asian Development Bank
ASLEF	Associated Society of Locomotive Engineers & Firemen
BNP	British National Party
CFA	Committee on Freedom of Association
CIA	Central Intelligence Agency
CILS	Core International Labour Standards
Committee of Experts	Committee of Experts on the Application of Conventions and Recommendations
Conference Committee	Conference Committee on the Application of Conventions and Recommendations
CPV	Communist Party of Vietnam
DOLISA	Department of Labour, Invalids and Social Affairs
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EJC	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GCHQ	Government Communications Headquarters
GDP	Gross Domestic Product
GSO	General Statistics Office
GSP	Generalised System of Preference
ICFTU	International Confederation of Free Trade Unions
IJC	International Court of Justice
ILC	International Labour Code
ILO	International Labour Organisation
ILS	International Labour Standards
IMF	International Monetary Fund
MFN	Most Favoured Nation
MOLISA	Ministry of Labour, Invalids and Social Affairs
NA	National Assembly
NLBR	National Labour Relations Board
NLRA	National Labour Relations Act
NT	National Treatment
SANDF	South African National Defence Force
SANDU	South African National Defence Union
SOEs	State Owned Enterprises
VCA	Vietnam Cooperatives Alliance
VCCI	Vietnam Chamber of Commerce and Industry
VGCL	Vietnam General Confederation of Labour
WTO	World Trade Organisation

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# Introduction

## Context

This Dissertation falls in the broad area of labour relations. Nonetheless, labour relations are always steeped into fundamental constitutional imperatives and developmental aspirations of nation States. Developmental aspirations of States inevitably compel them to work together because of the realisation that acting on their own would not achieve their objectives. The regulation of labour relations is one such issue, if not the dominant issue. States have long realised that national legislation on labour matters could not be solidly established by Governments in individual states if it was not supported by parallel standards adopted internationally.<sup>1</sup>

At the national level, the demand to regulate labour issues appears to have been initiated from two sources. One was that of humanitarians who relied on moral arguments for the protection of workers<sup>2</sup> from exploitative practices of their masters. Another was that of employers that were motivated by the idea of equal competition.<sup>3</sup> The movement to regulate labour relations in the context of economic hardship and social upheaval stemming from the World War I, at both national and international level, resulted in the creation of the International Labour Organisation (ILO) – an international organisation mandated to institute labour standards at the international level by the adoption of Conventions and Recommendations, which are the main sources of international labour standards (ILS). Among various types ILS, some are considered the core international labour standards (CILS), which relate to the freedom of association and collective bargaining, forced labour, child labour and discrimination in employment.

This Dissertation examines the opportunities and challenges attendant upon Vietnam in its effort to modernise itself economically and politically by joining the ILO and the WTO respectively. In particular, it evaluates the possibility of Vietnam to ratify and

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<sup>1</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 17.

<sup>2</sup> Kahn Freund (1977) *Labour and the Law*, 2nd edn, Stevens & Son, London, p. 6.

<sup>3</sup> Jean M. Servais (2005) *International Labour Law*, Kluwer Law International, The Hague, p. 21.

incorporate the CILS on freedom of association and collective bargaining into domestic law. This cannot be easily assumed because Vietnam's long social, political and economic history. The values nurtured by that history are deeply embedded into its constitution and its legal structures and its apparatus for ensuring justice.

All references to freedom of expression or freedom of association and collective bargaining refer to the right of workers and employers to organise and to bargain with each other and to defend and to protect their rights and interests in employment relations. They are provided for by the various Conventions and Recommendations of the ILO, particularly Conventions No. 87 and No. 98. Furthermore, because they are adopted to be applied in countries all over the world with different backgrounds and socio-economic realities, the CILS on freedom of association and collective bargaining must have a certain level of flexibility, which allows the interpretation of the ILO' supervision system including the Committee of Experts, the Conference Committee and most importantly the Committee on Freedom of Association (CFA). Therefore, besides the provisions of the above relevant instruments, this Dissertation also consults the case law of the CFA as a source of the CILS on freedom of association and collective bargaining.

Market economy based labour relations are a very recent phenomenon to Vietnam. Since the *Doi Moi* [renewal] process started in 1986, Vietnam has been developing a market economy with an open-door policy in both its economic and diplomatic aspects. Integration into the world's economy and community has led to new opportunities and challenges for Vietnam. Both require a re-appraisal of several matters of constitutional concern, among them, labour relations policy. In this context, the incorporation of the CILS on freedom of association and collective bargaining is no more a question of why but when and how?

This research is informed tremendously by my work as a legal advisor for the Department of Legislation under the Ministry of Labour, Invalids and Social Affairs of Vietnam (MOLISA) in 2003-2007. I have gained a lot of practical insights and working knowledge of current challenges in Vietnam labour relations especially in light of the dawn of the *Doi Moi* process. Therefore, conducting this research is not only beneficial in terms of contributing to my existing knowledge but it also has practical value as I hope to take the insights and recommendations arrived at back to my office desk.

Lastly, it appears to be the case that no research has been undertaken in this connection. Therefore this research contributes to the filling of a gap in national and international knowledge about the emerging Vietnam labour relations, its motivation, prospect for success, and abiding challenges.

### **Research Questions**

The Dissertation examines the opportunity of incorporating the CILS on freedom of association into Vietnam's legal system from four perspectives. Firstly, it examines the CILS on freedom of association and collective bargaining including their historical evolution, characteristics, roles, values, working mechanisms and their challenges. Secondly, it assesses the conceptualisation of these standards in both developed and developing countries. Thirdly, it is the investigation of the current situation of Vietnam's legal system and regulation of labour as well as the experiences of incorporating ratified CILS into Vietnam's legal system. Fourthly, what advantages and challenges attend the incorporation of the CILS on freedom of association and collective bargaining into Vietnam's legal system?

In order to achieve this aim, the Dissertation seeks the answers to the following questions, which, in turn, create the structure of the Dissertation:

1. What are the characteristics of ILS: How are they created, implemented and supervised?
2. What are the CILS and their provisions on freedom of association and collective bargaining?
3. What are the experiences and lessons that can be learnt from other countries in incorporating the CILS on freedom of association and collective bargaining into their legal systems?
4. Can Vietnam's legal system and the regulation of labour relations in Vietnam allow the ratification and incorporation of international treaties?
5. What are the lessons that can be learnt from the experiences of incorporating the ratified core ILO's Conventions into Vietnam's legal system?
6. What are the needs and how to incorporate the CILS on freedom of association and collective bargaining into Vietnam's legal system?

Chapter I traces the evolution, characteristics and working mechanisms of the international labour standards (ILS). This Chapter also explores the concept of ILS and their outstanding characteristics in comparison with other branches of international law. In addition, this Chapter studies the role and purposes of ILS in order to discover the significance of ILS in the socio-economic development of the world and the ILO's Member States. More importantly, this Chapter investigates how ILS are implemented and supervised at an international level by the ILO in order to understand the general obligations that will be imposed on Vietnam when incorporating the core international labour standards on freedom of association and collective bargaining into Vietnam's legal system.

Chapter II examines the emergence of the CILS and explains why they are core standards. Also in this section, by studying the notion of the CILS and their subjects, it measures the impact of ratification and implementation of the core ILO's conventions on national competitiveness in terms of foreign direct investment (FDI) attraction and export performance. This Chapter also explores the ILO's regulation of freedom of association and collective bargaining through not only its relevant instruments but also case law of the Committee on Freedom of Association (CFA).

Chapter III investigates practices of different States on the right to organise with others for the purpose of bargaining in employment relations. It focuses on the conceptualisation of that guarantee in the developed countries: the United Kingdom and the United States, which are the two most sophisticated and developed employment markets in the world that have long experiences of managing employment and labour relations. This Chapter also examines the practice of two other developing countries, namely, South Africa and China because they are historically and aspirationally closer to Vietnam than the former; and South Africa has incorporated properly the CILS on freedom of association and collective bargaining into its legal system whilst China has the most similarities with Vietnam in terms of political, economic and legal systems.

Chapter IV explores the evolution and characteristics of the Vietnam's legal system; it examines the relation between Vietnam law and international law in order to find out possibilities for ratification of international treaties and the opportunities, as well as challenges, of incorporating and implementing ratified international treaties in Vietnam's practice. This Chapter also investigates fundamental issues of labour

relations in Vietnam and discovers how Vietnam can regulate labour relations to strike a balance between fulfilling its international obligations to protect the rights at work as a member of the ILO and pursuing its goal of economic liberalisation due to economic integration as a member of the WTO in the context of globalisation.

Chapter V establishes the content of the CILS on forced labour, child labour and discrimination in the workplace, which derive from relevant instruments of the ILO that Vietnam has ratified. On that basis, this Chapter evaluates the incorporation into the legal system and implementation in practice of these CILS in Vietnam in order to draw a better understanding of the opportunities and challenges of incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system.

Chapter VI defines the need to incorporate the CILS on freedom of association and collective bargaining in Vietnam. It evaluates the chance of ratifying the core ILO Conventions on freedom of association and collective bargaining in Vietnam by examining the peculiarities of Vietnam in regulation of freedom of association and collective bargaining compared with the requirements of the CILS. More importantly, this Chapter makes necessary proposals in terms of both legislation and practical implementation for the successful incorporation of the CILS on freedom of association and collective bargaining into Vietnam's legal system.

## **Methodology**

The research methodology relied upon is predominantly textual analysis. To address the questions raised fully, it is necessary to proceed from an interdisciplinary approach. The issues of freedom of association and collective bargaining contain in themselves political, economic and social themes. Therefore, different approaches need to be confronted to retrace dimensions of economic and social interest at play.

Historical analysis is critical to this research because in order to understand an institution you must understand its history. By historicising Vietnam's labour relations the peculiarities of its labour relations code are exposed; their resilience under different constitutional imperatives are tested; and opportunities for renewal are mapped out.

The comparative method is also utilised to explore and establish the potential challenges attendant upon Vietnam as a developing socialist country in its effort to renew its



institutions for an ever-changing world. Statistical analysis is applied to establish trends and identify social and economic factors affecting the regulation of labour relations in Vietnam.

This research references also two very important surveys carried out by colleagues at MOLISA in 2009, namely the Survey on the Implementation of the Labour Code in 1500 enterprises in Vietnam and the Survey on the Dissemination and Communication of Labour Law in Vietnam.

### **Contributions**

The present research seeks to make a meaningful contribution to knowledge at both the national and international levels.

A contribution to literature is made by the unique of the content of this Dissertation. Internationally, there has been no study on the incorporation of the CILS on freedom of association into a single-party State, particularly Vietnam. This Dissertation provides a comprehensive and in-depth knowledge of the labour regime in Vietnam, which contributes to a new understanding of the legal system and the regulation of labour issues in Vietnam – a developing country, a newcomer in the globalisation process. At the national level, this is the first piece of research that examines the CILS in general and the CILS on freedom of association in particular. In addition, it is also by virtue of this Dissertation that the incorporation of ratified core ILO Convention in Vietnam is studied for the first time. Most importantly, it is also the first piece of research by which the chance of ratifying Conventions No. 87 and No. 97 of the ILO and the opportunities of incorporating the CILS on freedom of association and collective bargaining into Vietnam is examined, explored and defined.

While it contributes to fill the gap in literature, the present Dissertation also makes an important practical contribution to Vietnam. Its assessment of the experiences of incorporating the CILS on freedom of association and collective bargaining in four different countries brings back valuable lessons for Vietnam. Its evaluation of the incorporation of ratified core ILO Conventions into Vietnam informs the Government of the challenges and the gaps in domestic law that must be filled to adequately implement these ratified Conventions in Vietnam. Most importantly, its conclusion on

the possibility of ratifying and incorporating the CILS on freedom of association into Vietnam is a comprehensive basis for the Government in drafting the new Labour Code for Vietnam.

# Chapter I

## International Labour Standards Characterised

*“Every institution has its roots in the past”<sup>4</sup>*

### Introduction

This Chapter examines the evolution of the substantive international labour code and the procedures for its implementation with a view to establishing the challenges that current Governmental effort to assimilate it into Vietnam law should be mindful of. In order to achieve this, the Chapter examines the origin and nature of international labour standards (ILS). It analyses the purpose of the international labour code in general in order to discover the significance of ILS in socio-economic development generally, and for Vietnam in particular at the start of the twenty-first century.

More importantly, this Chapter analyses how ILS are implemented and supervised at an international level by the ILO in order to understand the general obligations that shall fall on Vietnam when it transforms the core international labour standards on freedom of association and collective bargaining into Vietnam’s legal system.

### 1.1. Origin and Nature of ILS

#### 1.1.1. The Emergence of ILS

Although the subject of work and the relations between those who manage it and those who perform it are as old as human civilisation,<sup>5</sup> the issue of regulation of labour at both national and international levels emerged only from the nineteenth century. It evolved

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<sup>4</sup> Johnston George Alexander (1924) *International Social Progress*, George Allen and Inwin Ltd, London, p. 14.

<sup>5</sup> Bruce Kaufman (2004) *The Global Evolution of Industrial Relations: Events, Ideas and the IIRA*, ILO, Geneva, p. 1.

from the need to support domestic labour law in individual States on the basis of protection of workers as well as on the basis of creating an equal playing field in terms of labour for economic competitors between countries.

Many stakeholders involved in the evolution of ILS. Social reformers including Necker, Robert Owen in England, Daniel Le Grand and Rerome Blanqui in France are considered precursors to the idea of international regulation of labour matters. Being motivated by humanitarian principles, they urged employers to take measures to improve labour conditions during the primacy of industrialisation. As the initiatives of social reformers failed to alleviate the harmful effects of industrialisation, revolutionaries, in another way, urged workers to take action by themselves through international worker organisations. Contributions towards the evolution of ILS were also made by Governments, the influence of religion through the Pope and the activities of various private associations.<sup>6</sup>

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<sup>6</sup> For the role of these stakeholders in the evolution of ILS, see Albert Thomas (1931) *The International Labour Organisation: The First Decade*, London, ILO; Anthony Alcock (1971) *History of the International Labour Organisation*, Macmillan Press, London; Arne Vandaele (2005) *International Labour Rights and the Social Clause: Friends or Foes*, Cameron May, London; Ayusawa I. Frederick (1920) *International Labour Legislation*, Columbia University Press, New York; Bob Hepple (2005) *Labour Law and Global Trade*, Hart Publishing, Oregon; Hassan Sunmonu (1994) "Contemporary Challenges for Labour Standards Resulting from Globalisation" in *International Labour Standards and Economic Interdependence*, eds. Werner Sengenberger and Duncan Campbell, Institute for Labour Studies, Geneva, pp. 105-112; Hetherington Wright (1920) *International Labour Legislation*, Methuen and Co, London; ILO (1969) *The ILO in the Service of Social Progress: A Workers' Manual*, ILO, Geneva; Johnston George Alexander (1924) *International Social Progress*, George Allen and Inwin Ltd, London; Kaushik Basu (2001) "Compacts, Convention, and Code Initiatives for Higher International Labour Standards", *Cornell International Law Journal*, vol. 34, pp. 487-500; Lammy Betten (1993) *International Labour Law: Selected Issues*, Kluwer, Boston; Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston; Pope Leon XIII. *Rerum Novarum Encyclical on the Conditions of Working Class (1891)*. Available at [http://www.osjspm.org/majordoc\\_rerum\\_novarum\\_official.aspx](http://www.osjspm.org/majordoc_rerum_novarum_official.aspx) (last visited 15 May 2008); Robert Cox (1953) "The Idea of International Labour Regulation", *International Labour Review*, vol. 67, pp. 191-196; Robert Owen (1918) *Two Memorials on Behalf of the Working Classes; the first presented to the Governments of Europe and America, the second to the Allied Powers Assembled in Congress at Aix – la – Chapelle*, Longman, London; Stanley Engerman (2003) "The History and Political Economy of International Labour Standards" in *International Labour Standards: History, Theory, and Policy Options*, ed. Kaushik Basu, Henrik Horn, Lisa Roman and Judith Shapiro, Blackwell Publishing Ltd, Oxford, pp. 9-83; Stephen Lawford (1939) *Sowing Justice or the Romance of the ILO*, Nicholson and Watson Limited, London; Victor Ghebali (1989) *The International Labour Organisation: A Case Study of UN Specialised Agencies*, Martinus Nijhoff Publisher, London; Victor Ghebali (1994) *From Philanthropy to Foundation: The Root of the ILO*, ILO, Geneva; Wilfred Jerks (1934) "The Origins of the International

These momentums and efforts led the Swiss Government to convene international conferences in 1905 and 1906 in Bern. At the later conference, the first two international labour Conventions were adopted on 26 September 1906. These are the International Conventions Respecting the Prohibition of Night Work for Women in Industrial Employment<sup>7</sup> and the International Convention on the Subject of Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches.<sup>8</sup> After that, many other Conventions were drafted covering issues such as the ten hour day for women and young workers and employment of young workers,<sup>9</sup> but their adoption was interrupted by the outbreak of World War I.<sup>10</sup>

The War made labour legislation of immense importance for both Governments and workers. For the workers, the War had led to the common understanding that labour legislation should reach its full development in the international sphere - an essential progression for the realisation of certain of their aspirations to equality.<sup>11</sup> Various Trade Union Congresses had expressed a similar desire, including those at Philadelphia in 1914, Leeds in 1916, Stockholm in 1917, London in 1918, Berlin in 1917 and 1918, and Bern in 1918.<sup>12</sup> The motions and resolutions adopted by these conferences all had the same common aim, despite differences of language and emphasis. They called for the insertion in peace treaties of social clauses and provisions for setting up a permanent

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Labour Organisation”, *International Labour Review*, vol. 30, pp. 575-581; William B. Gould IV (2001) “Labour Law for a Global Economy: The Uneasy Case for International Labour Standards”, *Nebraska Law Review*, vol. 80, pp. 715-753.

<sup>7</sup> Text available at *The American Journal of International Law*, Vol. 4, No. 4, Supplement: Official Documents (Oct., 1910), pp. 328-337. The International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment consists of 11 Articles. This Convention prohibits all forms of night work for women in industrial employment without distinction of age in all industrial undertakings employing more than ten men or woman, with the exception of two circumstances: in cases of *force majeure*, and in cases where the work had to do with raw material of materials, which rapidly deteriorate.

<sup>8</sup> Text available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R006> (last visited 20 February 2008). The International Convention on the Subject of Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches consisted of 6 Articles. This Convention requires contracting parties to bind themselves to the prohibition, in their prospective territories, of the manufacture, importation and sale of matches which contain white (yellow) phosphorus.

<sup>9</sup> Hetherington Wright (1920) *International Labour Legislation*, Methuen and Co, London, pp. 8-9.

<sup>10</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 18.

<sup>11</sup> Albert Thomas (1921) “The International Labour Organisation. Its Origin. Development and Future”, *International Labour Review*, vol. 1, No. 1, pp. 5-22.

<sup>12</sup> Victor Ghebali (1994) *From Philanthropy to Foundation: The Root of the ILO*, ILO, Geneva ILO World of Work Magazine. No 8. pp 8-11.

institutional framework dealing with labour issues.<sup>13</sup> The workers demanded that the terms of peace should safeguard the working classes of all countries from the attacks of capitalist competition and assure them a minimum guarantee of moral and material order as regards labour legislation, trade union rights, migration, social insurance, hours of work and industrial hygiene and safety.<sup>14</sup>

For Governments, World War I had compelled them to engage with workers to deal with injustice, hardship, and privation.<sup>15</sup> They were acutely aware of the workers' contribution and sacrifices to the war effort. The belief that labour management relations could no longer be addressed solely by national legislation was prompted by a number of factors, such as fear of the politicisation of labour; the spread of labour unrest became increasingly acute following the Bolshevik Revolution of 1917; the challenge of rising intra-European competition as European economies began the task of postwar reconstruction; the changing contours of international competition as the new industrial might of the United States challenged in the North and Japanese industrialism threatened colonial markets in the South; the international links being forged across labour movements. These concerns had provoked a clear and persistent call for international cooperation on the regulation of labour standards; and a demand that labour related provisions be included in any postwar peace treaty and be put into legislative form.<sup>16</sup>

By the end of World War I, the Allied Governments, particularly Great Britain and France had begun collaborating on a draft aimed at establishment by the Peace Treaty of Versailles an international organ for the regulation of labour matters.<sup>17</sup> The Peace Conference entrusted examination of this question to a special commission known as

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<sup>13</sup> Victor Ghebali (1989) *The International Labour Organisation: A Case Study of UN Specialised Agencies*, Martinus Nijhoff Publisher, London, p. 7.

<sup>14</sup> Albert Thomas (1931) *The International Labour Organisation: The First Decade*, London, ILO, p. 25.

<sup>15</sup> Albert Thomas (1921) "The International Labour Organisation. Its Origin. Development and Future", *International Labour Review*, vol. 1, No. 1, pp. 5-22.

<sup>16</sup> Consequently the immediate aftermath of the war was characterised also with the adoption of several legal documents relating to labour and social issues. They included minimum wage laws passed in France and Germany. The British Government specifically established the Ministry of Labour. See Victor Ghebali (1989) *The International Labour Organisation: A Case Study of UN Specialised Agencies*, Martinus Nijhoff Publisher, London, p. 6; Nigel Haworth, Stephen Hughes and Rorden Wilkinson (2005) "The International Labour Standards Regime: A Case Study in Global Regulation", *Environmental and Planning A*, vol. 37, No. 11, pp. 1939-1953.

<sup>17</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 18.

the Commission on International Labour Legislation,<sup>18</sup> which consisted of two representatives from each of the five big powers and five from other powers represented at the Conference.<sup>19</sup> The Commission on International Labour Legislation had been tasked with conducting an inquiry into the conditions of employment from the international aspect and 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 cooperation with and under the direction of the League of Nations.<sup>20</sup>

The work of the Commission led to the inclusion in the Treaty of Versailles<sup>21</sup> of Part XIII (from Article 387 to Article 426), a section which dealt with labour matters.<sup>22</sup> This section provided for the establishment of the ILO that, most importantly, might adopt Conventions and Recommendations in this field.<sup>23</sup>

The creation of the ILO was a great achievement and it was the result of a century of continuous effort on the part of individuals and nations.<sup>24</sup> At that time, the ILO was one of the earliest multilateral organisations and the first permanent organisation to draft treaties on a regular basis.<sup>25</sup> In October 1919, the International Labour Conference met in Washington, D.C to adopt its first Conventions and to appoint the Governing Body.<sup>26</sup> Since then, the International Labour Conference has met regularly in plenary once a year, except during the Second World War. To date, the ILO has adopted 188 Conventions and 199 Recommendations,<sup>27</sup> which are the main sources of ILS.

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<sup>18</sup> Johnston George Alexander. 1924, *International Social Progress*, George Allen and Inwin Ltd, London, p. 37.

<sup>19</sup> Ayusawa I. Frederick (1920) *International Labour Legislation*, Columbia University Press, New York, p. 105.

<sup>20</sup> Albert Thomas (1931) *The International Labour Organisation: The First Decade*, London, ILO, p. 26.

<sup>21</sup> Signed on 28 May 1919.

<sup>22</sup> See ILO (1920) *The Labour Provisions of the Peace Treaties*, ILO, Geneva.

<sup>23</sup> Article 19 of the ILO Constitution.

<sup>24</sup> Lewis Lorwin (1936) "The ILO and World Economic Policy", *International Labour Review*, vol. 33, pp. 457-467.

<sup>25</sup> Steve Charnovitz (2000) "The International Labour Organisation in Its Second Century" in *Max Planck Yearbook of United Nations Law*, Kluwer Law International, Neitherland, pp. 147-184. See also Jean Morellet (1933) "Legal Competence of the International Labour Organisation", *The ANNALS of the American Academy of Political and Social Science*, vol. 166, pp. 46-52.

<sup>26</sup> David Morse (1969) *The Origin and Evolution of the ILO and Its Role in the World Community*, Humphrey Press, New York, p. 11.

<sup>27</sup> Source: [www.ilo.org](http://www.ilo.org) (last visited 29 June 2010).

### 1.1.2. Concept of ILS

A few years after the birth of the ILO, Ernest Mahaim defined that ILS are the main source of International Labour Law and International Labour Law is that part of international law, which regulates the mutual relations of States with regard to their nationals who are workers.<sup>28</sup> However, this definition is still limited as it did not cover the relationship of foreign workers and the State concerned.

According to Valticos, International Labour Law is part of labour law which has an international source. It, therefore, covers the substantive rules of law, which have been established at international level, as well as the procedural rules relating to their adoption and their implementation.<sup>29</sup>

The ILO's position is that "International Labour Law is one category of international law, and international law is the body of legal rules that apply between sovereign states and such other entities as have been granted international personality by sovereign states."<sup>30</sup> International labour law can be universal, regional or bilateral. While regional law is applied in a certain geographical part of the world, bilateral law has a different purpose. Mainly, it determines the conditions of entry and of employment in each contracting state for the nationals of the other.<sup>31</sup>

Another term that is closely related to ILS is the International Labour Code (ILC). According to Valticos,<sup>32</sup> international labour Conventions and Recommendations which were adopted over the years are separate legal instruments and constitute, from a certain point of view, a comprehensive whole which has often been described as the ILC. Moreover, the term ILC has also been given to a methodical and systematic presentation of international standards compiled by the International Labour Organisation. From Lee Swepston's point of view, the standards adopted by the ILO are called the International

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<sup>28</sup> Ernest Mahaim (1921) "International Labour Law", *International Labour Review*, vol. 1, No. 3, pp. 283-285

<sup>29</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 17.

<sup>30</sup> ILO (2008) *International Labour Law*. Available at <http://www-old.ilo.org/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> (last visited 15 May 2008).

<sup>31</sup> *Ibid.*

<sup>32</sup> See Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, pp 18-20.



Labour Code.<sup>33</sup> Alan Gladstone's writes that the term ILC is used to denote the whole body of Conventions and recommendations adopted by the Conference of the ILO since 1919.<sup>34</sup>

The ILO states:

The ILC is not primarily a code of international obligations, but a code of internationally approved standards, certain of which are capable of becoming, and have in many cases become, binding upon States by reason of the ratification by those States of relevant international labour Conventions.<sup>35</sup>

In terms of ILS, ILS consists of Conventions and Recommendations adopted by the International Labour Conference.<sup>36</sup> Some authors even call it the Code of International Labour Law.<sup>37</sup> Bob Hepple writes that "ILS are embodied in Conventions and Recommendations of the ILO".<sup>38</sup> Some authors use the term ILS to mean international labour Conventions.<sup>39</sup> Jan Martin writes that no simple definition of the term "labour standards" exists. "The phrase denotes a collection of rules and regulations governing work, social policy, social security and human rights".<sup>40</sup> ILS are legal instruments drawn up by the ILO's constituents (Governments, employers and workers) setting out basic principles and rights at work. They are either Conventions, which are legally binding international treaties that may be ratified by Member States, or Recommendations, which serve as non-binding guidelines.<sup>41</sup>

It appears from its purpose and application that ILS are international rules, or regulations that are consolidated and classified into many subject areas in the field of labour and employment relations, which are applicable among states. ILS are normative in character, consisting of prescribed standards of conduct. These standards distinguish

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<sup>33</sup> Lee Swepston (1994) "The Future of ILO Standards", *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>34</sup> Alan Gladstone (1986) *The Manager's Guide to International Labour Standards*, ILO, Geneva, p. 9.

<sup>35</sup> ILO (1941) *The International Labour Code, 1939*, ILO, Montreal, p. XII.

<sup>36</sup> ILO (1952) *The International Labour Code. 1951*, ILO, Geneva, p. LXVI.

<sup>37</sup> Which is used as the title of their works. For example, see Neville Rubin, Evance Kalula and Bob Hepple (2005) *Code of International Labour Law: Law, Practice and Jurisprudence*, Cambridge University Press, Cambridge.

<sup>38</sup> Bob Hepple (2005) *Labour Law and Global Trade*, Hart Publishing, Oregon, p. 4.

<sup>39</sup> ILO (1969) *International Labour standards: Their Nature – Their Working – Their Value*, ILO, Geneva, p. 8.

<sup>40</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 13.

<sup>41</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 12.

themselves from moral rules by being, at least potentially, designed for authoritative interpretation by an independent judicial authority – the International Court of Justice (ICJ)<sup>42</sup> and by being capable of enforcement by the application of external sanctions. These characteristics make them legal rules.

ILS are characterised by two features: in the first place, they are universal, as they are intended to be applied in all the Member States of the ILO; on the other hand, and as a counterpart, they possess certain flexibility. Flexibility of standards is the price of their universality. If standards have to be universal, and therefore applicable to States whose level of development and legal approaches differ considerably from one another, the only realistic approach is to develop standards with sufficient flexibility so that they can be adapted to the most diverse of countries. In other words, ILS are flexible because they are adopted with a view that they should appeal to the majority of very diverse nations. This is a delicate balance to maintain, since it consists of not adopting standards which are too high and therefore would not be attractive to most Member States, nor inadequate standards which would only enshrine the lowest common denominator in order to attract the most nations to participate.<sup>43</sup>

ILS form a contrast with national labour standards in both their object and enforcement mechanisms. While ILS apply only between entities that can claim international personality, the national labour code is the internal law of States that regulates the conduct of individuals and other legal entities within their jurisdictions. ILS regulate relations between States, and the relation between workers and employers in their jurisdictions while labour codes can be applied only to labour issues occurring inside each State. Enforcement of ILS is based on the consent of the States and enabled by external sanctions; on the other hand, a domestic labour code is enforced by State authorities with domestic sanctions.

### ***Tripartite Characteristic of ILS***

ILS have a unique tripartite characteristic that enhances their reception in national law. Tripartism has made the ILO the most open organisation;<sup>44</sup> the most representative

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<sup>42</sup> Article 37(1) of the ILO Constitution.

<sup>43</sup> ILO (2001) *International Labour Standards: A Global Approach*, ILO, Geneva, p. 3.

<sup>44</sup> La Rosa and Isabelle Duplessis (2001) *Tripartism within the ILO: a Special Case*, International Training Centre, Turin, p. 1.

organisation; and the first international institution in history that brings together workers, employers and Governments.<sup>45</sup> For these reasons, it is a *sui generis* organisation the like of which had never existed before.<sup>46</sup>

The ILO is the first inter-Governmental organisation that provides for full participation of non-Governmental organisations in a tripartism mechanism.<sup>47</sup> This mechanism of the ILO was a revolutionary break with the State-centric international order of the early twentieth century.<sup>48</sup>

The *International Labour Conference* is the principal organ of the ILO. It adopts ILS. Each Member State's delegation must consist of four members: two Government delegates, one worker delegate and one employer delegate (2/1/1).<sup>49</sup> The ILO Constitution also requires Member States to agree on the designation of non-Government delegates from the country's most representative organisations of workers and employers, where such exist.<sup>50</sup> It is possible that the power to appoint delegates by the State may vitiate genuine tripartism.

Nonetheless, the ILO Constitution requires that each delegate has the right to vote individually on all issues submitted to the conference.<sup>51</sup> In practice worker delegates vote together and employer delegates vote together, following the logic of their interests rather than any presumed national allegiance.<sup>52</sup> Under these regulations, employer and worker delegates can freely express themselves and vote according to instructions received from their organisations. They sometimes vote against each other or even against their Government representatives.

The *Governing Body* is the executive arm of the International Labour Conference. Its function is to set the agenda for the Conference. It chooses the topics to be considered

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<sup>45</sup> Bernard Beguin (1959) "ILO and the Tripartite System", *International Conciliation*, vol. 32, pp. 410-448.

<sup>46</sup> Royal Meeker (1923) "The International Labour Organisation", *ANNALS of the American Academy of Political and Social Science*, vol. 108, pp. 206-210.

<sup>47</sup> Steve Charnovitz (2000) "The International Labour Organisation in Its Second Century" in *Max Planck Yearbook of United Nations Law* Kluwer Law International, Neitherland, pp. 147-184.

<sup>48</sup> Laurence Helfer (2006) "Understanding Change in International Organisations: Globalisation and Innovation in the ILO", *Vanderbilt Law Review*, vol. 59, No. 3, pp. 649-726.

<sup>49</sup> Sec. 1 Article 3 of the ILO Constitution.

<sup>50</sup> Sec. 5 Article 3 of the ILO Constitution.

<sup>51</sup> Sec. 1 Article 4 of the ILO Constitution.

<sup>52</sup> La Rosa and Isabelle Duplessis (2001) *Tripartism within the ILO: a Special Case*, International Training Centre, Turin, p. 2.

for standard setting. The Governing Body is also a tripartite organ; it consists of 56 people, 28 of whom represent Governments (10 of which are members of chief industrial importance), 14 employers and 14 workers.<sup>53</sup> Unlike the International Labour Conference, for which the Member State nominates the employer and the worker to include in its delegation, worker and employer representatives on the Governing Body are nominated by the employers' and workers' groups at the Conference.<sup>54</sup> This measure consolidates the autonomy of the Governing Body.<sup>55</sup> In practice, the principle of tripartism is also applied in some departments of the Governing Body, such as the Committee on Standing Orders and International Labour Standards; and the Committee on Freedom of Association. It is also evident in relation to the operation of ILO instruments (at national level) and the supervisory procedure, such as the Conference Committee on Application of Standards.<sup>56</sup>

### 1.1.3. Sources of ILS

#### *ILO Constitution*

The ILO Constitution is the most important source for ILS. The Constitution of the ILO lays down a number of general principles which have come to be regarded in certain respects as direct law. Such principles are contained in the Preamble of the Constitution (1919) and in the Declaration concerning the Aims and Purposes of the ILO adopted at the 26<sup>th</sup> Session of the International Labour Conference at Philadelphia on 10 May 1944 (Philadelphia Declaration),<sup>57</sup> which was incorporated into the ILO Constitution in 1946.<sup>58</sup>

The International Labour Conference has the right to amend the ILO's Constitution by a majority of two-thirds of the votes cast by delegates present. An amendment to the Constitution shall take effect when it is ratified or accepted by two-thirds of the

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<sup>53</sup> Sec. 1 Article 7 of the ILO Constitution.

<sup>54</sup> Sec. 4 Article 7 of the ILO Constitution.

<sup>55</sup> For more detail about the Governing Body see ILO (2008) *Introduction to the Governing Body*, ILO, Geneva.

<sup>56</sup> Neville Rubin, Evance Kalula and Bob Hepple (2005) *Code of International Labour Law: Law, Practice and Jurisprudence*, Cambridge University Press, Cambridge, p. 26.

<sup>57</sup> The Philadelphia Declaration consists of 3 main parts: (i) the aims; (ii) the purposes of the International Labour Organisation and (iii) the principles which should inspire the policy of its Members. Texts available at <http://www.ilo.org/ilolex/english> (last visited 22 February 2008).

<sup>58</sup> ILO (2008) *Origin and History*. Available at [http://www.ilo.org/global/About\\_the\\_ILO/Origins\\_and\\_history/lang--en/index.htm](http://www.ilo.org/global/About_the_ILO/Origins_and_history/lang--en/index.htm) (last visited 15 May 2008).

Member States including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance. At present, Members of chief industrial importance are Brazil, China, France, Germany, India, Italy, Japan, Russian Federation, United Kingdom and the United States.<sup>59</sup> It is striking that Africa is not represented in this “Security Council” elite group of States in spite of its significance to international trade and in particular contribution to the development of some of the fundamental Conventions that originated as Native Labour Code Law at the behest of Albert Thomas.

Several amendments to the Constitution have been passed since 1919. Most of the earlier amendments had sought to increase numbers on the Governing Body. The most recent amendment in 1997<sup>60</sup> sought to grant the International Labour Conference the right to abrogate any Convention adopted if it appeared that the Convention had lost its purpose or that it no longer made a useful contribution to attaining the objectives of the Organisation.

### ***ILO Conventions***

ILO Conventions are the main source of international labour law<sup>61</sup> and, of course, ILS. Conventions are instruments designed to create international obligations for the states that ratify them.<sup>62</sup> Conventions are adopted within an institutional framework. Thus, the adoption of Conventions does not follow the type of diplomatic negotiation which is usual in the case of treaties. Rather, they are prepared in discussions in an assembly that has many points in common with parliamentary assemblies. This also partly explains the fact that unanimity is not necessary for the adoption of Conventions. For the same reason, only the International Court of Justice (ICJ) can interpret the Conventions.<sup>63</sup>

In practice, the ICJ has been consulted just once to interpret the Night Work (Women) Convention, 1919 (No. 4) in 1932. On this occasion, regarding the scope of Convention

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<sup>59</sup> ILO (2008) *Introduction to the Governing Body*, ILO, Geneva, p. 2.

<sup>60</sup> This amendment has not yet come into force as it requires the ratification or acceptance of two-thirds (122/182) of the Members of the Organisation including five of the ten Members which are represented on the Governing Body as Members of chief industrial importance. By 2010, this amendment has been ratified by 107 states including six by Member States of chief industrial importance (China, France, India, Italy, Japan and United Kingdom). Source: <http://www.ilo.org/ilolex/english/constq.htm> (last visited 16 May 2010).

<sup>61</sup> Jean M. Servais (2005) *International Labour Law*, Kluwer Law International, The Hague, p. 63.

<sup>62</sup> Article 19 of the ILO Constitution.

<sup>63</sup> Articles 19 and 37 of the ILO Constitution.

No. 4, the ICJ decided that Convention No. 4 applies to women, who hold positions of supervision or management and are not ordinarily engaged in manual work.<sup>64</sup>

To date, the ILO has adopted 188 Conventions. At its 86<sup>th</sup> Conference in June 1998, the ILO adopted the *Declaration on Fundamental Principles and Rights at Work*,<sup>65</sup> which recognised eight Conventions as fundamental that are related to four main issues: (i) freedom of association and collective bargaining; (ii) elimination of forced and compulsory labour; (iii) elimination of discrimination in respect of employment and occupation; (iv) abolition of child labour.<sup>66</sup>

### ***ILO Recommendations***

In addition to its Conventions, the ILO has adopted a number of Recommendations. A Recommendation does not create obligations, but rather provides guidelines for action in some particular field.<sup>67</sup> Recommendations are officially communicated to every Member State of the ILO, which is expected to bring them before the authorities within whose competence the matter lies for enactment of legislation or for other action.<sup>68</sup> ILO Recommendations are considered as soft law in contrast with ILO Conventions which are considered as hard law.<sup>69</sup> As noted earlier, by May 2010, the ILO has adopted 199 Recommendations.

There are two types of Recommendations. The first is a Recommendation that frequently expands or complements a Convention.<sup>70</sup> The second type of Recommendation is a single matter that appears for the first time in order to prepare the

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<sup>64</sup> ICJ (1932) *Interpretation of the Convention of 1919 Concerning Employment of Women During the Night*, Series A/B edn.

<sup>65</sup> Text available at <http://www.ilo.org/ilolex/english> (last visited 25 February 2008).

<sup>66</sup> The reasons why these standards are “core” standards are explained in Chapter II.

<sup>67</sup> Article 19 of the ILO Constitution.

<sup>68</sup> See Article 19 of the ILO Constitution.

<sup>69</sup> Sarosh Kuruvilla and Anil Verma (2006) “International Labour Standards, Soft Regulation, and National Government Roles”, *Journal of Industrial Relations*, vol. 48, pp. 41-58. See also Paul Gormley (1966) “The Emerging Protection of Human Rights by the International Labour Organisation”, *Albany Law Review*, vol. 30, pp. 13-51.

<sup>70</sup> For example, in order to guide ratified Member States on the successful implementation of the Convention on Forced Labour, 1930 (No 29), the ILO passed the Forced Labour (Regulation) Recommendation, 1930 (No. 36). It also adopted the Workers’ Representatives Recommendation, 1971 (No. 143) to guide ratified Member States to the successful implementation of the Workers’ Representatives Convention, 1971 (No. 135). Text available at <http://www.ilo.org/ilolex/english> (last visited 25 February 2008).

way for adoption of a Convention in the future.<sup>71</sup> This usually happens when a Convention on a final vote fails to obtain the necessary quorum (two thirds), but obtains a simple majority. In this case, if the Conference approves, the drafted Convention will be transformed into a Recommendation and submitted to the Conference before the end of the session.<sup>72</sup>

### ***Adoption of Conventions and Recommendations***

ILS evolve from a growing international concern that action needs to be taken on a particular issue. Developing ILS at the ILO is a unique legislative process involving representatives of Governments, workers and employers from around the world,<sup>73</sup> and every delegate has an individual vote.

A two-thirds majority of votes is required for a standard to be adopted.<sup>74</sup> The International Labour Conference has recently implemented an integrated approach with the aim of improving coherence, relevance and impact of standards-related activities and developing a plan of action that embodies a coherent package of tools to address a specific subject. These tools may include Conventions, Recommendations and other types of instruments, promotional measures, technical assistance, research and dissemination of knowledge, and inter-agency cooperation.<sup>75</sup>

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<sup>71</sup> Albert Thomas (1931) *The International Labour Organisation: The First Decade*, London, ILO, pp. 315- 316.

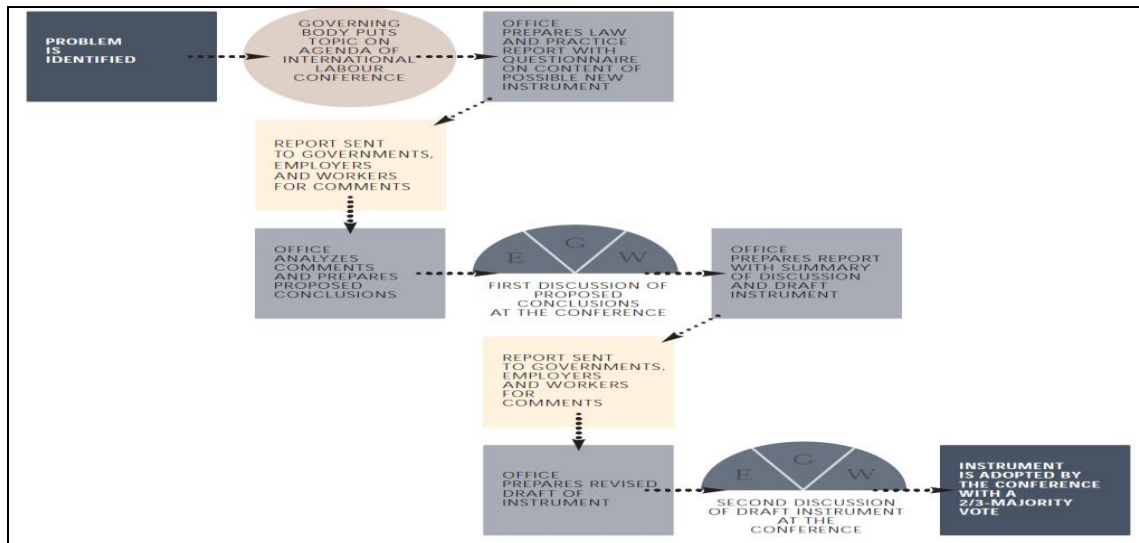
<sup>72</sup> for example, the Workers' Housing Recommendation, 1961 (No. 115) and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92). See Article 41 the Standing Orders of the International Labour Conference.

<sup>73</sup> Article 19 of the ILO Constitution. See also ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 14.

<sup>74</sup> Article 19 of the ILO Constitution.

<sup>75</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 10.

**Chart 1.1: Adoption of International Labour Standards**



The process of adopting ILO’s Conventions and Recommendations is one of the outstanding characteristics of ILS. In other branches of international law, the State is the sole player, the creator and implementer of a legal rule..<sup>76</sup> Instead of giving States a monopoly on creating and interpreting international legal rules, the ILO brings social partners who represent civil society into the process. Governments, workers and employers are thus all called upon to take part in standard-setting on an equal footing. This hybrid nature of the ILO explains most of the adaptations made to the traditional rules of treaty law in order to put the principle of tripartism into practice.

The process of making ILS consists of several steps. Most of these steps are involved by tripartite partners. First of all, the Governing Body makes the agenda for Conference sessions (the subject to be discussed) after examining all the proposals made by representatives of Governments, workers or employers.<sup>77</sup> Once the subjects for standards have been decided, a cycle of discussions is launched. This period includes sending of questionnaires to Governments, who must consult the most representative employers’ and workers’ organisations. These organisations are then involved in discussions within the Conference’s technical committees composed of workers’ and employers’ delegates who sit on them.<sup>78</sup> An instrument is passed at the Conference only

<sup>76</sup> Lee Swepston (1994) “The Future of ILO Standards”, *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>77</sup> Article 19 of the ILO Constitution.

<sup>78</sup> Articles 38, 39, 40 of the Standing Orders of the International Labour Conference.



if it receives the support of at least two thirds of the votes of delegates present.<sup>79</sup> This principle prevents Member States from adopting the instrument on their own.

Reservations become impossible in a tripartite set-up even though they are a privilege enshrined in the classical theory of international law. For one thing, ILO Conventions are the product of tripartite negotiation among Governments, workers and employers within the ILO. For another, the act of ratification involves the State alone - classical theory of international law. At the time of ratification, therefore, the State is not in a position to renegotiate the content of the Convention without undermining the principle of tripartism.<sup>80</sup> Furthermore, the procedure for ratification of the ILO Conventions also has unique features.<sup>81</sup> Member States are not bound to ratify a draft Convention adopted by the Conference, but they must within a certain time bring it to the competent authorities to consider the chance of ratification. These characteristics make ILS a mixture of international treaties and labour code.<sup>82</sup>

### ***Revision of Conventions and Recommendations***

The ILO is the only international organisation that revises the instruments it adopts.<sup>83</sup> Over time, some standards also need to be changed to reflect the needs and circumstances of society. Revision may take place by a revising Convention that replaces the old Convention or by a Protocol which adds new provisions to the old Convention.<sup>84</sup>

Revision has occurred regularly since the earliest days of the Organisation. It was decided as early as 1928 that the adoption of a Convention that revises an earlier one would not result in derogation of the older instrument.<sup>85</sup> A Convention might involve reciprocal obligations between States, and it is not possible to replace these

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<sup>79</sup> Article 19 of the ILO Constitution.

<sup>80</sup> La Rosa and Isabelle Duplessis (2001) *Tripartism within the ILO: a Special Case*, International Training Centre, Turin, p. 5.

<sup>81</sup> Jean Morellet (1933) "Legal Competence of the International Labour Organisation", *The ANNALS of the American Academy of Political and Social Science*, vol. 166, pp. 46-52.

<sup>82</sup> John Wood (1991) "International Labour Organisation Conventions. Labour Code or Treaties?", *The International and Comparative Law Quarterly*, vol. 40, No. 3, pp. 649-657.

<sup>83</sup> Lee Swepston. (2005) 'Adoption of Standards by the International Labour Organisation: Lessons and Limitations'. Paper presented to Workshop organised by the International Council on Human Rights Policy and International Commission of Jurists. Geneva (13–14 February). Available at [http://www.ichrp.org/files/papers/82/120B\\_-\\_Adoption\\_of\\_Standards\\_by\\_the\\_ILO\\_Swepston\\_Lee\\_2005.pdf](http://www.ichrp.org/files/papers/82/120B_-_Adoption_of_Standards_by_the_ILO_Swepston_Lee_2005.pdf) (last visited 18 June 2008).

<sup>84</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 17.

<sup>85</sup> Lammy Betten (1993) *International Labour Law: Selected Issues*, Kluwer, Boston, pp. 22-33.

automatically when the new Convention comes into force. Instead, when a revised Convention is adopted, it closes the earlier instrument to further ratifications as soon as the revised Convention enters into force.<sup>86</sup>

Protocols<sup>87</sup> are also international treaties, but which, in the ILO context, do not exist independently since they are always linked to a Convention. Like Conventions, they are subject to ratification (however, the Convention to which they are linked also remains open for ratification). They are used for the purpose of partially revising Conventions. Thus, they allow for the adaptation to changing conditions and they enable practical difficulties to be dealt with that may have arisen since the Convention was adopted. They are a useful way of keeping Conventions relevant and up to date. Protocols are particularly appropriate where the aim is to keep intact a Convention which has already been ratified and which may receive further ratifications, while amending or adding to certain provisions on specific points.<sup>88</sup>

#### **1.1.4. Subject Matter of ILS**

ILS cover a wide range of subject matter of labour law and social policy. Since the foundation of the ILO in 1919, the content of ILS has been broadening both in fields and persons covered and framework within which matters are treated.<sup>89</sup> In the first 40 years of its existence, the ILS concentrated on developing and enforcing international labour standards that regulate working conditions, such as working age, working hours, wages, etc. After World War II, the ILS focused on human rights and more technical issues.<sup>90</sup> A number of ILS go beyond the traditional field of labour law and touch upon

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<sup>86</sup> Conventions 1 to 26 do not contain a provision with regard to the effect of revising Conventions. Conventions 27 to 33 contain provisions on the effect of revising Conventions. Conventions 34 onwards contain the provision “unless the new Convention otherwise provides...”. See also Jean M. Servais (2005) *International Labour Law*, Kluwer Law International, The Hague, p. 68.

<sup>87</sup> The first Protocol was adopted in 1982, in respect of the Convention on Plantation, 1958 (No. 110). Other protocols that followed were adopted in the following:

- 1982 on Convention No. 110;
- 1990 on Convention No. 89;
- 1995 on Convention No. 81;
- 1996 on Convention No. 147; and
- 2002 on Convention No. 155.

<sup>88</sup> ILO (2006) *Manual for Drafting ILO Instrument*, ILO, Geneva, p. 79.

<sup>89</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 20.

<sup>90</sup> See also Ben Chigara (2007) “Latecomers to the ILO and the Authorship and Ownership of ILS”, *Human Rights Quarterly*, vol. 29, pp. 706-726.

matters of civil liberties (freedom of association), penal law (forced labour) and property law (indigenous people).

ILS can be divided into 20 subjects covering all aspects of labour relations,<sup>91</sup> including freedom of association and collective bargaining; equality at work; forced labour; child labour; tripartite consultation; labour administration; labour inspection; employment policy and promotion; vocational guidance and training; employment security; wages; working time; occupational safety and health at work; social security; maternity protection; migrant workers; seafarers and fishers; dock workers; indigenous and tribal peoples; and other special categories of workers.

ILS can also be categorised into eight main institutions, namely,<sup>92</sup> core and fundamental institutions; generally applicable institutions; benefits institutions; conditions of work institutions; occupational safety and health institutions; labour administration institutions; sea-farer workers institutions; institution on other types of workers. ILS can also be categorised into three main groups of standards: core and fundamental standards; priority standards; and other standards.

### ***Challenge of out of date Standards***

Although ILS cover many areas in the field of labour, however, many standards have been out of date. Even though there is general acceptance that the ILO's major standard setting is complete,<sup>93</sup> there has also been a lag in the updating of old Conventions and a failure to add Conventions that relate to the new realities of the global labour market. Between 1974 and 1979, a review carried out by the Governing Body revealed that 57 out of 151 ILO Conventions were out of date.<sup>94</sup> Another study in 1984 showed that 66 out of 156 ILO Conventions and 93 out of 169 ILO Recommendations were out of date and needed to be revised.<sup>95</sup> Statistics from the ILO website show that only 160

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<sup>91</sup> See ILO (2008) *Guide to International Labour Standards*, ILO, Geneva.

<sup>92</sup> *Ibid.*

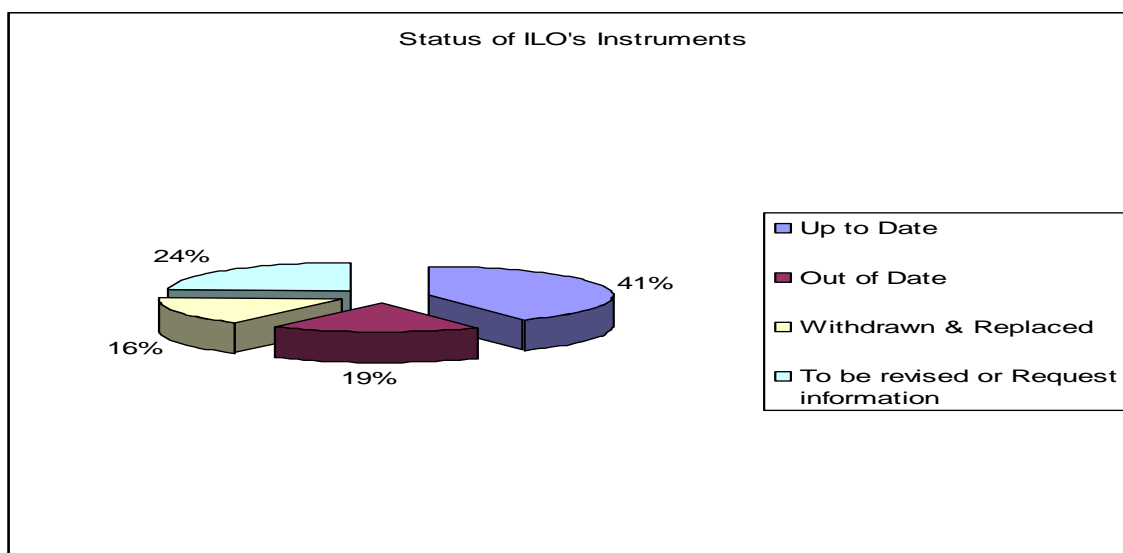
<sup>93</sup> Lee Swepston (2005) *Adoption of Standards by the International Labour Organisation: Lessons and Limitations*, Paper presented to Workshop organised by the International Council on Human Rights Policy and International Commission of Jurists (Geneva 13-14/2/2005). Available at [http://www.ichrp.org/files/papers/82/120B\\_-\\_Adoption\\_of\\_Standards\\_by\\_the\\_ILO\\_Swepston\\_Lee\\_2005.pdf](http://www.ichrp.org/files/papers/82/120B_-_Adoption_of_Standards_by_the_ILO_Swepston_Lee_2005.pdf) (last visited 18 June 2008).

<sup>94</sup> Final Report of the Working Party on International Labour Standards. *Official Bulletin (special edition)* vol. LXII, 1979, series A.

<sup>95</sup> Report from the Working Party on International Labour Standards, *Official Bulletin*, Vol. LXX, 1987, series A.

instruments (76 Conventions, 5 Protocols and 79 Recommendations) are up to date; while 48 instruments are in interim status, 61 instruments have been withdrawn or replaced and 72 instruments are out of date or have now been shelved and the rest are to be revised or asked for information.<sup>96</sup>

**Figure 1.1: Status of ILO's Instruments**



Furthermore, some Conventions that are critical to the evolving phenomenon of economic globalisation are among the least ratified, and the ILO has not revised them; for example, the Conventions on labour migration - Convention No. 97 and Convention No. 143, have been ratified by only 48 and 23 countries respectively. Recent trends in economic globalisation have been characterised by greater integration of global markets for goods, services and capital across borders, and the movement of workers. According to the UN, the number of migrants has increased quickly in the past 20 years from nearly 100 million people in 1980 to over 190 million in 2005.<sup>97</sup> Of these migrants, most are migrant workers; the ILO estimates that about 90% of world migrants are workers and their family members.<sup>98</sup> To cope with the impact of economic globalisation, these instruments should have been updated. But the neglect has been

<sup>96</sup> Source: ILO (2008) *International Labour Standards by Subjects*. Available at <http://www.ilo.org/ilolex/english/subjectE.htm> (last visited 8 December 2009).

<sup>97</sup> UN (2008) *World Migration 2005*. Available at <http://esa.un.org/migration/p2k0data.asp> (last visited 8 December 2009); UN (2005) *World Migration 2005*, UN Secretariats, New York.

<sup>98</sup> ILO (2007) *International Labour Migration and Development: The ILO Perspective*, ILO, Geneva, p. 4.

matched by the minimal attention given to issues around labour migration, beyond treating migrants as a “vulnerable group”.<sup>99</sup>

### ***Challenges from Informal Workers/Sector***

Since its inception, the ILO’s activities have focused on information gathering relating to country and region specific information in order to adequately inform the development of ILS. ILS regulate serve especially to monitor the protection to employees, mainly male workers in stable full-time, unionised jobs and rarely mentioned informal workers.<sup>100</sup> For example, the subjects of Convention No. 87 on Freedom of Association and the Right to Organise, 1948; Convention No. 98 on the Right to Organise and Collective Bargaining, 1949 are workers with an employment relationship (formal workers). Another example is Convention No. 102 on Social Security, 1952 which introduced benefits for nine contingencies, all of which link to the employment relationship. In its early years, building up social rights meant a transfer of income from capital to workers, since the former was expected to pay for the social benefits, such as sick leave, unemployment benefits and pensions, through insurance contributions and direct taxation, as well as work safety mechanisms.

Economic integration has altered the formulation of employment relations considerably. There has been a rapid growth in the informal sector<sup>101</sup> across the world<sup>102</sup> that is normally not unionised and not covered by ILS. For example, in Vietnam, by the year 2005, the total working population was 43 million but only 9 million workers were formal workers and covered by a social insurance scheme.<sup>103</sup> This was a feasible strategy in a national labour model based on closed economies, but the assumptions of that model do not apply in the Global Transformation era. An increasing majority of workers do not have the type of employment that yields such social entitlements, and the ILO has been unable to recommend alternative mechanisms without being blocked

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<sup>99</sup> Guy Standing (2008) “The ILO: An Agency for Globalisation”, *Development and Change*, vol. 39, No. 3, pp. 335-384.

<sup>100</sup> Sean Cooney (1998) “Testing Time for the ILO: Institutional Reform for the New International Political Economy”, *Comparative Labour Law and Policy Journal*, vol. 20, pp. 365-399.

<sup>101</sup> James Heintz and Robert Pollin (2003) *Informalisation, Economic Growth and the Challenge of Creating Viable Labour Standards in Developing Countries. Working Paper Series No. 60*. Available at [www.umass.edu/peri](http://www.umass.edu/peri) (last visited 20 May 2009).

<sup>102</sup> Werner Sengenberger (1994) “International Labour Standards in a Globalised Economy: The Issues” in *International Labour Standards and Economic Interdependence*, eds. Werner Sengenberger and Duncan Campbell, Institute for Labour Studies, Geneva, pp. 3-16, p. 9.

<sup>103</sup> Document No. 122/CP-XDPL date 25/9/2005 of the Government.

by its Governing Body. It is inherently difficult for ILS to be applied to working people in the informal sector.<sup>104</sup>

### **1.1.5. The Relevance of ILS**

#### ***The Purpose of ILS***

ILS are multi-purposed. Firstly, ILS aim at creating a fair international competition in the field of labour. Economic considerations are one of the factors that inspired policy makers at the end of the nineteenth century to adopt international labour legislation.<sup>105</sup> International agreements in the field of labour would help prevent international competition from taking place to the disadvantage of workers, and would constitute a code of fair competition between employers (business entities) and between States.<sup>106</sup> This argument was originally developed as a response to those who thought that legislation on labour matters would lead the State concerned into an unfavourable position in the international market, as it would result in higher prices for the goods of these states in comparison with those of their competitors. By making international agreements in the field of labour, international competition would occur on a level playing field, creating a code of fair competition between states.<sup>107</sup> Therefore, ILS aim at creating a level playing in terms of labour which contributes to fair international competition.

Secondly, ILS target at being an instrument to achieve peace through improving social justice is one of the purposes of ILS. The link between social justice and peace is all too apparent. Valticos writes that social justice is the driving force of international labour law.<sup>108</sup> As in the field of labour, the humanitarian concern originally appeared in the face of conditions of great hardship imposed on workers by industrialisation. It was the mainspring of the movement, the first achievement of which was the adoption on both the national and international levels of measures to protect vulnerable groups, such as

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<sup>104</sup> Guy Standing (2008) "The ILO: An Agency for Globalisation", *Development and Change*, vol. 39, No. 3, pp. 335-384.

<sup>105</sup> Jan Aart Scholte cited by Arne Vandaele (2005) *International Labour Rights and the Social Clause: Friends or Foes*, Cameron May, London, p. 65.

<sup>106</sup> ILO (2008) *International Labour Law*. Available at <http://www-old.ilo.org/actrav/actrav-english/telearn/global/ilo/law/lablaw.htm> (last visited 15 May 2008).

<sup>107</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 21.

<sup>108</sup> *Ibid*, p. 25.

children and women from conditions of work that had shocked the public conscience.<sup>109</sup> However, social justice is not a static idea. It is now commonly associated with the creation of conditions in which people can attain their political, economic and moral rights on the basis of human welfare.<sup>110</sup> One of the mandates of the ILO is the creation of “Lasting Peace through Social Justice”. To this end, the ILO adopts its instruments, Conventions and Recommendations with an overarching aim of fostering world peace through the creation of social justice. Moreover, on 10 June 2008, the ILO adopted the *ILO Declaration on Social Justice for a Fair Globalisation*;<sup>111</sup> this is the third major statement<sup>112</sup> of principles and policies adopted by the International Labour Conference in the ILO’s history. Once again, this Declaration confirms the aim and the goal of the ILO in attaining social justice for fair globalisation.

Thirdly, emphasising social and human objectives in economic development is among the purposes of ILS. In the Philadelphia Declaration, the ILO states the central aim of national and international policy should be to attain the social conditions described in the Declaration and it calls all national and international policies and measures to be considered in the “light of social objectives”.<sup>113</sup> In 1995, the World Summit for Social Development adopted the Copenhagen Declaration on Social Development.<sup>114</sup> This Declaration states the interactive characteristic of economic and social policy, and calls for integrate economic, cultural and social policies so that they become mutually supportive.<sup>115</sup> To achieve this goal, the ILO emphasises social and human objectives in development policies in its instruments, Conventions and Recommendations.

Finally, one of the purposes of the ILS is to create a source of inspiration for national action. Ratification of the respective ILO Conventions could contribute to consolidation of national labour legislation by acting as a guarantee against backsliding.<sup>116</sup> In addition to the international commitments to which they may give rise, ILS can serve as a

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<sup>109</sup> Stanley L. Engerman 2003, “The History and Political Economy of International Labour Standards” in *International Labor Standards: History, Theory, and Policy Options*, ed. Kaushik Basu, Henrik Horn, Lisa Roman and Judith Shapiro, Blackwell publishing Ltd, Oxford, pp. 9-83, p. 29.

<sup>110</sup> Phelan Edward (1949) *Yes and Albert Thomas*, Columbia University Press, New York, p. 252.

<sup>111</sup> Text available at <http://www.ilo.org/ilolex/english> (last visited 25 February 2008).

<sup>112</sup> It follows the Philadelphia Declaration in 1944 and the Declaration on Fundamental Principles and Rights at Works in 1998.

<sup>113</sup> See the Philadelphia Declaration.

<sup>114</sup> Text available at <http://www.un.org/esa/socdev/wssd/index.html> (last visited 25 May 2008).

<sup>115</sup> Para 26 the Copenhagen Declaration on Social Development.

<sup>116</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 29.

general guide and as a source of inspiration to Governments by virtue of their authority as texts adopted by an assembly composed of representatives of Governments, employers and workers of nearly all states of the world (183 Member States).<sup>117</sup> ILS may also provide a basis for the claims of workers and guide the policy of employers. International labour standards have thus developed into a kind of “international common law”. ILS have helped to form the basis for much social and labour legislation in most of the countries that have gained their independence since 1919.<sup>118</sup> ILS may be used as source of law to deal with particular cases by national courts when domestic law is silent or not clear on the relevant matters.<sup>119</sup> When making or amending national labour law, states can learn from ILS as a set of general rules and principles in the field of labour and can transform specific provisions of ILS into national labour law if they are suitable. For example, in Vietnam, when the Government drafts new regulation on labour issues, one of the principles applied is to look at the ILO’s standards relating to particular subjects in order to make domestic law conform to the ILS.

### ***The Role of ILS***

ILS play an important role in many aspects. Firstly, ILS are considered a path to decent work. Decent work<sup>120</sup> is crucial to workers because it sums up the aspirations of people in their working lives. It has now been established that labour is not a commodity,<sup>121</sup> neither is labour an inanimate product that can be negotiated for the highest profit or the lowest price. Working makes people human being. Work is part of everyone’s daily life and is crucial to a person’s dignity, well-being and development as a human being.<sup>122</sup> For this reason, economic development should include creation of jobs and working conditions in which people can work in freedom, safety and dignity. In short, economic

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<sup>117</sup> Source: <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited 20 May 2010).

<sup>118</sup> Lee Swepston (1994) “The Future of ILO Standards”, *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>119</sup> See Eric Gravel and Quentin Delpéch (2008) “International labour standards: Recent developments in complementarities between the international and national supervisory systems”, *International Labour Review*, vol. 147, No. 4, pp. 403-415.

<sup>120</sup> From the ILO’s point of view, decent work involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men. See ILO (2008) *Decent Work*. Available at <http://www.ilo.org/global/Themes/Decentwork/lang--en/index.htm> (last visited 15 May 2008).

<sup>121</sup> See the Philadelphia Declaration of 1944.

<sup>122</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 7.



development is not undertaken for its own sake but to improve the lives of human beings.<sup>123</sup> International labour standards are there to ensure that economic development remains focused on improving human life and dignity. A study has shown that failure to protect labour standards amounts to a severe infringement of a number of internationally recognised human rights.<sup>124</sup>

Secondly, ILS provide an international legal framework for fair globalisation because globalisation can be given a human face through ILS.<sup>125</sup> Globalisation has set in motion a process of far reaching change that affects everyone. Beside the advantages, globalisation brings about a lot of difficulties, such as income inequality, continuing high levels of unemployment and poverty, vulnerability of economies to external shocks, and the growth of both unprotected work and the informal economy, which impact on the employment relationship and the protections it can offer.<sup>126</sup> The world community is responding to this challenge in part by developing international legal instruments on trade, finance, the environment, human rights and labour. By laying down basic minimum social standards<sup>127</sup> agreed upon by all players in the global economy,

Thirdly, ILS contribute to economic development. Studies<sup>128</sup> have shown that, in their criteria for choosing states in which to invest, foreign investors rank workforce quality and political and social stability above low labour costs. At the same time, there is little evidence that states which do not respect core labour standards such as freedom of association, child labour, equal treatment, etc. are more competitive and attractive in the global economy. On the contrary, foreign direct investment appears to be more attracted to countries with high rather than low labour standards.<sup>129</sup> Moreover, states have low wages primarily as result of low productivity. Rather, the comparative advantage

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<sup>123</sup> Jan Oudegeest (1929) “The Functions of the International Labour Organisation”, *International Labour Review*, vol. 20, No. 1, pp. 1-14.

<sup>124</sup> Mohamed Chicktay (2002) “International Labour Standards: The Right to Be Human”, *The South African Law Journal*, vol. 119, pp. 513-525.

<sup>125</sup> Bob Hepple (2006) “Globalisation and the Future of Labour Law – Book review”, *International Law Journal*, vol. 35, No. 4, pp. 450-451.

<sup>126</sup> ILO Declaration on Social Justice for a Fair Globalisation 2008.

<sup>127</sup> Lewis Lorwin (1936) “The ILO and World Economic Policy”, *International Labour Review*, vol. 33, pp. 457-467.

<sup>128</sup> Kucera David (2002) “Core Labour Standards and Foreign Direct Investment”, vol. 141, No. 1,2, pp. 31-70.

<sup>129</sup> For intensive analysis of the impact of particular core labour standards on economy, see Chapter II. See also Drusilla Brown, Alan Deardorff and Robert Stern (1998) “Trade and Labour Standards”, *Open Economies Review*, vol. 9, No. 2, pp. 171-194.

derives from a relative abundance of low skilled labour. Imposing ILS will not necessarily raise the cost of labour; they will simply require labour in these countries to divert some of its wage to benefits, which may make workers worse off.<sup>130</sup>

Finally, ILS often serve like a double-edged sword. In addition to creating a safety net to protect social welfare, international labour standards can contribute to poverty reduction.<sup>131</sup> No one can be sure of what will happen in the future. Even fast growing economies with highly skilled workers can experience unforeseen economic downturns. Workers are the group mostly affected by economic crises. Furthermore, wages or salaries are the main and, in most cases, the only sources of income of workers and their family. Therefore, it is crucial for every country to create a mechanism to protect workers in cases of jobs lost or in cases where they are not able to work. In this context, social protection systems (notably unemployment and health insurance), are seriously wanting.<sup>132</sup> By creating a mechanism to strengthen social dialogue, freedom of association, and social protection systems, ILS offers better safeguards against such economic downturns. Economic development has always depended on acceptance of market rules. A market governed by a fair set of rules and institutions is more efficient and brings benefits to everyone,<sup>133</sup> including the labour market. Fair labour practices set out in ILS and applied through a national legal system ensure an efficient and stable labour market for workers and employers alike. Furthermore, ILS call for creation of institutions and mechanisms which can enforce labour rights. In combination with a set of defined rights and rules, functioning legal institutions can help formalise the economy and create a climate of trust and order which is essential for economic growth and development.<sup>134</sup>

## **1.2. Enforceability of ILS**

### **1.2.1. Implementation of ILS**

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<sup>130</sup> Drusilla Brown (2000) *International Trade and Core Labour Standards: A survey of the Recent Literature*, OECD Publishing, Paris, p. 24.

<sup>131</sup> DFID (2004) *Core Labour Standards and Poverty Reduction*, DFID, London, p. 11-16.

<sup>132</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 8.

<sup>133</sup> *Ibid*, p. 10.

<sup>134</sup> *Ibid*, p. 10.

Member States of the ILO are bound formally only by the Conventions they have ratified. Nevertheless, by virtue of membership of the ILO, they must obey the principles set out in the Constitution. Furthermore, Member States have to respect, to promote and to realise in good-faith and in accordance with the Constitution fundamental principles and rights at work even if they have not ratified relevant Conventions.<sup>135</sup>

### ***Ratification of Conventions***<sup>136</sup>

In case competent authority of a Member State consents and the ratification procedure results in a Convention forming part of the domestic legal order, the Government communicates its formal instrument of ratification to the Director-General of the ILO. The Director-General registers the ratification and gives notice of the fact to the United Nations and to other Member States.<sup>137</sup> The usual period after registration for the Convention to come into force for a ratifying member is twelve months.<sup>138</sup>

The gap between Conventions being adopted and Conventions being ratified has increased over time. By May 2010, the ILO had adopted 188 Conventions, of which 28 Conventions were adopted after 1985 but ratification of these Conventions is extremely low. Most Conventions adopted after 1985 receive fewer than 30 ratifications. The reasons for this trend may be explained by the adoption of a few core labour standards.<sup>139</sup> Another reason is that countries ratify Conventions only where the obligations are already reflected in their domestic law;<sup>140</sup> this also occurs in Vietnam, which is studied in Chapter V and Chapter VI. If it is the case, the role and claim of the ILO that ILS have influences on domestic law are undermined. It is also argued that the

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<sup>135</sup> Para 2 the Declaration of Fundamental Principles and Rights at Work, 1998.

<sup>136</sup> One of the main obligations imposed on Governments by the Constitution of the ILO is that they must submit the relevant instruments within twelve or eighteen months of their adoption to the competent national authorities. There is a basic distinction between submission of these instruments to the competent authorities and ratification. The obligation to submit is general in character and does not imply that the Convention must be ratified. Moreover, this obligation arises even with Recommendations, which are not open to ratification. On the contrary, the process of ratification of a Convention depends on, and is regulated by, national legislation.

<sup>137</sup> Article 20 of the ILO Constitution.

<sup>138</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 274.

<sup>139</sup> Source: <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited 20 May 2010). See also Bernhard Boockmann (2001) "The Ratification of ILO Conventions: A Hazard Rate Analysis", *Economic and Policy Journal*, vol 13, No. 3, pp. 281-309.

<sup>140</sup> Robert J. Flanagan and William B. Gould IV (2003) *International Labour Standards: Globalisation, Trade, and Public Policy*, Stanford University Press, Stanford, p. 15.

ILO is now adopting Conventions that are not in the interest of the Member States to ratify.<sup>141</sup>

### ***Obligations Arising from Ratified Conventions***

The machinery for enforcement of ratified Conventions has both a judicial and political function.<sup>142</sup> Involvement of the International Court of Justice as the only body with capacity to interpret ILO's Conventions gives Conventions their judicial character.<sup>143</sup> They are also political because in that the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) and the Conference Committee on the Application of Conventions and Recommendations (Conference Committee), the Governing Body and the International Labour Conference provide the machinery of discussion and cooperation necessary for the establishment and application of international labour standards.<sup>144</sup> When a Member State ratifies a Convention, the state is bound by two main obligations, which are implementing the ratified Convention and reporting its achievement as required.

After ratifying a Convention, a Member State must carry out the following actions to implement that Convention. First of all, it has to take all necessary measures to make effective the provisions of the ratified Convention, which means that the ratifying member must ensure that the provisions of the Convention should be applied fully. Secondly, when applying the Convention, the Member State should not affect any law, award, custom or agreements which ensure more favourable conditions to workers concerned than those provided for in the Convention.<sup>145</sup>

Every Member State has to compile and submit an annual report to the ILO on the measures which it has taken to give effect to provisions of ratified Conventions. From 1959, detailed reports were due only every two years. From 1977, reports were normally requested at four yearly intervals in order to ensure effectiveness of the supervisory system, while the two year period was maintained for some important

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<sup>141</sup> Anke Hassel (2008) "The Evolution of a Global Labour Governance Regime", *Governance: An International Journal of Policy, Administration, and Institution*, vol. 21, No. 2, pp. 231-251.

<sup>142</sup> Francis Wilson (1933) "The Enforcement of International Labour Standards", *The ANNALS of the American Academy of Political and Social Science*, vol. 166, pp. 95-101.

<sup>143</sup> Article 37 of the ILO Constitution.

<sup>144</sup> Francis Wilson (1933) "The Enforcement of International Labour Standards", *The ANNALS of the American Academy of Political and Social Science*, vol. 166, pp. 95-101.

<sup>145</sup> See Article 19 of the ILO Constitution.

Conventions. Since 1993, the reporting period has become a hybrid of periodical reports and non-periodical reports.<sup>146</sup>

### ***Challenge from Implementation***

The ratification of ILO's instruments has also increased.<sup>147</sup> However, ratification alone does not necessarily mean that a Convention is actually respected or implemented. A recent study has shown little evidence of a statistical link between ratification of ILO Conventions and actual working conditions;<sup>148</sup> there is also evidence on the difference between ratification and compliance.<sup>149</sup> There are some main reasons that make the implementation of ILS difficult.

The first reason is that the content of ILS is increasingly complex. According to Córdova, by 1990, the total number of substantive provisions of 171 adopted Conventions was 2,100 and the number of substantive provisions of the adopted 180 recommendations was 2,500. It is estimated that by 1990, ILS consisted of at least 4,600 substantive provisions.<sup>150</sup> By 2003, the ILO had adopted 379 instruments (185 Conventions and 194 Recommendations), which contain more than 5,000 specific standards.<sup>151</sup> Even though there are no statistics on the number of substantive provisions of ILS, nevertheless, the present number of substantive provisions of 387 instruments (188 Conventions and 199 Recommendations) must be much higher than the figure of 4,600. An increasing number of standards make it more difficult for ILS to be implemented.

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<sup>146</sup> See ILO Governing Body document No. GB 258/6/19.

<sup>147</sup> According to personal statistics from ILO website, by 12/2009, there have been totally 6696 ratifications of ILO's 188 Conventions. Most of Conventions from No. 60, which were adopted since 1985, have fewer than 30 ratifications (except for Convention No. 160 with 46 ratification, Convention No. 162 with 32 ratifications and Convention No. 182 with 169 ratifications), see Appendix 1. The latest Convention No. 188 on work in Fishing adopted in 2007 but has just received one ratification of Bosnia and Herzegovina on 4 February 2010. Source: <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited 12 June 2010).

<sup>148</sup> Werner Sengenberger (2006) "International Labour Standards in the Globalised Economy: Obstacles and Opportunities for Achieving Progress" in *Globalisation and the Future of Labour Law*, eds. John Craig and Michael Lynk, Cambridge University Press, Cambridge, pp. 331-355, p. 332.

<sup>149</sup> Córdova Efrén (1993) "Some Reflection on the Overproduction of International Labour Standards", *Comparative Labour Law Journal*, vol. 14, pp. 138-162. See also Breen Creighton 2004, "The Future of Labour Law: Is There a Role for International Labour Standards?" in *The Future of Labour Law*, eds. Catherine Barnard, Simon Deakin and Gillians Morris, Hart Publishing, Oregon, pp. 260-261.

<sup>150</sup> Córdova Efrén 1993, "Some Reflection on the Overproduction of International Labour Standards", pp. 138-162.

<sup>151</sup> Breen Creighton 2004, "The Future of Labour Law: Is There a Role for International Labour Standards?" in *The Future of Labour Law*, eds. Catherine Barnard, Simon Deakin and Gillians Morris, Hart Publishing, Oregon, p. 258.

The second reason is there are still different approaches to ILS; for example, there are countries which interpret “freedom of association” in their own special way – especially communist countries. There are countries which argue that they cannot afford to restrict child labour not only because of economic considerations but also they create a so called Western viewpoint which is at odds with authoritarian attitudes carried over from earlier times before democracy became a byword.<sup>152</sup> There is also an argument that there are some standards that could be achieved only by developed countries and which do not relate to conditions of the majority of the world.<sup>153</sup> Furthermore, there are many who believe that ILS are too complex, too restrictive, too expensive for employers if all of ILC standards are applied directly to all situations without any distinction.<sup>154</sup>

The third reason is the lack of capacity of ratified Member States to implement ILS. Massive international labour standards violations are observed and the enforcement of ILS is not adequate. On the other hand, the ILO is a voluntary organisation which has limited legal powers to enforce its instruments (ILS) on its member countries. Its major means are moral suasion and technical assistance to foster adoption and implementation of ILS.<sup>155</sup> As it lacks formal sanctions, therefore, with which to compel Member States to live up to their pledges, the ILO must rely on publicity, quasi-diplomatic representations, and such other less formal political as contrasted with legal means as it may find at its disposal.<sup>156</sup> It is also argued that the ILO is a “toothless tiger”.<sup>157</sup>

There are some outstanding cases of violation of ILS which have been dealt with for a long time, but which have not made appropriate progress (such as the case of forced labour in Myanmar). The enforcement of law at both national and international level relies on three tools – sunshine, carrots and stick;<sup>158</sup> the ILO has all three tools to enforce its standards: it has sunshine through its supervisory mechanism, it provides

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<sup>152</sup> Lee Swepston (1994) “The Future of ILO Standards”, *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>153</sup> Sean Cooney (1998) “Testing Time for the ILO: Institutional Reform for the New International Political Economy”, *Comparative Labour Law and Policy Journal*, vol. 20, pp. 365-399.

<sup>154</sup> Lee Swepston (1994) “The Future of ILO Standards”, *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>155</sup> Werner Sengenberger (2005) *Globalisation and Social Progress: The Role and Impact of International Labour Standards*, 2nd edn, Friedrich-Ebert-Stiftung, Bonn, p. 7.

<sup>156</sup> Pitman B. Potter (1929) *An Introduction to the Study of International Organisation*, G.Bell and Son Ltd, London, p. 349.

<sup>157</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C, p. 95.

<sup>158</sup> Kimberly A. Elliot (2000) “The ILO and Enforcement of Core Labour Standards”, *International Economics Policy Briefs*, No. 006 July, p. 2.

carrots by its technical support and its stick is promulgated in Article 33 of ILO Constitution.<sup>159</sup> However, Article 33 was invoked for the first time in ILO history only in 2000, when the Governing Body asked the International Labour Conference to take measures to lead Myanmar to end the use of forced labour. A complaint based on 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.<sup>160</sup> However, little improvement has been made by the Myanmar Government.

### **1.2.2. Supervision of ILS**

International labour standards are backed by a supervisory system that is unique at the international level, ensuring that States implement the Conventions they ratify. The ILO regularly examines application of standards in Member States and points out areas where they could be better applied. There are four main ways to supervise the application of ILC: (i) supervising by reports; (ii) supervising through representations; (iii) supervising through complaints; and (iv) supervising through a special mechanism in the field of freedom of association.<sup>161</sup>

#### ***Regular Supervisory System***

The reports submitted by Governments on the application of ratified Conventions, on the effect given to unratified Conventions and/or Recommendations and on the submission of these instruments to the competent authorities are examined by two committees, namely, the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts)<sup>162</sup> and the Conference Committee on the Application of Conventions and Recommendations (Conference Committee).<sup>163</sup>

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<sup>159</sup> In the event of any Member State failing to carry out within the time specified in the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice (ICJ), as the case may be, the Governing Body may recommend to the International Labour Conference such action as it may deem wise and expedient to secure compliance therewith.

<sup>160</sup> ILO Governing Document GB.303/8.

<sup>161</sup> The special supervision mechanism in the field of freedom of association is examined in Chapter VI.

<sup>162</sup> The Committee of Experts was set up in 1926, and is composed of experts of recognised competence who are completely independent of Government and appointed in their personal capacity. Its function is to determine whether the requirements of a given Convention are being met, whatever the economic and social conditions existing in a given Member State. See ILO (2008) *Committee of Experts on the*

In its examination of a State report, the Committee of Experts issues (i) observations on any discrepancy or violation that has been noted; or (ii) requests, which are communicated directly to the Government concerned in order that it may reply to the Committee in its next Conference. In addition to these two types of documents, every year the Committee of Experts makes a general study on one particular subject based on the reports requested from all States on the Conventions and Recommendations relevant to that subject. These observations are published in the Committee's annual report.<sup>164</sup> The report of the Committee of Experts is used for discussion at the International Labour Conference. This is an extremely important part of the ILO's supervisory machinery, whereby Member States that have breached ratified Conventions can be called to the bar of international public opinion to explain their reasons.<sup>165</sup>

The annual report of the Committee of Experts is submitted to the International Labour Conference, where it is examined by the Conference Committee. 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 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 particular paragraphs of its General Report.<sup>166</sup>

The reporting procedure is one of the outstanding characteristics of ILS. In the reporting procedure, social partners play an important role. As a result of the reporting procedure,

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*Application of Conventions and Recommendations*. Available at <http://www.ilo.org> (last visited 20 May 2008).

<sup>163</sup> The Conference Committee on the Application of Standards is a standing committee of the Conference, and is made up of Governments', employers' and workers' delegates. See ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 77.

<sup>164</sup> The Committee's annual 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 observations on the application of international labour standards; and Part III is a General Survey. Direct requests relate to more technical questions or requests for further information. They are not published in the report but are communicated directly to the Governments concerned.

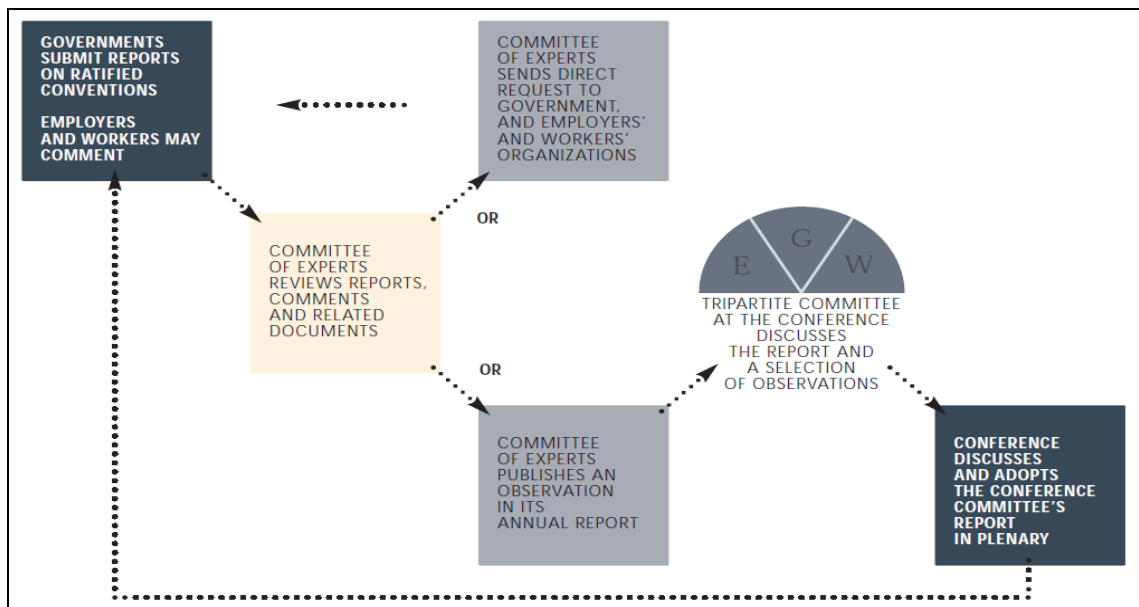
<sup>165</sup> Breen Creighton (2004) "The Future of Labour Law: Is There a Role for International Labour Standards?" in *The Future of Labour Law*, eds. Catherine Barnard, Simon Deakin and Gillians Morris, Hart Publishing, Oregon, pp. 256-257.

<sup>166</sup> ILO (2008) *Guide to International Labour Standards*, ILO, Geneva, pp. 261-262.



it is indeed the State itself that writes the report on the position of national legislation and practice, but in doing so it must answer the questions on a form adopted by the Governing Body, a tripartite organ. Furthermore, draft of reports must be communicated to the workers' organisations and employers' organisations for their comments.<sup>167</sup> In addition, comments by workers' organisations and employers' organisations.

**Chart 1.2: Regular Supervision Procedure**



### ***Representations***

According to the ILO Constitution, an industrial association of employers or of workers has the right to issue 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” and “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”.<sup>168</sup>

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

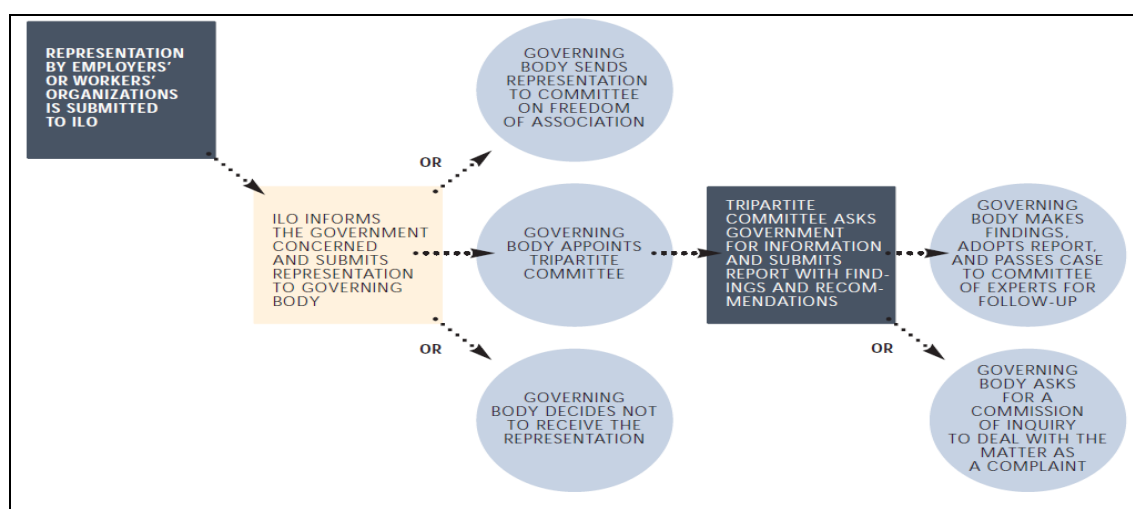
<sup>167</sup> Sec 2. Article 23 of the ILO Constitution.

<sup>168</sup> Article 24 of the ILO Constitution.

examines the information submitted and concludes with Recommendations. Where the Government’s statement is not considered satisfactory, the Governing Body is entitled to “publish the representation and the statement”.<sup>169</sup>

In the Presentation procedure, a workers’ organisation or an employers’ organisation may lodge a representation with the ILO alleging that a Member State has violated the provisions of a Convention that it has duly ratified.<sup>170</sup> By this provision, non-Government organisations from civil society are offered a direct appeal at the international level.<sup>171</sup> This characteristic makes the ILS unique among other branches of international law.

**Chart 1.3: Representations Procedure**



### **Complaints**

Under the ILO Constitution, a complaint may be filed against a Member State for not complying with a ratified Convention by (i) another Member State, which ratified the same Convention, (ii) a delegate to the International Labour Conference, or (iii) the Governing Body.<sup>172</sup>

Upon receipt of a complaint, the Governing Body may communicate with the Government, to order them to make a statement. If the Governing Body does not think it

<sup>169</sup> Article 25 of the ILO Constitution.

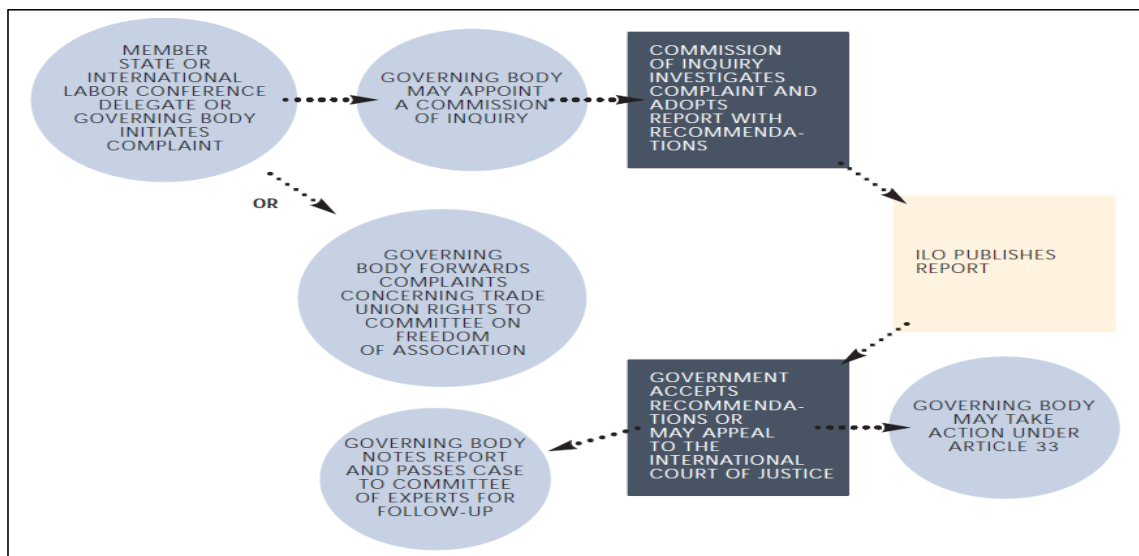
<sup>170</sup> Article 24 of the ILO Constitution.

<sup>171</sup> La Rosa and Isabelle Duplessis (2001) *Tripartism within the ILO: a Special Case*, International Training Centre, Turin, pp. 6 -7.

<sup>172</sup> Articles 26 - 34 of the ILO Constitution.

necessary to communicate the complaint to the Government in question or if, when it has made such a 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.<sup>173</sup> A Commission of Inquiry, consisting of three independent members, 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.<sup>174</sup> A Commission of Inquiry is the ILO's highest-level investigative procedure; it is generally set up when a Member State is accused of committing persistent and serious violations and has repeatedly refused to address them.<sup>175</sup> When a State refuses to fulfil the Recommendations of a Commission of Inquiry, the Governing Body can take action to secure compliance.<sup>176</sup>

**Chart 1.4: Complaints Procedure**



### ***Challenges of ILS' Supervisory Mechanism***

In contrast to the growth of instruments adopted and ratified, there has been a decrease in the percentage of reports received. In 2008, a total of 2,517 reports were requested from Governments on the application of Conventions ratified by Member States (Article

<sup>173</sup> Article 26 of the ILO Constitution.

<sup>174</sup> ILO (2008) *Guide to International Labour Standards*, ILO, Geneva, p. 168. To date the ILO had set up 12 Commission of Inquiry. Source: <http://www.ilo.org/ilolex/english/INQUIRY.htm> (last visited 21 April 2010).

<sup>175</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 82.

<sup>176</sup> Article 33 of the ILO Constitution.

22 of the Constitution). However, only 1,962 reports were received, which accounted for 77.95 %. In addition, a total 351 reports were requested under Article 35 of the ILO Constitution but 282 reports were received, which accounts for 80.34 %.<sup>177</sup> Furthermore, a number of reports received were incomplete and did not enable the ILO to reach conclusions regarding the application of the Conventions concerned<sup>178</sup> or they lamented the fact that so few employers and worker groups chose to comment in the reports.<sup>179</sup> The content of reports sometimes requires information that many developing countries do not have or, indeed, have but do not have the resources to collect.

More ratification will, of course, require more monitoring, necessitating more staff and resources. But capacity has been over stretched in both human resources and time available. In terms of human resources, in 1927, eight members of the Committee of Experts had responsibility for examining 180 reports received;<sup>180</sup> in 2008, sixteen members of this Committee had to examine 2,244 reports as noted above. In terms of time spent on examination, the Committee of Experts has only two or three weeks to examine the reports received<sup>181</sup> in order to make the general report for the following International Labour Conference.

Therefore, the International Labour Office carries out all the preparatory work, and then an individual member of the Committee of Experts does the analysis of the reports. However, members of this Committee have limited time while the reports from Member States often provide a partial and superficial view of the problems under consideration. In addition, the work of the International Labour Office can rarely provide full insight into the practice of the large numbers of countries involved. As a result, evaluation by the Committee of Experts is mostly based on legal documents with very little attention to actual practice and the real socio economic circumstances of the concerning

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<sup>177</sup> ILO (2008) *Report of the Committee of Experts on the Application of Conventions and Recommendations (2008)*. Available at <http://www.ilo.org/ilolex/gbe/ceacr2008.htm> (last visited 25 October 2008).

<sup>178</sup> Córdova Efrén (1993) "Some Reflection on the Overproduction of International Labour Standards", pp. 138-162.

<sup>179</sup> Kimberly A. Elliot (2000) "The ILO and Enforcement of Core Labour Standards", No. 006 July, p. 3.

<sup>180</sup> Breen Creighton (2004) "The Future of Labour Law: Is There a Role for International Labour Standards?" in *The Future of Labour Law*, eds. Catherine Barnard, Simon Deakin and Gillians Morris, Hart Publishing, Oregon, p. 261.

<sup>181</sup> ILO (2008) *General Reports of the CEACR*. Available at <http://www.ilo.org/ilolex/english/ceacrrepsq.htm> (last visited 10 January 2009).

countries.<sup>182</sup> Knowledgeable observers have worried openly about a decline in the quality of new Conventions and Recommendations, which have proved, in the main, impracticable and many important Conventions that were not being monitored for periods of up to four or even five years.<sup>183</sup>

Another challenge of the supervisory mechanism of ILS is the relation between the ILO and the International Court of Justice in dealing with complaints. According to Article 26 of the ILO Constitution, where a party to a Convention is alleged to be out of compliance, a non-Governmental delegate or by a Member State that is a party to that Convention may lodge a complaint. When this procedure happens, the ILO Governing Body may refer the complaint to a commission of inquiry to investigate the issues and to make recommendations. 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. 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 ICJ.<sup>184</sup>

According to its status, the role of the ICJ is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies.<sup>185</sup> Only States can bring the case to the ICJ.<sup>186</sup> Therefore, the intervening role of the Governing Body (through its Commission of Inquiry) could deprive the ICJ of its jurisdiction because in this case no formal dispute between two Member States exists.

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<sup>182</sup> Córdova Efrén (1993) "Some Reflection on the Overproduction of International Labour Standards", pp. 138-162.

<sup>183</sup> Guy Standing (2008) "The ILO: An Agency for Globalisation", *Development and Change*, vol. 39, No. 3, pp. 335-384.

<sup>184</sup> Article 29 of the ILO Constitution.

<sup>185</sup> See Chapter XIV Charter of United Nations. Text available at <http://www.un.org/en/documents/charter/> (last visited 22 April 2010).

<sup>186</sup> Sec 1 Article 34 Status of the International Court of Justice. Text available at <http://www.icj-cij.org/documents/index.php?p1=4andp2=2andp3=0> (last visited 22 April 2010). It has been suggested that a Statu of an International Court of Human Rights be adopted to which non-States actors could also become parties in addition to States. See Manisuli Ssenyonjo (2008) "The Applicability of International Human Rights Law to Non-State Actors: What Relevance to Economic, Social and Cultural Rights?", *The International Journal of Human Rights*, vol. 12, No. 5, pp. 725-760.

## Conclusion

After nearly a century, the initial ideal of setting up labour regulations at international level had made great progress, which finally, after the World War I, led to the emergence of the ILO, which could adopt Conventions and Recommendations. By May 2010, the ILO had adopted 188 Conventions and 199 Recommendations, which are the main sources of ILS. ILS cover many aspects including human rights at work, labour relations and conditions at work, etc.

The genesis of the ILO was critical for the establishment of ILS and provided institutional legitimacy for labour standards to be dealt with internationally. ILO is the only one of three organisations created after the World War I that is still in existence.<sup>187</sup> Established at the beginning of the twentieth century by industrialised nations, much of its early attention was given to setting up labour standards to avoid unfair competition from countries with cheap labour standards. Today the ILO works as a development agency that focuses on improving working and living conditions helping less advanced countries to develop their economic potential and raise their productivity; it also helps more advanced countries lay the social basis for greater economic cooperation.<sup>188</sup>

By encouraging cooperation among Member States on questions relating to labour issues, it was believed, therefore, that the ILS would be a means to promote peace and reduce nationalist competition. It was also believed that the ILO would advance social justice by establishing uniform labour standards across national boundaries. ILS are the tools used by the ILO to pursue its purposes in creating fair international competition, maintaining social justice to establish lasting peace, creating a balance between economic development and human protection, and being a source of national legislation and policy.

The ILO Constitution recognises that universal and lasting peace can be established if it is based on social justice. ILS play an important role in ensuring decent work for workers, enhancing economic development and in protecting workers and society from

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<sup>187</sup> The other two organisations are the League of Nations and the World Court. See also Ed Lorenz (2002) "Bringing Law to Globalisation through ILO Conventions: A Labour Perspective on the Core Labour Standards", *MSU-DCL Journal of International Law*, vol. 11, pp. 101-112.

<sup>188</sup> David Morse (1957) "The International Labour Organisation in a Changing World", *ANNALS of the American Academy of Political and Social Science*, vol. 310, pp. 31-38.

social hardship and poverty. The purposes and roles of ILS are the basis for consideration of incorporating appropriate ILS into Vietnam.

The working mechanism of the ILO has provided some distinctive characteristics to ILS that make ILS different from other types of international legal standards. These characteristics are derived from the ILO's tripartite mechanism, its procedure to adopt ILS and its supervisory system. The tripartite structure of the ILO shows the democratic of the operation of the ILO. This structure also creates a very important opportunity for social partners to participate in and increase their influence in the operation of the ILO in general and in the creation, revision and supervision of the ILS in particular. In creating ILS, the work of the ILO encompasses a triadic arrangement of workers' organisations, employers' organisations and Governments, with further NGOs' participation. In this, employers, workers and Governments all play a part, though separately, in the evolution of the concept of international action for the promotion of labour standards.<sup>189</sup> In monitoring ILS, the ILO creates two unique procedures, which are not available in the supervisory systems of other branches of international law: reporting and representation procedures.

At present, ILS are facing some important challenges, which result from institutional and globalisation challenges. Implementation and enforcement are still big problems due to the lack of teeth of the ILO, which only rarely use its sanctions power to condemn non-compliant Member States, to verify compliance in the field, or to fight against violations. Another challenge for the ILO is that there has also been a lag in the updating of old Conventions and a failure to add Conventions that relate to the new realities of the global labour market. Furthermore, under the impact of globalisation, it is important for the ILO to widen the scope of ILS from covering only traditional employment relations between workers and employers to covering many labour aspects of informal workers. These challenges, among other things, have raised the need to reshape ILS by focusing on core international labour standards.<sup>190</sup> The ILO's core international labour standards, particularly the core international standards on freedom of association and collective bargaining are examined in the next Chapter.

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<sup>189</sup> David Morse (1969) *The Origin and Evolution of the ILO and Its Role in the World Community*, Humphrey Press, New York, p. 7.

<sup>190</sup> Anke Hassel (2008) "The Evolution of a Global Labour Governance Regime", *Governance: An International Journal of Policy, Administration, and Institution*, vol. 21, No. 2, pp. 231-251.

## Chapter II

### The Core International Labour Standards on Freedom of Association and Collective Bargaining in the ILO's Jurisprudence

*“No legislator can attack it [freedom of association] without impairing the very foundation of society.”<sup>191</sup>*

#### Introduction

Chapter I showed that international labour standards (ILS) cover a very wide area of labour issues. Among these are core international labour standards (CILS) that are synonymous with the objectives of the ILO and therefore obligatory for all Member States parties of the ILO.<sup>192</sup> This Chapter examines the emergence of the CILS in general and the CILS on freedom of association and collective bargaining in the ILO's jurisprudence in particular.

Part I examines the emergence of the CILS and interrogates the rationale for making them core standards. The notion of CILS appears critical to both States parties inclination to ratify and implement the relevant ILO's Conventions and national competitiveness in terms of States' capacity to attract foreign direct investment attraction and export performance.

In part II, it explores the ILO's jurisprudence on freedom of association and collective bargaining. As acknowledged in Chapter I, flexibility of standards is one of the characteristics of ILS and, of course, of the CILS on freedom of association and collective bargaining. Therefore, this Chapter examines the regulation of the ILO on freedom of association and collective bargaining, which derive not only from the ILO's

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<sup>191</sup> Alexis de Tocqueville (1835) *Democracy in America*, Regnery Publishing Inc, Washington, D.C, p. 152.

<sup>192</sup> Baban Hasnat (2002) “The Impact of Core Labour Standards on Exports”, *International Business Review*, vol. 11, No. 5, pp. 563-575.



relevant instruments but also from case law of the ILO's Committee on Freedom of Association (CFA).

## **2.1. The Concept and Impact of the CILS**

### **2.1.1 Emergence and Definition of the CILS**

#### *Emergence*

Two phenomenons are frequently associated with the firming of the CILS. One is the end of the Cold War and the other is the intensifying process of deeper economic integration or globalisation. After the cold war, the battle between the proponents of a global economy based on free trade, capital mobility, and intellectual property rights on the one hand, and the proponents of global standards to protect workers and the environment on the other hand replaced the battle between communism and capitalism.<sup>193</sup>

Henceforth, the ILO has come under sustained attack from many sides, making the future relevance of ILS uncertain.<sup>194</sup> The ILO has been accused by some of bringing a negative approach to the phenomenon of globalisation. It has been argued that instead of helping to harness the potential of economic growth for all, the ILO has adopted an old-style and top-down regimental approach typical of the ideological divide of the twentieth century, rather than an innovative approach to managing the realities of a new global economy.<sup>195</sup> The neoliberals regard labour standards as impediments to the market. In their view, what is required is a trade-off between economic development and labour standards, and free trade would certainly distribute the fruits of globalisation for all.<sup>196</sup> One prominent commentator has argued that "Democracy, sovereignty and

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<sup>193</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C, p. 7.

<sup>194</sup> Lee Swepston (1994) "The Future of ILO Standards", *Monthly Labour Review*, vol. 117, No. 9, pp. 16-23.

<sup>195</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 16.

<sup>196</sup> Erika de Wet (1994) *Labour Standards in the Globalised Economy: The Inclusion of a Social Clause in the General Agreement on Tariffs and Trade/World Trade Organisation*, International Institute for Labour Studies, Geneva, p. 3. See also Philip Alston (1994) "Post-post-modernism and International

higher labour standards do not always, or even necessarily, go together with faster economic growth and more widely spread prosperity. Sometimes, we have to choose”.<sup>197</sup>

Studies carried out by one group concluded that if labour standards are needed to address labour market imperfections in the process of globalisation in various nations, there is little reason to think that they should be the same everywhere. Likewise, nations with high standards of labour may worsen their own welfare if those with low standards are forced to harmonise their labour standards in the context of low skilled labour.<sup>198</sup> Therefore, it is difficult to generate much theoretical support for the pursuance of international labour standards.<sup>199</sup>

Another group doubted the relevance and competence of the ILO to legislate for globalisation and proposed another measure to enforce international labour standards. This argument came from fair trade proponents, organisations of civil society and other non-Governmental labour activist groups.<sup>200</sup> They highlighted pervasive worker rights’ abuses in spite of the existence of extensive ILO Conventions that had also been ratified by many Member States. Consequently, they argue that the ILO, while important as an international forum for a discussion on the social dimensions of globalisation, was failing to accomplish its mission.

Besides the positive effects of globalisation, these critics pointed to its “ugly face,” revealing the existence of sweatshops and the pervasive use of forced and child labour in industries that have become the backbone of the new global economy.<sup>201</sup> They blamed the ILO for failure to implement and enforce international labour standards and

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Labour Standards: The Quest for a New Complexity” in *Labour Standards and Economic Interdependence*, eds. Werner Sengenberger and Duncan Campbell, International Institute for Labour Studies, Geneva, pp. 95-104; Arne Vandaele (2005) *International Labour Rights and the Social Clause: Friends or Foes*, Cameron May, London, p. 73.

<sup>197</sup> Martin cited by Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 16.

<sup>198</sup> Drusilla Brown, Alan Deardorff and Robert Stern (1996) “International Labour Standards and Trade: A Theoretical Analysis” in *Harmonisation and Fair Trade: Prerequisites for Free Trade*, eds. B. Jagdish and H. Robert, MIT Press, Cambridge, pp. 227-280.

<sup>199</sup> Drusilla Brown, Alan Deardorff and Robert Stern (1998) “Trade and Labour Standards”, *Open Economies Review*, vol. 9, No. 2, pp. 171-194.

<sup>200</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C. p. 73.

<sup>201</sup> Martin cited by Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 16.

proposed to include social clauses in international trading systems and the use of trade sanctions to enforce international labour standards.<sup>202</sup>

Furthermore, they found that the rate of ratification of ILO Conventions had declined massively in recent times. Member States of the ILO were not keen either to expand any further, the body of international labour standards already in existence. In addition, they argued that as a consequence of the institutional structure of the ILO, it did not represent workers in the informal economy.<sup>203</sup>

Nonetheless, at the Singapore Ministerial meeting in 1996, members of the WTO renewed their commitment to the observance of internationally recognised core labour standards and recognised that the ILO was the competent body to establish and deal with international labour standards.<sup>204</sup> In the following year, at its 85<sup>th</sup> Session, the ILO confirmed that the *raison d'être* of the ILO “is still to guarantee social peace, without which neither the multilateral trade system, nor the financial system – and by extension the global economy – would be able to develop or even survive”.<sup>205</sup> In his report, the Director-General of the ILO put forward proposals for the adoption of a solemn declaration on core international labour standards.<sup>206</sup>

ILO's Member States recognised the need to identify a core set of international labour standards which would establish a foundation for decent and fair treatment of workers and to establish new and more vigorous mechanisms to promote these standards. In this context, the question of what these standards are must be answered.

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<sup>202</sup> Gijbert Liemt (1989) “Minimum Labour Standards and International Trade: Would a Social Clause Work?”, *International Labour Review*, vol. 128, No. 4, pp. 433-448. See also Sandra Polaski (2003) *Trade and Labour Standards: A Strategy for Developing Countries*. Available at [http://www.carnegieendowment.org/pdf/files/Polaski\\_Trade\\_English.pdf](http://www.carnegieendowment.org/pdf/files/Polaski_Trade_English.pdf) (last visited 15 January 2009); Luke L. Arnold (2005) “Labour and the World Trade Organisation: Towards a Reconstruction of the Linkage Discourse”, *Deakin Law Review*, vol. 10, No. 1, pp. 83-119.

<sup>203</sup> Sean Cooney (1998) “Testing Time for the ILO: Institutional Reform for the New International Political Economy”, *Comparative Labour Law and Policy Journal*, vol. 20, pp. 365-399.

<sup>204</sup> WTO (1996) *Singapore Ministerial Declaration*. Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/min96\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm) (last visited 15 September 2008); OECD (2000) *International Trade and Core Labour Standards. OECD Policy Brief, October*. Available at [www.oecd.org/publication/Pol\\_crief/](http://www.oecd.org/publication/Pol_crief/) (last visited 15 January 2009).

<sup>205</sup> ILO (1997) *The ILO Standard Setting and Globalisation: Report of the Director – General. International Labour Conference 85<sup>th</sup> Session*, ILO, Geneva, p. 7.

<sup>206</sup> *Ibid*, p. 7.

### *The Concept of the CILS*

International labour standards are multi-faceted, consisting of different subjects. Moreover, implementation of international labour standards varies from country to country depending on its stage of development, per capita income, political, social and cultural conditions and institutions.<sup>207</sup> Therefore, the determination of CILS could be a moot point.

In 1989, a review of eight different studies found that the following standards were often mentioned: freedom of association (mentioned in all eight studies); the right to organise and bargain collectively (mentioned in all eight studies); minimum age for the employment of children (mentioned in all eight studies); freedom from discrimination in employment and occupation (mentioned in six studies); freedom from forced labour (mentioned in six studies) and occupational safety and health (mentioned in six studies).<sup>208</sup>

Another study in 1995 proposed the following set of basic rights for workers all over the world: freedom from slavery and servitude; freedom from unsafe and unhealthy working conditions; a limit to hours of which children may work; the right to freedom of association and the right to collective bargaining.<sup>209</sup>

The World Social Summit in Copenhagen in March 1995,<sup>210</sup> and after that the OECD itself in 1996,<sup>211</sup> agreed that the following issues constituted the “core” standards: prohibition of forced labour; freedom of association; the right to organise and bargain collectively; elimination of child labour; and removal of discrimination in employment.

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<sup>207</sup> Drusilla Brown, Alan Deardorff and Robert Stern (1998) “Trade and Labour Standards”, *Open Economies Review*, vol. 9, No. 2, pp. 171-194 .

<sup>208</sup> Gijsbert Liemt (1989) “Minimum Labour Standards and International Trade: Would a Social Clause Work?”, *International Labour Review*, vol. 128, No. 4, pp. 433-448.

<sup>209</sup> Fields Gary (1995) *Trade and Labour Standards: A Review of the Issues*, OECD, Paris, p. 13.

<sup>210</sup> United Nations (2008) *Copenhagen Declaration on Social Development. Part C: Commitments*. Available at [http://www.un.org/esa/socdev/wssd/decl\\_partc.html](http://www.un.org/esa/socdev/wssd/decl_partc.html) (last visited 15 January 2009).

<sup>211</sup> OECD (1996) *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris, p. 26.

After several years of discussion and intense negotiations,<sup>212</sup> on 18 June 1998, the International Labour Conference adopted the *Declaration on Fundamental Principles and Rights at Work* (the 1998 Declaration), and a Follow up to the Declaration to encourage the implementation of the 1998 Declaration was also adopted.<sup>213</sup> The Declaration confirms four sets of rights and principles at work:

1. Freedom of association and the effective recognition of the right to collective bargaining;
2. Elimination of all forms of forced or compulsory labour;
3. Effective abolition of child labour; and
4. Elimination of discrimination in respect of employment and occupation.<sup>214</sup>

The political commitment to the 1998 Declaration is revealed in legal obligations imposed by Conventions. In addition, the 1998 Declaration states that the CILS are embodied in the following:<sup>215</sup>

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

After its adoption, the 1998 Declaration was criticised for reducing the international labour rights agenda to bare essentials and losing sight of other significant issues such

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<sup>212</sup> Hilary Kellerson (1998) “The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future”, *International Labour Review*, vol. 137, No. 2, pp. 223-227.

<sup>213</sup> Full text available at <http://www.ilo.org/ilolex/english> (last visited 21 April 2010). See also Janice Bellace (2001) “The ILO Declaration of Fundamental Principles and Rights at Work”, *International Journal of Comparative Labour Law and Industrial Relations*, vol. 17, No. 3, pp. 269-287.

<sup>214</sup> Section 2 of the Declaration. See also Janice Bellace (2001) “The ILO Declaration of Fundamental Principles and Rights at Work”, *International Journal of Comparative Labour Law and Industrial Relations*, vol. 17, No. 3, pp. 269-287.

<sup>215</sup> Texts available at <http://www.ilo.org/ilolex/english> (last visited 21 April 2010).

as regulations on working hours and minimum wages,<sup>216</sup> and the right to a decent living.<sup>217</sup> However, this concept is widely accepted and has been reaffirmed by many other institutions, such as the World Bank,<sup>218</sup> the International Monetary Fund (IMF),<sup>219</sup> the Asian Development Bank (ADB),<sup>220</sup> the Organisation for Economic Cooperation and Development (OECD),<sup>221</sup> the United Kingdom Department for International Development (DFID),<sup>222</sup> and scholars worldwide.<sup>223</sup>

Therefore, the CILS can be defined as a set of four internationally recognised basic rights and principles at work relating to: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) elimination of all forms of forced or compulsory labour; (iii) effective abolition of child labour; and (iv) elimination of discrimination in respect of employment and occupation.<sup>224</sup> These standards are enshrined in the relevant Conventions and Recommendations of the ILO.

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<sup>216</sup> Philip Alston (2004) "Core Labour Standards and the Transformation of the International Labour Rights Regime", *The European Journal of International Law*, vol. 15, No. 3, pp. 457-521; Philip Alston (2005) "Facing Up to the Complexities of the ILO's Core Labour Standards Agenda", *The European Journal of International Law*, vol. 16, No. 3, pp. 467-480.

<sup>217</sup> Singh and Zammitt cited by Ritash Sarna (2005) *The impact of core labour standards on Foreign Direct Investment in East Asia*. Available at <http://www.jil.go.jp/profile/documents/Sarna.pdf> (last visited 16 January 2009).

<sup>218</sup> World Bank (2009) *Core Labour Standards Toolkit* [Homepage of World Bank], [Online]. Available at <http://go.worldbank.org/1JZA8B2CO0> (last visited 15 February 2009).

<sup>219</sup> Stephen S. Golub (2007) *International Labour Standards and International Trade*. IMF Working paper No WP/97/37 [Homepage of International Monetary Fund], [Online]. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882280) (last visited 15 February 2009).

<sup>220</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 10.

<sup>221</sup> OECD (2000) *International Trade and Core Labour Standards*. OECD Policy Brief, October. Available at [www.oecd.org/publication/Pol\\_crief/](http://www.oecd.org/publication/Pol_crief/) (last visited 18 January 2009).

<sup>222</sup> DFID (2004) *Labour Standards and Poverty Reduction*, DFID, London, p. 9.

<sup>223</sup> See: Baban Hasnat (2002) "The Impact of Core Labour Standards on Exports", *International Business Review*, vol. 11, No. 5, pp. 563-575. See also Drusilla Brown (2000) *International Trade and Core Labour Standards: A Survey of the Recent Literature*, OECD Publishing, Paris; Gudrun Biffl and Joe Isaac (2005) "Globalisation and Core Labour Standards: Compliance problems with ILO Conventions 87 and 98. Comparing Australia and other English-Speaking Countries with EU Member States", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 21, No. 3, pp. 405-444; Keith E. Maskus and Will J. Martin (2001) "Core Labour Standards and Competitiveness: Implications for Global Trade Policy", *Review of International Economics*, vol. 9, No. 2, pp. 317-328; Jeff Hilgert (2009) "Mapping the Boundaries of Human Rights at Work: Questioning How the ILO Defines Labour Rights and Social Justice", *Labour Studies Journal*, vol. 34, No. 1, pp. 21-38.

<sup>224</sup> Markus Burianski, Caroline Negi and Mathias Ulbrich (2002) "Free Trade and Core Labour Rights: Status Quo of a Discussion", *Tilburg Foreign Law Review*, vol. 9, pp. 393-416.

### *What makes them Core Standards?*

There are several justifications. Firstly, these standards are suggested as the core standards because they embody the fundamental dignity of workers as human beings as promulgated in the key human rights instruments, including the Universal Declaration of Human Rights,<sup>225</sup> the International Covenant on Civil and Political Rights<sup>226</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>227</sup>

Freedom of association and the right to collective bargaining is a human right recognised by Article 23(4) of the Universal Declaration of Human Rights, Article 22 of the International Covenant on Civil and Political Rights and Article 8(1) of the International Covenant on Economic, Social and Cultural Rights. The notion that freedom to form a union and bargain collectively is a fundamental human right follows directly from the concept that every human being has value and should be treated with respect and dignity. If human beings have value and should be treated with respect and dignity, they are entitled to participate in important decisions affecting their lives, such as determination of the terms and conditions of their employment. Denying any person the right to participate in these decisions is an affront to human dignity.<sup>228</sup>

Elimination of all forms of forced or compulsory labour is also promulgated by Article 4 and Article 5 of the Universal Declaration of Human Rights, Article 8 of the International Covenant on Civil and Political Rights. The matter of child labour is mentioned at Article 25(2) of the Universal Declaration of Human Rights and Article 32 of Convention on the Rights of the Child.<sup>229</sup> Discrimination in respect of employment and occupation is prohibited by Article 23 (1,2,3) of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Economic, Social and Cultural Rights.

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<sup>225</sup> Text available at <http://www.un.org/Overview/rights.html> (last visited 10 February 2009).

<sup>226</sup> Text available at <http://www2.ohchr.org/english/law/ccpr.htm> (last visited 10 February 2009).

<sup>227</sup> Text available at [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (last visited 10 February 2009).

<sup>228</sup> AFL-CIO (2005) *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*. Available at [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf) (last visited 28 September 2009).

<sup>229</sup> Text available at [www.unicef.org/crc](http://www.unicef.org/crc) (last visited 10 February 2009).

In the area of human rights protection, the ILO has made the most significant strides of any United Nations agency.<sup>230</sup> The CILS express the role of the ILO in protecting four human rights of workers in the workplace. These rights are seen as essential human rights because they are inherent, inalienable and universal. These rights are inherent because they are the birthright of all human beings. They are not granted only to citizens, but belong to people simply by reason of their humanity. They are inalienable because no one can agree to give them up, or have them taken away. They are universal because they apply to every worker regardless of nationality, status, sex or race. Thus, “building on basic human rights”<sup>231</sup> makes these standards core standards.

Secondly, these standards are core because they are important for market economies to operate efficiently. The CILS contain rules that are capable of regulating labour market transactions comparable to the rules that protect property rights and freedom of transactions in a market economy.<sup>232</sup> Furthermore, they allow workers to negotiate standards in other areas; for example, the right to organise allows workers to associate with others to create collective power that makes them stronger in fighting for their rights and interests through collective bargaining and through strikes.<sup>233</sup>

Thirdly, these standards are core as they are different from cash international labour standards. Besides the CILS, a wide range of other standards are called cash standards<sup>234</sup> because they mandate particular outcomes. Standards, such as minimum wages, working hours, annual leave, occupational safety and health, social security all directly affect labour costs. Implementation of these standards depends on the level of economic development of each country; for instance, employers of a country, where the national standards are lower, will have to pay more cash to implement these international labour standards if they are implemented. Therefore, the CILS may be seen

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<sup>230</sup> See Paul Gormley (1966) “The Emerging Protection of Human Rights by the International Labour Organisation”, *Albany Law Review*, vol. 30, pp. 13-51.

<sup>231</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 19. See also Markus Burianski, Caroline Negi and Mathias Ulbrich (2002) “Free Trade and Core Labour Rights: Status que of a Discussion”, *Tilburg Foreign Law Review*, vol. 9, pp. 393-416.

<sup>232</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C, p. 11.

<sup>233</sup> Centre for Global Development (2007) *Labour Standards*. Available at <http://www.globaldevelopmentmatters.org/qa-Labour-standards.asp#4> (last visited 16 February 2009).

<sup>234</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C, p. 13.



as rights to a process not to a particular outcome.<sup>235</sup> In any event, there is no empirical evidence to prove that implementing the CILS increases labour costs and undermines trading benefits.<sup>236</sup>

Fourthly, these standards are core because they are prohibitive in character.<sup>237</sup> For other ILO's Conventions, implementation obligations of Member States occur only after they have ratified the Conventions concerned. In the case of core Conventions, all ILO Member States have an obligation, arising out of membership requirements, to respect, to promote and to realise, in good-faith and in accordance with the ILO Constitution, these standards, even if they have not ratified the relevant Conventions.<sup>238</sup> The reason why they are prohibitive is that they are fundamental minimum standards that are applicable to all countries. These standards do not establish a particular level of working conditions, wages or health and safety standards to be applied internationally and are not intended to alter the comparative advantage of any country<sup>239</sup> and they should not be used for protectionist trade purposes.<sup>240</sup>

Finally, these standards are core because they are monitored and supervised by a special review mechanism. This mechanism requires all Member States which have not ratified relevant core labour standards Conventions to submit their national reports, on an annual basis, on action that they have taken to promote relevant principles. The national reports are then reviewed by the Governing Body of the ILO. The International Labour Office may set up a group of experts to access and provide written comments. Furthermore, the General Director of the ILO is required to make a global report on the state of implementation of the Declaration every year, focusing on each of the CILS in turn.<sup>241</sup>

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<sup>235</sup> Christopher McCrudden and Anne Davies (2000) "A Perspective on Trade and Labour Rights", *Journal of International Economic Law*, vol. 3, pp. 43-62.

<sup>236</sup> A full explanation of this point is studied in the next part of this section.

<sup>237</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 17.

<sup>238</sup> Section 2 ILO Declaration on Fundamental Principles and Rights at Work 1998.

<sup>239</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 12.

<sup>240</sup> Section 5 of the Declaration on Fundamental Principles and Rights at Work 1998.

<sup>241</sup> Part II and Part III of the Follow-up to the Declaration on Fundamental Principles and Rights at Work 1998.

Because they are essential labour standards, they have been integrated in a range of guidelines for companies, such as the United Nations Global Compact;<sup>242</sup> the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights;<sup>243</sup> the OECD Guidelines for Multinational Enterprises.<sup>244</sup> It is reasonable to state that human rights and international labour standards (in general) and the CILS (in particular) are frequently united by similar values.<sup>245</sup>

### 2.1.2. The CILS and National Competitiveness

Globalisation has three main dimensions: greater foreign direct investment (FDI), greater foreign trade and international migration. These three dimensions have influence on and are linked with improving working conditions (higher wages, fewer hours of work, fewer accidents at work) and improving workers' rights. Therefore, it has been agreed that open economies have better working conditions than more closed economies.<sup>246</sup>

The ILO Declaration on Fundamental Principles and Rights at Work states that “the comparative advantage of any country should in no way be called into question by this Declaration and its follow up”.<sup>247</sup> However, it is important to know whether implementation of CILS has any reversal impact on a country's competitiveness in the context of globalisation in regard to FDI inflows and export performance.<sup>248</sup>

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<sup>242</sup> United Nations Global Compact (2009) *The Ten Principles* [Homepage of United Nations], [Online]. Available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited 10 February 2009).

<sup>243</sup> United Nations Economic and Social Council (2003) *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* [Homepage of United Nations], [Online]. Available at <http://www.unhchr.ch/huridocda/huridoca.nsf/0/64155e7e8141b38cc1256d63002c55e8?opendocument> (last visited 10 February 2009).

<sup>244</sup> OECD (2000) *The OECD Guidelines for Multinational Enterprises*, OECD Publications, Paris, p. 21.

<sup>245</sup> Nicolas Valticos (1998) “International Labour Standards and Human Rights: Approaching the year 2000”, *International Labour Review*, vol. 137, No. 2, pp. 135-147.

<sup>246</sup> See Robert J. Flanagan (2006) *Globalisation and Labour Conditions: Working Conditions and Worker Rights in a Global Economy*. Oxford: Oxford University Press, pp 36-46.

<sup>247</sup> Para 5 of the ILO Declaration on Fundamental Principles and Rights at Work.

<sup>248</sup> See James Heintz (2002) *Global Labour Standards: Their Impact and Implementation. Working Paper Series No. 46*. Available at [www.umass.edu/peri](http://www.umass.edu/peri) (last visited 10 May 2009).

## *The CILS and FDI*

It is often alleged that FDI might be attracted to locate in countries with lower labour standards to take advantage of low labour costs.<sup>249</sup> It is also argued that low labour standards countries are havens for foreign investors,<sup>250</sup> and that foreign investors tend to locate where union representation is weaker,<sup>251</sup> and that unionisation has a negative impact on FDI<sup>252</sup> or weak union rights are associated with a stronger comparative advantage.<sup>253</sup>

However, countries where labour conditions are poor and the CILS are not implemented are not countries that attract more FDI. First of all, empirical studies have found no evidence of the link between low labour standards and FDI growth.<sup>254</sup> Secondly, poor working conditions often signal low labour productivity or are one element of a package of national characteristics that discourage FDI flows.<sup>255</sup> Thirdly, studies have confirmed that FDI is more attracted to countries with high labour standards, and FDI tends to be greater in countries with stronger worker rights;<sup>256</sup> for example, in relation to the right to organise and collective bargaining, implementing this right allows workers to participate more in policy making, empowers workers in the negotiating process and thus protects workers from being exploited. Consequently, the employment relationship becomes more stable; it plays an important role in maintaining social and political stability of countries. Additionally, socio political stability can foster economic growth

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<sup>249</sup> See Layna Mosley and Saika Uno (2007) "Racing to the Bottom or Climbing to the Top? Economic Globalisation and Collective Labour Rights", *Comparative Political Studies*, vol. 40, pp. 923-948.

<sup>250</sup> Rodrik cited by Kucera David (2002) "Core Labour Standards and Foreign Direct Investment", vol. 141, No. 1,2, pp. 31-70.

<sup>251</sup> Friedman Joseph, Gerlowski Daniel and Silberman Johnathan (1992) "What Attract Foreign Multinational Corporation? Evidence from Branch Plant Location in the United States", *Journal of Regional Science*, vol. 32, No. 4, pp. 403-418.

<sup>252</sup> Bartik Timothy (1985) "Business Location Decisions in the United States: Estimates of the Effects of Unionisation, Taxes and other Characteristics of States", *Journal of Business and Economic Statistics*, vol. 3, pp. 14-22. See also Woodward Douglas (1992) "Locational Determinants of Japanese Manufacturing Start-up in the United States", *Southern Economic Journal*, vol. 58, pp. 690-708.

<sup>253</sup> Matthias Busse (2002) "Comparative Advantage, Trade and Labour Standards", *Economic Bulletin*, vol. 6, No. 2, pp. 1-8.

<sup>254</sup> Drusilla Brown (2000) *International Trade and Core Labour Standards: A survey of the Recent Literature*, OECD Publishing, Paris.

<sup>255</sup> Robert J. Flanagan (2003). *Labour Standards and International Competitive Advantage*. Available at [www.iza.org/iza/en/papers/transatlantic/1\\_flanagan.pdf](http://www.iza.org/iza/en/papers/transatlantic/1_flanagan.pdf) (last visited 10 May 2009).

<sup>256</sup> Kucera David (2002) "Core Labour Standards and Foreign Direct Investment", *International Labour Review*, vol. 141, No. 1,2, pp. 31-70.

and, in turn, economic growth is an advantage for attracting FDI.<sup>257</sup> Therefore, implementing the CILS on union rights actually increases countries' competitiveness.

Furthermore, it has been proved that FDI into developed countries where the CILS are implemented is always higher than into developing countries with lower labour standards.<sup>258</sup> On the contrary, violation of CILS does not necessarily result in increased competitiveness;<sup>259</sup> for example, a study evaluating the effects of gender inequality in education and employment on investment and economic growth has concluded that greater gender inequality leads to lower rates of investment and slower growth.<sup>260</sup> Another study has shown that forced labour and FDI are negatively associated.<sup>261</sup>

Finally, when deciding to invest, investors have rated the size and the growth of markets very highly. They also view the political and social stability of the host countries and the quality of the labour force as more important than other factors, such as weak labour standards and cheap labour costs.<sup>262</sup> Therefore, implementation of the CILS does not make a country less attractive to FDI.

### ***The CILS and Trade Performance***

With regard to the potential impact of CILS on trade performance, it is sometimes argued that implementing the CILS - especially the standards on freedom of association and non-discrimination, reduces export performance.<sup>263</sup> In theory, forced labour and child labour may increase the supply of labour and could be used to increase low wage

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<sup>257</sup> Nicholas Billington (1999) "The Location of Foreign Direct Investment: An Empirical Analysis", *Applied Economics*, vol. 31, No. 1, pp. 65-76.

<sup>258</sup> UNTAD (2006) *World Investment Report 2006: FDI from Developing and Transition Economies: Implications for Development*, UNTAD, Geneva, pp. 3-4.

<sup>259</sup> Will J. Martin and Keith E. Maskus (2001) "Core Labour Standards and Competitiveness: Implication for Global Trade Police", *Review of International Economics*, vol. 9, No. 2, pp. 317-328.

<sup>260</sup> Klasen cited by Kucera David (2002) *Effects of Labour Standards on Labour Costs and FDI Flows*. Available at <http://training.itcilo.it/decentwork/staffconf2003/documents/KuceraLabourStandardsFDI.pdf> (last visited 10 February 2009).

<sup>261</sup> Matthias Busse and Sebastian Braun (2002) *Trade and Investment Effects of Forced Labour: An Empirical Assessment*, Hamburg Institute of International Economics, Hamburg, p.13.

<sup>262</sup> Werner Sengenberger (2005) *Globalisation and Social Progress: The Role and Impact of International Labour Standards*, 2nd edn, Friedrich-Ebert-Stiftung, Bonn, p. 13; Ritash Sarna (2005) *The Impact of Core Labour Standards on Foreign Direct Investment in East Asia*. Available at <http://www.jil.go.jp/profile/documents/Sarna.pdf> (last visited 10 March 2009).

<sup>263</sup> Jai S. Mah (1997) "Core Labour Standards and Export Performance in Developing Countries", *World Economy*, vol. 20, No. 6, pp. 773-785.

exports. However, studies carried out by the ILO<sup>264</sup> and other scholars<sup>265</sup> have found that forced labour and child labour are uncommon in export industries and have accounted for a small percentage of the total child labour and forced labour worldwide.<sup>266</sup> Thus, implementing CILS on forced labour and child labour would have little impact on international comparative advantage. On the contrary, taking children out of factories and enrolling them in schools could even increase productivity in the long run by building human resource capital – the most important capital of a country in the modern world.<sup>267</sup> Furthermore, enforcing these standards would also remove the danger of a consumer backlash against companies or countries caught engaging in forced labour or child labour,<sup>268</sup> which, in turn, increases the competitiveness of the country.

Concerning discrimination, if enterprises in an export sector discriminate against a particular group of workers, this may well reduce the labour supply to that sector, with the consequence of lower production and exports. In this case a reduction in discrimination would increase production and exports. Furthermore, if discrimination happens in a non-export sector, it may well increase the supply of labour to the export sector and thus increase trade, so that implementing the CILS on discrimination theoretically increases production and trade rather than undermine countries' competitiveness.

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<sup>264</sup> ILO (2002) *A Future without Child Labour. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2002*, ILO, Geneva, p. xi, 21. See also ILO (2001) *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2001*, ILO, Geneva.

<sup>265</sup> Sarah Bachma (2000) "A new Economics of Child Labour: Searching for Answers behind the Headlines", *Journal of International Affairs*, vol. 53, No. 2, pp. 545-572; Drusilla Brown, Alan Deardorff and Robert Stern (2003) "Child Labour: Theory, Evidence, and Policy" in *International Labour Standards: History, Theory, and Policy Options*, eds. Kaushik Basu, Henrik Horn, Lisa Roman and Judith Shapiro, Blackwell publishing Ltd, Oxford, pp. 195-247.

<sup>266</sup> ILO (2005) *A Global Alliance against Forced Labour. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2005*, ILO, Geneva, p. 30.

<sup>267</sup> Kathleen Beegle, Rajeev Dehejia and Roberta Gatti (2005) *Why Should We Care about Child Labour? The Education, Labour Market, and Health Consequences of Child Labour. World Bank Working paper No. 3479*. Available at [www.worldbank.org](http://www.worldbank.org) (last visited 11 February 2009).

<sup>268</sup> Kimberly A. Elliot and Richard B. Freeman (2003) *Can Labour Standards Improve under Globalisation?* Institute for International Economics, Washington, D.C, p. 17.

In practice, studies by Cees van Beer (1998),<sup>269</sup> and OECD (1996)<sup>270</sup> found little evidence to recommend the view that that low labour standards have an impact on trade. Other studies have found no evidence that countries with low labour standards gain competitive advantage in international markets.<sup>271</sup> Empirical evidence based on cross-sectional data for developing countries over the period 1990-2001 does not support the view that labour standards have affected comparative advantage and export performance.<sup>272</sup>

On the question of child labour Bernham's<sup>273</sup> diversified empirical study found that there are no differences in outcome variables closely linked to the aim of the ILO's minimum age Conventions between ratified Member States and non-ratified Member States. By examining the impact of labour standards on exports of 58 non-OECD developing countries, Baban Hasnat<sup>274</sup> found that, except for Conventions No. 87 and No. 98, ratification of other core Conventions had no influence on exports.

A study carried out by the OECD also concluded that there is no correlation at the aggregate level between real wage growth and the degree of observance of the right to freedom of association; there is no evidence that countries with low labour standards enjoy a better global export performance than those countries with high labour standards; there is a positive association over time between successfully sustained trade reform and improvements in core labour standards.<sup>275</sup>

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<sup>269</sup> Cees van Beer (1998) "Labour Standards and Trade Flows of OECD Countries", *World Economy*, vol. 21, No. 1, pp. 57-73.

<sup>270</sup> OECD (1996) *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris.

<sup>271</sup> Robert J. Flanagan (2003) *Labour Standards and International Competitive Advantage*. Available at [www.iza.org/iza/en/papers/transatlantic/1\\_flanagan.pdf](http://www.iza.org/iza/en/papers/transatlantic/1_flanagan.pdf) (last visited 10 May 2009).

<sup>272</sup> Yiagadeesen Samy and Vivek Dehejia (2007) *Trade and Labour Standards: A Review of the Theory and New Empirical Evidence*. Available at <http://www.carleton.ca/economics/cep/cep07-12.pdf> (last visited 5 March 2009).

<sup>273</sup> Bernhard Boockmann (2003) *The Effect of ILO Minimum Age Conventions on the Incidence of Child Labour* [Homepage of Centre for European Economic Research (ZEW)], [Online]. Available at <http://www.vfs.uzh.ch/papers/Boockmann.pdf> (last visited 5 March 2009).

<sup>274</sup> Baban Hasnat (2002) "The Impact of Core Labour Standards on Exports", *International Business Review*, vol. 11, No. 5, pp. 563-575.

<sup>275</sup> OECD (1996) *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade*, OECD, Paris.

In addition, studies have shown that a low degree of effective implementation of the CILS increases inequality in society.<sup>276</sup> There is no evidence that poor labour standards affect trade patterns significantly.<sup>277</sup> However, rather than providing competitive advantages, weak labour standards typically reduce efficiency, raise costs and lower output, and implementing CILS is likely to increase economic efficiency.<sup>278</sup> Efforts by both developing countries and private firms to adhere to some of these core standards are unlikely to impinge severely on trade patterns.<sup>279</sup> In fact, economic dynamism and the rise in labour standards are not in conflict.<sup>280</sup> Furthermore, countries with higher labour standards dominate world trade today.<sup>281</sup>

It is reasonable to conclude that implementing the CILS does not hinder either FDI inflows or labour costs.<sup>282</sup> Core labour standards are human rights and as such require enforcement regardless of political or economic circumstance. Core labour standards also make macroeconomic sense in that they help to generate investment, foster trade and enhance the effectiveness and efficiency of the market. Adherence to core labour standards has positive political and governance effects in that it strengthens democratic institutions and buttresses the rule of law.<sup>283</sup> Further, there appears to be no empirical evidence of a negative relationship between observance of CILS and comparative advantage. In fact, strong compliance with fundamental rights of workers has a positive effect on long term income and long term growth. Thus, it is suggested that

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<sup>276</sup> Remi Bazillier and Nicholas Sirven (2008) "Is There a Social Kuznets Curve? The Influence of Labour Standards on Inequality", *Journal of Development Studies*, vol. 44, No. 7, pp. 913-934.

<sup>277</sup> Stephen S. Golub (2007) *International Labour Standards and International Trade. IMF Working paper No WP/97/37* [Homepage of International Monetary Fund], [Online]. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882280) (last visited 15 February 2009), p. 32.

<sup>278</sup> Will J. Martin and Keith E. Maskus. 2001, "Core Labour Standards and Competitiveness: Implications for Global Trade Policy", *Review of International Economics*, vol. 9, No. 2, pp. 317-328.

<sup>279</sup> Stephen S. Golub (2007) *International Labour Standards and International Trade. IMF Working paper No WP/97/37* [Homepage of International Monetary Fund], [Online]. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882280) (last visited 15 February 2009), p. 32.

<sup>280</sup> Markus Burianski, Caroline Negi and Mathias Ulbrich (2002) "Free Trade and Core Labour Rights: Status quo of a Discussion", *Tilburg Foreign Law Review*, vol. 9, pp. 393-416.

<sup>281</sup> Will J. Martin and Keith E. Maskus (2001) "Core Labour Standards and Competitiveness: Implications for Global Trade Policy", *Review of International Economics*, vol. 9, No. 2, pp. 317-328.

<sup>282</sup> Kucera David (2002) *Effects of Labour Standards on Labour Costs and FDI Flows*. Available at <http://training.itcilo.it/decentwork/staffconf2003/documents/KuceraLabourStandardsFDI.pdf> (last visited 5 March 2009).

<sup>283</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 22.

incorporation and compliance with the CILS should be one of the goals of development strategies of every country.<sup>284</sup>

### 2.1.3. The CILS & the Social Clause

#### *The Social Clause Arguments*

The link between international trade and labour standards is not new<sup>285</sup> as, since the end of the nineteenth century, there have been regulations to prohibit the import of goods produced by prisoners in the United States and the United Kingdom but there was no direct ideological linkage between foreign trade and labour standards at this period.<sup>286</sup> Although, the idea did not become reality then, it was a subject of debate about a century ago together with the issue of international labour legislation.<sup>287</sup> The development of international trade and competition led to the development of the debate on the link between trade and labour standards, which then become the debate on a social clause.<sup>288</sup>

The social clause is the link between liberalisation of international trade agreements at GATT/WTO and the provision of labour standards based on the ILO's core labour standards.<sup>289</sup> The social clause aims at requiring implementation of the CILS in trade

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<sup>284</sup> Remi Bazillier (2004) *Core Labour Standards and Economic Growth*. Available at <ftp://mse.univ-paris1.fr/pub/mse/cahiers2004/Bla04088.pdf> (last visited 15 March 2009). See also James Heintz (2002) *Global Labour Standards: Their Impact and Implementation. Working Paper Series No. 46*. Available at [www.umass.edu/peri](http://www.umass.edu/peri) (last visited 15 March 2009), p. 19.

<sup>285</sup> Steve Charnovitz (1987) "The Influence of International Labour Standards on the World Trading Regime: A Historical Overview", *International Labour Review*, vol. 126, No. 5, pp. 565-590.

<sup>286</sup> Stanley L. Engerman (2003) "The History and Political Economy of International Labour Standards" in *International Labour Standards: History, Theory, and Policy Options*, ed. Kaushik Basu, Henrik Horn, Lisa Roman and Judith Shapiro, Blackwell publishing Ltd, Oxford, pp. 57-58.

<sup>287</sup> Nigel Haworth and Stephen Hughes (1997) "Trade and International Labour Standards: Issues and Debates over a Social Clause", *Journal of Industrial Relations*, vol. 39, pp. 179-195.

<sup>288</sup> See Gijssbert Liemt (1989) "Minimum Labour Standards and International Trade: Would a Social Clause Work?", *International Labour Review*, vol. 128, No. 4, pp. 433-448. See also Jean M. Servais (1989) "The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?", *International Labour Review*, vol. 128, No. 1, pp. 423-432; Eddy Lee (1997) "Globalisation and Labour Standards: A Review of Issues", *International Labour Review*, vol. 136, No. 2, pp. 173-189; Yasmin Moorman (2001) "Integration of ILO Core Rights Labour Standards into the WTO", *Columbia Journal of Transnational Law*, vol. 39, pp. 555-583.

<sup>289</sup> The issue of trade and labour standards has been with the WTO since its birth. At the Ministerial Conference of the General Agreement on Tariffs and Trade held in Marrakesh in April 1994 to sign the treaty that formed the WTO, nearly all ministers expressed their point of view on the issue. The Chairman of that conference concluded there was no consensus among member Governments at the time, and thus no basis for agreement on the issue. See also Jan Martin Witte (2008) *Realising Core Labour Standards:*



mechanisms; failure to comply leading potentially to trade sanctions or the withdrawal of trade benefits.<sup>290</sup> The reason for a social clause is the lack of teeth of the ILO in enforcing the CILS as it relies on moral suasion and voluntary compliance, which are seen too weak, allowing violation of core labour standards.<sup>291</sup>

### *Proponents of the Social Clause*

Proponents of the social clause are ethically and morally driven groups that are keen to promote worker rights as a part of human rights, and the “fair trade” group sees higher labour standards in developing countries as an instrument for blunting competition from those countries with labour intensive industries.<sup>292</sup> Worker rights groups have suggested that, in the absence of a social clause, aggressive competition will have a deleterious effect on labour standards, dragging them down to the lowest prevailing levels among competitor nations, and it would lead to the “race to the bottom”<sup>293</sup>. They have argued:

... the major beneficiaries from a social clause as envisaged by the ICFTU would be all those developing countries that seek to improve their workers’ living standards, for they are the most vulnerable to competition from countries that continue to allow exploitation of workers. A social clause based on the seven specified Conventions would not make a major difference to the comparative advantage of developing countries derived from their abundant supply of labour. Eliminating the worst extremes of exploitation would however ensure that competition would become focused on improving productivity rather than on forcing down wages and working conditions. The social clause would build a bottom floor below which competition was considered to be not only unfair but also unacceptable in terms of basic human rights and values.<sup>294</sup>

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*The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 25.

<sup>290</sup> Arne Vandaele (2005) *International Labour Rights and the Social Clause: Friends or Foes*, Cameron May, London, p. 28.

<sup>291</sup> Eddy Lee (1997) “Globalisation and Labour Standards: A Review of Issues”, *International Labour Review*, vol. 136, No. 2, pp. 173-189.

<sup>292</sup> Arvind Panagariya (2009) *Labour Standards and Trade Sanctions: Right End Wrong Means*. Available at <http://www.columbia.edu/~ap2231/Policy%20Papers/Hawaii3-AP.pdf> (last visited 15 September 2009).

<sup>293</sup> Nigel Haworth and Stephen Hughes (1997) “Trade and International Labour Standards: Issues and Debates over a Social Clause”, *Journal of Industrial Relations*, vol. 39, pp. 179-195.

<sup>294</sup> ICFTU (2009) *Labour Standards and Trade - What is the Social Clause?*. Available at <http://www.icftu.org/displaydocument.asp?Index=990916245andLanguage=EN> (last visited 18 March 2009).

Fair traders, mostly from developed countries, have argued that workers in developed countries are exposed to unfair competition from countries where standards are lower or not enforced.<sup>295</sup> To avoid this, and to create a level playing field for trade, they insist that the CILS must be included in trade agreements and which must be enforced by trade sanctions.<sup>296</sup> In their view, the benefits of this linkage are:

- (i) providing a mechanism for lifting labour standards in developing countries, to the benefit of the otherwise exploited labour forces in those countries;
- (ii) promoting human rights, and values such as openness, transparency and good governance can help cement the broader rule of law, which benefits business; and
- (iii) creating uniform internationally accepted labour rights means there is less capacity for them to be misused by developed countries for protectionist purposes, and reduced potential for a loss of relative competitive advantage by developing countries.<sup>297</sup>

### *Opponents of the Social Clause*

Arguments against the social clause come from developing countries and proponents of “free trade” theory. Many developing countries feel that developed countries’ concern about working conditions in developing countries is due, above all, to their export success.<sup>298</sup> They have opposed the social clause and regard it as a disguise of protectionism imposed by developed countries.<sup>299</sup> Free trade supporters have argued that the inclusion of the CILS in trading regimes constitutes an unnecessary intervention in trade and that it distorts and inhibits employment and income growth. On the other hand, free trade will increase economic development and consequently increase labour standards.<sup>300</sup> They state:

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<sup>295</sup> Luke L. Arnold. 2005, “Labour and the World Trade Organisation: Towards a Reconstruction of the Linkage Discourse”, *Deakin Law Review*, vol. 10, No. 1, pp. 83-119.

<sup>296</sup> Brian Langille (1994) “Labour Standards in the Globalised Economy and the Free/ Fair Trade debate” in *International Labour Standards and Economic Interdependence*, ed. S. Werner and C. Duncan, International Institute of Labour Studies, Geneva, pp. 329-338, p. 331.

<sup>297</sup> Christian Barry and Sanjay Reddy (2005) *Just Linkage: International Trade and Labour Standards*. Available at [www.alternatefutures.org](http://www.alternatefutures.org) (last visited 18 March 2009).

<sup>298</sup> Fose Salazar Xirinachs (2000) “The Trade – Labour Nexus: Developing Countries’ Perspective”, *Journal of International Economic Law*, vol. 3, No. 2, pp. 377-385.

<sup>299</sup> Gijbert Liemt (1989) “Minimum Labour Standards and International Trade: Would a Social Clause Work?”, *International Labour Review*, vol. 128, No. 4, pp. 433-448.

<sup>300</sup> Nigel Haworth and Stephen Hughes (1997) “Trade and International Labour Standards: Issues and Debates over a Social Clause”, *Journal of Industrial Relations*, vol. 39, pp. 179-195.

... linkage in the form of a Social Clause at the WTO will not do the job. By making market access conditional on satisfaction of labour standards, it creates two problems: it makes the use of trade sanctions the way to advance standards; and it makes the WTO the international institution charged with the job. Complex problems such as child labour cannot be solved through trade sanctions. [...] Trade sanctions can flag the issue; they cannot flog it. [...] Also, when my friend Robert Reich claims, as do unions, that the WTO has teeth (i.e. it imposes trade sanctions) but the ILO has none, I say: God gave us not just teeth but also a tongue. And today, a good tongue-lashing based on credible documentation by impartial and competent bodies such as a restructured ILO can unleash shame, embarrassment, guilt to push societies towards greater progress on social and moral agendas.<sup>301</sup>

Moreover, a trade link gradation of labour standards would exclude a large part of the workforce not engaged in export production; this would affect the interests of workers and therefore result in restrictions on employment opportunities in developing countries.<sup>302</sup>

Furthermore, there is no empirical evidence to support a negative relationship between deeper economic integration and labour standards.<sup>303</sup> However, Bhagwati<sup>304</sup> writes that the social clause is a bad idea because it is a typical tool often deployed by fearful unions that are intent on raising the costs of production in poor countries as free trade with them threatens their jobs. In this context, the use of trade sanctions to enforce labour rights is likely to be problematical due to lack of agreement on exactly what constitutes a violation of such labour rights and the high risk of protectionist abuse of sanctions.<sup>305</sup>

Extending the possibility of trade sanctions to labour standards would markedly raise the likelihood of trade discrimination and place real strains on the global trading

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<sup>301</sup> Jagdish Bhagwati (2001) *Free Trade and Labour*. Available at [http://www.columbia.edu/~jb38/ft\\_lab.pdf](http://www.columbia.edu/~jb38/ft_lab.pdf) (last visited 18 March 2009).

<sup>302</sup> Farkhanda Zia Mansoor (2005) "Trade Versus Peace: A Contextual Analysis of Core Labour Standards in the Global Trading Community", *Asper Review of International Business and Trade Law*, vol. 5, pp. 133-158.

<sup>303</sup> Kevin Banks (2006) "The Impact of Globalisation on Labour Standards", eds. John Craig and Michael Lynk (ed) *Globalisation and the Future of Labour Law*. Cambridge: Cambridge University Press pp 135 – 145. See also Stephen S. Golub (2007) *International Labour Standards and International Trade*. IMF Working paper No WP/97/37 [Homepage of International Monetary Fund], [Online]. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=882280](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=882280) (last visited 15 February 2009), p. 32.

<sup>304</sup> Jagdish Bhagwati (1995) "Trade Liberalisation and 'Fair Trade' Demands: Addressing the Environmental and Labour Standard Issues", *World Economy*, vol. 18, No. 6, pp. 745-759.

<sup>305</sup> Jagdish Bhagwati (2001) *Free Trade and Labour*. Available at [http://www.columbia.edu/~jb38/ft\\_lab.pdf](http://www.columbia.edu/~jb38/ft_lab.pdf) (last visited 18 March 2009).

system.<sup>306</sup> In addition, using trade penalties as a form of external pressure to enforce labour standards is unlikely to give positive results as the implantation of labour standards depends on the economic and social circumstances prevailing in a country at a specific time.<sup>307</sup>

### ***The Debate in Action***

At the GATT Marrakesh Ministerial meeting which established the WTO in 1994, many trade ministers had addressed the connection between trade and labour and stated that improving labour standards was the responsibility of the ILO and should not be brought into the WTO.<sup>308</sup> The issue of linkage between trade and labour standards was, however, the subject of heated debate during the WTO's first ministerial meeting in Singapore in December 1996.<sup>309</sup> The Singapore meeting resulted in the issuing of a declaration that sought to put an end to the social clause debate. Nonetheless, it also committed the WTO's membership to a broad acceptance of core labour standards. It also attempted to put an end to suggestions that the WTO had any responsibility in this area. Furthermore, it rejected the use of labour standards as a vehicle for protectionism and sought to safeguard the comparative wage advantage of developing countries. It pointed to the continuation of "existing collaboration" between the WTO and ILO secretariats.<sup>310</sup>

The debate re-emerged over the course of the WTO's next three ministerial meetings: the WTO's second ministerial meeting in Geneva (5/1998); the third ministerial meeting in Seattle (11-12/1999) and the fourth ministerial meeting in Doha (11/2001). The Doha meeting gave general acceptance to the closure of the social clause debate. Key to this was the issuing of a second ministerial declaration in which the labour standards issue was addressed. Similarly, to its Singapore predecessor, the Doha Declaration absolved

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<sup>306</sup> Keith E. Maskus (1997) *Should Core Labour Standards Be Imposed Through Trade Policy?* World Bank Working Paper No 1817, World Bank, Washington, D.C, p. 66.

<sup>307</sup> Andrew Brown and Robert Stern (2008) "What are the issues in Using Trade agreement to Improve International Labour Standards", *World Trade Review*, vol. 7, No. 2, pp. 331-357.

<sup>308</sup> Steve Charnovitz (2000) "The International Labour Organisation in Its Second Century" in *Max Planck Yearbook of United Nations Law* Kluwer Law International, Neitherland, pp. 147-184, p. 152.

<sup>309</sup> Nigel Haworth, Stephen Hughes and Rorden Wilkinson (2005) "The International Labour Standards Regime: A Case Study in Global Regulation", *Environmental and Planning A*, vol. 37, No. 11, pp. 1939-1953.

<sup>310</sup> WTO (1996) *Singapore Ministerial Declaration*. Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/min96\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/min96_e.htm) (last visited 15 September 2008).

the WTO of any responsibility for labour standards and emphasised that the appropriate location for such discussions was the ILO. In doing so, the Doha Declaration promulgated a clear division of labour between the two organisations and their associated regimes, involving no significant overlap of interests.<sup>311</sup>

At present, the attempt to link international labour standards and trade within the WTO has failed. Nevertheless, this issue is most likely to continue and become more dynamic<sup>312</sup> as long as no efficient enforcement of CILS exists.<sup>313</sup> It is concluded that the appropriate institution to deal with the core international labour standards (CILS) is the ILO.<sup>314</sup> Therefore, the best way to enforce CILS is to strengthen the ILO's supervisory mechanism and, as suggested for a fine to be imposed by the ILO on violators of the CILS. However, there are still suggestions to include labour standards in bilateral trade agreements at national level<sup>315</sup> and in fact some CILS have been included in some countries' Generalised System of Preferences (GSP).<sup>316</sup>

## **2.2. The CILS on Freedom of Association and Collective Bargaining**

### **2.2.1. The ILO's Recognition and Regulation of Freedom of Association and Collective Bargaining**

The significance of the right to freedom of association and collective bargaining is self-evident. Since the foundation of the ILO, freedom of association has been given more attention together with the need to regulate employment conditions at international

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<sup>311</sup> WTO (2001) *Doha Ministerial Declaration*. Available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/min01\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_e.htm) (last visited 15 September 2008).

<sup>312</sup> Luke L. Arnold (2005) "Labour and the World Trade Organisation: Towards a Reconstruction of the Linkage Discourse", *Deakin Law Review*, vol. 10, No. 1, pp. 83-119.

<sup>313</sup> Jan Martin Witte (2008) *Realising Core Labour Standards: The Potential and Limits of Voluntary Codes and Social Clauses: A Review of the Literature*, GTZ, Eschborn, p. 27.

<sup>314</sup> Arvind Panagariya (2009) *Labour Standards and Trade Sanctions: Right End Wrong Means*. Available at <http://www.columbia.edu/~ap2231/Policy%20Papers/Hawaii3-AP.pdf> (last visited 15 September 2008).

<sup>315</sup> Sandra Polaski (2003) *Trade and Labour Standards: A Strategy for Developing Countries*. Available at [http://www.carnegieendowment.org/pdf/files/Polaski\\_Trade\\_English.pdf](http://www.carnegieendowment.org/pdf/files/Polaski_Trade_English.pdf) (last visited 15 January 2009).

<sup>316</sup> Lance Compa and Jeffrey Vogt (2001) "Labour Rights in the Generalised System of Preferences: A 20 Years Review", *Comparative Labour Law and Policy Journal*, vol. 22, pp. 199 – 238.

level,<sup>317</sup> and was mentioned in the ILO's Constitution. The Preamble of Part XIII of the Treaty of Versailles calls for "recognition of the principle of freedom of association"<sup>318</sup> In 1921, the ILO adopted the first Convention on the right of association – Freedom of Association (Agriculture) Convention, 1921 (No 11). However, the Convention was lacking: firstly it applied only to workers in the agricultural sector and, secondly, it did not have any substantive provisions.<sup>319</sup>

The Philadelphia Declaration, which was incorporated into the ILO Constitution, affirms that freedom of expression and of association were essential to sustained social progress. It also refers to:

... 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.<sup>320</sup>

Freedom of association in the context of trade unionism has been one of the main concerns of international law since the World War II.<sup>321</sup> The standards on freedom of association and effective recognition of the right to collective bargaining have a special place in the ILS, as they are an essential means by which workers can defend their interests in employment relations. In this sense, they are an aspect of human rights,<sup>322</sup> and it helps to emphasises the tripartite structure of the ILO.<sup>323</sup>

Some have argued that the right to freedom of association and effective recognition of the right to collective bargaining are the foundations for a process in which workers and employers make claims upon each other and resolve them through a process of negotiation leading to collective agreements that are mutually beneficial.<sup>324</sup> Promotion of freedom of association and collective bargaining facilitates also a more balanced

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<sup>317</sup> See Chapter I.

<sup>318</sup> ILO (1920) *The Labour Provisions of the Peace Treaties*, ILO, Geneva, p. 1

<sup>319</sup> See Freedom of Association (Agriculture) Convention, 1921 (No 11).

<sup>320</sup> See Philadelphia Declaration.

<sup>321</sup> See also Ferdinand Von Prondzynski (1987) *Freedom of Association and Industrial Relations: A Comparative Study*, Mansell Publishing Limited, London, p. 18.

<sup>322</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva at 26.

<sup>323</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 92.

<sup>324</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 49.

relationship between management and labour (employers and workers). It also provides a mechanism for negotiating a fair share of the results of their work, with due respect for the financial position of the enterprise or public service in which they are employed. For employers, free association enables firms to ensure that competition is constructive, fair, and based on a collaborative effort to raise productivity and improve conditions of work.<sup>325</sup> The prospects for achieving social justice are poorer in societies with limited or no promotion of freedom of association and collective bargaining.<sup>326</sup>

The Right of Association (Non-Metropolitan Territories) Convention, 1947 (No. 84)<sup>327</sup> was the first ILO's instrument to contain substantive provisions on the right of association and on settlement of labour disputes. It requires appropriate measures to be taken to protect the right to associate of employers and employed alike,<sup>328</sup> and to assure the right to conclude collective agreements between trade unions and employers.<sup>329</sup> Following the request from the Economic and Social Council of the United Nations,<sup>330</sup> in 1948, the ILO adopted the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and a year later the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>331</sup>

In his closing speech of the 31<sup>st</sup> Session of the International Labour Conference in 1948, Mr. Justin Godart, President of the Conference stated the role the adoption of Convention No. 87 as “the great principle laid down in the Preamble to our Constitution

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<sup>325</sup> *Ibid*, p. 49.

<sup>326</sup> ILO (1998) “Introduction: Labour Rights, Human Rights”, *International Labour Review*, vol. 137, No. 2, pp. 127-134.

<sup>327</sup> Text available at <http://www.ilo.org/ilolex/english> (last visited 20 March 2009).

<sup>328</sup> Article 2 of the Convention No. 84.

<sup>329</sup> Article 3 of the Convention No. 84.

<sup>330</sup> ILO (1948) “The ILO and the Problem of Freedom of Association and Industrial Relations”, *International Labour Review*, vol. 58, No. 5, pp. 575-600. See also Harold Dunning (1998) “The Origin of Convention No. 87 on Freedom of Association and the Right to Organise”, *International Labour Review*, vol. 137, No. 2, pp. 149-167.

<sup>331</sup> Details on the adoption of Conventions No. 87 and 98 can be found at Harold Dunning (1998) “The Origin of Convention No. 87 on Freedom of Association and the Right to Organise”, *International Labour Review*, vol. 137, No. 2, pp. 149-167; ILO (1948) “The ILO and the Problem of Freedom of Association and Industrial Relations”, *International Labour Review*, vol. 58, No. 5, pp. 575-600; Eric Gravel, Isabelle Duplessis and Bernard Gernigon (2001) *The Committee on Freedom of Association. Its impact over 50 years*, ILO, Geneva; Edward Potter (1984) *Freedom of Association, the Right to Organise and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 and No. 98*, Labour Policy Association, Inc, Washington, D.C; Tonia Novitz (1998) “Freedom of Association and ‘Fairness at Work’ - An Assessment of the Impact and Relevance of ILO Convention No. 87 on Its Fiftieth Anniversary”, *Industrial Law Journal*, vol. 27, No. 3, pp. 169-191.

and reaffirmed in the Philadelphia Declaration that freedoms of expression and of association are essential to sustained progress have become a juridical reality”.<sup>332</sup> The reason for this is because when it is recognised by a Convention, it will create obligation on ratified Member States

This was followed by the adoption of various Conventions and Recommendations relating to specific aspects of freedom of association as well as the rights to organise and collective bargaining. These include:<sup>333</sup>

1. Workers’ Representatives Convention, 1971 (No. 135).
2. Workers’ Representatives Recommendation, 1971 (No. 143).
3. Labour Relations (Public Service) Convention, 1978 (No. 151).
4. Labour Relations (Public Service) Recommendation, 1978 (No. 159).
5. Collective Bargaining Convention, 1981 (No. 154).
6. Collective Bargaining Recommendation, 1981 (No. 163).
7. Collective Agreements Recommendation, 1951 (No. 91).

The content of CILS on freedom of association and effective recognition of the right to collective bargaining derive from many ILO instruments, of which the fundamental instruments are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

## **2.2.2 The CILS on Freedom of Association**

### ***The Right to Organise***

Convention No. 87 guarantees the right of workers and employers, “without distinction whatsoever, to establish and to join organisations of their own choosing without previous authorisation.”<sup>334</sup>

“Without distinction whatsoever” means there must be no prohibition based on discrimination for the reason of race, nationality, political affiliation of political

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<sup>332</sup> ILO (1948), *Provisional Record of Proceedings, 31<sup>st</sup> Session*. ILO, Geneva.

<sup>333</sup> Text available at <http://www.ilo.org/ilolex/english> (last visited 20 March 2009).

<sup>334</sup> Article 2 of the Convention No. 87.



activities, sex, marital status, and age of the right to organise of workers and employers.<sup>335</sup> In addition, prohibition of the right to organise for specific categories of workers like workers in export zones, workers in agriculture or workers in public sectors is incompatible with this provision. In cases of workers in the armed forces and the police, the CILS leave the Member States to decide to what extent the guarantees provided for in Convention No. 87 shall apply to the armed forces and the police.<sup>336</sup> The CFA requires that, members of the armed forces and the police who can be excluded should be defined in a restricted manner.<sup>337</sup> Furthermore, civilian workers in manufacturing establishments of the armed forces or the police should have the right to organise as provided by the CILS.<sup>338</sup>

“Without previous authorisation” means that workers and employers can establish their organisations without the requirement that they have to obtain any kind of previous authorisation. Such authorisation could concern the formation of the trade union organisation itself, the need to obtain approval of the constitution or rules of the organisation or authorisation for taking steps prior to the establishment of the organisation.<sup>339</sup>

“Of their own choosing” implies free determination of the structure and composition of unions. Any provisions that require a certain minimum number of workers or employers to set up their organisations must be fixed in a reasonable manner so that the establishment of organisations is not hindered.<sup>340</sup> Any provision to fix membership limited to workers in the same occupation or branch activity should be applied only to the first level organisation.<sup>341</sup> “Of their own choosing” also means that workers and

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<sup>335</sup> ILO (2006) *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th edn, ILO, Geneva (2006 Digest hereafter), para. 209. See also CFA: Case No. 1900, Report No. 308, para. 182; Lee Swepston (1998) “Human Rights Law and Freedom of Association: Development through ILO Supervision”, *International Labour Review*, vol. 137, No. 2, pp. 169-194.

<sup>336</sup> Article 9 of the Convention No. 87.

<sup>337</sup> CFA: Case No. 2066, Report No. 321, para. 332; Case No. 2288, Report No. 333, para. 829.

<sup>338</sup> CFA: Case No. 2229, Report No. 330, para. 941.

<sup>339</sup> CFA: Case No. 1894, Report No. 308 para. 536; Case No. 1987, Report No. 313, para. 111; Case No. 2038, Report No. 318, para. 530; Case No. 2090, Report No. 324, para. 200; Case No. 2140, Report No. 329, para. 295; Case No. 2225, Report No. 332, para. 377; Case No. 2268, Report No. 333, para. 733; and Case No. 2282, Report No. 334, para. 638.

<sup>340</sup> ILO (1994) *Freedom of association and Collective Bargaining*, ILO, Geneva, p. 38 (para. 81).

<sup>341</sup> *Ibid*, p. 39 (para. 84).

employers may choose between several workers or employers' organisations in their interest and it does not mean that a unified trade union movement is preferable to trade union pluralism.<sup>342</sup>

Free choice is very important in the enjoyment of the right to organise, especially for workers. The right of workers to establish trade unions of their own choosing implies, in particular, the possibility to create more than one trade union in one enterprise or unit if the workers so choose.<sup>343</sup> According to the CILS, laws or regulations that prohibit the creation and establishment of more than one trade union for a given occupational or economic category, regardless of the level of trade union, are not compatible with the principle of freedom of association.<sup>344</sup> On the one hand, a provision of the law which does not authorise the establishment of a second trade union in one enterprise is a violation of the CILS on freedom of association provided by the Convention No. 87 of the ILO;<sup>345</sup> on the contrary hand, law that requires only one single trade union for each enterprise or unit are not in accordance with the CILS.<sup>346</sup>

According to the CILS, the monopoly of trade union is not a violation of the CILS if this is the result of unity within trade union movement which come from the desire of workers and for the advantage of workers.<sup>347</sup> On the contrary, the monopoly of trade union system imposed by law or the unity of trade union is created through legislation is not compatible and is a violation of the right to organise of workers.<sup>348</sup>

Organisational rights and liberty of unions must be ensured. The CILS grant workers' and employers' organisations the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and

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<sup>342</sup> ILO (2006) *Digest*, p. 68 (para. 322).

<sup>343</sup> CFA: Case No. 1840, Report No. 302, para. 280; Case No. 1581, Report No. 327, para. 351; Case No. 2327, Report No. 337, para. 109.

<sup>344</sup> ILO (2006) *Digest*, p. 66 (para. 314).

<sup>345</sup> CFA: Case No. 2327, Report No. 337, para. 281.

<sup>346</sup> CFA: Case No. 2301, Report No. 333, para. 592.

<sup>347</sup> ILO (2006) *Digest*, p. 67 (para. 319).

<sup>348</sup> CFA: Case No. 2348, Report No. 338, para. 995; Case No. 1963, Report No. 320, para. 220; Case No. 2067, Report No. 324, para. 998.

to formulate their programmes. The public authorities are required to refrain from any interference, which would restrict this right or impede the lawful exercise thereof.<sup>349</sup>

Enjoyment of the right to draw up their constitutions requires fulfilment of two basic conditions: firstly, national legislation should lay down only formal requirements as regards trade union constitutions; secondly, the constitutions and rules should not be subject to prior approval at the discretion of the public authorities.<sup>350</sup> Both workers and employers have the right to appeal to the courts in connection with requiring approval public authorities. The courts should be able to re-examine the substance of the case, as well as the grounds on which an administrative decision is based.<sup>351</sup>

Organisations of workers and employers have the right to elect their representatives in full freedom and to decide for themselves the rules which should govern the administration of their organisations, and the election of office leaders.<sup>352</sup> It constrains public authorities from any interference, which might restrict the exercise of this right, whether as regards the holding of trade union elections, conditions of eligibility or the re-election or removal of representatives.<sup>353</sup>

The right of organisations to organise their administration, without interference by the public authorities includes, in particular, autonomy and financial independence, and protection of assets and property of these organisations. The right of organisations freely to organise their activities and to formulate their programmes, implies that organisations have the right to pursue lawful activities for the defence of their occupational interest.<sup>354</sup>

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<sup>349</sup> Article 3 of the Convention No. 87.

<sup>350</sup> ILO (1994) *Freedom of Association and Collective Bargaining*, ILO, Geneva, p. 49 (para. 109).

<sup>351</sup> ILO (2006) *Digest*, p. 80 (para. 376).

<sup>352</sup> Article 3 of the Convention No. 87. See also ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 14.

<sup>353</sup> Article 3 of the Convention No. 87. See also ILO (2006) *Digest*, p. 83 (para. 391); CFA: Case No. 1817, Report No. 302, para. 322; Case No. 1865, Report No. 304, para. 251; Case No. 2090, Report No. 329, para. 273; Case No. 2301, Report No. 333, para. 591; and Case No. 2327, Report No. 337, para. 210.

<sup>354</sup> ILO (2006) *Digest*, p. 103 (para. 495). See also CFA: Case No. 1934, Report No. 308, para. 127; Case No. 2075, Report No. 323, para. 523; Case No. 2140, Report No. 329, para. 295; Case No. 1888, Report No. 330, para. 658; Case No. 2313, Report No. 334, para. 1119; and Case No. 2236, Report No. 335, para. 970.

It is not compatible with the CILS for the law to establish the minimum contribution of members, or to specify the proportion of union funds that has to be paid to federations, or to require that the public authorities approve certain financial operations, such as the receipt of funds from abroad. Provisions of national law that seek to prohibit a trade union leader from receiving remuneration of any kind and restrict a trade union fund from being independent of public authorities are not compatible with the right to organise.<sup>355</sup> Provisions which restrict the freedom of trade unions to administer and utilise their funds as they wish for normal and lawful trade union purposes are incompatible with principles of freedom of association.<sup>356</sup>

Incompatibility may also arise where the administrative authority has the power to examine the books and other documents of an organisation, conduct an investigation and demand information at any time. It is also incompatible with the right to organise when an administrative authority is the only body authorised to exercise control, or if such control is exercised by the single central organisation expressly designated by the law. The freedom to organise their administration is not limited to strictly financial operations but also implies that trade unions should be able to dispose of all their fixed and movable assets unhindered and that they should enjoy inviolability of their premises, correspondence and communications.<sup>357</sup>

Convention No. 87 secures the right to organise by prohibiting national authorities from dissolving or suspending workers' and employers' unions.<sup>358</sup> The ILO considers that dissolution of a union should be undertaken as the last resort, and after exhausting other possibilities with less serious effects for the organisation as a whole.<sup>359</sup> The decision to dissolve organisations should be freely and voluntarily taken by workers and employers concerned.<sup>360</sup> Measures of suspension or dissolution by the administrative authority constitute serious infringements of the principles of freedom of association. Dissolution or suspension of trade union organisations constitutes extreme forms of interference by

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<sup>355</sup> *Ibid* pp. 97-98 (para. 468, 469). See also CFA: Case No. 1865, Report No. 304, para. 248; Case No. 1865, Report No. 306, para. 326; Case No. 1942, Report No. 324, para. 41.

<sup>356</sup> *Ibid*, p. 98 (para. 649). See also CFA: Case No. 1942, Report No. 324, para. 41.

<sup>357</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 15.

<sup>358</sup> Article 4 of the Convention No. 87.

<sup>359</sup> ILO (2006) *Digest*, p. 137 (para. 699). See also Case No. 1935, Report No. 315, para. 22; Case No. 1581, Report No. 327, para. 110; and Case No. 2181, Report No. 329, para. 760.

<sup>360</sup> *Ibid*, p. 137(para. 679).

the authorities in the activities of organisations, and should therefore be accompanied by all the necessary guarantees. This can be ensured only through normal judicial procedure,<sup>361</sup> which should also have the effect of a stay of execution. As regards the distribution of trade union assets in the event of dissolution, these should be used for the purposes for which they were acquired.<sup>362</sup>

In order to coordinate their activities and strengthen the efficacy of their action, workers' and employers' organisations generally group together in federations, either with a vertical structure covering organisations which represent the same or similar categories of workers, employers or with a horizontal structure representing workers of the same region in different occupations or branches of activity. Federations in turn often establish confederations at the national or inter-occupational level.<sup>363</sup> Therefore, Convention No. 87, by guaranteeing the right to form and join unions of workers and employers, implies the right to establish and join federations and confederations of workers' and employers' organisations as well as the right to affiliate with international counterparts of these organisations.<sup>364</sup> This standard requires that national federations and confederations be able to group together and act freely at the international level.<sup>365</sup>

### ***The Right not to Organise (not to Join a Union)***

The CILS assert the right to form and to join a union as a positive right, but the negative aspect of this right is silent within the ILO's jurisprudence. It is important to note that there is no correlative right recognised by the ILO not to join an association (negative right to organise). At the Conference which adopted Convention No. 87, the ILO refused to include in it a provision stipulating the right not to join an association,<sup>366</sup>

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<sup>361</sup> *Ibid*, p. 141 (para. 678).

<sup>362</sup> ILO (1994) *Freedom of Association and Collective Bargaining*, ILO, Geneva, p. 82 (para. 188).

<sup>363</sup> *Ibid*, p. 83 (para. 190).

<sup>364</sup> ILO (2006) *Digest*, p. 145 (para. 710). See also CFA: Case No. 2153, Report No. 327, para. 155; Case No. 2140, Report No. 329, para. 295; Case No. 2229, Report No. 330, para. 942; Case No. 2225, Report No. 332, para. 378; Case No. 2301, Report No. 333, para. 592; and Case No. 2153, Report No. 336, para. 170.

<sup>365</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 16.

<sup>366</sup> ILO (1947) *Provisional Record of Proceedings, 30<sup>th</sup> Session*, ILO, Geneva, p. 571. See also Virginia Leary (1996) "The Paradox of Workers' Rights as Human Rights" in *Human Rights, Labour Rights, and International Trade*, eds. Lance Compa and Stephen Diamond, University of Pennsylvania Press, Philadelphia, pp. 22-47, p. 35; Harold Dunning (1998) "The Origin of Convention No. 87 on Freedom of Association and the Right to Organise", *International Labour Review*, vol. 137, No. 2, pp. 149-167.

leaving it to each Member State to decide whether it is appropriate to guarantee the right of workers not to join a trade union or, on the other hand, to authorise and, where necessary, to regulate the use of union security clauses in practice.<sup>367</sup> A Member State that prohibits union security practices in order to guarantee the right not to join a union, as well as a Member State that authorises such practices is compatible with Convention No. 87.<sup>368</sup> A distinction should be made between union security clauses allowed by law and those imposed by law, only the latter of which appear to result in a trade union monopoly system contrary to the principles of freedom of association.<sup>369</sup>

### ***Promotion of and Protection from Anti Union Discrimination***

Anti union discrimination is one of the most serious violations of freedom of association, as it may jeopardise the very existence of trade unions.<sup>370</sup> The CILS provide that workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. It provides that such protection shall apply more particularly in respect of acts calculated to: (i) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; or (ii) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer, within working hours.<sup>371</sup> However, the CILS are silent on the issues of compelling workers to join a certain trade union as a condition of his or her employment, which is called the closed-shop agreement and is studied in the next Chapter.

In addition, workers should be protected against any measures of anti-union discrimination in the course of employment by causing the dismissal of or otherwise prejudice to a worker because of union membership or because of participation in union

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<sup>367</sup> ILO (1959) 43<sup>rd</sup> Session Report of the Committee of Experts, Report III (part IV), (para. 36).

<sup>368</sup> ILO (1994) *Freedom of association and Collective Bargaining*, ILO, Geneva, p. 46 (para. 100).

<sup>369</sup> ILO (2006) *Digest*, p. 76 (para. 363). See also CFA: Case No. 1963, Report No. 320, para. 220.

<sup>370</sup> *Ibid*, p. 155 (para. 769).

<sup>371</sup> Article 1 of the Convention No. 98.

activities outside working hours, or with the consent of the employer, within working hours.<sup>372</sup>

The CILS require no person shall be prejudiced in employment due to trade union membership or legitimate trade union activities, whether past or present.<sup>373</sup> The CILS also provide that no person should be dismissed or prejudiced in employment because of trade union membership or legitimate trade union activities, and it is important to forbid and penalise in practice all acts of anti-union discrimination in respect of employment.<sup>374</sup> Furthermore, no one should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities or membership, and the persons responsible for such acts should be punished.<sup>375</sup>

Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.<sup>376</sup> This standard establishes the total independence of workers' organisations from employers in exercising their activities.<sup>377</sup> The closure of a trade union office, as a consequence of a legitimate strike, constitutes a violation of the principles of freedom of association and, if carried out by management, interference by the employer in the functioning of a workers' organisation, which is prohibited.<sup>378</sup> Intervention by an employer to promote the constitution of the executive board of a trade union, and interference with its correspondence, are acts which constitute a grave

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<sup>372</sup> *Ibid.*

<sup>373</sup> ILO (2006) *Digest*, p. 155 (para. 770). See also CFA: Case No. 1823, Report No. 300, para. 440; Case No. 1819, Report No. 304, para. 155; Case No. 1867, Report No. 306, para. 67; Case No. 1930, Report No. 310, para. 364; Case No. 1963, Report No. 320, para. 226; Case No. 2068, Report No. 325, para. 316; Case no. 2098, Report No. 327, para. 757; Case No. 2187, Report No. 331, para. 441; Case No. 2380, Report No. 336, para. 794; and Case No. 2200, Report No. 388, para. 325.

<sup>374</sup> *Ibid.*, p. 155 (para. 771). See also CFA: Case No. 1874, Report No. 305, para. 270; Case No. 1925, Report No. 309, para. 116; Case No. 1972, Report No. 316, para. 708; Case No. 1998, Report No. 320, para. 254; Case No. 2055, Report No. 321, para. 355; Case No. 2125, Report No. 327, para. 778; Case No. 2203, Report No. 330, para. 808; Case No. 2097, Report No. 331, para. 277; Case No. 2229, Report No. 333, para. 108; and Case No. 2239, Report No. 334, para. 394.

<sup>375</sup> *Ibid.*, p. 155 (para. 772).

<sup>376</sup> Article 2 of the Convention No. 98.

<sup>377</sup> ILO (2006) *Digest*, p. 171 (para. 855). See also CFA: Case No. 2068, Report No. 325, para. 321; Case No. 2198, Report No. 329, para. 683; Case No. 2186, Report No. 330, para. 379; Case No. 2185, Report No. 331, para. 676; Case No. 2316, Report No. 334, para. 506; Case No. 2388, Report No. 337, para. 1355; and Case No. 2374, Report No. 338, para. 509.

<sup>378</sup> *Ibid.*, p. 171 (para. 856). See also CFA: Case No. 1849, Report No. 302, para. 215.

violation of the principles of freedom of association.<sup>379</sup> Any anti-union tactics in the form of bribes offered to union members to encourage them to withdraw from the union, as well as efforts to create puppet unions are contrary to the CILS on freedom of association and collective bargaining.<sup>380</sup> This standard also requires that public authorities exercise great restraint in relation to intervention in the internal affairs of trade unions. It is even more important that employers exercise restraint in this regard. They should not, for example, do anything which might seem to favour one group within a union at the expense of another.<sup>381</sup> It also requires Government to examine the possibility of adopting clear and precise provisions ensuring adequate protection of workers' organisations against these acts of interference, which are accompanied by efficient procedures to ensure their implementation in practice.<sup>382</sup>

With regard to the armed forces and the police, the CILS provides that application of the above provisions to them shall be determined by national laws or regulations.<sup>383</sup> Furthermore, the provisions of Convention No. 87 do not deal with the position of public servants, nor shall it be construed as prejudicing their rights or status in any way.<sup>384</sup>

### ***Protection and Facilities to Be Afforded to Workers' Representatives***

The CILS on freedom of association and collective bargaining require that workers' representatives should receive protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities.<sup>385</sup> The CILS also require that workers'

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<sup>379</sup> *Ibid*, p. 171 (para. 857). See also CFA: Case No. 1966, Report No. 311, para. 360.

<sup>380</sup> *Ibid*, p. 171 (para. 858). See also CFA: Case No. 2090, Report No. 324, para. 209; Case No. 2090, Report No. 330, para. 232 and Case No. 2388, Report No. 337, para. 1354.

<sup>381</sup> *Ibid*, p. 172 (para. 859). See also CFA: Case No. 2118, Report No. 327, para. 641; Case No. 2198, Report No. 329, para. 685; Case No. 2118, Report No. 330, para. 116; and Case No. 2132, Report No. 331, para. 589.

<sup>382</sup> *Ibid*, p. 172 (para. 861). See also CFA: Case No. 2168, Report No. 333, para. 358.

<sup>383</sup> Sec. 1, Article 5 of the Convention No. 98.

<sup>384</sup> Article 6 of the Convention No. 98.

<sup>385</sup> Article 1 of the Convention No. 135.



representatives<sup>386</sup> be afforded appropriate facilities in order to enable them to carry out their functions promptly and efficiently.<sup>387</sup>

Trade unions and elected representatives of workers must be provided facilities in order to operate and to carry out their functions with condition that the facilities should not impair the efficient operation of the enterprise. Facilities afforded to workers' trade union representatives include the following items: granting of time off from work without loss of pay or benefits; access to workplaces, to the management of the enterprise and to management representatives empowered to take decisions; authorisation to collect trade union dues; authorisation to post trade union notices; distribution of union documents to workers; material facilities and information necessary for the exercise of their functions.<sup>388</sup>

### ***The Right to Strike***

The right to strike is not explicitly granted in the ILO Constitution, Conventions, Recommendations,<sup>389</sup> nor specifically recognised in Conventions Nos. 87 and 98. The right to strike seems to have been taken for granted in the report prepared for the first discussion of Convention No. 87. It has been recited several times in that part of the report describing the history of the problem of freedom of association and in an outline survey of legislation and practice. In the conclusions and observations of the same report, it was also mentioned in connection with the special case of public servants and voluntary conciliation. During discussions at the Conference in 1947 and 1948, no

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<sup>386</sup> According to Article 3 of the Convention No. 135, Workers' representatives are defined as persons who are recognised as such under national law or practice. Worker representatives are:

- (i) either trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or
- (ii) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.

<sup>387</sup> Article 2 of the Convention No. 135.

<sup>388</sup> Sec. IV of the Recommendation No. 143.

<sup>389</sup> Jane Hodges Aeberhard and Alberto Otero De Dios (1987) "Principles of the Committee on Freedom of Association Concerning Strike," *International Labour Review*, vol 126, No. 5, pp 543 – 563.

amendment expressly establishing or denying the right to strike was adopted or even submitted.<sup>390</sup>

Nonetheless, the right to strike is always recognised as one of the essential and legitimate means through which workers and their organisations may promote and defend their economic and social interest.<sup>391</sup> Evidently, it is an intrinsic corollary to the right to organise.<sup>392</sup> At present, only the Abolition of Forced Labour Convention, 1957 (No. 105),<sup>393</sup> and the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92),<sup>394</sup> mention the right to strike. However, several resolutions of the International Labour Conference, regional conferences and industrial committees refer to the right to strike or to measures to guarantee its exercise.<sup>395</sup>

### 2.2.3. The CILS on Collective Bargaining

Freedoms of association and collective bargaining have a special relationship. Association without the chance to use it in a collective bargaining process would be completely pointless.<sup>396</sup> On the contrary, the right to bargain constitutes an essential corollary to freedom of association.<sup>397</sup> When States and their associations appear to have taken a relaxed regulatory framework to labour relations, the right to collective bargaining is often the basis for making “soft” law for balancing of management’s and

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<sup>390</sup> Source: ILO (1948), *Provisional Record of Proceedings, 31<sup>st</sup> Session*. ILO, Geneva.

<sup>391</sup> ILO (2006) *Digest*, p. 109 (para. 522, 523). See also CFA: Case No. 1809, Report No. 302, para. 381; Case No. 1863, Report No. 304, para. 356; Case No. 1850, Report No. 307, para. 120; Case No. 1900, Report No. 308, para. 183; Case No. 1934, Report No. 311, para. 126; Case No. 2072, Report No. 324, para. 587; Case No. 1581, Report No. 327, para. 111; Case No. 2116, Report No. 328, para. 368; Case No. 2258, Report No. 332, para. 522; and Case No. 2305, Report No. 335, para. 505. See also Jane Hodges Aeberhard and Alberto Otero De Dios (1987) “Principles of the Committee on Freedom of Association Concerning Strike,” *International Labour Review*, vol 126, No. 5, pp 543 – 563.

<sup>392</sup> *Ibid.*, p. 109 (para. 522, 523). See also Bernard Gernigon, Alberto Otero and Horacio Guido (2000) *ILO Principles Concerning the Right to Strike*, ILO, Geneva.

<sup>393</sup> Article 1 of the Convention No. 105.

<sup>394</sup> Paragraphs 4, 6 and 7 of the Recommendation No. 92.

<sup>395</sup> For example: The Resolution concerning trade union rights and their relations to civil liberties adopted by the International Labour Conference at its 54<sup>th</sup> Session in 1970 (para. 15); the Resolution adopted by the First African Regional Conference of the ILO held in Lagos in 1960 (para. 5); the Resolution adopted by the Fifth Asian Regional Conference of the ILO in Melbourne in 1962 (para. 42). See also ILO (1994) *Freedom of association and Collective Bargaining*, ILO, Geneva. At 62, 63 (para. 142).

<sup>396</sup> Royal Commission on Trade Unions and Employers’ Associations (1968) *Three Studies in Collective Bargaining*, HMSO, London, p. 55.

<sup>397</sup> ILO (2006) *Digest*, p. 177, para. 881. See also Jane Hodges Aeberhard and Alberto Otero De Dios (1987) “Principles of the Committee on Freedom of Association Concerning Strike,” *International Labour Review*, vol 126, No. 5, pp 543 – 563.

labour's interests.<sup>398</sup> The recognition and application of the right to collective bargaining was based implicitly on two factors. On the one hand, it based on an essentially liberal concept that the best way to govern a relationship between parties is to allow them to regulate it themselves. On the other hand, it relied on the acknowledgement that the employment relationship is grounded on economic inequality and juridical subordination, neither of which is conducive to fair negotiation of an individual contract between an employer and a worker.

### ***The Right to Collective Bargaining***

Collective bargaining is recognised as a right of employers and their organisations, on the one hand, and organisations of workers (first-level trade unions, federations and confederations).<sup>399</sup> The right to collective bargaining is recognised throughout the private and public sectors, and it is only the armed forces, the police and public servants engaged in the administration of the State who may be excluded from exercising of the right to collective bargaining.<sup>400</sup> In any case, any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organisations in an effort to obtain their agreement.<sup>401</sup> As such, the right to collective bargaining is a fundamental human right<sup>402</sup> in the workplace. It best summarises the purposes of the ILO.<sup>403</sup> Trade unions habitually insist that they should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those that they represent.<sup>404</sup>

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<sup>398</sup> Dagmar Schiek (2005) "Autonomous Collective Agreements as a Regulatory Device in European Law: How to Read Article 139 EC", *Industrial Law Journal*, vol. 34, No. 1, pp. 23-56.

<sup>399</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 28, 29.

<sup>400</sup> Article 5 of the Convention No. 98 .

<sup>401</sup> ILO (2006) *Digest*, p. 199 (para. 243). See also CFA: Case No. 2194, Report No. 330, para. 791; and Case No. 2293, Report No. 335, para. 1237.

<sup>402</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 28, 29. See also Guy Davidov (2004) "Collective Bargaining Laws: Purpose and Scope", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, No. 1, pp. 81-106; Hoyt Wheeler (2000) "Viewpoint: Collective Bargaining Is a Fundamental Human Right", *Journal of Industrial Relations*, vol. 39, No. 3, pp. 535-539.

<sup>403</sup> Part III (e) of the Philadelphia Declaration 1944.

<sup>404</sup> ILO (2006) *Digest*, p. 177 (para. 880). See also CFA: Case No. 1928, Report No. 310, para. 175; Case No. 1951, Report No. 311, para. 220; Case No. 2019, Report No. 321, para. 412; Case No. 2119, Report No. 327, para. 253; and Case No. 2326, Report No. 338, para. 450.

Convention No. 98 avoids the definition exercise. Instead, it outlines fundamental tenets of collective bargaining. These include measures appropriate to national conditions that shall be taken to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>405</sup>

The term collective bargaining extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other hand.<sup>406</sup> Negotiation means any form of discussion, formal or informal, that was designed to reach agreement.<sup>407</sup> In the ILO's instruments, collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement. Collective agreements mean:

all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.<sup>408</sup>

According to the CILS, collective bargaining has three main purposes. Firstly, collective bargaining determines working conditions and terms of employment. Secondly, it regulates relations between employers and workers. Thirdly, it aims at regulating relations between employers or their organisations and a workers' organisation or workers' organisations.<sup>409</sup>

### ***Parties, Subjects and Content of Collective Bargaining***

As mentioned above, parties involved in collective bargaining include employers or their organisations and workers' organisations. The party from the workers' side must be their organisation. Nevertheless, in some case, workers negotiate their collective

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<sup>405</sup> Article 4 of the Convention No. 98.

<sup>406</sup> Article 2 of the Convention No. 154.

<sup>407</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 22.

<sup>408</sup> Para 2 Recommendation No. 91.

<sup>409</sup> Article 2 of the Convention No. 154.

agreement through elected representatives. In this case, the CILS authorise collective bargaining only with representative of workers concerned in the absence of a workers' organisation at the specific level.<sup>410</sup> It is also required that appropriate measures shall be taken, wherever necessary, to ensure that the existence of these representatives is not used to undermine the position of the workers' organisations concerned.<sup>411</sup> According to the CILS, a trade union which represents the majority or a high percentage of the workers in a bargaining unit may enjoy preferential or exclusive bargaining rights. However, in cases where no trade union meets these requirements or such exclusive rights are not recognised, all trade unions in that unit should nevertheless be able to conclude a collective agreement on behalf of their own members.<sup>412</sup>

Matters which might be subject to collective bargaining focus on terms and conditions of work and employment and on the regulation of the relations between employers and workers and their organisations.<sup>413</sup> The concept of working conditions is not limited to traditional working conditions, such as working time, wages, occupational safety at work, holidays, etc, but also covers certain matters which normally emerge in employment relations, such as promotion, transfers, dismissals, redundancy, etc. Collective bargaining may also include the coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, etc. The CILS require that these matters should not be excluded from the scope of collective bargaining by law, or as in this case, by financial disincentives and considerable penalties applicable in case of non implementation of the Code and Guidelines.<sup>414</sup>

Collective agreements are binding on the parties and are intended to determine terms and conditions of employment which are more favourable than those established by law.

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<sup>410</sup> Recommendation No. 91 paragraph 2. See also CFA: Case No. 1512, Report No. 229, para. 424; Case No. 1781, Report No. 302, para. 253; Case No. 1926, Report No. 308, para. 628; Case No. 1926, Report No. 321, para. 65; Case No. 2138, Report No. 327, para. 545; Case No. 2243, Report No. 331, para. 618; Case No. 2216, Report No. 332, para. 909; and Case No. 2251, Report No. 333, para. 977.

<sup>411</sup> Article 3 of the Convention No. 154.

<sup>412</sup> ILO (2006) *Digest*, p. 195 (para. 976).

<sup>413</sup> Article 2 of the Conventions No. 154.

<sup>414</sup> ILO (2006) *Digest*, p. 182 (para. 913). See also CFA: Case No. 2326, Report No. 338, para. 450. Bernard Gernigon, Alberto Otero and Horacio Guido (2000) "ILO Principles Concerning Collective Bargaining", *International Labour Review*, vol. 139, No. 1, pp. 33-55.

Preference must not be given to individual contracts over collective agreements, except where more favourable provisions are contained in individual contracts.<sup>415</sup>

### ***Workers Covered by Collective Bargaining***

Workers in all sectors are entitled to collective bargaining, except for the armed forces and the police, which shall be determined by national laws or regulations.<sup>416</sup> In addition, public servants engaged in the administration of the State may not be covered by collective bargaining.<sup>417</sup>

Furthermore, a distinction must be drawn between, on the one hand, public servants who by their functions are directly engaged in the administration of the State (that is, civil servants employed in Government ministries and other comparable bodies), as well as officials acting as supporting elements in these activities and, on the other hand, persons employed by the Government, by public undertakings or by autonomous public institutions. Only the former category can be excluded from the scope of Convention No. 98.<sup>418</sup>

Apart from the foregoing, the CILS require Member States to take appropriate measures to encourage and promote full development and utilisation of machinery for negotiation of terms and conditions of employment between public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in determination of these matters.<sup>419</sup>

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<sup>415</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 29. See also Bernard Gernigon, Alberto Otero and Horacio Guido (2000) "ILO Principles Concerning Collective Bargaining", *International Labour Review*, vol. 139, No. 1, pp. 33-55.

<sup>416</sup> Article 5 of the Convention No. 98.

<sup>417</sup> Article 6 of the Convention No. 98.

<sup>418</sup> ILO (2006) *Digest*, p. 178 (para. 886, 887). See also CFA: Case No. 1882, Report No. 306, para. 433; Case No. 1902, Report No. 308, para. 702; Case No. 2019, Report No. 321, para. 412; Case No. 2110, Report No. 325, para. 265; Case No. 2138, Report No. 327, para. 541; Case No. 2222, Report No. 334, para. 209; and Case No. 2253, Report No. 338, para. 84.

<sup>419</sup> Article 7 of the Convention No. 151.

### ***The Principle of Negotiating***

The CILS require that collective bargaining must be established on free and voluntary negotiation, free choice, good-faith and follow voluntary procedures.<sup>420</sup> The CILS do not impose any duty on Member States to enforce collective bargaining with a given organisation by compulsory means but the CILS require Member States to promote collective bargaining through non-compulsive measures.<sup>421</sup>

Free choice means collective bargaining is possible at any level, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels. The level of negotiation should not be imposed by law, by decision of the administrative authority or by the case law of the administrative labour authority.<sup>422</sup>

Collective bargaining could function effectively only if it is conducted in good-faith by both parties. However, as good-faith cannot be imposed by law, it could be achieved only as a result of the voluntary and persistent efforts of both parties.<sup>423</sup> Establishment of rules for procedures of collective bargaining can be agreed voluntarily between workers' associations and employers or can be established by law. If regulated by law these provisions should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or *ex officio* by the voluntary conciliation authority.<sup>424</sup>

### ***Settlement of Disputes***

The CILS establish that disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established

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<sup>420</sup> Article 4 of the Convention No. 98. See also CFA: Case No. 1975, Report No. 321, para. 117; Case No. 2146, Report No. 327, para. 896; Case No. 2196, Report No. 330, para. 304, Case No. 2132, Report No. 331, para. 590; Case No. 2233, Report No. 332, para. 639; and Case No. 2349, Report No. 337, para. 404.

<sup>421</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 25. See also CFA: Case No. 2349, Report No. 337, para. 404.

<sup>422</sup> ILO (2006) *Digest*, p. 197 (para. 988). See also CFA: Case No. 1845, Report No. 302, para. 514; Case No. 1906, Report No. 306, para. 553; Case No. 1926, Report No. 308, para. 629; Case No. 1975, Report No. 321, para. 117; Case No. 2099, Report No. 325, para. 193 and Case No. 2326, Report No. 338, para. 448.

<sup>423</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 25.

<sup>424</sup> See Convention No. 154.

either by agreement between the parties or by laws or regulations as may be appropriate under national conditions.<sup>425</sup>

Settlement of disputes arising in connection with the determination of terms and conditions of employment shall be sought, as may be appropriate to national conditions, through negotiation between the parties or through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.<sup>426</sup> Bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.<sup>427</sup>

The CILS allow conciliation and mediation to be imposed by law within the framework of the process of collective bargaining, provided that reasonable time limits are established. However, imposition of compulsory arbitration in cases where the parties do not reach agreement is generally contrary to the principle of voluntary collective bargaining and is admissible only in following circumstances:

- (i) in essential services in the strict sense of the term (those whose interruption would endanger the life, personal safety or health of the whole or part of the population);
- (ii) with regard to public servants engaged in the administration of the State;
- (iii) where, after prolonged and fruitless negotiations, it is clear that the deadlock will not be overcome without an initiative by the authorities;
- (iv) in the event of an acute national crisis;
- (vi) arbitration which is accepted by both parties (voluntary arbitration) is always legitimate.<sup>428</sup>

According to the CILS, Member States have to adapt measures suitable to national conditions to assist the parties to find a solution to the dispute themselves, whether the dispute arising during the negotiation of agreements or arising in interpretation and application of agreements.<sup>429</sup> The CILS also require that the parties concerned abstain from strikes and lockouts while these procedures are in progress.<sup>430</sup>

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<sup>425</sup> Para. 6 of the Recommendation No. 91.

<sup>426</sup> Article 8 of the Convention No. 151.

<sup>427</sup> Article 5 of the Convention No. 154.

<sup>428</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 29, 30.

<sup>429</sup> Recommendation No. 163.

<sup>430</sup> Recommendation No. 92.



#### **2.2.4. The Obligations of Member States**

In addition to the general obligations of Member States noted in Chapter I, each Member State ratifying relevant Conventions on freedom of association and collective bargaining incurs additional obligations.

Member States which ratify Convention No. 87 have to undertake measures to ensure that workers and employers may exercise freely the right to organise.<sup>431</sup> Those, which ratify Convention No. 98 have to establish machinery appropriate to national conditions for the purpose of ensuring respect for the right to organise,<sup>432</sup> to take appropriate measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to regulation of terms and conditions of employment by means of collective agreements.<sup>433</sup>

### **2.3. Implementation of the CILS on Freedom of Association and Collective Bargaining**

#### **2.3.1. Ratification**

Ratification of Conventions Nos. 87 and 98 has increased steadily,<sup>434</sup> by May 2010, it stood at 149 and 159 Member States, respectively, out of a total of 183 ILO Member States. These figures correspond to 82.32% and 87.84%, respectively, of the ILO's membership and are detailed below:<sup>435</sup>

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<sup>431</sup> Article 11 of the Convention No. 87.

<sup>432</sup> Article 3 of the Convention No. 98.

<sup>433</sup> Article 4 of the Convention No. 98.

<sup>434</sup> ILO (2008) *Freedom of Association in Practice: Lessons learned. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2008*, ILO, Geneva, p. 7.

<sup>435</sup> Source: <http://www.ilo.org/ilolex/english/docs/declworld.htm> (last visited 21 May 2010).

**Table 2.1: Ratification of Conventions No. 87 and No. 98 (up to May 2010)**

<b>Member States</b>	<b>Ratification of Convention No. 87</b>	<b>Ratification of Convention No. 98</b>
Total (183)	149	159
Africa (53)	48	52
Americas (35)	33	32
Asia (44)	19	25
Europe (51)	50	51

*Source: ILO*

This table shows an imbalance between continents in the ratification of Conventions Nos. 87 and 98. Fewer than half the ILO Member States in the Asia Pacific region have ratified Convention No. 87 and just over half had ratified Convention No. 98, compared with ratification levels of between 85 and 98 % in Africa and the Americas, and up to 100 % for Europe. This could be because there are a number of new ILO Member States in the Asia Pacific region that have not yet ratified these two Conventions.<sup>436</sup> Another issue that has also been raised frequently concerns the proportion of the global workforce or the percentage of the world population not yet covered by these Conventions. About half the total labour force of ILO Member States lives in five countries: Brazil, China, India, Islamic Republic of Iran and United States,<sup>437</sup> but none of them have ratified Conventions Nos. 87 and 98 (except for Brazil has ratified Convention No. 98 in 1952).<sup>438</sup> Therefore, half of the world's labour force is still not covered and guaranteed the right to freedom of association and collective bargaining provided by the two important Conventions of the ILO.

### **2.3.2. Implementation**

Ratification does not mean that the rights and principles concerned are implemented in full. Although freedom of association is recognised as a fundamental right at work, the

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<sup>436</sup> ILO (2008) *Freedom of Association in Practice: Lessons Learned. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2008*, ILO, Geneva, p. 7.

<sup>437</sup> Freedom of association and collective bargaining in China and the United States are discussed in Chapter III.

<sup>438</sup> Source: <http://www.ilo.org/ilolex/english/docs/declworld.htm> (last visited 21 May 2010).

International Confederation of Free Trade Unions (ICFTU) estimates that in 2003, for example, some 300,000 workers in Asia and 6,566 in Africa were dismissed because of their trade union activities. The majority of the 50 million workers in export processing zones do not enjoy the right to join unions. The ICFTU also reported that 129 trade unionists were murdered in 2003 due to their trade union activities, and that more than 200 were killed in 2002 for the same reasons.<sup>439</sup>

In a survey in 2007, the International Trade Union Confederation (ITUC) found that the most tragic consequences of anti-union actions are still the alarming numbers of murders, abductions, arrests and imprisonments, as well as acts of discrimination and intimidation against trade unionists, which continued. The list of worst offending countries in terms of anti-union violence and repression is getting longer rather than shorter. The most horrific record remains the shameful property of Colombia where, in 2007, another 39 trade unionists were murdered in conditions of continued impunity. In too many countries across the globe, trade unions continue to be banned or their work severely restricted in particular sectors. Public service workers, agricultural workers, health workers, teachers and journalists are amongst the main victims of these situations.<sup>440</sup>

Moreover, the concept of “essential services” is frequently used and abused by Governments to deny the rights to strike, to collective bargaining and even to organise, to categories of workers whose basic trade union rights are recognised under the terms of international Conventions. Trade union pluralism and workers’ rights to set up trade unions of their own free choice are still denied in a number of countries, particularly in Asia and in the Middle East and the Gulf States. Export Processing Zones remain a no-go area for trade unions in many countries. Non-application of labour legislation, denial of trade union rights and other basic workers’ rights, dismissals of trade union activists, discrimination and intimidation practices continue to be the rule rather than the exception.<sup>441</sup>

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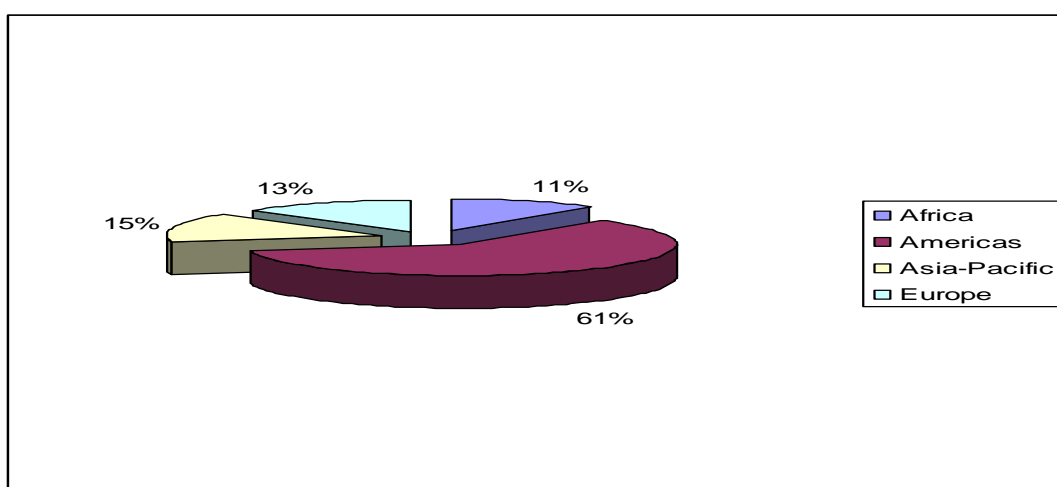
<sup>439</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standards*, ILO, Geneva, p. 25.

<sup>440</sup> ITUC (2008) *Annual Survey of Violations of Trade Union Rights 2008 - ITUC*. Available at <http://survey08.ituc-csi.org/survey.php?IDContinent=0andLang=EN> (last visited 20 May 2009).

<sup>441</sup> *Ibid.*

During the period 2004–07, the Conference Committee on the Application of Standards examined 35 individual cases relating to Convention No. 87 and 16 cases relating to Convention No. 98. Conclusions on six of these cases were included in special paragraphs in the reports of the Committee: Myanmar in 2004 and 2005 and Belarus in 2005 and 2007, for failure to apply Convention No. 87; Bangladesh in 2006, for failure to apply Convention No. 98; and Belarus in 2006, for failure to apply both Conventions Nos. 87 and 98. In the period between March 2004 and June 2007, the CFA adopted 366 individual reports on cases relating to 82 countries based on 366 complaints. The majority of reports adopted concerned the Americas region (204 for Latin America and 18 for North America). The second region in terms of the number of reports adopted was Asia, with 56 reports, four of which concerned Arab States (three for Iraq, one for Bahrain). 48 reports were on cases received from European countries, of which 28 related to Central and Eastern Europe. Africa, with 40 reports, maintained roughly its earlier level.<sup>442</sup>

**Figure 2.1: Allegations Examined by the CFA from 2004 to 2007 (by region)**



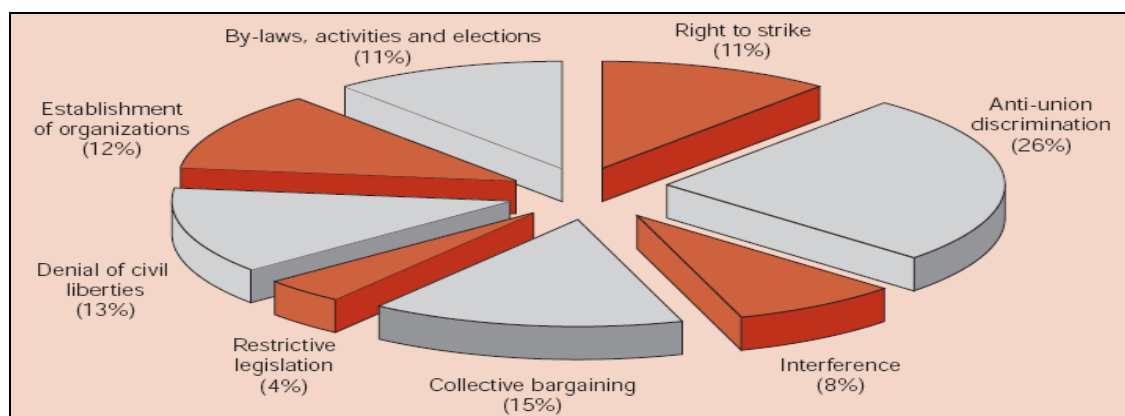
*Source: ILO*

Allegations of interference with the right to freedom of association and the effective recognition of the right to collective bargaining are in practice multi-faced. They are categorised according to the following subjects: denial of civil liberties, restrictive

<sup>442</sup> ILO (2008) *Freedom of Association in Practice: Lessons Learned. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2008*, ILO, p. 8.

legislation of the right to organise and collective bargaining, establishment of organisation, right to strike, anti-union discrimination, interference, and collective bargaining. In comparison with the period 1995-2000<sup>443</sup> and 2000-2003,<sup>444</sup> allegations made to the CFA on the restriction of civil liberties accounted for one-third of complaints in the period 1995–2000, but progressively decreased to 10% of all allegations for the period 2000–2003 and stood at 13% for the period 2004–2007. On the other hand, the largest single category of allegations, both globally and by region, concerns acts of anti-union discrimination. Allegations of anti-union discrimination have increased, from 23% in 1995–2000 to 26% in 2000–2007. There has been an increase in allegations of employer interference in trade union activities, from 4 % for the period 1995–2000 to 6% for the period 2000–2003 and to 8% for the period 2004–2007. Alleged violations of collective bargaining rights have increased from 11 % in the period 1995–2000 to 19% for the period 2000–2003 and fell to 15% for the period 2004–2007. There has also been a slight increase in allegations concerning Government interference in trade union activities, from 8% in the period 1995–2000 to 9% in the period 2000–2003 and 11 % in 2004–2007.<sup>445</sup>

**Figure 2.2: Allegations Examined by the CFA from 2004 to 2007 (by content)**



Source: ILO

<sup>443</sup> See ILO (2000) *Your Voice at Work. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2000*, ILO, Geneva.

<sup>444</sup> See ILO (2004) *Organising for Social Justice. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2004*, ILO, Geneva.

<sup>445</sup> ILO (2008) *Freedom of Association in Practice: Lessons Learned. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2008*, ILO, p. 9.

The right to organise and collective bargaining is not just an issue for workers. Employers have also lodged complaints with the ILO's Committee on Freedom of Association regarding illegal interference with the activities of their organisations.<sup>446</sup> From 2004 to 2007, four CFA cases originated from complaints by employers' organisations. These complaints alleged Government interference in the activities of employers' organisations (Albania);<sup>447</sup> a Government's refusal to allow membership contributions to employer's organisations to be tax deductible (Republic of Moldova);<sup>448</sup> legislative interference preventing parties from freely determining the level of negotiation (Peru);<sup>449</sup> and the arrest of the president of an employer's organisation and difficulties faced by employers in participating in collective bargaining, as well as their exclusion from social dialogue structures, tripartism and consultations (Bolivian Republic of Venezuela).<sup>450</sup>

## **Conclusion**

As a result of a growing awareness of the need for a social pillar in the global economy, consensus has emerged in the international community around a set of fundamental principles and rights at work which are called the core international labour standards (CILS).<sup>451</sup> In the context of the failure to include a social clause in the WTO, the recognition and definition of the CILS by the ILO contribute to the importance and relevance of the ILO in promoting international labour rights and labour standards.

The CILS consist of four subjects, relating to freedom of association and the effective recognition of collective bargaining, elimination of all forms of forced labour, effective abolition of child labour and elimination of discrimination in respect of employment and occupation that are provided by ILO in its relevant Conventions and Recommendations. The CILS ensure every Member State of the ILO has an obligation

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<sup>446</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 25.

<sup>447</sup> CFA: Case No. 2345, Report No. 335.

<sup>448</sup> CFA: Case No. 2350, Report No. 338.

<sup>449</sup> CFA: Case No. 2375, Report No. 338.

<sup>450</sup> CFA: Case No. 2254, Report No. 353.

<sup>451</sup> ILO (2000) *Your Voice at Work. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General*, ILO, Geneva, p. 1.

arising from the very fact of membership in the Organisation to respect, to promote and to realise them, in good-faith and in accordance with the ILO Constitution even if it has not ratified the relevant Conventions.

These international labour standards are core because they are inherent human rights in the work place and important for market economies to operate efficiently. They are core because they are different from “cash” international labour standards and prohibitive in character. Finally, they are core because they are monitored and supervised by a special review mechanism.

While analyses in Chapter I show the important role of ILS, studies in this Chapter indicate that CILS also have an important role in fostering social and economic development. Studies in this Chapter also show no evidence of the negative effect of ratification and implementation of the CILS on a national economy. Therefore, incorporation the CILS into its domestic legal system does not undermine a country’s economic performance. On the contrary, ratification and implementation of the CILS contribute, among other things, contribute to economic and social development. In addition, there is no theoretical and practical rationale for the adoption of a social clause; the CILS can be better implemented through many methods, and one of these methods is enhancing the enforcement capacity of the ILO.

Freedom of association and the right to bargain collectively are recognised by the ILO as fundamental rights in the workplace, entitled to workers and employers. The most important instruments containing the CILS on Freedom of association and collective bargaining are Convention No. 87 and Convention No. 98 of the ILO. According to the CILS, all workers and all employers have the right to freely form and join organisations of their own choosing without distinction, and without previous authorisation.

According to the CILS, the prohibition of the creation of more than one trade union at an enterprise or unit is a violation of the right to organise. On the other hand, the CILS allow workers and employers to choose between more than organisations for the protection of their rights and interests. The CILS does not prohibit the unified trade union movement with the conditions that this come from the desire of workers and for the advantage of workers and it is not imposed by law. However, the CILS do not imply that a unified trade union movement is preferable to trade union pluralism.

The CILS allow the Member States to decide the right to organise of workers in the armed forces and the police. All workers and employers have the right to bargain collectively on all matters concerning the employment relationship. The CILS require the right to organise and collective bargaining must be granted to all types of workers, not only workers in the private sector of the economy but also civil servants and public service employees in general.

The independence of trade unions is a vital foundation for the full enjoyment of the right to organise. The CILS require that trade unions must be independent from authorities in both organisational operation and financial issues; trade unions must also be independent from employers in carrying out their activities.

The CILS require all Member States of the ILO to promote and to realise in good-faith the right to freedom of association and collective bargaining of workers and employers. For Member States, which have ratified the core ILO Conventions on freedom of association and collective bargaining, the CILS require that Member States should take necessary measures to ensure workers and employers can exercise and enjoy their rights properly.

Despite being recognised at international level within the ILO jurisprudence and the fact that the ratification of the core Conventions on freedom of association and collective bargaining has been rising rapidly, implementation of the CILS on freedom of association and collective bargaining is still challenging. Various violations were found in both developed and developing countries all over the world. Violations were also found in every aspect of freedom of association and collective bargaining, which include violation relating to the right to organise, the right to strike, the right to collective bargaining, etc.

The level of recognition, promotion and implementation of the CILS on freedom of association and collective bargaining depends on the context of each country particularly its policies and legislation on labour relations. The national practice of the CILS on freedom of association and collective bargaining in some countries in the world will be discussed in the next Chapter.



## Chapter III

### State Practice on the Core International Labour Standards on Freedom of Association and Collective Bargaining

#### Introduction

Employment relations regimes of States are influenced significantly by the peculiarities of their own histories and their political aspirations. Both these factors have an internal and external dynamic whose interaction is critical to the many decisions that the Government of the day has to contend with. Therefore, straight comparisons of employment relations provisions of one entity with those of another are problematic unless allowances are made for the multitude of individual factors that inform the State practice under examination.<sup>452</sup> This observation poses serious challenges for the ILO's mission of establishing a universal labour code for the purpose of preventing the occurrence or development of conditions of privation and hardship to so many people that the peace and security of the world is imperilled.<sup>453</sup> Just how does such a code evolve given the disparate histories and varied aspirations of nation States unless it is either so rudimentary and so general that it is acceptable to all States; or so limited in its scope that it hardly protects "people everywhere"?<sup>454</sup>

This Chapter examines practices of different States on the right to organise with others for the purpose of bargaining in employment relations. It focuses on the conceptualisation of that guarantee in the United Kingdom and the United States for two

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<sup>452</sup> Johannes Schregle (1981) "Comparative Industrial Relations: Pitfalls and Potential", *International Labour Review*, vol. 120, No. 1, pp. 15-30.

<sup>453</sup> See Part XIII of the Peace Treaty of Versailles. For examining this challenge in view of the majority status of former colonies that now form the majority of the membership of the ILO, although they had had no input in the creation of the majority of the current stock of ILO Conventions and Recommendations, see especially Ben Chigara (2007) "Latecomers to the ILO and the Authorship and Ownership of the International Labour Code", *Human Rights Quarterly*, vol. 29, pp. 706-726. Examining the relevance of the ILO as a social justice movement in light of the threat of unequal distribution of global wealth posed by the WTO regime, see especially Guy Standing (2008) "The ILO: An Agency for Globalisation", *Development and Change*, vol. 39, No. 3, pp. 335-384 and, Ernest Ulrich Petersmann (2004) "The Human Rights Approach Advocated by the UN High Commissioner for Human Rights and by the International Labour Organisation: Is It Relevant for WTO Law and Policy", *Journal of International Economic Law*, vol. 7, No. 3, pp. 605-627.

<sup>454</sup> See Philadelphia Declaration.

reasons. Firstly, because these are the two most sophisticated employment markets in the world, their practices on the right to organise and bargain in employment relations would have significant lessons for Vietnam, which has recently begun to adopt ILO standards for the regulation of employment and labour relations. Secondly, both the United Kingdom and the United States have varied but significantly long experiences of managing employment and labour relations.

The practice of two other States is examined, namely, South Africa and China. These economies have been chosen because they are different from the United Kingdom) and United States in many obvious ways and are historically and aspirationally closer to Vietnam than the former. South Africa also has a long labour relations history that has been tempered by its unenviable apartheid history and more recently, Government of national unity that has incorporated properly the CILS on freedom of association and collective bargaining into its legal system. China has been selected because it has the most similarities with Vietnam in terms of political, economic and legal systems. Examination of jurisprudence from these jurisdictions should yield important lessons for Vietnam.

### **3.1. Conceptualisation of the CILS on Freedom of Association and Collective Bargaining in the United Kingdom**

With the population of 61.7 million, the United Kingdom is the third biggest population in the European Union (EU),<sup>455</sup> the fifth biggest population in Europe and the twentieth second in the world.<sup>456</sup>

The United Kingdom was one of the Allied government actively participated in the establishment of the ILO by incorporating in the Peace Treaty a part concerning the regulation of labour at an international level.<sup>457</sup> By 2009, the United Kingdom has ratified 68 Conventions of the ILO, of which Convention No. 21 on Inspection of

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<sup>455</sup> After Germany with 81.8 million and France with 65.4 million. Source: Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

<sup>456</sup> Source Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

<sup>457</sup> For analysis, see Chapter I, Part 1.1.

Emigrants Convention, 1926 is conditional ratification and 17 Conventions have been denounced. The United Kingdom ratified all 8 core ILO Conventions mostly right after their adoption. Convention No. 87 was ratified on 27 June 1949 and Convention No. 98 was ratified on 30 June 1950.<sup>458</sup>

Since then, the right to freedom of association and the right to collective bargaining appear to have shot to the top of the agenda, with national employment tribunals and regional human rights courts receiving numerous applications for adjudication. This is because formal recognition of this right has become commonplace in the United Kingdom. Is it the ILO dynamic or, the benevolence of the values of freedom of association and collective bargaining that is behind the success of the ILO here in spite of the phenomenal challenges raised by the requirement of universal application of its standards?<sup>459</sup>

### **3.1.1. Freedom of Association**

#### ***The Right to Organise***

At the European level, the principle of freedom of association in the Europe is recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) adopted by the Council of Europe in 1950<sup>460</sup> and the European Social Charter, 1961 (revised in 1996).<sup>461</sup> Within the European Union (EU), freedom of association is protected by the the Community Charter of the Fundamental Social Rights of Workers, 1989<sup>462</sup> and the Charter of Fundamental Rights of the European Union (2000).<sup>463</sup>

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<sup>458</sup> Source <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited 26 August 2010).

<sup>459</sup> Ben Chigara (2007) "Latecomers to the ILO and the Authorship and Ownership of the International Labour Code", *Human Rights Quarterly*, vol. 29, pp. 706-726.

<sup>460</sup> Text Available at <http://Conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8atWorkCL=ENG> (last visited 20 January 2010).

<sup>461</sup> Text Available at <http://Conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8atWorkCL=ENG> (last visited 20 January 2010). Article 5 provides:

All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.

<sup>462</sup> Text Available at <http://www.eurofound.europa.eu> (last visited 10 February 2010) (last visited 20 January 2010). Articles 11 provides:

Freedom of association is highly respected in the Europe. The European Court of Human Rights (ECtHR) declared in *Djavit An v. Turkey*<sup>464</sup> that the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. In *ERT v. Pliroforissis & Kouvelas*,<sup>465</sup> the European Court of Justice (ECJ) stated that freedom of association is a fundamental right in EU law, and is binding on Community institutions when legislating, and also on the Member States when implementing EU legislation.

At a national level, according to the Human Rights Act 1998 (c 42),<sup>466</sup> freedom of association and the right to organise proclaimed in Article 11 of the ECHR is recognised and protected in the United Kingdom. This Article provides that:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.<sup>467</sup>

In the United Kingdom, trade union is defined as an organisation (whether temporary or permanent), which consists wholly or mainly of workers or affiliated organisation of one or more descriptions and whose principal purposes include the regulation of relations between workers of that description or those descriptions or those organisations and employers or employers' associations.<sup>468</sup>

At regional level, in *Cheall v. United Kingdom*,<sup>469</sup> the ECtHR stated that the right to form trade unions involves, for example, the right of trade unions to draw up their own rules, to administer their own affairs and to establish and join trade union federations. In

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Employers and workers of the European Community shall have the right of association in order to constitute professional organisations or trade unions of their choice for the defence of their economic and social interests. Every employer and every worker shall have the freedom to join or not to join such organisations without any personal or occupational damage being thereby suffered by him.

<sup>463</sup> Texts Available at [www.eucharter.org](http://www.eucharter.org) (last visited 20 January 2010). Article 12 (1) provides:

Everyone has the right to freedom of peaceful assembly and to freedom of association, at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

<sup>464</sup> *Djavit An v. Turkey*, Application No. 20652/92, ECHR (2003).

<sup>465</sup> *ERT v Pliroforissis at Work Kouvelas*, Case No. C-260/89 [1991], ECR I-6965.

<sup>466</sup> Text available at [http://opsi.gov.uk/acts/acts1998/ukpga\\_19980042\\_en\\_1](http://opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1) (last visited 26 August 2010).

<sup>467</sup> Article 11 of the ECHR.

<sup>468</sup> Sec 1 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA).

<sup>469</sup> *Cheall v. United Kingdom*, 8 EHRR CD74 (1986).

the United Kingdom, workers have the right to choose to join, from trade union of their own choosing, they can belong to a trade union even if that trade union is different from the one recognised by the employer. There is no legislation imposing the monopoly of trade unions and trade union system in the United Kingdom. Otherwise, in the United Kingdom, workers have the right to belong to more than one trade union. Trade unions have the right to join federations at all levels.<sup>470</sup>

The independence of trade union is recognised by law in the United Kingdom. “Independent trade union” means a trade union which is not under the domination or control of an employer or group of employers or of one or more employers' associations, and is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control.<sup>471</sup> Trade unions, which have been registered with the list of Certification Officer, can apply for a certificate that they are independent.<sup>472</sup> In the United Kingdom, once established, the election of certain member and the making of trade union rules are business of trade unions themselves.<sup>473</sup>

In addition to regional legislation on protection of the right to organise, the United Kingdom appears to have taken on the role of promoter of the same right abroad by being a party to the EU Special Incentive Arrangement for Sustainable Development and Good Governance (GSP+).<sup>474</sup> This policy is couched in terms that make direct reference to applicable ILO Conventions, including Convention No. 87. Under this scheme, Countries that ratify a number of key international treaties on labour standards, human rights, good governance and environmental protection will be eligible for duty-free access for most covered products.<sup>475</sup>

In the United Kingdom, The right to organise of employers is guaranteed. Employers have the right to join, to form associations with principal purposes include the

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<sup>470</sup> Sec. 118 of the TULRCA.

<sup>471</sup> Sec. 5 of the TULRCA.

<sup>472</sup> Sec. 6(1) of the TULRCA.

<sup>473</sup> Secs. 46-56 of the TULRCA.

<sup>474</sup> Council Regulation No. 732/2008 dated 22/7/2008 applying a scheme of generalised tariff preferences for the period from 1/1/2009 to 31/12/2011.

<sup>475</sup> Source <http://www.bis.gov.uk/policies/trade-policy-unit/trade-and-development/gsp> (last visited 26 August 2010).

regulation of relations between employers of that description or those descriptions and workers or trade unions.<sup>476</sup> Once established, employers' organisations have the right to manage their business independently similar to the rights to carry out their own affairs of trade unions.<sup>477</sup> Furthermore, employers' organisations have the right to form, to join federations of their own choosing.<sup>478</sup> Regulation on the right to organise of employers in the United Kingdom law can be a good experience for Vietnam.

***Limitation of the Right to Organise due to Essential State Service - The case of Government Communications Headquarters (GCHQ)***

In the United Kingdom, national security employees are persons employed by the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.<sup>479</sup>

The case arose out of the removal of the right to organise for staff working at Government Communications Headquarters (GCHQ), a civilian manned branch of the United Kingdom Government. It raised the question of the extent to which a Government could remove the right of workers to organise on the basis of national security. In particular it examined the question of whether it would be a violation of the right to freedom of association.

To paraphrase the facts, on 25 January 1984, each member of the staff of GCHQ had received a circular and an option form which asked them either to agree to surrender their right to belong to a trade union and receive a cash payment of £1,000 in return; or to apply for a transfer to another unspecified job in the civil service. Staff that refused to complete the option form or who, after deciding to leave GCHQ, refused to accept an alternative posting would be dismissed and denied redundancy payments. Staff were also told that they would be allowed to join a staff association which would be "approved for the time being" by the Director of GCHQ.<sup>480</sup> Disciplinary action might be taken against anyone involved in industrial action. Staff, who did not wish to remain at

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<sup>476</sup> Sec. 122 of the TULRCA.

<sup>477</sup> Sec. 131 of the TULRCA.

<sup>478</sup> Sec. 135 of the TULRCA.

<sup>479</sup> Sec. 15 of the Employment Relations Act 1999.

<sup>480</sup> CFA: Case No. 1261, Report No. 234, para. 345.

GCHQ, were to be given the opportunity to seek a transfer to elsewhere in the civil service. If such a transfer was not possible, the respective person would be eligible for premature retirement on redundancy terms. Staff remaining at GCHQ would receive an *ex gratia* payment of £1,000 in recognition of the loss of rights previously enjoyed.<sup>481</sup>

Commenting on this case, Lord Wedderburn stated: “[T]he events at GCHQ would come rightly to be perceived as a milestone, a turning point in 1984 along a path that rendered freedom of association meaningless”.<sup>482</sup>

The terms and conditions of employment of civil servants in the United Kingdom are the responsibility of the Minister for the Civil Service.<sup>483</sup> Employment under, or for the purposes of a Government department, or any official or body exercising on behalf of the Crown the functions conferred by any enactment is called Crown employment.<sup>484</sup> Crown employment does not include any employment in respect of which there is in force a certificate issued by or on behalf of a Minister of the Crown certifying that employment of a description specified in the certificate, or the employment of a particular person so specified, is (or, at a time specified in the certificate, was) required to be excepted from this section for the purpose of safeguarding national security; and any document purporting to be a certificate so issued shall be received in evidence and shall, unless the contrary is proved, be deemed to be such a certificate.<sup>485</sup>

#### United Kingdom Courts’ Decisions:

The case shows enormous differences in understanding and interpretation of the right to freedom of association among United Kingdom Courts.

#### *The High Court:*

On 16 July 1984 the judge declared invalid the instructions issued by the Minister for the Civil Service on 22 December 1983. It accepted GCHQ’s submissions that the

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<sup>481</sup> *Council of Civil Servants v. United Kingdom*, 10 EHRR 269 (1988).

<sup>482</sup> Lord Wedderburn (1989) “Freedom of Association and Philosophies of Labour Law”, *Industrial Law Journal*, vol. 18, pp. 1-38.

<sup>483</sup> Article 4 of the Civil Service Order 1984.

<sup>484</sup> Section 138 (2) or the Employment Protection (Consolidation) Act 1978.

<sup>485</sup> Section 138 (4) of the Employment Protection (Consolidation) Act 1978; Section 121 (4), Employment Protection Act 1975.

Prime Minister's direction on 22 December 1983 and the statutory certificates issued on 25 January 1984 were invalid because there had been no previous consultation by the Government with the trade unions. On the other hand, the Court decided that the Crown was competent to dismiss a civil servant at will, unless some statutory provisions prevented it. The Court also found it unnecessary to refer to the ILO Convention No. 87 because there was no doubt about the relevant English law.<sup>486</sup>

*The Court of Appeal:*

On 6 August 1984, the Court of Appeal allowed the appeal of the Minister for the Civil Service and set aside the High Court's declaration.<sup>487</sup> The Court of Appeal found that the actions taken by the Government with regard to trade union membership at GCHQ were actions taken on the grounds of national security. The court agreed with the previous Court that on 22 December 1983 the Prime Minister had in fact been giving instructions "for controlling the conduct of service" and for "providing for ... the conditions of service" within the meaning of Article 4 of the 1982 Civil Service Order, and that the Government's actions had been in accordance with its international obligations under the ILO Conventions. The court decided that, on rare occasions, the rights of an individual had to be subordinated to the protection of the realm. The Court of Appeal then granted the applicants leave to appeal to the House of Lords.<sup>488</sup>

*The House of Lords:*

Contrary to the High Court's judgment, the five Lords found that the employees, did not have a legal right to prior consultation but they might have had a legitimate expectation that the Minister would consult them before issuing the instructions of 22 December 1983. Furthermore, the Lords decided that the work at GCHQ was a matter of national security, and that security would have been seriously compromised, had industrial action taken place similar to what had happened at GCHQ between 1979 and 1981. Consultation prior to the oral instructions of the Prime Minister would have served further to reveal the vulnerability of GCHQ to such action. In the Lords' view, the

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<sup>486</sup> *R v. The Secretary of State for Foreign and Commonwealth Affairs ex parte Council of Civil Service Unions and Another*, IRLR 309 (1984).

<sup>487</sup> *R v The Secretary of State for Foreign and Commonwealth Affairs ex parte Council of Civil Service Unions and another*, IRLR 353 (1984).

<sup>488</sup> *Ibid.*



interests of national security required that no notice should be given of the decision before administrative action had been taken to give effect to it. The reason for this was the risk that advance notice to the national unions of the executive Government's intention would attract the very disruptive action prejudicial to the national security the recurrence of which the decision barring membership of national trade unions to civil servants employed at GCHQ was designed to prevent. In its judgment of 22 November 1984 based on national security, the House of Lords unanimously dismissed the appeal.<sup>489</sup>

*The European Court of Human Rights (ECtHR):*

After the House of Lords' judgment, the workers applied to the ECtHR invoked Article 11 of the ECHR and argued that the United Kingdom Government had removed the right of individual workers at GCHQ to belong to a trade union, and had thereby deprived these unions of any role in industrial relations at GCHQ. On 20 January 1987, the ECtHR declared the application of workers inadmissible and decided that the United Kingdom had not violated Article 11 of the ECHR.<sup>490</sup>

*The ILO's View:*

The CFA requires that, the member of the armed forces who can be excluded should be defined in a restricted manner.<sup>491</sup> Furthermore, civilian workers in manufacturing establishments of the armed forces should have the right to organise provided by the CILS.<sup>492</sup> Therefore, the decision of the ECtHR in this case also raised the question of how to protect the right of freedom of association (the right to organise) of workers working in areas of public life that relate to national security in light of the wide reception of that standard through various pieces of regional and national legislation.

In examining a complaint made by the General Council of the Trade Union Congress (TUC) that the United Kingdom Government was in breach of Convention No. 87,<sup>493</sup>

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<sup>489</sup> *R v The Secretary of State for Foreign and Commonwealth Affairs ex parte Council of Civil Service Unions and another*, IRLR 28 (1985).

<sup>490</sup> *Council of Civil Servants v. United Kingdom*, 10 EHRR 269 (1988).

<sup>491</sup> CFA: Case No. 2066, Report No. 321, para. 332; Case No. 2288, Report No. 333, para. 829.

<sup>492</sup> CFA: Case No. 2229, Report No. 330, para. 941.

<sup>493</sup> Dated 14 February 1984.

both the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) proceeded from the principled position that they had always taken, namely, that the exclusion of public servants from this fundamental right contravenes Convention No. 87.<sup>494</sup>

The CFA concluded:

- (i) The unilateral action taken by the Government to deprive the category of public service workers of their right to belong to a trade union was not in conformity with the ILO Convention No. 87 that the United Kingdom had previously ratified.<sup>495</sup>
- (ii) The United Kingdom Government should pursue negotiations with the civil servants' unions involved, and a genuine effort be made to reach an agreement which would ensure not only the Government's wish as regards continuity of operations at GCHQ but also its full application of the freedom of association Conventions which it had ratified.<sup>496</sup>

The United Kingdom Government had argued that Convention No. 87 must be interpreted in light of Convention No. 151 and Convention No. 98. The United Kingdom Government had invoked Article 1.2 of Convention No. 151,<sup>497</sup> to argue that the provisions of the Convention No. 151 did not apply to staff employed at GCHQ.<sup>498</sup> More specifically, the United Kingdom Government had maintained that the rights described in Convention No. 151 gave practical expression to the general statement of rights in Convention No. 87. It argued:

... the provisions of Conventions No. 87 and No. 151 were interwoven to such an extent that the power in Article 1.2 of Convention No. 151 to disapply the guarantees provided by that Convention would be of no utility or practical effect unless it was intended to have the effect of disapplying also the associated provisions of the earlier Convention” and that it was “the clearly intention of Convention No. 151 that the extent of the protections set out in its Article 4 should be

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<sup>494</sup> CFA: Case No. 1261, Report No. 234, para. 362.

<sup>495</sup> *Ibid*, para. 371.

<sup>496</sup> *Ibid*, para. 371.

<sup>497</sup> It is left to national laws or regulations to determine the extent to which the guarantees provided for in the Convention are to apply to employees in the public service whose duties are of a highly confidential nature.

<sup>498</sup> CFA: Case No. 1261, Report No. 234, para. 372.

for determination by Governments in the case of workers whose duties are of a highly confidential nature.<sup>499</sup>

The ILO had dismissed these arguments for three main reasons. Firstly, by its terms, Convention No. 87 guarantees the basic right to form and join organisations of their own choosing to all workers “without distinction whatsoever”, including all public servants, whatever the nature of their functions, the only limitations permitted by Convention No. 87 concerning members of the armed forces and the police. Therefore, exclusion of public servants from this fundamental right contravened Convention No. 87. Secondly, not only must all workers be granted the right to organise, but also ratifying Member States must take all necessary and appropriate measures to ensure that workers may freely exercise that right. It follows that, instead of taking measures to enable the workers concerned freely to exercise the right to organise, the Government, by exercising powers granted to it as Government under the Employment Protection Act (Consolidation) 1978, and then imposing restrictive terms of employment, had itself taken the action which had resulted in workers’ loss of this right contrary to Convention No. 87.<sup>500</sup> Thirdly, the Committee of Experts could not accept that Convention No. 151, which was intended to complement Convention No. 98 by laying down certain provisions concerning, in particular, protection against anti-union discrimination and the determination of terms and conditions of employment as these related to the public service in general, in any way contradicted or diluted the basic rights of association guaranteed to all workers by virtue of Convention No. 87.<sup>501</sup>

After the House of Lords’ judgment in this case, in January 1985 the United Kingdom Government had written to the ILO, again arguing that Convention No. 87 had been qualified by Convention No. 151.<sup>502</sup>

The Committee of Experts had an opportunity to reconsider the complaint of the TUC in 1985. Its Report concluded that the United Kingdom Government’s reply had raised complex legal questions on which the International Court of Justice might more

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<sup>499</sup> *Ibid*, para. 358.

<sup>500</sup> *Ibid*, para. 362.

<sup>501</sup> *Ibid*, para. 363.

<sup>502</sup> Susan Corby (1986) “Limitation on Freedom of Association in the Civil Service and the ILO’s Response”, *Industrial Law Journal*, vol. 15, No. 1, pp. 161-172.

appropriately be requested to provide an opinion.<sup>503</sup> The Conference Committee considered the Report of the Committee of Experts and made its own report. This report was put forward for adoption by the Plenary Session of Conference. It concluded with the Conference Committee's hope that "the Government would be able to find appropriate solutions to the problems raised by the application of the Convention".<sup>504</sup>

Even after the European Court of Human Rights had decided that the United Kingdom had not violated Article 11 of the European Convention on Fundamental Human Rights and Freedoms, the ILO still maintained its position as follows:

The ILO supervisory bodies regard the unilateral action taken by the Government to deprive a category of public service workers of their right to belong to a trade union to be inconsistent with the Convention No. 87, ratified by the United Kingdom on 27 June 1949.<sup>505</sup>

During 1987 and 1988 the ILO continued to request the United Kingdom Government to give close consideration to its recommendations in 1984<sup>506</sup> and to implement fully the right to organise of workers "without distinction whatsoever" as provided by Convention No. 87.<sup>507</sup>

*The New Labour Government's actions:*

While the GCHQ case shows the importance attached to standards on freedom of association and collective bargaining by the ILO, the United Kingdom's legislation on labour relations under Margaret Thatcher sought to weaken their relevance to industrial relations. Trade union power and values of collective bargaining were reduced significantly.<sup>508</sup> Failure to protect the right of workers to organise is habitually cited as

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<sup>503</sup> ILO (1985) *Report of the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva Report III, Part 4A, pp. 193-195.

<sup>504</sup> CFA Case No. 1261, Report No. 234, para. 363.

<sup>505</sup> *Ibid*, para. 14.

<sup>506</sup> CEACR. Document No. (ILOLEX) 131987GBR087.

<sup>507</sup> CEACR. Document No. (ILOLEX) 131988GBR087.

<sup>508</sup> Kenneth Miller and Mairi Steele (1993) "Employment Legislation: Thatcher and After", *Industrial Relation Journal*, vol. 24, No. 3, pp. 224-235.

one of the reasons why the Conservative Government became increasingly unpopular.<sup>509</sup>

Tony Blair's Government, took a different view of the GCHQ case, and upon taking office in 1997, immediately entered into a collective agreement, signed on 3 September 1997, by which the Public Services, Tax and Commerce Union were granted sole recognition rights for collective bargaining, organisation and representation. However, staffs remain free to join any other union they wish to. Management agreed to encourage the membership and active participation in the union whilst unfair dismissal rights of workers were restored.<sup>510</sup> The union agreed to desist from using strike and other disruptive action. The ILO welcomed this development with great satisfaction.<sup>511</sup>

### ***Protection from Anti-union Activities***

In the United Kingdom, employers were allowed by national law to use financial benefit to thwart workers' right to organise. In *Associated Newspapers Ltd v. Wilson*<sup>512</sup> and, *Associated British Ports v. Palmer*,<sup>513</sup> the United Kingdom's House of Lords decided that employers could move workers from collective contracts to individualised contract with better benefits. This means that the law allowed employers to use financial benefits to exchange for workers' enjoyment of the right to organise.

However, these regulations have been amended after the decision of the ECtHR. In *Wilson and Palmer, NUJ v. the United Kingdom*,<sup>514</sup> the ECtHR declared that it is a violation of the right to freedom of association if legislation permits employers to use financial incentives to induce workers to surrender important union rights. Moreover, in exercising the right to organise, as a member of the EU, EU law requires the United

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<sup>509</sup> Gavin Drewry (1985) "The GCHQ Case - A failure of Government Communications", *Parliamentary Affairs*, vol. 38, pp. 371-386. See also Lord Wedderburn (1989) "Freedom of Association and Philosophies of Labour Law", *Industrial Law Journal*, vol. 18, pp. 1-38.

<sup>510</sup> John Gennard (1997) "Labour Government: change in Employment Law", *Employment Relations*, vol. 20, No. 1, pp. 12-25.

<sup>511</sup> CEACR. Document No (ILOLEX) 131997GBR087. See also Tonia Novitz (2000) "International Promise and Domestic Pragmatism: To What Extent Will the Employment Relations Act 1999 Implement International Labour Standards Relating to Freedom of Association", *The Modern Law Review*, vol. 63, No. 3, pp. 379-393.

<sup>512</sup> *Associated Newspapers Ltd v. Wilson*, 1 IRLR 258 (1995).

<sup>513</sup> *Associated British Ports v. Palmer*, 1 IRLR 258: 5, 141 (1995).

<sup>514</sup> *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002).

Kingdom to ensure that workers do not suffer any personal or occupational damage because of exercising their right to freedom of association.<sup>515</sup> Occupational damage includes “dismissal or action short of dismissal or pressure by an employer on a worker to give up their position in the union”.<sup>516</sup>

The current legislation in the United Kingdom protects Workers in exercising their right to organise. According to the law of the United Kingdom, it is unlawful to refuse a person employment because he is unwilling to accept a requirement to make payments or suffer deductions in the event of his not being a member of a trade union.<sup>517</sup>

### ***The Closed-Shop***

In the United Kingdom, the right to organise shows two main aspects, namely, the right to establish and join trade unions and the right not to join trade unions. It was established in *Young, James and Webster v. the United Kingdom*<sup>518</sup> that misapplication of negative aspect of the right to organise can create the closed-shop problem. This case arose from the applications of Mr. Young, Mr. James and Mr. Webster, who were former employees of the British Railways Board. In 1975, a closed-shop agreement had been concluded between British Railways Board and three trade unions, providing that henceforth membership of one of those trade unions would be a condition of employment. The applicants had failed to satisfy this condition and in 1976 had been duly dismissed.

After failed litigation attempts in the domestic Courts, they applied to the ECtHR alleging that the United Kingdom Government has violated their right to organise protected by Article 11 of the ECHR.

The foregoing discussion in this case shows that the closed-shop is an undertaking or workplace in which, because of an agreement or arrangement between one or more trade unions and one or more employers or employers’ associations, workers of a certain class are in practice required to be or become members of a specified union. The

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<sup>515</sup> Article 11 of the Community Charter of the Fundamental Social Rights of Workers 1989.

<sup>516</sup> *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002). See also Catherine Barnard (2006) *EC Employment Law*, 3rd edn, Oxford University Press, p. 752.

<sup>517</sup> Sec. 137(1b)(ii) of the TULRCA.

<sup>518</sup> *Young, James and Webster v. the United Kingdom*, 4 EHRR 38 (1982).

employer may not be under any legal obligation to consult or obtain the consent of individual workers directly before such an agreement or arrangement is put into effect. In other words, in a workplace where a closed-shop agreement exists, workers do not have the right not to join a trade union of their own choosing.<sup>519</sup> Closed-shop agreements often include “pre-entry” shop agreements, where prospective workers must demonstrate membership of the union that the employer has previously entered into a relationship with; and “post-entry” shop agreements, that contain the requirements by the relevant unions that workers must join a trade union within a reasonable time after being engaged, the latter being more common.

Closed-shop agreements may result in negative effects for both workers and employers. For the workers, it is the violation of their rights to organise protected by the ECHR. On the other hand, closed-shop agreements limit the employers’ free exercise to hire workers at their will. Closed-shop problem arises as a result of strict protection of trade unions’ security and rights when they are more protected than individuals’ freedom of association. Therefore, balancing the individuals’ right to organise against the collective interest of the union to defend their collective interest becomes a key issue in dealing with closed-shop agreements.

In its judgment in *Young, James and Webster v. the United Kingdom*, the ECtHR declared that it is in breach of Article 11 of the ECHR concerning freedom of association to dismiss a worker who refuses to join a trade union with whom the employer has entered into a closed-shop agreement at a time after the employment of the employee, in so far as membership was not a condition for the employment.<sup>520</sup>

After the decision of the ECtHR, legislation has been revised in the United Kingdom, which provides that both pre-entry and post-entry closed shop agreements are illegal. The law provides that it is unlawful to refuse a person employment:<sup>521</sup>

(a) because he is, or is not, a member of a trade union, or

(b) because he is unwilling to accept a requirement:

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<sup>519</sup> *Young, James and Webster v. the United Kingdom*, 4 EHRR 38 (1982), para. 13.

<sup>520</sup> *Ibid*, para. 55.

<sup>521</sup> Sec. 137(1) of the TULRCA.

(i) to take steps to become or cease to be, or to remain or not to become, a member of a trade union.

The experiences of the United Kingdom on the regulation of the right not to organise and on closed shop agreements provide good lessons for Vietnam.

### ***The Right of Trade Unions to Deny Membership***

According to the law of the United Kingdom, workers have the right not to be person who is, or is seeking to be, in employment with respect to which it is the practice, in accordance with a union membership agreement, for the employee to belong to a specified trade union, or one of a number of specified trade unions, has the right not to have an application for membership of a specified trade union unreasonably refused, and not to be unreasonably expelled from a specified union.<sup>522</sup>

On the contrary, the law not only seeks to protect the rights of workers or employers to establish and to join unions but also allows unions the right to accept or to reject applicants for membership. This can have the effect of mystifying the guarantee that appears to be absolutely beyond doubt in numerous Conventions and charters. This right of unions were granted by the ECtHR in *ASLEF v. United Kingdom*.<sup>523</sup>

Associated Society of Locomotive Engineers & Firemen (ASLEF) is a trade union based in the United Kingdom. ASLEF removed Mr. Lee from its membership on the basis that because he was a member of the British National Party (BNP), he was likely to bring the union into disrepute and that he opposed the objectives of the union.<sup>524</sup> The case raised the question whether allowing a trade union to expel its member due to his membership of a political party was a violation of the right to organise under Article 11 of the ECHR.

### **National Law:**

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<sup>522</sup> Sec. 174(a) of the TULRCA.

<sup>523</sup> *ASLEF v. United Kingdom*, [2007] IRLR 361.

<sup>524</sup> *Ibid.* See also Michael Ford and John Hendy (2007) *ASLEF v UK* [Homepage of The Institute of Employment Rights], [Online]. Available at [www.ier.org.uk](http://www.ier.org.uk) (last visited 15 August 2009); Keith Ewing (2007) "The Implications of the ASLEF case", *Industrial Law Journal*, vol. 36, No. 4, pp. 425-445.



The Trade Union and Labour Relations (Consolidation) Act, 1992 provides conditions that may give rise to expulsion of an individual from a trade union. One of these requirements is the conduct of the individual concerned, including his or her being or ceasing to be, or having been or ceased to be a member of a political party.<sup>525</sup>

*National Courts' View:*

*The first Employment Tribunal:*

Mr Lee had challenged his expulsion from ASLEF under Section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992. The first Employment Tribunal ruled that there was no suggestion that there was any link with ASLEF in relation to this activity by Mr Lee as a British National Party activist. In addition, this Tribunal found no evidence that the membership of Mr Lee with BNP would bring ASLEF into disrepute. Therefore, on 21 May 2003 the Employment Tribunal had found in favour of Mr Lee.<sup>526</sup>

*The Employment Appeal Tribunal:*

ASLEF appealed to the Employment Appeal Tribunal (EAT), which on 22 February 2004 allowed the appeal. A trade union could expel a member only if its reasons for so doing were exclusively related to a member's activities as a party member of a political party and not to his membership *per se*. The Employment Appeal Tribunal decided that the first Employment Tribunal had failed to determine: (i) who and/or what body, on the defendant's behalf, had expelled the claimant; and (ii) the true reasons for the claimant's expulsion, that being whether it was attributable to his conduct, excluding his being a member of the BNP. Therefore, the matter had to be remitted to a freshly constituted tribunal to answer such questions.<sup>527</sup>

*The second Employment Tribunal:*

On 6 October 2004, the second Employment Tribunal upheld Mr Lee's complaint. It rejected ASLEF's defence that Mr Lee's expulsion was entirely attributable to his

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<sup>525</sup> Section 174 of the Trade Union and Labour Relations (Consolidation) Act, 1992.

<sup>526</sup> *ASLEF v United Kingdom*, [2007] IRLR 361.

<sup>527</sup> *Lee v. Associated Society of Locomotive Engineers and Firemen*, [2004] All ER (D) 209.

conduct (apart from the fact of membership of the BNP). It stated that the expulsion was “primarily because of his membership of the BNP”.<sup>528</sup>

*The European Court of Human Rights’ View:*

On 24 March 2005, ASLEF lodged an application against the United Kingdom Government to the ECtHR. ASLEF alleged that it had been prevented from expelling one of its members due to his membership of the BNP, a political party that advocated views inimical to its own. It invoked Article 11 of the Convention on Fundamental Human Rights and Freedom on the right to organise, claiming that it had the right to choose its own membership.<sup>529</sup>

In the Court’s opinion, the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected. Invoking Articles 3 and 5 of ILO Convention No. 87, the Court highlighted for *the first time* in its history, jurisprudence that trade union autonomy is an aspect of Article 11.<sup>530</sup> Prior to that point, the ECtHR had focused on the right of individual workers rather than that of their collective interest expressed through a trade union.<sup>531</sup>

The Court ruled that:

Just as a worker should be free to join, or not join a trade union without being sanctioned or subject to disincentives so too should a trade union be equally free to choose its membership. The right to join a union “for the protection of his interests” cannot be interpreted as conferring a general right to join a union of one’s choice irrespective of the rules of the union. In the exercise of their rights unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union.<sup>532</sup>

Based on this argument, the ECtHR held that the United Kingdom had violated Article 11 of the ECHR.

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<sup>528</sup> *ASLEF v United Kingdom*, [2007] IRLR 361.

<sup>529</sup> *Ibid.*

<sup>530</sup> Michael Ford and John Hendy (2007), *ASLEF v UK* [Homepage of The Institute of Employment Rights], [Online]. Available at: [www.ier.org.uk](http://www.ier.org.uk) (last visited 15 August 2009), p. 6.

<sup>531</sup> Stephanie Palmer (2000) “Human Rights: Implications for Labour Law”, *Cambridge Law Journal*, vol. 59, pp. 168-200.

<sup>532</sup> *ASLEF v United Kingdom*, [2007] IRLR 361.

This decision shows that EU law is more focused and more developed on this point than ILO standards and jurisprudence at that time. The right of unions to expel from membership those who break the rules of the unions or who by their conduct or beliefs reveal that they are a threat to the stability or reputation of the unions was reconfirmed by the ECJ in the case of *RSPCA v. Attorney General*.<sup>533</sup>

The *ASLEF* case demonstrates the growing significance and influence of ILO standards, in general, and the CILS on freedom of association, in particular, on EU legislation. Furthermore, the decision of the ECtHR also raised the question of the need to consider the feasibility of incorporating into the CILS and revising Convention No. 87 of the ILO by provisions allowing a trade union to refuse to accept and to expel its member for certain reasons.

#### *The Government's Actions:*

After the decision of the ECtHR, the United Kingdom Government amended the regulation on the exclusion or expulsion from a trade union for membership of political parties which details the conditions and procedure required for a lawful exclusion or expulsion from a trade union for membership of a political party focusing on the protection of the worker or worker concerned.<sup>534</sup> This has created new difficulties as it has been argued that the content of the new law is not clear and the procedure is not easy for trade unions to follow. It appears also that the new law impinges on unions' right to make their own rules.<sup>535</sup>

#### ***The Right to Strike***

In the EU, recognition of the right to strike in the interpretation of Article 11(1) of the ECHR has developed from denial to indirect and then direct approval. In *Schmid & Dahlstrom v. Sweden*,<sup>536</sup> the ECtHR held that the right to join a trade union in Article 11 of the ECHR did not imply a right to strike. However, in *National Union of Belgian Police v. Belgium*, the ECtHR decided that Article 11(1) on indirect protection,

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<sup>533</sup> *RSPCA v. Attorney General*, 2 All ER 530 (2001).

<sup>534</sup> Section 19 of the Employment Act (2008).

<sup>535</sup> Keith Ewing (2009) "Implementing the ASLEF Decision - A Victory for the BNP?", *Industrial Law Journal*, vol. 38, No. 1, pp. 50-57.

<sup>536</sup> *Schmid and Dahlstrom v. Sweden*, 1 EHRR 67 (1979-80).

guarantees the right to strike by safeguarding the freedom to protect occupational interests of trade union members by trade union action.<sup>537</sup> In *UNISON v. the United Kingdom*, the ECtHR stated that “there is no express inclusion of a right to strike or an obligation on employers to engage in collective bargaining”.<sup>538</sup> However, in *Wilson and Palmer, NUJ v. the United Kingdom*, the ECtHR clearly stated that “while it may be subject to regulation, the right to strike, as a part of the right to collective action, represents one of the most important of the means by which the State may secure a trade union’s freedom to protect its members’ occupational interests”.<sup>539</sup>

In the United Kingdom, the right to strike is recognised by law as a mean of industrial actions,<sup>540</sup> to solve labour disputes. The law provide a clear procedure to carry out a strike, for example a ballot to get the consent of workers for strike actions must be taken before strike,<sup>541</sup> notice of ballot and sample of voting paper must be sent to the employer of the workers who will be entitled to vote in the ballot.<sup>542</sup> Peaceful picketing is legal and protected by law.<sup>543</sup> However, strike action to enforce trade union membership,<sup>544</sup> strike action taken because of dismissal<sup>545</sup> and secondary strike action are not protected by the law.<sup>546</sup>

### **3.1.2. Collective Bargaining**

#### ***The Right to Collective Bargaining***

At the European level, the right to collective bargaining is recognised by the European Social Charter, 1961 (revised in 1996).<sup>547</sup> Within the EU, this right is protected by the

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<sup>537</sup> *National Union of Belgian Police v. Belgium*, 1 EHRR 578 (1975).

<sup>538</sup> *UNISON v. United Kingdom*, IRLR 497 (2002), para. 35.

<sup>539</sup> *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002).

<sup>540</sup> Part V of the TULRCA.

<sup>541</sup> Sec. 226 of the TULRCA.

<sup>542</sup> Sec. 226A of the TULRCA.

<sup>543</sup> Sec. 20 of the TULRCA.

<sup>544</sup> Sec. 222 of the TULRCA.

<sup>545</sup> Sec. 223 of the TULRCA.

<sup>546</sup> Sec. 224 of the TULRCA.

<sup>547</sup> Article 6 (4) provides:

Community Charter of the Fundamental Social Rights of Workers, 1989<sup>548</sup> and the Charter of Fundamental Rights of the European Union, 2000.<sup>549</sup> However, it has been argued that the right to collective bargaining, even recognised by the above instruments, and considered as a social right, is not really a legal right.<sup>550</sup> In *Wilson and Palmer, NUJ v. the United Kingdom*, the ECtHR stated “Although collective bargaining may be one of the ways by which trade unions may be enabled to protect their members’ interests, it is not indispensable for the effective enjoyment of trade union freedom”.<sup>551</sup> However, in the EU, in *Wiking*<sup>552</sup> and *Lava*<sup>553</sup>, the ECJ expressly and unambiguously recognised that the right to collective action is firmly based in EU law as a fundamental right,<sup>554</sup> and this right prevails in respect of fundamental rights, mandatory provisions and the minimum rules.<sup>555</sup>

In the United Kingdom, collective bargaining is recognised and promoted by law. According to the law, collective bargaining means negotiations relating to or connected with the content of the collective agreement. The law defines collective agreement as any agreement or arrangement made by or on behalf of one or more trade unions and

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The right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

<sup>548</sup> Article 12 provides:

Employers or employers’ organisations, on the one hand, and workers’ organisations, on the other, shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice.

<sup>549</sup> Article 28 provides:

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

<sup>550</sup> Eva Kocher (2008) “Fundamental Social Rights in Community Law and in the German Constitution - Equivalent Rights?”, *The International Journal of Comparative Labour Law and Industrial Relation*, vol. 24, No. 3, pp. 385-396. See also Catherine Barnard (2006) *EC Employment Law*, 3rd edn, Oxford University Press, p. 765.

<sup>551</sup> *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002).

<sup>552</sup> *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, Case No. C-438/05.

<sup>553</sup> *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, Case No. C-341/05.

<sup>554</sup> *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, Case No. C-438/05, para. 49.

<sup>555</sup> Commission for the European Communities(CEC) (1989) *Summary Report on Comparative Study on Rules Governing Working Conditions in the Member States*, Office for the Official Publications of the European Communities, Luxembourg, p. 14, para. 45.

one or more employers or employers' associations and relating to one or more of the matters of the employment relationship.<sup>556</sup>

### ***Subject and Content of Collective Bargaining***

Collective bargaining is regarded as a multi-profit process. Collective agreements between management and labour have the benefits of preventing costly labour conflicts, reducing transaction costs through a collective and rule based negotiation process, and promoting predictability and transparency. A measure of equilibrium between the bargaining power on both sides helps to ensure a balanced outcome for both sides and for society as a whole.<sup>557</sup>

In the United Kingdom, the law provides in details the contents of collective agreements, which include:<sup>558</sup> terms and conditions of employment, or the physical conditions in which any workers are required to work; engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; allocation of work or the duties of employment between workers or groups of workers; matters of discipline; a worker's membership or non-membership of a trade union; facilities for officials of trade unions; and machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in such negotiation or consultation or in the carrying out of such procedures. Regulation of the United Kingdom on the subject matters of collective bargaining can be a good example for Vietnam.

### ***Principle of Collective Bargaining***

Collective bargaining is a voluntary mechanism between trade unions and employers in the ECHR. Each party (employer or workers) is free to choose whether to use the process of collective bargaining or not, and the employer is not obligated by law to negotiate with the workers. In *Swedish Engine Drivers' Union*, the ECtHR stated that it

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<sup>556</sup> Sec. 178(1) of the TULRCA.

<sup>557</sup> *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case No. C-67/96, para. 181.

<sup>558</sup> Sec. 178(2) of the TULRCA.

is not a violation of collective bargaining in the EU if a Member State does not put an obligation on employers to enter into collective bargaining.<sup>559</sup>

In the United Kingdom, neither party is obligated to negotiate.<sup>560</sup> Furthermore, the collective agreements have no binding legal effect in principle. The employment conditions of collective agreements are nevertheless rather easily recognised in case law as terms incorporated in employment contracts, either through express incorporation or by custom, or implied terms.<sup>561</sup> Section 179 (1) of the United Kingdom Trade Union and Labour Relations (Consolidation) Act 1992 writes:

A collective agreement shall be conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement is in writing, and contains a provision which (however expressed) states that the parties intend that the agreement shall be a legally enforceable contract.

Kahn Freund found that the main motive for this practice in the United Kingdom may have been the desire to keep industrial relations from adjudicative authority of the common law courts.<sup>562</sup>

### ***Settlement of Disputes***

Most of the European Union Member States draw a distinction between disputes over conflicts of interest and disputes over conflicts of rights.<sup>563</sup> While disputes over conflicts of rights concern interpretation and application of existing contractual clauses,<sup>564</sup> for example, disputes over planned reduction of days off agreed in the collective agreement; on the other hand, disputes over conflicts of interests relate to

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<sup>559</sup> *Swedish Engine Drivers' Union v. Sweden*, 1 EHRR 578 (1979-80). See also *Wilson and Palmer, NUJ v. the United Kingdom*, IRLR 128 (2002).

<sup>560</sup> Alan Bogg "Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK", *Electronic Journal of Comparative Law*, [Online], vol. Vol 10, No. 3. Available at [www.ejcl.org](http://www.ejcl.org) (last visited 15 August 2008). See also Catherine Barnard (2007) "Worker Representation in the UK" in *Decentralising Industrial Relations and the Role of Labour Unions and Employee Representatives*, ed. B. Roger, Kluwer Law International, Netherlands, pp. 65-79.

<sup>561</sup> Stephen Hardy (2007) *Labour Law and Industrial Relations in Great Britain*, 3rd edn, Kluwer Law, The Hague, p. 108.

<sup>562</sup> Kahn Freund (1977) *Labour and the Law*, 2nd edn, Stevens and Son, London, p. 147.

<sup>563</sup> Roger Blanpain (1972) "Prevention and Settlement of Collective Labour Disputes in the EEC Countries - Part I", *Industrial Law Journal*, vol. 1, pp. 74-83.

<sup>564</sup> Catherine Barnard (2006) *EC Employment Law*, 3rd edn, Oxford University Press, p. 775.

changes in the establishment of new collective rules,<sup>565</sup> for example, disputes relating to increasing the minimum wage agreed by the current collective agreement.

In the United Kingdom, labour disputes are not divided into two above types. According to the law of the United Kingdom, labour disputes are called “trade disputes” which are disputes between employers and workers, or between workers and workers relating to the content of collective bargaining, which include: terms and conditions of employment, or the physical conditions in which any workers are required to work; engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers; allocation of work or the duties of employment as between workers or groups of workers; matters of discipline; the membership or non-membership of a trade union on the part of a worker; facilities for officials of trade unions; and machinery for negotiation or consultation, and other procedures, relating to any of the foregoing matters, including the recognition by employers or employers' associations of the right of a trade union to represent workers in any such negotiation or consultation or in the carrying out of such procedures.<sup>566</sup>

The United Kingdom law provide sufficient mechanism to deal with labour disputes as required by the CILS. The settlement mechanisms employed to resolve these disputes include alternative dispute resolution, conciliation,<sup>567</sup> arbitration procedures,<sup>568</sup> and the court.<sup>569</sup> These mechanisms are in conformity with the CILS.

### **3.1.3. Implementation of Freedom of Association and Collective Bargaining in the United Kingdom**

At the regional level, the right to organise enjoys enormous recognition and protection in the EU. National and international unions have been established to ensure its protection. The European Trade Union Confederation (ETUC) was established in 1973 to represent workers and their national affiliates at the European level. Its role has been increased as European integration has expanded to 27 Member States. At present,

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<sup>565</sup> *Ibid*, p. 775.

<sup>566</sup> Sec. 218(1) of the TULRCA.

<sup>567</sup> Secs. 210, 211 of the TULRCA.

<sup>568</sup> Sec. 212 of the TULRCA.

<sup>569</sup> Secs. 215, 216, 217 of the TULRCA See also Article 13(2) of the Community Charter of the Fundamental Social Rights of Workers, 1989, which encourages use of these procedures.



ETUC membership comprises 82 National Trade Union Confederations from a total of 36 European countries, and 12 European industry federations, covering some 60 million individual trade unionists.<sup>570</sup>

However, at the national level, in reality, the trade unions movement is characterised by significant diversity. In the United Kingdom, Germany, Ireland, and Denmark, unions are unified.<sup>571</sup> In Italy, industrial relations are divided by politics and ideology into Catholic and anti-Catholic, Communist and anti-Communist, collectivist and individualist.<sup>572</sup> Belgium has the same situation where industrial relations are divided into three main ideological pillars of society: Catholicism, Protestantism, and Socialism.<sup>573</sup>

Although most of the CILS on freedom of association and collective bargaining have been incorporated sufficiently into domestic legal system, the trade union movement has been weakening in the United Kingdom. Union membership density declined throughout the 1990s and then bottomed out at around 29 % in the early 2000s. Opportunities for worker voice within the United Kingdom workplace have been increasingly restricted. The Workplace Employment Relations Survey 2004 shows that only 27% of worker place recognised one or more trade unions in the negotiation of pay and conditions for some workers while this figure for 1998 was 33%.<sup>574</sup>

Historically, industrial relations, in general and collective bargaining, in particular, in the EU have been divided into two main systems: the Anglo-Saxon system, based on voluntarism; and the Continental system, which is based more on the regulation and interference of the State.<sup>575</sup> In recent years, EU collective bargaining practices have

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<sup>570</sup> Source: <http://www.etuc.org/> (last visited 12 January 2010).

<sup>571</sup> Ulrich Zachert (1993) "Trade Union in Europe: Dusk or New Dawn" *International Journal of Comparative Labour Law and Industrial Relations*, vol. 9, pp 15.

<sup>572</sup> Wisser cited by Catherine Barnard (2006) *EC Employment Law*, 3rd edn, Oxford University Press, p. 757.

<sup>573</sup> Ferner and Hyman cited by Catherine Barnard (2006) *EC Employment Law*, 3rd edn, Oxford University Press, p. 757.

<sup>574</sup> Damian Grimshaw and Lorrie Marchinton (27) "United Kingdom: Persistent Inequality and Vulnerability Traps" in *The Evolving World of Work in the Enlarged EU: Progress and Vulnerable*, ed. Francois Eyraud and Daniel Vaughan-Whitehead, ILO, Geneva, pp 517-554, p. 531. See also Lord Wedderburn (2007) "Labour Law 2008: 40 Years on", *Industrial Law Journal*, vol 36, No. 4, pp 397-424.

<sup>575</sup> Richard Hyman (1995) "Industrial Relations in Europe: Theory and Practice", *European Journal of Industrial Relations*, vol. 1, pp. 17-46.

evidenced two simultaneous processes, namely, Europeanisation on the one hand, and decentralisation on the other hand.<sup>576</sup> This has given rise to convergence and diversification in EU collective bargaining practice.<sup>577</sup> Convergence is evident at regional level. Economic and political integration had given impetus to the establishment of EU level collective bargaining at three levels: the EU multi sector level; the EU sector level and; the EU company level.<sup>578</sup> These developments facilitated the adoption significant EU level collective bargaining Directives.<sup>579</sup> Diversification is the result of a decentralisation process that increases collective bargaining at plant, company and national levels.<sup>580</sup> In an integrated EU, multi-national companies (MNCs) are in need of effective instruments for homogeneous regulation of working conditions that can be applied in all branches or plants of MNCs and their subsidiaries regardless

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<sup>576</sup> Niels-Erick Wergin (2004) “Book Review: Collective Bargaining in Europe - Europeanisation or Decentralisation?”, *European Political Economy Review*, vol. 2, No. 1, pp. 104-108. See also Manfred Weiss (2006) “Industrial Relations and EU Enlargement” in *Globalisation and the Future of Labour Law*, eds. John Craig and Michael Lynk, Cambridge University Press edn, Cambridge, pp. 169-190.

<sup>577</sup> Robert Rebhahn (2004) “Collective Labour Law in Europe in a Comparative Perspective (Part II)”, *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, No. 1, pp. 107-132.

<sup>578</sup> There have been a lot of efforts to establish and develop collective bargaining at EU level. Social dialogue between social partners is recognised and encouraged by Article 137.1 (f) and Article 139 of the Treaty of Rome, establishing the European Economic Community (EEC), signed in Rome on 25 March 1957, and entered into force on 1<sup>st</sup> January 1958, (equal to Article III – 212 Constitution of Europe). The idea of European collective agreements was first raised at the European Parliament by Jacques Delors in the mid 1980s. It was then carried forward into the Community Charter of the Fundamental Social Rights of Workers, 1989, which provides that: “The dialogue between the two sides of industry at European level must be developed, if the parties deem it desirable”. From the second half of the 1990s onwards, cross-sectoral, sectoral and company-level bargaining has developed into a key movement in transnational industrial relations in the EU. See also Marginson Paul and Sisson Keith (1998) “European Collective Bargaining: A Virtual Prospect?”, *Journal of Common Market Studies*, vol. 36, No. 4, pp. 505-528; Edoardo (2009) “Transnational Collective Bargaining in Europe: The case for Legislative Action at EU Level”, *International Labour Review*, vol. 148, No. 1-2, pp. 149-162.

<sup>579</sup> On 14/12/1995, European employers’ organisations: BusinessEurope, the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the European Centre of Employers and Enterprises CEEP) and European Trade Union Confederation (ETUC) signed a framework agreement concerning parental leave. This resulted in the conclusion of the first Framework Agreement at Community level in December 1995, followed by a Council Directive in 1996 (Council Directive 96/34/EC). After 15 years, on 18/6/2009 European employers’ organisations (BusinessEurope, UEAPME, CEEP) and ETUC signed an amendment revising that of 14/12/1995. A Council Directive was issued on 15/12/1997 concerning the agreement on part-time work was concluded by UNICE, CEEP and the ETUC on 6/6/1997 (Council Directive 97/81/EC). On 28/6/1999 a Council Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Council Directive 99/70/EC). On 16/7/2002, another collective bargaining was signed at EU level regulating employment conditions for tele-workers, health and safety, training and collective rights.

<sup>580</sup> Robert Rebhahn (2004) “Collective Labour Law in Europe in a Comparative Perspective (Part II)”, *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, No. 1, pp. 107-132.

of the countries in which they operate.<sup>581</sup> However, at national level, different countries in the EU have different regimes for collective bargaining as well as different scope and enforcement of collective agreement.<sup>582</sup>

In the United Kingdom, together with the decline in trade union membership, there has been decline in collective bargaining, particularly bargaining relating to salary. According to the Workplace Employment Relations Survey 2004, proportion of workplaces that set pay for some workers through collective agreements declined from 30% in 1998 to 22% in 2004. The use of collective bargaining is not common at the same level in different public and private workplaces. In 2004, 77% of public workplaces used collective bargaining compared to only 11% of private workplaces.<sup>583</sup>

Practice of the right to organise and collective bargaining of the United Kingdom in the context that the CILS on these rights have been incorporated appropriately into its legal system show the challenges of the implementation and the impact of the CILS on the promotion of these rights in ratified Member States, which have been mentioned in Chapter I.

## **Observations**

Freedom of association and the right to organise are recognised, promoted and protected under the United Kingdom law and practice. The United Kingdom's conceptualisation of the CILS on Freedom of association and collective bargaining raise some issues about CILS in particular and the ILO in general that need to be re-examined and investigated. The United Kingdom practice, indeed, has many lessons that Vietnam can benefit from in the process of incorporating the CILS on Freedom of association and collective bargaining into Vietnam's legal system.

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<sup>581</sup> Arrowsmith Jame and Marginson Paul (2006) "The European Cross-border Dimension to Collective bargaining in Multinational Companies", *European Journal of Industrial Relations*, vol. 12, No. 3, pp. 245-266.

<sup>582</sup> Taco van Peijpe (2009) "Collective Labour Law after Viking, Laval, Ruffert, and Commission v. Luxembourg", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 25, No. 2, pp. 81-107.

<sup>583</sup> Damian Grimshaw and Lorrie Marchinton (27) "United Kingdom: Persistent Inequality and Vulnerability Traps" in *The Evolving World of Work in the Enlarged EU: Progress and Vulnerable*, ed. Francois Eyraud and Daniel Vaughan-Whitehead, ILO, Geneva, pp 517-554, p. 532. See also Lord Wedderburn (2007) "Labour Law 2008: 40 Years on", *Industrial Law Journal*, vol 36, No. 4, pp 397-424.

In the United Kingdom, freedom of association is recognised as a pillar on which democratic society rests and thrives. Freedom of association includes the right to form, to join trade unions of individuals to protect their economic and social interests. Workers can join and establish trade unions of their own choosing at different levels. The law has the duty to limit interference of the States in the enjoyment of the right to organise of workers, trade unions. The United Kingdom practice is a good example for Vietnam in legislation of freedom of association and the right to organise.

It is suggested from EU practice that the right must be promulgated in the highest legal document (the constitution) of Vietnam. Restrictions on the right to organise should only be imposed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

*GCHQ* shows the misapplication in the implementation of the provisions on the categories of workers excluded from the right to organise provided by the CILS at both national and regional levels. In addition, ignorance of the United Kingdom to the comments and requests of the ILO in this case again reveals the weakness in enforcement of the CILS, which was mentioned in Chapter I. This fact once again proves that the ILO does not have “teeth” to enforce its standards, and that implementation and enforcement of the ILS are still among the main challenges to the ILO. A lesson that Vietnam can learn from this case is how to limit the categories of workers excluded from the right to organise to meet both requirement of domestic context and the CILS. The case of *GCHQ* also shows the importance of the right to organise in enhancing the stability of the Government. Therefore in order to create, maintain and develop social stability, Vietnam need to promote and protect the right to organise of the workers.

The United Kingdom and EU jurisprudence shows that the right to organise has a dual function. It is both positive and negative. Positively, workers have the right to form and to join trade unions of their own choosing while the negative aspect is that workers have the right not to form, to join and not to be compelled to form or to join trade unions. The United Kingdom practice in its legislation of the negative aspect of the right to organise raises the need for the re-examination with a view to incorporating the right not to

organise into the CILS, which are still silent on this issue. The negative aspect of this right is also a matter that should be recognised in Vietnam.

*ASLEF* demonstrates that, in such cases, the court will have to strike a balance between the workers' right to organise and trade unions' interests. United Kingdom jurisprudence shows that the right to organise is not only granted to the workers or employers but also to the trade unions. Therefore, in the exercise of their rights to organise, trade unions must remain free to decide, in accordance with union rules, questions concerning admission to and expulsion from the union. On the one hand, workers enjoy the right to form, join or not to form, join unions, on the other hand, trade unions must be able to decide to accept a member or not and trade unions are not compelled to admit members. Nonetheless, *ASLEF* raises a new issue that is still silent in ILO jurisprudence – the right to deny trade union membership. This supports the argument that some ILO standards may be out of date in spite of the work of the three Working Parties established by the ILO Governing Body to deal with the revision of ILS.<sup>584</sup>

The CILS allow Member States to resolve the problem of trade union security. In the United Kingdom, closed-shop agreements are prohibited as they are violation of freedom of association and the right to organise. Closed-shop agreements create negative impact on both employers and workers. Experience of the EU and the United

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<sup>584</sup> The first Working Party was set up in 1974, it submitted its report in 1979. The tasks of the first Working Party were: to propose a system for classifying ILO Conventions and Recommendations; to identify subject areas that were considered to require further study or new standards. See Final Report of the Working Party on International Labour Standards. *Official Bulletin (special edition)* vol. LXII, 1979, series A.

The second Working Party was set up in 1984 to: examine the classification of the Conventions and Recommendations of the first Working Party; to consider and formulate Recommendations for future policy as regard adopting standards; to consider the importance that should be given to revising and consolidating existing standards; to consider the formulation of standards for new subjects. Its report was submitted in 1987. See Report from the Working Party on International Labour Standards, *Official Bulletin*, Vol. LXX, 1987, Series A.

The third Working Party on Policy regarding the Revision of Standards (WP/PRS) was established, p. 262<sup>nd</sup> Session of the Governing Body in 1995. The duties of this Working Group are: to determine the actual revision needs of the International Labour Code; to formulate the criteria that could be applied in the effort to revise the ILS; to determine areas where evaluation of standards may be needed; to ensure coherency in the standard-setting system procedures; to analyse the difficulties and obstacles involved in the ratification of ILO Conventions; to suggest the measures for improving the ratification of Conventions that have been revised. See Ben Chigara (2007) "Latecomers to the ILO and the Authorship and Ownership of the ILC", *Human Rights Quarterly*, vol. 29, pp. 706-726.

Kingdom on this issue suggests that closed-shop problem should be dealt with by international legal instruments, particularly in the CILS. In addition, this can be a lesson for Vietnam; appropriate attention should be paid to this issue in the process of making labour law in Vietnam.

In the United Kingdom, the process of collective bargaining is voluntary, and autonomous between employers and workers' association; neither party is obliged to negotiate. The United Kingdom also provides a compatible mechanism for resolving disputes arising from collective bargaining required by the CILS. These may be good experiences for Vietnam in dealing with collective bargaining disputes.

To sum up, the CILS on freedom of association and collective bargaining have been recognised, protected and promoted in the United Kingdom and the EU. In aspects of protection of the right to organise, some regulations are even more advanced than the CILS. Compliance with the CILS in the United Kingdom, together with its socio-economic development have shown that implementation of the CILS on freedom of association and collective bargaining do not have any negative affect on a country's development. On the contrary, they facilitate human security necessary for business security through the recognition, promotion and protection of the inherent dignity of individuals against more powerful actors in the world of work, thus facilitating the realisation of social justice.

### **3.2. Conceptualisation of the CILS on Freedom of Association and Collective Bargaining in the United States**

With a population of 308 million,<sup>585</sup> the United States is the third largest population country in the world. The working age population (from 15 to 65) accounts for 67% of the population.<sup>586</sup>

For many ideological and political reasons, the United States' involvement in the ILO has been erratic. Even though the first meeting of the ILO was held in Washington,

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<sup>585</sup> See <http://www.census.gov/population/www/popclockus.html> (last visited 20 February 2010).

<sup>586</sup> Source Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

D.C.,<sup>587</sup> the United States did not become a full member of the ILO until 1934. Even worse, the United States withdrew its membership in 1977 and rejoined in 1980.<sup>588</sup> Of the eight core ILO Conventions, the United States has ratified only two core Conventions on elimination of forced labour: Convention No. 105 and Convention No. 182.<sup>589</sup>

### 3.2.1. Trade as a Mechanism for Promoting the CILS in the United States

For over three decades, the United States has recognised CILS as a trade objective in its trade laws.<sup>590</sup> However, none of those statutory provisions refers to Convention No. 87 nor Convention No. 98 of the ILO.<sup>591</sup> This is curious not least because jurisprudence of the courts of its foremost trade partner, the EU regards the principles enshrined in Conventions No. 87 and No. 98 as fundamental rights that are necessary in a democratic State. Further, the curiosity deepens when one considers that the ILO code was intended from the outset to ensure a fairer trade competition policy. Does this suggest that the United States might benefit from a more liberal labour relations policy?

The United States appears to rely on bilateral and regional trade agreements<sup>592</sup> to ensure a fairer international trade policy rather than insisting upon and relying on CILS.<sup>593</sup> To

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<sup>587</sup> See Chapter I.

<sup>588</sup> For details see Stephen Schlossberg (1990) "United States' Participation in the ILO: Redefining the Role", *Comparative Labour Law Journal*, vol. 11, pp. 48-80.

<sup>589</sup> Source [www.ilo.org](http://www.ilo.org) (last visited 20 February 2010).

<sup>590</sup> U.S. trade laws define five basic workers' right by Sec. 502(a)(4) of the Trade Act of 1974, as amended. These are: (1) the right of association; (2) the right to organise and bargain collectively; (3) prohibition of forced or compulsory labour; (4) a minimum age for employment of children; and (5) acceptable conditions of worker rights with respect to minimum wages, hours of work, and occupational safety and health.

<sup>591</sup> Steve Charnovitz (2008) "The ILO Convention on Freedom of Association and Its Future in the United States", *The American Journal of International Law*, vol. 102, No. 1, pp. 90-107.

<sup>592</sup> Lance Compa (2006) "Labour Rights in the FTAA" in *Globalisation and the Future of Labour Law*, eds. John Craig and Michael Lynk, Cambridge University Press, Cambridge, pp. 245-273. See also Brian Langille (2006) "Globalisation and the Just Society - Core Labour Rights, the FTAA, and Development" in *Globalisation and the Future of Labour Law*, eds. John Craig and Michael Lynk, Cambridge University Press, Cambridge, pp. 274-303; Lance Compa and Jeffrey Vogt (2001), "Labour Rights in the Generalised System of Preferences: A 20 Years Review", *Comparative Labour Law and Policy Journal*, vol. 22, pp. 199-238.

<sup>593</sup> Christopher Candland (2009) "Core Labour Standards under the Administration of George W. Bush", *International Labour Review*, vol. 148, No. 1-2, pp. 169-181.

date, the United States has passed five laws relating to promotion of the CILS,<sup>594</sup> namely, the Generalised System of Preferences Renewal Act of 1984, the Overseas Private Investment Corporation Renewal Act of 1985, the Caribbean Basin Economic Recovery Act of 1986, the Omnibus Trade and Competitiveness Act of 1988, and the Trade Act of 2002.<sup>595</sup> According to the law in the United States, countries that do not afford internationally recognised worker rights and have not eliminated the worst forms of child labour are excluded from GSP treatment.<sup>596</sup> In deciding GSP treatment, the President may also consider discretionary criteria, such as steps taken to protect worker rights.<sup>597</sup>

The *North American Free Trade Agreement* (NAFTA), between the United States, Mexico, and Canada was the first trade agreement ever linked in a major way to workers' rights through its companion, the *North American Agreement on Labour Cooperation*.<sup>598</sup> In recent years, the United States Governments have wanted to link Free Trade Agreement or Trade Promotion Agreement (FTA) commitments with the ILO *Declaration on Fundamental Principles and Rights at Work*, 1998 rather than ILO Conventions.<sup>599</sup> In the FTA signed between the United States and Peru,<sup>600</sup> the two parties committed to "adopt and maintain in its statutes and regulations" the rights stated in the ILO *Declaration on Fundamental Principles and Rights at Work*, 1998. In addition, this FTA requires that:

[n]either Party shall waive or otherwise derogate from ... its statutes or regulations implementing those rights where the waiver or derogation would be inconsistent with a fundamental right. To be

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<sup>594</sup> See Christopher Candland (2009) "Core Labour Standards under the Administration of George W. Bush", *International Labour Review*, vol. 148, No. 1-2, pp. 169-181; Philip Alston (1996) "Rights Provisions in U.S Trade Law: "Aggressive Unilateralism"?" in *Human Rights, Labour Rights, and International Trade*, eds. Lance Compa and Stephen Diamond, University of Pennsylvania Press, Philadelphia, pp. 71-98.

<sup>595</sup> Texts available at <http://uscode.house.gov>. (last visited 10 February 2010).

<sup>596</sup> 19 U.S.C. § 2462(b)(2).

<sup>597</sup> 19 U.S.C. § 2462(c).

<sup>598</sup> Went into effect with NAFTA on January 1, 1994. Text available at [www.naalcosh.org/index\\_e.htm](http://www.naalcosh.org/index_e.htm) (last visited 10 February 2010).

<sup>599</sup> The U.S – Peru FTA contains a footnote (Note 39, Article 17) stating that the obligations on fundamental labour rights refer only to the ILO Declaration on Fundamental Principles and Rights at Work.

<sup>600</sup> Signed on 12/4/2006. Text available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text> (last visited 10 February 2010).



a violation of these provisions, the challenged measure has to be affecting trade or investment between the parties.<sup>601</sup>

By incorporating the CILS into FTAs, the United States can use financial punishment to enforce labour rights; for example the FTA between United States and Peru provides that “An uncorrected violation [of labour rights] can lead to a monetary fine or, if unpaid, to a trade sanction.”<sup>602</sup>

### **3.2.2. Freedom of Association**

#### *Convention No. 87 in the United States*

The United States Government voted in the ILO for adoption of Convention No. 87,<sup>603</sup> but it has not ratified Convention No. 87.<sup>604</sup> Any efforts to ratify Convention No. 87 have failed. On 27 August 1949, the Convention was transmitted to the United States Senate for advice and consent. After 60 years, Convention No. 87 continues to lie on the shelf in the Senate. It is the longest pending treaty on the calendar of the Senate Committee on Foreign Relations.<sup>605</sup> Why? It is because the United States maintains a principled position on the application of some international treaties.

From the United States’ point of view, “No ILO Convention will be ratified unless or until United States law and practice, at both the federal and state levels, is in full conformity with its provisions.”<sup>606</sup> The United States Council for International Business has put up more barriers to the ratification of the ILO Conventions on Freedom of association and collective bargaining when it states: “No ILO Convention will be

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<sup>601</sup> Article 17 of the U.S – Peru FTA.

<sup>602</sup> Article 21 of the U.S – Peru FTA.

<sup>603</sup> The Convention was adopted by 127 – 0 (with 11 abstentions) at the International Labour Conference held in San Francisco. All United States delegates (Government, worker, and employer) voted for the Convention. ILO (1948), *Provisional Record of the 31<sup>st</sup> Session*. ILO, Geneva, p. 268.

<sup>604</sup> Source: [www.ilo.org](http://www.ilo.org) (last visited 10 February 2010).

<sup>605</sup> US Department of State, Office of Legal Adviser, *Treaties pending in the Senate (update 16/3/2009)*. Available at <http://www.state.gov/s/l/treaty/pending/> (last visited 22 September 2009).

<sup>606</sup> U.S. Department of Labour, Bureau of International Labour Affairs, *International Labour Organisation (ILO)*. Available at <http://www.dol.gov/ilab/programs/oir/ILO.ht> (last visited 23 September 2009).

forwarded to the United States Senate for ratification if ratification would require any change in United States federal or state laws.”<sup>607</sup>

One of the main reasons why the United States has not ratified Convention No. 87 of the ILO is explained thus: if Convention No. 87 was ratified and, as a treaty, superseded contrary requirements in United States legislation, the Convention would affect or alter United States labour law in many significant ways; for example, ratification would:

[a]lter a fundamental principle of United States labour law, which makes union rights derivative from those of workers, by subordinating worker rights to those of labour organisations.<sup>608</sup>

In recent years, it has been argued that the above opinion is still valid. More importantly, it has been stated:

Unqualified ratification of one or both of those Conventions [Nos. 87 and 98] would redirect US labour policy significantly. To mention just two [examples]: the Conventions would broaden the right to strike but give representation rights to minority unions; and they would revoke or modify substantial portions of the Landrum-Griffin Act, but would remove limits on disaffiliations of local unions from international union.<sup>609</sup>

The United States Government’s nominal attention to the CILS may be one of the reasons why most labour lawyers in the United States have shown little interest, understanding, or use of ILO Conventions No. 87 and 98.<sup>610</sup>

The only specific reference to Conventions No. 87 in United States law concerns labour rights in Cuba rather than in the United States. That provision states that the United States will observe whether a transitional Government in Cuba makes demonstrable progress towards “allowing the establishment of independent trade unions as set forth in Conventions No. 87 and No. 98 of the International Labour Organisation, and allowing

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<sup>607</sup> U.S. Council for International Business, Issue Analysis: *U.S. Ratification of ILO Core Labour Standards* 4 (Apr. 2007). Available at <http://www.uscib.org/index.asp?documentID=1926> (last visited 23 September 2009).

<sup>608</sup> Phelan Edward (1984) *Freedom of Association, the Right to Organise and Collective Bargaining: The Impact on U.S. Law and Practice of Ratification of ILO Conventions No. 87 and No. 98*, Labour Policy Association, Inc, Washington, D.C, p. 44.

<sup>609</sup> Phelan Edward (2006) “The Growing Importance of the International Labour Organisation: The View from the United States” in *Globalisation and Future of Labour Law*, eds. C. John and L. Michael, Cambridge University Press, Cambridge, pp. 356-374, p. 371.

<sup>610</sup> David Gregory (1989) “The Right to Organise as a Fundamental Human and Civil Right”, *Mississippi College Law Review*, vol. 9, pp. 135-154.

the establishment of independent social, economic, and political associations.”<sup>611</sup> Meeting the prescribed requirements could have an effect upon the probable lifting of the United States’ long trade embargo against Cuba.<sup>612</sup>

However, there has been no development concerning ratification of Convention No. 87 and Convention No. 98 and, at present, there are no ongoing efforts to ratify them.<sup>613</sup> How can the right to freedom of association and collective bargaining can be guaranteed in the absence of ratification? Would United States’ experiences in recognising, promoting and protecting the right to freedom of association and collective bargaining provide any lessons for Vietnam? Should Vietnam follow the United States in dealing with Conventions No. 87 and No. 98? The following sections explore answers to these questions.

### ***The Right to Organise***

Trade unionism came late to the United States where trade unions appear to have obtained political power before industrial power.<sup>614</sup> In contrast, Britain appears to have experienced industrial power ahead of the power to fend the law off and keep it out of their affairs.<sup>615</sup> In the United States, the existence of trade unions comes from the desire of individual workers who vote to form or disband them. Trade unions have no legal status at the workplace apart from that given to them by individual workers. Although trade unions engage in political activities, they are viewed no differently in the political process than any other interest group; they are not given special roles in policy making and are not perceived as serving social function. In contrast, trade unions in the EU are

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<sup>611</sup> 22 U.S.C. § 6065(a)(6)(C) (2000).

<sup>612</sup> Cuba ratified Convention No. 87 in 1952. Source: [www.ilo.org](http://www.ilo.org) (last visited 24 October 2009).

<sup>613</sup> See ILO document No. Cf. GB.291/LILS/4 para. 13. See also ILO. *Country Baseline under the ILO Declaration Annual Review (2002 – 2008)*. Available at [www.ilo.org/wcmsp5/groups/public/---ed.../wcms\\_decl\\_facb\\_usa.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed.../wcms_decl_facb_usa.pdf) (last visited 25 October 2009).

<sup>614</sup> Selig Perlman (1922) *A History of Trade Unionism in the United States*, Macmillan Co., New York. See also Cynthia Estlund (2002) “An American Perspective on Fundamental Labour Rights” in *Social and Labour Rights in a Global Context: International and Comparative Perspectives*, ed. Bob Hepple, Cambridge University Press, Cambridge, pp. 192-214.

<sup>615</sup> William B. Gould IV (2004) *A Primer on American Labour Law*, 4th Edition. Cambridge, MA: MIT Press , p. 3.

given rights apart from individual workers and are given explicit roles as representative organisations in EU policy making.<sup>616</sup>

Historically, the United States Government has taken three approaches to labour unions, namely: (i) criminalisation<sup>617</sup>, (ii) neutral free-market approach,<sup>618</sup> and (iii) the compulsory unionism approach.<sup>619</sup>

Freedom of association as well as other workers' rights are not explicitly guaranteed by the United States Constitution. However, the right to peacefully assemble is recognised by its First Amendment ratified on 15 December 1791,<sup>620</sup> which provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Even though the First Amendment identifies rights to assemble and to petition the Government, the text of the First Amendment does not make specific mention of a right to association.<sup>621</sup>

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<sup>616</sup> Richard Block (2003) "Collective Bargaining in Context: Comparing the United States and Europe" in *Bargaining for Competitiveness: Law, Research, and Case Studies*, ed. Richard Block. Michigan State University, Michigan, pp. 1-13.

<sup>617</sup> The Government views labour unions as illegal organisations that conspire to disrupt commerce or harm employers. Membership in a labour union is illegal under this approach, and so are strikes and threats designed to force employers to bestow additional benefits upon their workers. This approach existed in many states for a brief time in American history (roughly between 1806 and 1842). See Robert Hunter (1999) *Michigan Labour Law: What Every Citizen Should Know*. Mackinac Centre for Public Policy, Michigan, p. 4.

<sup>618</sup> The Government neither encourage nor discourage the formation of labour unions. Workers who choose to form a union are free to do so. Government does not prohibit union membership or union activity, provided existing laws against fraud, violence, and property damage are not violated. Individual workers may join or not join a union, and union leaders must earn each worker's voluntary support by providing desired benefits. Under this approach, employers may choose to deal or not deal with the labour union and workers are free to strike regardless of how much it may economically harm their employer. This approach existed in a number of states mostly prior to the 1850s. See Robert Hunter (1999) *Michigan Labour Law: What Every Citizen Should Know*. Mackinac Centre for Public Policy, Michigan, p. 4.

<sup>619</sup> The Government plays an active role in encouraging labour unions. The Government forces employers to recognise labour unions and negotiate with them in a process called "mandatory collective bargaining." Unions are recognised by law as "exclusive bargaining representatives" who may prohibit individual workers in their bargaining units from negotiating individual working arrangements with their employer, even if they would be better off doing so and their employer is willing. This approach arose out of the Great Depression era of the late 1920s to the mid-1930s. Robert Hunter (1999) *Michigan Labour Law: What Every Citizen Should Know*. Mackinac Centre for Public Policy, Michigan, pp. 4-5.

<sup>620</sup> Text available at <http://www.usconstitution.net/const.html#Am1> (last visited 22 October 2009). 10/22].

At the beginning of the twentieth century, despite the emergence of international recognition of labour law issues, which led to the birth of the ILO, legislation to protect workers' rights in the United States was notable for its silence on the matter. By applying the liberty of contract theory in industrial relations, the interference of Government (by law) in industrial relations in the United States was very limited. A lot of State law and regulations on labour relations were struck down and declared invalid by the Supreme Court on the basis that these regulations unlawfully interfered with the principle of liberty to contract, the right to sell and to buy labour between workers and employers.

In *Adkins v. Children's Hospital of District of Columbia*,<sup>622</sup> the Supreme Court decided that standards on minimum wages were invalid; in *Locher v. New York*,<sup>623</sup> the Supreme Court rejected the argument that the law was necessary to protect the health of bakers, deciding it was a labour law attempting to regulate the terms of employment, and calling it an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract;" and, notably in *Adair v. United States*,<sup>624</sup> the United States Supreme Court ruled that regulations to legalise organised labour activities and to prohibit discharge of a union activist were invalid.

The right to organise of workers for the purpose of collective bargaining was brought under the law for the first time<sup>625</sup> in 1926 by the Railway Labour Act,<sup>626</sup> which established the right of rail workers to form and join trade unions. However, this Act grants the right only to workers in rail transportation.<sup>627</sup> Full recognition of the right to organise of workers in the United States took place in 1935 when the National Labour Relation Act<sup>628</sup> was passed (the Wagner Act), which provides that "Workers

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<sup>621</sup> Gerrit Pienaar (1993) "Freedom of Political Association in South Africa, Germany and the USA", *Journal of South Africa Law*, vol. 2, pp. 233-252.

<sup>622</sup> *Adkins v. Children's Hospital of District of Columbia*, 261 US 525 (1923).

<sup>623</sup> *Locher v. New York*, 148 US 45 (1905).

<sup>624</sup> *Adair v. United States*, 208 US 161 (1908).

<sup>625</sup> Jame Gross (2002) "Applying Human Rights Standards to Employment Rights in the USA: The Human Rights Watch Report 2000", *Industrial Relations Journal*, vol. 33, No. 3, pp. 182-196.

<sup>626</sup> Text available at <http://uscode.house.gov> (last visited 16 January 2010).

<sup>627</sup> In 1964 the RLA was extended to workers and employers in the air transportation sector.

<sup>628</sup> Text available at [www.nlr.gov](http://www.nlr.gov) (last visited 20 January 2010).

shall have the right to self-organisation, to form, join, or assist labour organisations”.<sup>629</sup> Workers are able to join and form trade unions of their own choosing and they are not obliged to join or to form a certain trade union or trade union system.

However, more constraints to the right of workers to organise were provided by the first amendment of the Wagner Act, the Taft–Hartley Act in 1947.<sup>630</sup> While it continued to confirm the right to organise and to collective bargaining of workers, this Act excluded independent contractors and supervisors from the law’s coverage.<sup>631</sup> The Taft–Hartley Act also added the following provisions that have been used to limit freedom of association; such as it permits union shops only after a majority of the workers vote for them;<sup>632</sup> it states that workers have the right to refrain from organising and collective bargaining;<sup>633</sup> it forbids jurisdictional strikes and secondary boycotts;<sup>634</sup> it also allows the President to appoint a board of inquiry to investigate union disputes when he believes a strike would endanger national health or safety, and obtain an 80-day injunction to stop the continuation of a strike.<sup>635</sup> With the above barriers to the enjoyment of workers’ right to freedom of association, it is stated that the Taft–Hartley Act has destroyed the philosophy of the Wagner Act that collective bargaining should be encouraged.<sup>636</sup> The current legislation, the National Labour Relations Act (consolidated) (NLRA),<sup>637</sup> provides “Employees shall have the right to self-organisation, to form, join, or assist labour organisations”.<sup>638</sup>

In the United States, the right to associate follows logically from the right to speak, to petition, and to assemble. In *NAACP v. Alabama*,<sup>639</sup> the United States Supreme Court

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<sup>629</sup> Sec. 7 of the Wagner Act.

<sup>630</sup> Text Available at <http://vi.uh.edu/pages/buzzmat/tafthartley.html> (last visited 14 February 2010).

<sup>631</sup> Sec. 152 of the Taft-Hartley Act.

<sup>632</sup> Sec. 159 of the Taft-Hartley Act.

<sup>633</sup> Sec. 101 of the Taft-Hartley Act.

<sup>634</sup> Sec. 187 of the Taft-Hartley Act.

<sup>635</sup> See Secs. 176, 177, 178 of the Taft-Hartley Act.

<sup>636</sup> See also Jame Gross (2002) “Applying Human Rights Standards to Employment Rights in the USA: The Human Rights Watch Report 2000”, *Industrial Relations Journal*, vol. 33, No. 3, pp. 182-196. For more details see Good Dale Edward (1949) *Some Effects of the Taft-Hartley Act*, University of Illinois Bulletin, Illinois.

<sup>637</sup> Act 29 of the NLRA.

<sup>638</sup> Sec. 7. [§ 157.] of the NLRA.

<sup>639</sup> *NAACP v. Alabama*, 357 U.S. 449 (1958).

held that freedom of association is an essential part of the freedom of speech because, in many cases, people can engage in effective speech only when they join with others.<sup>640</sup>

In *Roberts v. United States Jaycees*,<sup>641</sup> the United States Supreme Court reconfirmed the right to freedom of association. Furthermore, it declared in *Shelton v. Tucker*<sup>642</sup> that the right of freedom of association is a right closely allied to freedom of speech and a right which, lies at the foundation of a free society.<sup>643</sup> However, it is argued that the recognition and protection of freedom of association provided by the Constitution and its amendment were applied mainly in the political rather than in industrial relations.<sup>644</sup>

Regarding to employers, the right to organise of employers in the United States is not considered completely equivalent to the right to organise of workers.<sup>645</sup> The Wagner Act does not mention the right to organise of employers, but the Taft-Hartley Act provides: “It shall be an unfair labour practice for a labour organisation or its agents to restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.”<sup>646</sup>

### ***The Right not to Organise***

The negative aspect of the right to organise is not provided directly in the Wagner Act but is provided clearly in the Taft-Hartley Act. The Wagner Act indirectly protects the right not to join a trade union by making it an unfair labour practice for employers who “encourage or discourage membership in any labour organisation”.<sup>647</sup> The Taft-Hartley Act provides that workers have the right to refrain from any trade union activities.<sup>648</sup>

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<sup>640</sup> For more details see Marsha Schemer (1980) “Freedom of Association: NAACP v. Alabama”, *Ohio State Law Journal*, vol. 41, pp. 823-857.

<sup>641</sup> *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

<sup>642</sup> *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>643</sup> *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>644</sup> Ferdinand Von Prondzynski (1987) *Freedom of Association and Industrial Relations: A Comparative Study*, Mansell Publishing Limited, London, p. 7. See also *Democratic Party of US v. Wisconsin ex rel La Follette*, 450 US 107 (1981); *EU v. San Francisco Democratic Party*, 489 US 214 (1989); *California Democratic Party v. Jones*, 530 US 567 (2000).

<sup>645</sup> Clyde Summers (1964) “Freedom of Association and Compulsory Unionism in Sweden and the United States”, *University of Pennsylvania Law Review*, vol. 112, pp. 647-696.

<sup>646</sup> Sec. 101 of the Taft-Hartley Act.

<sup>647</sup> Sec. 8 (3) of the Wagner Act.

<sup>648</sup> Sec. 7 of the Taft-Hartley Act.

This Act makes it an unfair labour practice for a union “to restrain or coerce” workers in the exercise of the right to refrain from trade union activities.<sup>649</sup> If workers became dissatisfied with collective bargaining, they could obtain an election to decertify the union by majority vote, and revert to individual bargaining.<sup>650</sup> Further protection of the right not to join a union is provided by restricting the secondary boycott and thereby curtails the union’s use of economic pressure to achieve representative status.<sup>651</sup>

### ***Workers Excluded from the Right to Organise***

Even though the law in the United States provides the right to organise to all employees, the definition of the term “employees” has excluded a number of categories of workers from the provision of these rights. In defining the term “employees”, the NLRA provides:<sup>652</sup>

Employees shall not include any individual employed as an agricultural labourer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labour Act, or by any other person who is not an employer.

In addition, some decisions by the Supreme Court and by the National Labour Relations Board (NLRB) on the scope of the NLRA’s coverage have also increased the categories of workers excluded from the right to organise and collective bargaining. In *NLRB v. Kentucky River Community Care, Inc.*,<sup>653</sup> United States Supreme Court decided that any future tests used by the NLRB to determine whether or not workers are supervisors (the category of workers who are not considered as workers by the NLRA) should be less categorical and more fact-specific. This decision could result in an increase in the number of workers considered supervisory and thus excluded from coverage under the NLRA’s right to organise and collective bargaining. In *American Commercial Barge Line Company et al*, the NLRB found that tugboat pilots exercised independent judgment in carrying out supervisory functions. Therefore they were supervisors and

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<sup>649</sup> Sec. 8 of the Taft-Hartley Act.

<sup>650</sup> Sec. 9 (e) of the Taft-Hartley Act.

<sup>651</sup> Sec. 8 (b) of the Taft-Hartley Act.

<sup>652</sup> Sec. 2 (3) [§152.] of the NLRA.

<sup>653</sup> *NLRB v. Kentucky River Community Care Inc*, 532 U.S. 706 (2001).



excluded from the coverage of the NLRA.<sup>654</sup> Recently, in *Brown University*, the NLRB excluded graduate teaching and research assistants from the protection of freedom of association and collective bargaining.<sup>655</sup>

Thus, the major groups excluded from NLRA coverage, whether in the Act itself or via amendments and judicial interpretation, are:

1. Agricultural workers.
2. Domestic workers.
3. Small business workers.
4. Independent contractors.
5. Supervisors and managers.
6. Public workers.

***The Right to Organise of Workers and the Property Rights of Their Employer – The Case of Lechmere Inc v. NLRB***

United States federal laws put the right to private property of employers above the right to organise of workers. In *Lechmere, Inc. v. NLRB*,<sup>656</sup> the Supreme Court of America ruled that private property will assume absolute priority over rights of freedom of association.

This case arose from the efforts of Local 919 of the United Food and Commercial Workers Union (the Union), to organise workers at a retail store in Newington, Connecticut, owned and operated by Lechmere, Inc. The Union began its campaign to organise the store's 200 workers, none of whom was represented by a union, in June 1987. After a full-page advertisement in a local newspaper drew little response, union organisers entered Lechmere's parking lot and began placing handbills on the windscreen of cars parked in a corner of the lot used mostly by workers. Lechmere's manager immediately confronted the organisers, informed them that Lechmere prohibited solicitation or handbill distribution of any kind on its property, and asked them to leave, and then Lechmere removed the handbills. The union organisers renewed

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<sup>654</sup> *American Commercial Barge Line Company et al*, NLRB 168 (2002).

<sup>655</sup> *Brown University*, N.L.R.B 342, No. 42 (2004). See also CFA Case No. 2547, Report No. 350.

<sup>656</sup> *Lechmere, Inc v. NLRB*, 502 U.S. 527 (1992).

this handbilling effort in the parking lot on several subsequent occasions; each time they were asked to leave and the handbills were removed. The question that arose from the case is what prevails between the rights of workers to organise under Article 7 of the NLRA and the property rights of their employers.

Decisions in this case show the different perceptions in various Courts in the United States of the right to organise in relation to the right to property.

*The Administrative Law Judge:*

The union took the case to an Administrative Court. The Administrative Law Judge ruled in the union's favour over of Lechmere, Inc. It stated:

We will not prohibit representatives of Local 919, United Food and Commercial Workers, AFL-CIO ('the Union') or any other labour organisation, from distributing union literature to our workers in the parking lot adjacent to our store in Newington, Connecticut, nor will we attempt to cause them to be removed from our parking lot for attempting to do so.<sup>657</sup>

This statement was affirmed and adopted by the NLRB.

*The Court of Appeal:*

Lechmere appealed to the Court of Appeals for the First Circuit. The Court of Appeal found that there was not any effective alternative means of communicating the organisational message opened to the trade union. Furthermore, the absence of trespassory hand billing made the employees "beyond the reach of reasonable union efforts to communicate with them". In this case, workers were not able to exercise their right to organise. Therefore, the Court of Appeal denied Lechmere's petition for review and enforced the Board's order.<sup>658</sup>

*The United States Supreme Court:*

Having failed at the appeal court, Lechmere applied to the United States Supreme Court, which decided that Lechmere did not commit an unfair labour practice by barring nonworker union organisers (referring to union organisers who are not employed by and

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<sup>657</sup> *Lechmere, Inc.*, 295 N. L. R. B. 94 (1988).

<sup>658</sup> *Lechmere, Inc v. NLRB*, 914 F. 2d 313 (1990).

work for Lechmere) from its property. In the opinion of the Supreme Court, the NLRA confers rights only on workers, not on unions or their nonworker organisers. Thus, as a rule, an employer cannot be compelled to allow nonworker organisers onto his property. The NLRA simply does not protect nonworker union organisers except in the rare case where “the inaccessibility of workers makes ineffective the reasonable attempts by nonworkers to communicate with them through the usual channels.” It is only when reasonable access to workers is unfeasible that it becomes appropriate to balance between the right to organise and private property rights.<sup>659</sup>

The decision of the Supreme Court declared that private property will assume absolute priority over rights of freedom of association, whenever union organisers are involved. This decision raises the problem of how to protect the right to organise of workers while this right is regarded as subordinate to the employers’ property right. It is also noted from this case that, in the United States, the right to organise is the right of workers contracted to a certain employer but not the rights of workers in general. This exclusion results in the fact that millions of America’s workers completely lack legal protection of the right to make a free choice to form or to join a union.<sup>660</sup>

This approach of the United States’ Supreme Court does not conform with and is an attack to the CILS on freedom of association and collective bargaining.

*The ILO’s Perspectives:*

In a communication dated 5 March 1990, the United Food and Commercial Workers International Union (UFCW) presented to the ILO a complaint of violations of trade union rights against the Government of the United States.<sup>661</sup> In its third supplementary observation (11 February 1992), the UFCW stated that the United States Supreme Court recently rendered in *Lechmere Inc. v. NLRB* a decision which would have a devastating impact on freedom of association rights for workers in the United States.<sup>662</sup>

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<sup>659</sup> *Lechmere, Inc v. NLRB*, 502 U.S. 527 (1992).

<sup>660</sup> AFL-CIO (2005) *The Silent War: The Assault on Workers’ Freedom to Choose a Union and Bargain Collectively in the United States*. Available at [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf) (last visited 28 September 2009), p. 1.

<sup>661</sup> CFA Case No. 1523, Report No. 284, para. 138.

<sup>662</sup> *Ibid*, para. 151.

In examining this complaint, the CFA requested the United States Government to “guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionisation.”<sup>663</sup> However, this recommendation has been ignored.<sup>664</sup>

### ***Promotion of and Protection from Anti-union Discrimination***

In the United States, it is an unfair labour practice for an employer to interfere with, restrain, or coerce workers in the exercise of their right to organise.<sup>665</sup> The law also prohibits discrimination against workers in the exercise of their right to organise, to bargain collectively and to engage in concerted acts, such as strikes and picketing, and requires employers to bargain with the representative chosen by a majority of workers.<sup>666</sup>

The right to organise in the United States is both individual and collective.<sup>667</sup> Although the law protects the rights of individual workers, it gives the union separate protection, for example, protection against discrimination in employment designed to interfere with the workers’ freedom of association.<sup>668</sup>

In the United States, the independence of trade unions from employers is protected. It is an unfair labour practice for an employer to dominate or to interfere with the formation or administration of any labour organisation or contribute financial or other support to it.<sup>669</sup>

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<sup>663</sup> *Ibid*, para. 195.

<sup>664</sup> Jame Gross (2002) “Applying Human Rights Standards to Employment Rights in the USA: The Human Rights Watch Report 2000”, *Industrial Relations Journal*, vol. 33, No. 3, pp. 182-196.

<sup>665</sup> Sec. 8 (1) [§ 158.] of the NLRA.

<sup>666</sup> Sec. 8 (3) [§ 158.] of the NLRA.

<sup>667</sup> Clyde Summers (1964) “Freedom of Association and Compulsory Unionism in Sweden and the United States”, *University of Pennsylvania Law Review*, vol. 112, pp. 647-696.

<sup>668</sup> Sec. 8 (3) [§ 158.] of the NLRA.

<sup>669</sup> Sec. 8 (2) [§ 158.] of the NLRA.

## *The Right to Strike*

The right to strike in the United States is recognised as part of the workers' right to engage in other collective activities for the purpose of collective bargaining or other mutual aid or protection.<sup>670</sup> Any activities either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right is an unfair labour practice.<sup>671</sup>

However, some provisions of United States law openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association. In *NLRB v. Mackay Radio & Telegraph*, the United States Supreme Court, by allowing employers to permanently replace workers who exercise the right to strike, had created a doctrine named the Mackay doctrine.<sup>672</sup> This doctrine and practice is a violation of the right to strike and is not in conformity with ILO standards. The CFA had held that the right to strike is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently and legally by another worker.<sup>673</sup>

More limitations imposed on workers exercising their right to strike are set out by the NLRB and the courts. *Valley City Furniture*<sup>674</sup> prohibited work stoppages for workers refusing additional working hours over which the employer had refused to bargain. In *Lion Oil*,<sup>675</sup> the United States' Supreme Court decided that strikes are limited in contract term when they are not expressly provided. In *Terry Poultry*,<sup>676</sup> the NLRB permitted retaliation against workers leaving their work place to file a complaint.

While mutual support among workers and unions is recognised in most of the world as a legitimate expression of solidarity, it is harshly proscribed under United States law as

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<sup>670</sup> Sec. 7 [§ 157.] of the NLRA.

<sup>671</sup> Sec. 13 [§ 163.] of the NLRA.

<sup>672</sup> *NLRB v. Mackay Radio and Telegraph*, 304 U.S.333 (1938). This case is one of the earliest interpretations of the provisions of NLRA, its decision created a so called Mackay doctrine, which allows employers to recruit new workers to replace the strikers. For more detail see Thomas Kohler and Julius Getman (2005) "The Story of NLRB v. Mackay Radio and Telegraph Co.: The High Cost of Solidarity" in *Labour Law Stories*, eds. C. Laura and F. Catherine, Foundation Press, New York, pp. 13-54.

<sup>673</sup> CFA: Case No. 1849, Report No. 302, para. 217; Case No. 1865, Report No. 306, para. 336; Case No. 1899, Report No. 307, para. 81.

<sup>674</sup> *Valley City Furniture*, 110 NLRB (1954); *NLRB v. Valley City Furniture Co.*, 230 F.2d 947 (1956).

<sup>675</sup> *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957).

<sup>676</sup> *Terry Poultry*, 109 NLRB (1954).

illegal secondary boycotts.<sup>677</sup> A sit-down strike, the tactic that was so useful in organising during the period, was found to be illegal in *NLRB v. Fansteel Metallurgical Corporation*.<sup>678</sup>

In *NLRB v. Sands Manufacturing Co.*,<sup>679</sup> the United States Supreme Court upheld the employer's decision to fire its workers who threatened to strike after mandatory bargaining had failed to solve an industrial dispute. In the court's opinion, the workers' threat of a strike is a breach of contract, which deprived them of their statutory right to strike. Also in this case, the US Supreme Court declared that a sit-down strike is illegal.

In the United States, the law allows workers to give up their strongest weapon by providing that a no strike employment contract is legal and enforceable. In *Boys Markets, Inc v. Retail Clerks Local*,<sup>680</sup> the US Supreme Court upheld an injunction of the NLRB ordering workers back to work when the workers went on strike instead of following the required arbitration procedure in their non-strike contract. It has been argued that the reasons for this decision are United States' constitutional doctrine treats workers more as sellers of a commodity than as citizens in a democratic society<sup>681</sup> and, furthermore, the employment relationship has always been viewed primarily as an economic transaction rather than a relationship that incorporates social content.<sup>682</sup>

### **3.2.3. Collective Bargaining**

#### ***The Right to Collective Bargaining***

The right to collective bargaining is guaranteed in the United States. Workers have the right to organise in order to bargain collectively through representatives of their own

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<sup>677</sup> Sec. 10 (e) [§ 160.] of the NLRA. See also Human Rights Watch (2000) *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Human Rights Watch Organisation, Washington, D.C, p. 14.

<sup>678</sup> *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

<sup>679</sup> *NLRB v. Sands Manufacturing Company*, 306 U.S 332 (1939).

<sup>680</sup> *Boys Markets, Inc v. Retail Clerks Local*, 398 US. 235 (1970).

<sup>681</sup> Carl Swidorski (2003) "From the Wagner Act to the Human Rights Watch Report: Labour and Freedom of Expression and Association, 1935 - 2000", *New Political Science*, vol. 25, No. 1, pp. 55-80.

<sup>682</sup> Richard Block (2003) "Collective Bargaining in Context: Comparing the United States and Europe" in *Bargaining for Competitiveness: Law, Research, and Case Studies*, ed. Richard Block. Michigan State University, Michigan, pp. 1-13, p. 6.

choosing.<sup>683</sup> Collective bargaining is governed by federal and state statutory laws, administrative agency regulations, and judicial decisions. It is considered an unfair labour practice for a trade union to refuse to bargain collectively with an employer;<sup>684</sup> it is also an unfair labour practise for an employer to refuse to bargain collectively with the representatives of his workers.<sup>685</sup>

### ***Parties, Subject and Content of Collective Bargaining***

The result of collective bargaining procedures is a collective agreement between workers and employers. Workers are often represented in bargaining by a union or other labour organisation. The representatives of workers must be designated or selected by the majority of the workers in a collective bargaining unit and representatives will be exclusive representatives of all the workers in that unit.<sup>686</sup> On the other hand, an individual worker or a group of workers are able to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining trade union, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement after presenting it at the representing trade union.<sup>687</sup> The regulation on exclusive representative in collective bargaining reveals the pluralism of trade unions in the United States where there are more than one trade union established in a bargaining unit.

The content of collective bargaining relates to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising, and the execution of a written contract incorporating any agreement reached if requested by either party.<sup>688</sup>

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<sup>683</sup> Sec. 7 [§ 157.] of the NLRA.

<sup>684</sup> Sec. 8 (b3) [§ 158.] of the NLRA.

<sup>685</sup> Sec. 8 (a5) [§ 158.] of the NLRA.

<sup>686</sup> Sec. 9 [§ 159.] of the NLRA.

<sup>687</sup> Sec. 9 [§ 159.] of the NLRA.

<sup>688</sup> Sec. 8 (d) [§ 158.] of the NLRA.

### ***Workers Covered by Collective Bargaining***

While, by its definition of the term employee, the NLRA has excluded from its coverage some categories of workers at federal level,<sup>689</sup> local statutes have been adopted to give workers in some of these groups' collective bargaining rights. For instance, as of November 2006, 25 states as well as the District of Columbia provided collective bargaining rights to all public workers; while 12 states provided rights to some of their public workers, such as fire-fighters and teachers; by contrast, 13 states did not grant collective bargaining rights to their public workers;<sup>690</sup> by August 2008, 9 states had provided collective bargaining right to agricultural workers;<sup>691</sup>

Even though workers in some of these categories have been granted rights under various states and local statutes, some recent Supreme Court decisions have deprived more and more workers of collective bargaining rights or their meaningful exercise. In *Hoffman Plastic*,<sup>692</sup> the Supreme Court ruled that undocumented alien workers were not eligible for back pay under the NLRA. This case did not explicitly exclude undocumented alien workers from coverage of the NLRA; however, because back pay is one of the major remedies available for a violation, this decision diminished the legal bargaining rights available to these workers under the Act.

### ***Principle of Negotiating***

Collective bargaining is a voluntary process in the United States. Collective bargaining is the performance of the mutual obligation of the employer and the representative of the workers to meet at reasonable times and to confer in good-faith.<sup>693</sup> In *NLRB v. Truitt Manufacturing Co.*<sup>694</sup> the United States Supreme Court held that the obligation to bargain in good-faith requires an employer to open its books to the union when the employer refuses a request for a wage increase on the basis that such an increase will

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<sup>689</sup> Sec. 2 (3) [§152.] of NLRA.

<sup>690</sup> American Rights at Work (2008) *The Haves and the Have-nots: How American Labour Law Denies a Quarter of the Workforce Collective Bargaining Rights*, American Rights at Work, Washington, D.C, p. 11

<sup>691</sup> *Ibid*, p. 7

<sup>692</sup> *NLBR v. Hoffman Plastic Compound Inc.*, 535 U.S. 137 (2002).

<sup>693</sup> Sec. 8 (d) [§ 158.] of the NLRA.

<sup>694</sup> *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956).



drive the employer out of business.<sup>695</sup> In *NLRB v. Insurance Agents' International Union*,<sup>696</sup> the Supreme Court ruled that union slow down tactics were consistent with the principle of bargain in good-faith.

### *Settlement of Disputes*

In the United States, a labour dispute includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and worker.<sup>697</sup>

The settlement of issues between employers and workers through collective bargaining is given the same mechanisms as recommended by the ILO. These mechanisms include conciliation, mediation, and voluntary arbitration. The purposes of these mechanisms are to aid and encourage employers and the representatives of their workers to reach and maintain agreements, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining.<sup>698</sup>

### **3.2.4. Implementation of Freedom of Association and Collective Bargaining in the United States**

Most workers in the United States are not unionised. In the United States, a report made in 2005 has shown that only 12.5% of the workers belonged to trade unions. According to this survey, there were 57 million workers who say they want to join a union if they were able to.<sup>699</sup>

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<sup>695</sup> See also Kenneth G. Dau-Schmidt (2005) "The Duty to Bargain in Good-faith: *NLRB v. Truitt Manufacturing Co.* and *NLRB v. Insurance Agents' International Union*" (August 11, 2005). *Bepress Legal Series*. Working Paper 1318. Available at <http://law.bepress.com/expresso/eps/1318> (last visited 14 April 2010).

<sup>696</sup> *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960).

<sup>697</sup> Sec. 2. [§ 152.] 9 of the NLRA.

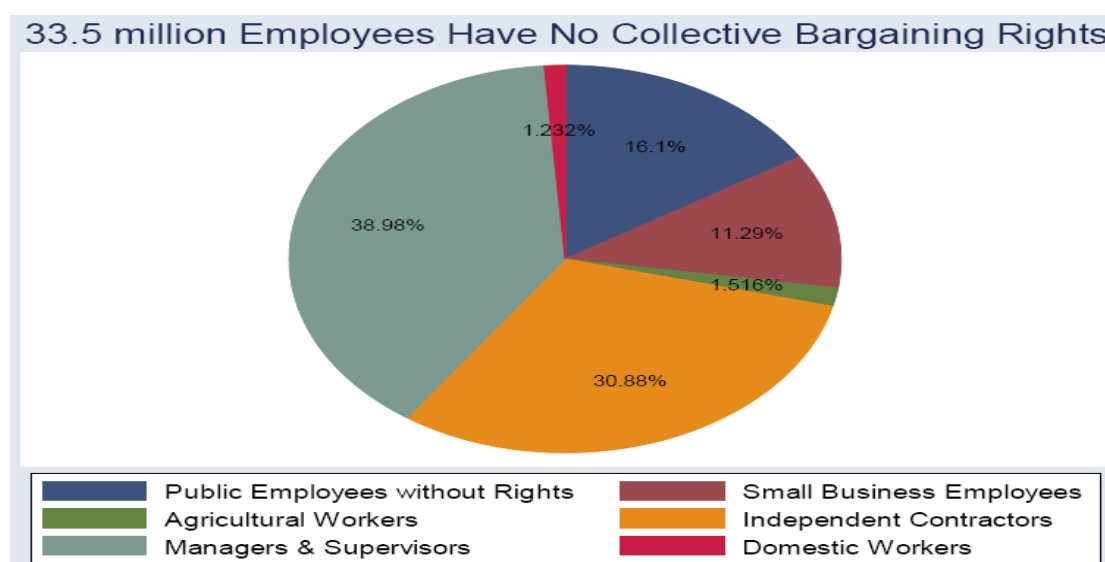
<sup>698</sup> Sec. 201. [§ 171.] b of the NLRA.

<sup>699</sup> AFL-CIO (2005) *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*. Available at [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf) (last visited 28 September 2009), p. 2.

Due to the impact of decentralisation in trade unions in the United States, most collective bargaining agreements in the United States take place at an enterprise level,<sup>700</sup> unlike in EU countries where collective bargaining normally takes place at industry level or national level.

According to statistics, in the United States about 33.5 million workers do not have any collective bargaining right.<sup>701</sup> Among public workers, 15.7 million (or 74.5% of all public workers) have been granted rights, whereas 5.4 million (or 25.5%) are without collective bargaining rights. In private sector workers, 101.1 million (or 85%) have collective bargaining rights. By contrast, 17.8 million private workers (15%) have no right to collective bargaining with their employers.<sup>702</sup>

**Figure 3.1: Workers Denied the Right to Collective Bargaining in the United States**



*Source: American Rights at Work*

<sup>700</sup> William B. Gould IV (2004) *A Primer on American Labour Law*, 4th Edition. Cambridge, MA: MIT Press, p. 4.

<sup>701</sup> United States General Accounting Office (GAO) (2002) *Collective Bargaining Rights: Information on the Number of Workers with and without Bargaining Rights*, GAO, Washington, D.C, p. 10.

<sup>702</sup> American Rights at Work (2008) *The Haves and the Have-nots: How American Labour Law Denies a Quarter of the Workforce Collective Bargaining Rights*, American Rights at Work, Washington, D.C, p. 2.

In addition, actions taken by the United States Government after 11 September terrorist attack have put a lot of pressure on civil liberties (including the right to organise of workers), and these actions may seriously damage the long term prospect for a new upsurge in the power of labour's freedom of association.<sup>703</sup> It is even stated that the above provision providing the right to organise in the United States, has become a false promise for most workers,<sup>704</sup> and that human rights standards have never been an important influence in the making of United States labour law.<sup>705</sup> CFA has received 51 complaints against the United States regarding to freedom of association and collective bargaining, even though it is not a party to Convention No. 87 and Convention No. 98.<sup>706</sup>

### **Observations**

In the United States, the right to join trade unions is an aspect of freedom of association, which is granted by the First Amendment of the United States Constitution. The right to freedom of association is a right closely allied to freedom of speech and a right which, lies at the foundation of a free society. The right to organise of workers has both active and negative aspects. On the one hand, workers are free to form and join trade unions, on the other hand, workers have the right to refrain from any trade union activities. Regulation of the United States on the right not to organise calls for the recognition and incorporation of this right into the CILS.

The United States does not seem to believe in the ILO's mechanism for enforcing the right to organise and to collective bargaining and it has not ratified both ILO core Conventions No. 87 and 98. In addition, the United States use trade law as a mechanism to implement the right to organise and collective bargaining both domestically and abroad. Practice of the United States once again reveals the ILO's weakness in enforcing ILS, which was discussed in Chapter I. It also demonstrates that United States

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<sup>703</sup> Ruben Garcia (2006) "Labour's Fragile Freedom of Association Post - 9/11", *University of Pennsylvania Journal of Labour and Employment Law*, vol. 8, pp. 283-351.

<sup>704</sup> AFL-CIO (2005) *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*. Available at [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf) (last visited 28 September 2009), p. 4.

<sup>705</sup> Jame Gross (2002) "Applying Human Rights Standards to Employment Rights in the USA: The Human Rights Watch Report 2000", *Industrial Relations Journal*, vol. 33, No. 3, pp. 182-196.

<sup>706</sup> See <http://www.ilo.org/ilolex/english/casframeE.htm> (last visited 25 October 2009).

law often requires incorporation and implementation of the CILS in its trade partners. Therefore, it is beneficial for Vietnam to incorporate the CILS in domestic law in order to trade with the United States. In fact, the problem of the recognition, promotion and recognition of the freedom of association and the right to organise was one of the main challenges for Vietnam when Vietnam applied for the Generalised System of Preference (GSP) of the United States.<sup>707</sup>

The United States' practice in domestic law has shown the role and linkage between ratification of the ILO relevant core Conventions and the protection the right to organise and collective bargaining of workers. The fact that the United States has not ratified the ILO's relevant Convention may have contributed to two negative consequences. Firstly, many workers (perhaps a quarter of the workforce<sup>708</sup>) in the United States are excluded from the rights to organise and to collective bargaining provided by the NLRA. Secondly, for those who are granted freedom of association and collective bargaining, their right to strike is not properly protected. Therefore, in Vietnam, ratification and incorporation of the CILS on freedom of association and collective bargaining is one of the most efficient ways to protect the right to organise and collective bargaining of workers. However, development of the United States economy in relation to poor reorganisation and promotion of the CILS raises questions about the relationship between economic development and violation of the CILS that would need further research to explore.

The case of *Lechmere, Inc. v. NLRB*<sup>709</sup> shows the precedence of individual rights over the right to organise of workers, which is not in conformity with the CILS. Furthermore, it allows employers to create barriers and difficulties for workers and trade unions in exercising their right to organise. Vietnam would do well to give due consideration to issues that are critical to establishing a balance between the right to organise and the right to property in its emergent labour code. What are the benefits of this recommendation? First, the right to organise is a fundamental right of workers that should not be obstructed and limited by the right to property of the employers.

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<sup>707</sup> In May 2008, Vietnam officially requested to receive trade benefits under the United States' GSP program as a beneficiary developing country. However, preparation activities had been carried out since 2005. For intensive analysis, see Chapter VI.

<sup>708</sup> American Rights at Work (2008) *The Haves and the Have-nots: How American Labour Law Denies a Quarter of the Workforce Collective Bargaining Rights*, American Rights at Work, Washington, D.C, p.1.

<sup>709</sup> *Lechmere, INC v. NLRB*, 502 U.S. 527 (1992).

Secondly, the law needs to establish limits to the employers' enjoyment of their right to property. Finally, the law must establish conditions, in which the right to organise of workers is exercised in order not to undermine the right to property of their employers.

The right of United States' workers to strike is limited and severely constrained by the Mackey doctrine; the illegality of secondary boycotts and sit-down strikes; as well as the legality of a no-strike employment contract. These are experiences that Vietnam should consider when incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system.

The right to collective bargaining is granted to both workers and employers and their organisations. The denial of either party to negotiate is illegal. The United States' law and practice provide a compatible mechanism to resolve disputes arising from collective bargaining required by the CILS. Like the regulations of the EU on this issue, experiences of the United States may be good lessons for Vietnam in dealing with collective bargaining disputes.

The regulation on recognition of exclusive trade union by majority vote of workers may lead to instances where no trade union in a bargaining unit meets the majority vote and recognised representatives of the workers. In this context, workers can not enjoy their right to collective bargaining. However, the United States' experience in protecting of individual worker or group of workers from the exclusive trade union in a bargaining unit can be a good example for Vietnam.

In the United States, millions of workers are excluded from coverage by laws to protect rights of organising, bargaining, and striking. For workers who are covered by such laws, recourse for labour rights violations is often delayed to a point where it ceases to provide redress. When they are applied, remedies are weak and often ineffective. The United States Government accepted, in the first annual report required by the ILO's Declaration on Fundamental Principles and Rights at Work 1998 in 2000, that: "The United States acknowledges that there are aspects of this system that fail to fully protect the rights to organise and bargain collectively of all workers in all circumstances".<sup>710</sup>

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<sup>710</sup> See ILO (2000) *Compilation of Annual Reports, Freedom of Association and the Effective Recognition of the Right to Collective Bargaining: United States* cited by Steve Charnovitz (2008) "The ILO

It has been criticised that workers' exercise of rights to organise, to bargain, and to strike in the United States has been frustrated by many employers who realise they have little to fear from labour law enforcement through a ponderous, delay-ridden legal system with meaner remedial powers.<sup>711</sup> However, there are still some experiences that Vietnam can learn from law and practice of the United States on the right to organise and collective bargaining.

### **3.3. Conceptualisation of the CILS on Freedom of Association and Collective Bargaining in South Africa**

South Africa is the most populated country in Southern Africa with a population of 50.70 million. People of working age (from 15<sup>712</sup> to 65<sup>713</sup>) accounts for 63% (31.94 million) of the population in South Africa.<sup>714</sup>

After the removal of the apartheid regime by the historic election in 1994, the new Government of South Africa started to make its own new policies and laws on all aspects of life, including policy and law on labour issues including ratification of international labour Conventions on fundamental rights in employment relations. As in other Southern African countries, labour law in South Africa was originally imposed by

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Convention on Freedom of Association and Its Future in the United States", *American Journal of International Law*, vol. 102, No. 1, pp. 90-107.

<sup>711</sup> Human Rights Watch (2000) *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* Human Rights Watch Organisation, Washington, D.C, p. 23.

<sup>712</sup> Sec. 43 of the Basic Conditions of Employment Act.

<sup>713</sup> There is no general retirement age in South Africa. Employers and employees are therefore free to agree, at which age the employees will retire. This agreement is normally found in the employee's employment contract, or may, in special circumstances, be determined with reference to the rules of the retirement fund to which the employee belongs. But normally age of retirement in South Africa is not over 65. See also *SACTWU and Others v. Rubin Sportswear*, [2002] ZALC 95 (LC); *Schweitzer v. Waco Distributors (a Division of Voltex (Pty) Ltd)*, [1998] 19 IU 1573 (LC).

<sup>714</sup> Southern Africa population by country: Botswana 2.0 millions; Lesotho 2.1 millions; Namibia 2.2 millions; Swaziland 1.2 millions. Source: Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

colonial powers, endured largely in the post-colonial era, and has been influenced by the borrowings from Western labour law structures and norms.<sup>715</sup>

South Africa was one of the founders of the ILO, but was later expelled for its apartheid policies in 1966<sup>716</sup> and rejoined in 1994.<sup>717</sup> By December 2009, South Africa had ratified 23 Conventions of the ILO, of which Convention No. 87 and No. 98 were both ratified on 19 February 1996.<sup>718</sup>

### 3.3.1. Freedom of Association

#### *The Right to Organise*

In South Africa, black workers were denied the right to organise for many years until the 1980s when the right to organise and the right to collective bargaining were afforded to them.<sup>719</sup> Since the removal of the apartheid regime, freedom of association is guaranteed by the Constitution,<sup>720</sup> which states that everyone has the right to freedom of association.<sup>721</sup>

In employment relations, the right to organise is provided by the South African Constitution to both workers and employers as “every worker has the right to form and

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<sup>715</sup> For the evolution of Southern African labour law see Evance Kalula (2004) “Beyond Borrowing and Bending: Labour Market Regulation and Labour Law in Southern Africa” in *The Future of Labour Law: Liber Amicorum Bob Hepple QC*, eds. Catherine Barnard, Simon Deakin and Gillian Morris, Hart Publishing, Oxford, pp. 275-288. See also Colin Fenwick, Evance Kalula and Ingrid Landau (2007) *Labour Law: A Southern African Perspective*, International Institute for Labour Studies, Geneva. Peter Nanyenya Takirambudde (1995) “Protection of Labour Rights in the Age of Democratisation and Economic Restructuring in Southern Africa”, *Journal of African Law*, vol. 39, No. 1, pp. 39-63.

<sup>716</sup> South Africa first came into conflict with the ILO in 1949, when it refused to endorse Convention No. 87 on the Freedom of Association. In 1961, the ILO passed a resolution specifically criticising the country’s racial policies in the general field of employment, and advising South Africa to withdraw until apartheid was abandoned. In 1963, Government, Employer and Worker delegates representing thirty-two Member States announced, after the opening of the International Labour Conference, their decision not to participate in the deliberations of the Conference in protest against South Africa’s continued membership. In 1964, the ILO adopted the Declaration Concerning the Policy of Apartheid.

<sup>717</sup> Source: [www.ilo.org](http://www.ilo.org) (last visited 10 January 2010).

<sup>718</sup> One Convention was conditionally ratified (Convention No. 27), two Conventions were denounced (Conventions Nos. 4 and 41). Source: [www.ilo.org](http://www.ilo.org) (last visited 10 January 2010).

<sup>719</sup> *South African National Defence Union v. Minister of Defence and Others*, [1999] (6) BCLR 615 (26 May 1999) para 20.

<sup>720</sup> The Constitution of the Republic of South Africa, 1996, was approved by the Constitutional Court (CC) on 4 December 1996 and took effect on 4 February 1997. Text Available at <http://www.info.gov.za/documents/constitution/index.htm> (last visited 12 January 2010).

<sup>721</sup> Sec.18 of South Africa Constitution.

join a trade union and to participate in the union's activities”<sup>722</sup> and, “every employer has the right to form and join an employers' organisation and to participate in the activities of the organisation.”<sup>723</sup> This right is regulated in detail by the Labour Relations Act, 1995,<sup>724</sup> including both aspects: the individual right and organisational right.

According to the law and courts, a worker in South Africa enjoys the following rights:

1. The right to participate in the founding of a trade union;<sup>725</sup>
2. The right to join a trade union of his/ her choice;<sup>726</sup>
3. The right to participate in trade union's activities;<sup>727</sup>
4. The right to participate in the election of trade union leaders and office bearers;<sup>728</sup>
5. The right to be appointed as an office-bearer, leaders or trade union representative.<sup>729</sup>

Workers are free in joining, establishing trade unions of their own choosing. The law does not compel workers to join or to form a certain trade union or trade union system.

However, under South Africa's labour laws, the term “worker” is as defined, excluded from an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.<sup>730</sup>

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<sup>722</sup> Sec. 23 (2) of South Africa Constitution.

<sup>723</sup> Sec. 23 (3) of South Africa Constitution.

<sup>724</sup> Amended by the Labour Relations Amendment Act, No. 42 of 1996, Proclamation, No. 66 of 1996; Labour Relations Amendment Act, No. 127 of 1998; Labour Relations Amendment Act, No. 12 of 2002 (hereafter the Labour Relations Act). Texts Available at <http://www.labour.gov.za/legislation/acts/labour-relations/labour-relations-act> (last visited 21 April 2010).

<sup>725</sup> Sec. 4(1)(a) of the Labour Relations Act. See also *South African National Defence Union v. The Minister of Defence and Another*, [1999] (6) BCLR 615 (CC).

<sup>726</sup> Sec. 4(2)(b) of the Labour Relations Act. See also *MEWSA v. Alpine Electrical Contractors*, [1997] ILJ 1430 (CCMA); *Oostelike Gauteng Diensteraad v. Tvl Minisipale Oensienfond*, [1997] ILJ 68 (T); *Nkutha and Others v. Fuel Gas Installation Pty Ltd*, [2000] 21 ILJ 218.

<sup>727</sup> Sec. 4(2)(a) of the Labour Relations Act. See also *Independent Municipal and Allied Trade Union and Others v Rustenburg Transitional Council* (J1543/98), [1999] ZALC 145.

<sup>728</sup> Sec. 4(2)(b) of the Labour Relations Act.

<sup>729</sup> Sec. 4(2)(c) of the Labour Relations Act. See also *Food and Allied Workers Union and Another v. The Cold Chain* (C324/06), [2007] ZALC 17; *Independent Municipal and Allied Trade Union and Others v Rustenburg Transitional Council* (J1543/98), [1999] ZALC 145 .

<sup>730</sup> Sec. 213 of the Labour Relations Act.



Nonetheless, the right to organise recognised in the Constitution applies to all workers irrespective of where they may be employed, how they are employed or for how long. Furthermore, the Constitution permits the court to develop common law rules and remedies to give effect to rights contained in the Constitution (including the right to organise) in case where there is no legislation giving effect to that right. Therefore, some categories of workers, even excluded by the Labour Relations Act, still have the constitutional right to organise.<sup>731</sup> The right to organise of employers is also guaranteed by the Labour Relation Act, every employer has the right to participate in forming an employers' organisation or a federation of employers' organisations as well as the right to an employers' organisation, subject to its constitution.<sup>732</sup>

Every trade union and every employers' organisation is entitled to organisational right including the right to manage its own business by determining its own constitution and rules, holding elections for its office bearers, leaders and representatives, organising its administration.<sup>733</sup> The right to join, to affiliate with a federation of trade unions and employers' organisations at national and international level is guaranteed.<sup>734</sup>

No pre-authorisation is required in the establishing organisations, but both workers' and employers' organisations have to register with the Department of Labour.<sup>735</sup> There are several benefits of registration, e.g. registered unions are guaranteed organisational rights if they can prove that they are representative and collective agreements between registered trade unions and registered employers' organisations are binding on members.<sup>736</sup>

In South Africa, the right to organise may be limited due to union security arrangements contained in collective agreements. A pre-entry shop agreement is illegal but post-entry agreement (an agreement between a representative trade union and employer requiring

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<sup>731</sup> Halton Cheadle and Marlea Clarke (2000) *National Studies on Workers' Protection. Country Study: South Africa*, International Labour Office, Cape Town, pp. 11-12.

<sup>732</sup> Sec. 6(1) of the Labour Relations Act.

<sup>733</sup> Sec. 8 (a, b) of the Labour Relations Act.

<sup>734</sup> Sec. 8 (c, d, e) of the Labour Relations Act.

<sup>735</sup> Sec. 11 of the Labour Relations Act.

<sup>736</sup> Debbie Budlender (2009) *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, International Labour Office, Geneva, p. 9.

all workers covered by the agreement to be members of the trade union) is accepted in South Africa provided that:

- (i) a ballot has been held of the workers to be covered by the agreement;
- (ii) two thirds of the workers who voted have voted in favour of the agreement; and
- (iii) it provides that no membership subscription or levy deducted may be paid to a political party as an affiliation fee or contributed in cash or kind to a political party or a person standing for election to any political office, or used for any expenditure that does not advance or protect the socio-economic interests of workers.<sup>737</sup>

However, the right to organise of workers in a closed-shop are not protected when the law permits an employer to dismiss an employee in some cases such as:

- (i) the workers refuses to join a trade union party to a closed shop agreement;
- (ii) the worker is refused membership of a trade union party to a closed shop; or
- (iii) the worker is expelled from a trade union party to a closed shop agreement.<sup>738</sup>

### ***The Right not to Organise***

In South Africa, the law is silent on the negative aspect of the right to organise (right not to organise). Workers and employers are protected from anti- union discrimination, but the law does not have any provision regarding to the protection of the right not to organise of workers and employers.

### ***Workers Excluded from the Right to Organise – the Case of SANDU v. Minister of Defence and Others***<sup>739</sup>

The case arose out of an order made on 25 November 1998 by Hartzenberg J, which in substance declared section 126B of the Defence Act, 44 of 1957,<sup>740</sup> to be unconstitutional and invalid to the extent that it prohibits members of the South African National Defence Force from participating in public protest and from joining trade unions. The Applicant was the South African National Defence Union (SANDU), and the Respondents were The Minister of Defence and the Chief of the Defence Force.

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<sup>737</sup> Sec. 26 (3) of the Labour Relations Act.

<sup>738</sup> Sec. 26 (6) of the Labour Relations Act.

<sup>739</sup> *SANDU v. Minister of Defence and Others*, [1999] 6 BCLR 615 (26 May 1999).

<sup>740</sup> Text Available at <http://www.dod.mil.za/documents/documents.htm> (last visited 21 April 2010).

This case concerns the question of whether it is constitutional for the Defence Act to prohibit members of the armed forces from participating in public protest action and from joining trade unions

*The National Law:*

Section 23 (2) of South Africa Constitution provides that every worker has the right: (i) to form and join a trade union; (ii) to participate in the activities and programmes of a trade union; and (iii) to strike.

In term of the members of the armed forces, Section 126 B of the Defence Act provides as follow:

A member of the Permanent Force shall not be or become a member of any trade union as defined in section 1 of the Labour Relations Act, 1956 (Act 28 of 1956): Provided that this provision shall not preclude any member of such Force from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister. And any member who violates this regulation will be liable to criminal sanction.

The Labour Relations Act, 1956 has been replaced by the Labour Relations Act, 1994

*The Constitutional Court's Decision:*

In examining the case, the Constitutional Court decided that the relationship between members of the armed forces and the Ministry of Defence is “akin to an employment relationship.”<sup>741</sup> The Court used the ILO’s approach, in which the members of the armed forces and the police are also workers for the purposes of the ILO’s Conventions on the right to organise and collective bargaining. Due to the fact that South Africa has ratified both ILO Conventions Nos. 87 and 98, the Court interpreted that the term “workers” provided in the Constitution also covers members of the armed forces.

Therefore, the Court ruled that prohibiting members of the armed forces from joining a trade union was unconstitutional, and provisions of section 126B(1) of the Defence Act infringed their constitutional right to form and join trade unions.<sup>742</sup>

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<sup>741</sup> *SANDU v. Minister of Defence and Others*, [1999] 6) BCLR 615 (26 May 1999), para. 24.

<sup>742</sup> *Ibid*, para. 30.

While the CILS allow Member States to decide the grant of the right to organise to the armed forces and the police, the decision of South Africa Constitutional Court in this case clearly states that the right to organise is granted to all categories of workers in South Africa including the members of the armed forces and the police.

### ***Promotion of and Protection from Anti-union Discrimination***

South Africa Law provides very sufficient protection for the workers' from anti-union discrimination in exercising the right to organise before entering and during the employment relationship. No person is allowed to do, or threaten to require a worker or a person seeking employment not to be a member of a trade union, not to become a member of a trade union, or to give up membership of a trade union. No one is allowed to prejudice a worker or a person seeking employment because of past, present or anticipated membership of a trade union; participation in forming a trade union or federation of trade unions or participation in the lawful activities of a trade union, federation of trade unions, failure or refusal to do something that an employer may not lawfully permit or require a worker to do, disclosure of information that the worker is lawfully entitled or required to give to another person. No person may advantage, or promise to advantage, a worker or a person seeking employment in exchange for that person not exercising the right to organise unless the worker concerned has consented to it.<sup>743</sup> In *Food and Allied Workers Union and Another v. The Cold Chain*,<sup>744</sup> the Labour Court of South Africa stated that the rights to organise may be exercised by an employee without fear of being discriminated against by reason of the employee so exercising his or her rights, or being advantaged in exchange for not exercising any right provided by the Labour Relations Act.

Employers are also protected from discrimination in exercising the right to organise.<sup>745</sup> No person may do, or threaten to require an employer not to be a member of an employers' organisation; not to become a member of an employers' organisation, or to give up membership of an employers' organisation. It is against the law to prejudice an employer because of past, present or anticipated exercising the right to organise activities as a membership of an employers' organisation, participation in forming an

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<sup>743</sup> Sec. 6 of the Labour Relations Act.

<sup>744</sup> *Food and Allied Workers Union and Another v. The Cold Chain*, (C324/06). [2007] ZALC 17.

<sup>745</sup> Sec. 7(1) of the Labour Relations Act.

employers' organisation or a federation of employers' organisations, participation in the lawful activities of an employers' organisation or a federation of employers' organisations, disclosure of information that the employer is lawfully entitled or required to give to another person. Furthermore, no person may advantage, or promise to advantage, an employer in exchange for that employer not exercising the right to organise.<sup>746</sup> However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

### ***The Right to Strike***

In South Africa, strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and worker. In this definition, every reference to work includes overtime work, whether it is voluntary or compulsory.<sup>747</sup>

Every worker in South Africa has the right to strike guaranteed by the Constitution as “workers shall have the right to strike for the purpose of collective bargaining”.<sup>748</sup> The law provides in detail the substantive and procedural requirements of a strike, secondary strike and picketing.<sup>749</sup> A legal strike is protected; workers participating in a legal strike are not considered to have committed a breach of employment contracts so that they cannot be dismissed simply on account of striking. Unlike the case of workers in the United States, in South Africa, replacement of workers participating in a strike is strictly forbidden.<sup>750</sup> In *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*, the South African Constitutional Court stated that the right to strike is essential to the process of collective bargaining because a strike is what

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<sup>746</sup> Sec. 7(2) of the Labour Relations Act.

<sup>747</sup> Sec. 213 of the Labour Relations Act.

<sup>748</sup> Sec. 23 of the Constitution.

<sup>749</sup> Sec. 66, 67, 68 of the Labour Relations Act.

<sup>750</sup> Sec. 76 of the Labour Relations Act .

makes collective bargaining work and the role of a strike in collective bargaining is equivalent to the role of the engine in a motor vehicle.<sup>751</sup>

The right to strike of workers in South Africa can be limited by a binding collective agreement<sup>752</sup> or in some certain circumstances provided by law, workers engaged in an essential service,<sup>753</sup> or a maintenance service.<sup>754</sup> The law allows workers in essential and maintenance services to take part in a protest to promote and protect their rights and interests.<sup>755</sup>

***The Right to Strike of a Minority union – The Case of National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another***<sup>756</sup>

This case arose from refusal of the employer, Bader Bob (Pty) Ltd, to recognise a union shop steward and the denial of willingness to bargain collectively with a minority trade union. The trade union is a minority union affiliated to the National Union of Metal Workers of South Africa.

Bader Bob (Pty) Ltd manufactured leather products for the automobile industry and employed approximately 1000 semi-skilled and unskilled workers. Since early 1999, the General Industrial Workers Union of South Africa had represented the majority of the first respondent's workers and had enjoyed the organisational rights provided by law at Bader Bob (Pty) Ltd. On 16 August 1999 the trade union wrote to the employer claiming to represent a large number of its workers. Even though the union represented not a majority, but only about 26% of the workers at the employer's workplace, the employer was willing to afford the union access to its premises, and stop order facilities.

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<sup>751</sup> *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*, [2003] 2 BLLR 103 (CC), para 67.

<sup>752</sup> Sec 65 of the Labour Relations Act.

<sup>753</sup> The list of essential services is decided by an Essential Services Committee set up by the Minister of Labour under the auspices of the Commission. This Committee consist of persons who have knowledge and experience of labour law and labour relations. Sec. 70 of the Labour Relations Act.

<sup>754</sup> A service is a maintenance service if the interruption of that service has the effect of material physical destruction to any working area, plant or machinery. The law allows workers in essential and maintenance services to take part in protest to promote and protect their rights and interests. See Sec. 75 of the Labour Relations Act.

<sup>755</sup> Sec. 77 of the Labour Relations Act.

<sup>756</sup> *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another*, [2003] 2 BLLR 103 (CC).

However, because the union was not representative of a majority of its workforce, the employer was not willing to recognise the union's shop stewards, nor was it willing to bargain collectively with the union.

The union then declared a dispute over the question of organisational rights and, in particular, the question of the recognition of its shop stewards and its right to bargain collectively on behalf of its members. That dispute was referred to conciliation at the Commission for Conciliation, Mediation and Arbitration (CCMA) but remained unresolved. Thereafter the union informed the company that it intended to institute strike action. The employer approached the Labour Court for an interdict on the basis that the union was not entitled to take strike action to demand recognition of its shop stewards.

The question this case raises is whether a minority union and its members are entitled to take lawful strike action to persuade an employer to recognise its shop stewards and to bargain collectively with it.

National Law:

The Constitution of South Africa provides that every worker has the right to form and join a trade union; to participate in the activities and programmes of a trade union and to strike.<sup>757</sup> The Constitution also provides that every trade union, employers' organisation and employer has the right to engage in collective bargaining.<sup>758</sup>

The Labour Relations Act provides that trade union leaders may have access to an employer's premises for purposes of recruiting members, or communicating with them and for holding meetings outside working hours.<sup>759</sup> Shop stewards are elected for certain purposes, most importantly perhaps, to represent its members in grievance and disciplinary proceedings,<sup>760</sup> and workers of unions who are trade union officials are

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<sup>757</sup> Sec. 23(2) of the Constitution.

<sup>758</sup> Sec. 23(3) of the Constitution.

<sup>759</sup> Sec. 12 of the Labour Relations Act.

<sup>760</sup> Sec. 14 of the Labour Relations Act.

entitled to reasonable amounts of time off during working hours in order to attend to union business.<sup>761</sup>

### The Courts' Decisions:

#### *The Labour Court:*

The Labour Court held that the minority union at Bader and its workers had the right to strike and refused to grant Bader Bob an interdict prohibiting the strike.<sup>762</sup>

#### *The Labour Appeal Court:*

Having failed in the Labour Court, the employer appealed to the Labour Appeal Court. The Labour Appeal Court upheld the appeal, dismissed the decision of the Labour Court. The Labour Appeal Court found that:

If a minority trade union demands that the employer to grant it “organisational rights” in a workplace where there is a majority trade union that has been granted the organisational rights, the employer would be entitled to adopt the attitude that it cannot give what it does not have. This is so because, once the organisational rights have been granted to one trade union in a workplace properly, there would be no further organisational rights which the employer can grant to another trade union.<sup>763</sup>

The Court declared that the strike action was unlawful and unprotected. Therefore, the Labour Appeal Court granted the interdict.<sup>764</sup>

#### *The Constitutional Court:*

The union appealed to the Constitutional Court. In their appeal, the union and the workers relied on the Constitution<sup>765</sup> and argued that the provisions of the Labour Relations Act, interpreted in the light of the Constitution, afforded them the right to strike in the circumstances. If not, they argued, the provisions were unconstitutional.

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<sup>761</sup> Sec. 15 of the Labour Relations Act.

<sup>762</sup> *Bader Bop (Pty) Ltd and Another v. National Bargaining Council and Others*, [2001] ILJ 2431.

<sup>763</sup> *Bader Bop (pty) Ltd v. National Union of Metal and Allied Workers of SA and Others*, [2002] 23 ILJ 104 para. 57.

<sup>764</sup> *Ibid*, para. 59.

<sup>765</sup> Article 23 of the Constitution.



The Constitutional Court found that the right to strike is a constitutional right and not limited by the Labour Relations Act<sup>766</sup> and there are no express provisions of the Labour Relation Act prohibiting strikes by minority unions.<sup>767</sup> Taking consideration of the purpose of the Labour Relations Act, the ILO's jurisprudence on freedom of association and collective bargaining,<sup>768</sup> the Constitutional Court decided to grant leave to appeal and upheld the appeal itself and it also set aside the Labour Appeal Court's order.<sup>769</sup>

The case shows the plurality in trade union system in South Africa, it reveals that there are more than one trade union can be set up in an enterprise in South Africa, it demonstrates that workers have the right to choose, to form and to join trade unions of their own choosing. The decision of the Constitutional Court in this case reconfirms that in South Africa, the right to strike for the purpose of collective bargaining is granted for individual workers and, workers can exercise the right to strike either through majority unions or through minority unions at the workplace. Moreover, this means that a minority trade union is also entitled to organisational rights including the right to engage in collective bargaining and to organise strike action.

### **3.3.2. Collective Bargaining**

#### ***The Right to Collective Bargaining***

The right to collective bargaining was recognised in South Africa before the enactments of the current Constitution and the Labour Relations Act. In some earlier cases, such as *United African Motor and Allied Workers Union v. Fodens*,<sup>770</sup> *East Rand Gold and Uranium Co Ltd v. National Union of Mine Workers (NUM)*<sup>771</sup> and *NUM v. East Rand Gold and Uranium Company Ltd*,<sup>772</sup> the courts recognised the right to bargain

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<sup>766</sup> *National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another*. [2003] 2 BLLR 103 (CC) (13 December 2002), para. 39, 40.

<sup>767</sup> *Ibid*, para. 17.

<sup>768</sup> *Ibid*, paras. 26-36.

<sup>769</sup> *Ibid*, para. 48.

<sup>770</sup> *United African Motor and Allied Workers Union (UAMAWU) v. Fodens (SA)*, 1983 ILJ 212. [1983] ILJ 212 (IC).

<sup>771</sup> *East Rand Gold and Uranium Co Ltd v. NUM*, [1989] ILJ 683 (LAC).

<sup>772</sup> *NUM v. East Rand Gold and Uranium Company Ltd*, (57/90) [1991] ZASCA 168 (Supreme Court of South Africa) .

collectively existed in South African labour law on the basis of an unfair labour practice.<sup>773</sup>

The Constitution of South Africa provides that “every trade union, employers’ organisation and employer has the right to engage in collective bargaining.”<sup>774</sup> This constitutional right is granted to all categories of workers. In *SANDU v. Minister of Defence and Others*,<sup>775</sup> South African Constitutional Court decided that the right to collective bargaining is also granted to the armed forces.

In addition, one of the main purposes of the Labour Relations Act in South Africa is to promote and facilitate collective bargaining.<sup>776</sup> Therefore, the law creates appropriate mechanisms to foster collective bargaining; these include bargaining councils,<sup>777</sup> status councils<sup>778</sup> and workplace forums.<sup>779</sup>

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<sup>773</sup> See also Jan Theron, Shane Godfrey and Margaret Visser (2007) *Globalisation, the Impact of Trade Liberalisation, and Labour Law: The Case of South Africa*, International Institute for Labour Studies, Geneva footnote 20, p. 8.

<sup>774</sup> Sec. 23(4) of the Constitution.

<sup>775</sup> *SANDU v. Minister of Defence and Others*, [2007] 9 BLLR 785 (CC) (30 May 2007).

<sup>776</sup> Sec. 1(c) of the Labour Relations Act.

<sup>777</sup> A bargaining council is established in a particular sector by one or more registered trade unions and one or more registered employers’ organisations, this is another channel to collective bargaining. Establishment of a bargaining council is voluntary and must be registered. Some of the main functions of bargaining councils are to conclude collective agreements; to enforce those collective agreements; and to prevent and resolve labour disputes. See Secs. 27-39 of the Labour Relations Act.

<sup>778</sup> A representative trade union or representative employers’ organisation may apply to the registrar in the prescribed form for the establishment of a statutory council in a sector and area in respect of which no council is registered. Unlike bargaining council membership, which has voluntary basis, membership of status councils by unions or employer organisations can be enforced by Ministerial order. The function of status councils are similar but more limited to the function of bargaining council, these include: to perform the dispute resolution functions; to promote and establish training and education schemes; and to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council or their members; and to conclude collective agreements to give effect to these matters. See Secs. 39-48 of the Labour Relations Act.

<sup>779</sup> A work-place forum is established at any workplace in which an employer employs more than 100 workers. The main functions of workplace forum are to promote the interests of all workers in the workplace, whether or not they are trade union members; to enhance efficiency in the workplace; to be consulted by the employer, with a view to reaching consensus, about the matters related to many aspects of employment relation; to participate in joint decision-making. The workplace forum play as a supportive and alternative institution for the collective agreement, in case a collective agreement is not concluded at the concerned workplace. See Secs. 78-94 of the Labour Relations Act.

### ***Parties, Subjects and Content of Collective Bargaining***

Parties involved in collective bargaining are one or more registered trade unions and, on the other hand one or more employers and/or one or more employers' registered organisations.<sup>780</sup> This regulation once again contributes to demonstrate the plurality in trade union system in South Africa, which is compatible and in conformity with the requirement of the CILS.

The law does not prescribe what issues can be covered by collective bargaining.<sup>781</sup> However, the purpose of collective bargaining is to reach a collective agreement, which means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by workers and employers' representatives.<sup>782</sup> Therefore the content of collective bargaining is very wide; they may be terms and conditions of employment or they may be any other matter of mutual interest between workers and employers' representatives.

### ***Legal Value of Collective Agreements***

A concluded collective agreement in South Africa has legal binding effect not only on the parties concerned<sup>783</sup> but it is also binding on workers who are not members of the trade unions party to the agreement if:

- (i) the workers are identified in the agreement;
- (ii) the agreement expressly binds the workers; and
- (iii) that trade union or those trade unions have as their members the majority of workers employed by the employer in the workplace.<sup>784</sup>

A collective agreement takes precedence over the individual contract; a collective agreement varies any contract of employment between a worker and employer who are both bound by the collective agreement.<sup>785</sup> No provision of an individual employment

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<sup>780</sup> Sec. 213 of the Labour Relations Act.

<sup>781</sup> Debbie Budlender (2009) *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, International Labour Office, Geneva, p. 9.

<sup>782</sup> Sec. 213 of the Labour Relations Act.

<sup>783</sup> Sec. 23(1)(a,b,c) of the Labour Relations Act.

<sup>784</sup> Sec. 23 (1) (d) of the Labour Relations Act.

<sup>785</sup> Sec. 23(3) of the Labour Relations Act.

contract may permit a worker to be paid less remuneration, to be treated less favourably than the applicable collective agreement.<sup>786</sup>

### ***Principles of Collective Bargaining***

Collective bargaining is a voluntary process in South Africa, which must be carried out in good-faith and which entails that the purpose of the negotiations must be to reach an agreement.<sup>787</sup> In addition, trade unions and employers are free to choose the level of collective bargaining. Collective bargaining can take place at national level (the National Economic Development and Labour Council)<sup>788</sup> or at sectoral level by bargaining councils and at plant level.

However, the perception of whether one party is obliged to engage in collective bargaining with the other party is not similar in different level of courts in South Africa. In the case of *SANDU v. South African National Defence Force (SANDF)*, different courts had different answers to the question of whether the employer has an obligation to negotiate collectively with the workers' representatives or not.

The first court held that the employer (SANDF) was not obliged to bargain collectively with the trade union (SANDU), and that the employer's withdrawal from negotiations with the trade union was reasonable.<sup>789</sup> On the other hand, the second court found out that the regulations removing the obligation of the employer to bargaining collectively with the trade union violated the union members' rights to participate in union activities as well as their rights to freedom of expression and association. This court held that, contrary to the earlier judgment, the employer had a duty to bargain with the trade union.<sup>790</sup>

The decisions in these cases were appealed to the Supreme Court of Appeal. The Supreme Court of Appeal decided that:

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<sup>786</sup> Sec. 199(1, 2) of the Labour Relations Act.

<sup>787</sup> *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd*, (57/90) [1991] ZASCA 168 (Supreme Court of South Africa), p. 29.

<sup>788</sup> See the National Economic, Development and Labour Council Act, 1994.

<sup>789</sup> *SANDU v Minister of Defence and Others*, [2003] (3) SA 239 (T).

<sup>790</sup> *SANDU v. Minister of Defence and Others*, [2004] (4) SA 10 (T).

... the Constitution, while recognising and protecting the central role of collective bargaining in our labour dispensation, does not impose on employers or workers a judicially enforceable duty to bargain. It does not contemplate that, where the right to strike is removed or restricted, but is replaced by another adequate mechanism, a duty to bargain arises.<sup>791</sup>

This decision confirms the voluntary nature of collective bargaining in South Africa where either party is not obliged to negotiate with another.

### ***Settlement of Disputes***

South Africa Law provides a sufficient mechanism to deal with disputes that arise from collective agreements through conciliation and arbitration. The law requires every collective agreement (excluding an agency shop agreement or a closed shop agreement or a settlement agreement contemplated), must provide a procedure to resolve any dispute about the interpretation or application of the collective agreement. The procedure must first require the parties to attempt to resolve the dispute through conciliation and, if the dispute remains unresolved, to resolve it through arbitration.<sup>792</sup>

Where there is a dispute about the interpretation or application of a collective agreement, any party to the dispute may refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration if:

- (i) the collective agreement does not provide for a procedure as required;
- (ii) the procedure provided for in the collective agreement is not operative; or
- (iii) any party to the collective agreement has frustrated the resolution of the dispute in terms of the collective agreement.<sup>793</sup>

### **3.3.3. Implementation of Freedom of Association and Collective Bargaining in South Africa**

By 2009, the total number of trade union members in South Africa was 3.2 million accounting for 25% of the formal work force. By September 2007, 36% of those employed in formal businesses were members of trade unions. In contrast, only 7% of those employed in informal businesses were trade union members. Informal sector union members constitute only 1% of non-domestic workers who were union members. Among domestic workers, only 2% are recorded as belonging to a trade union.<sup>794</sup> The

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<sup>791</sup> *Minister of Defence and Others v. SANDU and Others*, [2007] (1) SA 402 (SCA) para 25.

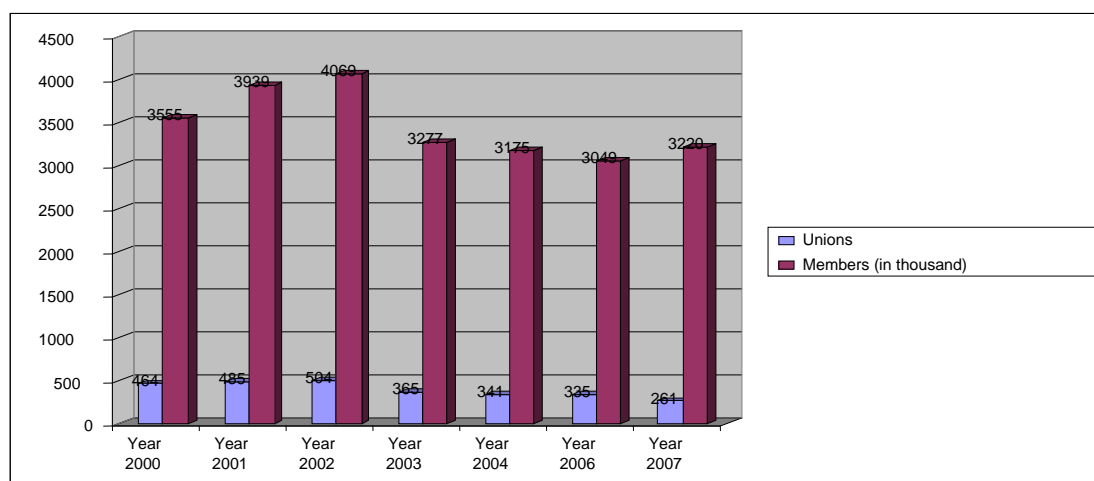
<sup>792</sup> Sec. 24 (1) of the Labour Relations Act.

<sup>793</sup> Sec. 24(2,4,5) of the Labour Relations Act.

<sup>794</sup> Debbie Budlender (2009) *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, International Labour Office, Geneva, p. 13.

number of unions and employer organisations tends to decrease further in subsequent years, but the trend in the number of union members is less clear. In particular, while 2007 has by far the smallest number of unions, the number of members is similar to that for 2003. Simple division gives an average union size of 12,338 members in 2007, compared with fewer than 10,000 for each of the previous years.

**Figure 3.2: Registered Trade Unions' Membership in South Africa<sup>795</sup>**



By October 2008, 21 union federations had been registered with the Labour Department,<sup>796</sup> of which there were four main national union organisations. The Congress of South African Trade Unions (COSATU),<sup>797</sup> with a membership of 1.8 million is the biggest trade union federation in South Africa. It is followed by the Federation of Unions of South Africa (FEDUSA) with 560,000 members<sup>798</sup> and the National Council of Trade Unions (NACTU) with almost 400,000,<sup>799</sup> members and the Confederation of South African Workers' Unions (CONSAWU) with 290,000 members.<sup>800</sup> All four are affiliated with the International Trade Union Confederation.<sup>801</sup>

<sup>795</sup> *Ibid*, p. 13.

<sup>796</sup> Of these, the more active were the Federation of Unions of South Africa (FEDUSA), National Council of Trade Unions (NACTU), COSATU, the Movement for Social Justice, Confederation of South Africa Workers Union, International Federation of Building and Wood Workers, Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied workers Union, and International Textile Garment and Leather Workers Federation Africa.

<sup>797</sup> Source <http://www.cosatu.org.za> (last visited 10 February 2010).

<sup>798</sup> Source <http://www.fedusa.org.za> (last visited 10 February 2010).

<sup>799</sup> Source <http://www.nactu.org.za/> (last visited 10 February 2010).

<sup>800</sup> Source <http://www.consawu.co.za/establishment> (last visited 10 February 2010).

The rate of trade union membership varies between sectors in South Africa, the highest rate of union membership occurs in mining at 76%, but this sector accounts for only 5% of all formal sector workers. The next highest rate is in community, social and personal services, where a large number of Government workers are found. This is followed by manufacturing. Rates are lowest in agriculture and construction. The former was previously excluded from labour legislation, and has remained a difficult area in which to organise. The latter includes many small businesses, with a large informal sector alongside the formal sector, and many short term contracts, casual work, and other forms of informal employment.

**Table 3.1: Formal Sector Workers and Union Membership in South Africa (%)<sup>802</sup>**

Industry	Distribution	% members
Agriculture, hunting, etc	8	11
Mining and quarrying	5	76
Manufacturing	16	38
Electricity, gas, etc	1	36
Construction	7	12
Wholesale and retail trade	2	24
Transport, storage, etc	5	36
Financial intermediation	13	27
Community, social , personal services	24	58
Total	10	36

The number of strikes in South Africa has declined in the past ten years, but the number of strikers and consequently the days lost has increased rapidly. In 2005 there were 102 strikes accounting for 2,627,953 days lost, while in 2006 there were 99 strikes accounting for 4,152,563 days lost. In 2007 there were only 75 strikes but the total days lost came up to 9,528,945.<sup>803</sup> These figures show the increase in both number of workers took part in strikes and the length of strikes in the recent years.

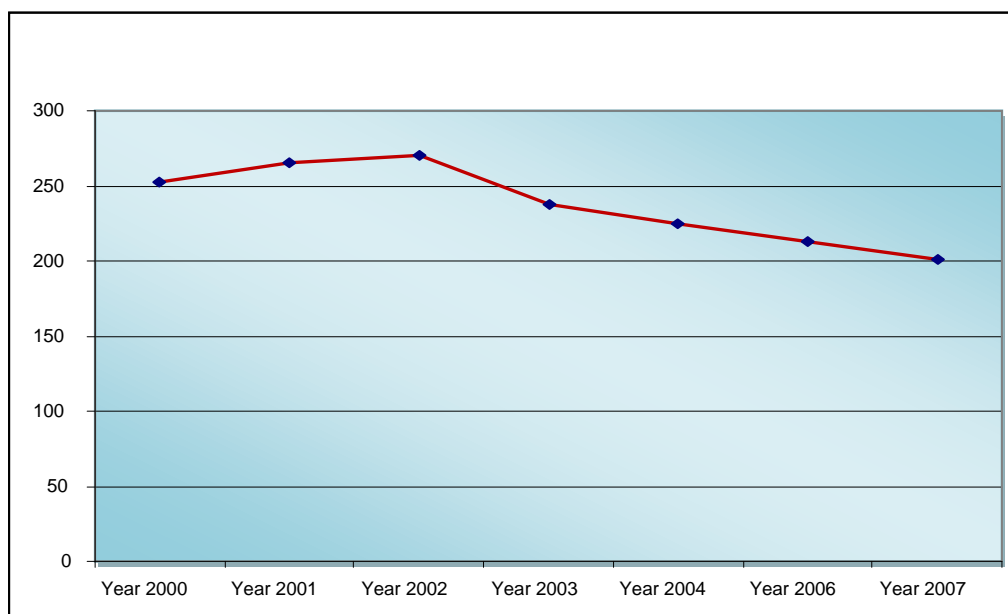
<sup>801</sup> Source [http://www.ituc-csi.org/IMG/pdf/05GC\\_List\\_Affiliates.pdf](http://www.ituc-csi.org/IMG/pdf/05GC_List_Affiliates.pdf) (last visited 10 February 2010).

<sup>802</sup> Debbie Budlender (2009) *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, International Labour Office, Geneva, p. 15.

<sup>803</sup> Source [www.labour.gov.za](http://www.labour.gov.za) (last visited 15 September 2009). See also Shane Godfrey, Jan Theron and Margaret Visser (2007) *The State of Collective Bargaining in South Africa: An Empirical and*

In South Africa, the number of employers' organisations has declined in the last years. There are now nine registered federations of employer organisations, of which some are more active while some are not.<sup>804</sup>

**Figure 3.3: Employers' Organisations in South Africa**



*Source: www.workinfo.com*

In terms of collective bargaining, the bargaining councils provided for in the Labour Relations Act vary greatly in terms of their geographical and sectoral scope and partly, as a result, in terms of their size. Some council are national, while others are restricted to a particular province, region or city. The number of bargaining councils decreased sharply from 87 in 1995 to just over 50 in 2007, of which private sector councils covered 1,282,043 workers in 2004 as compared to 823,823 in 1995. If public sector workers are included, coverage in 2004 was estimated at 2,358,012.

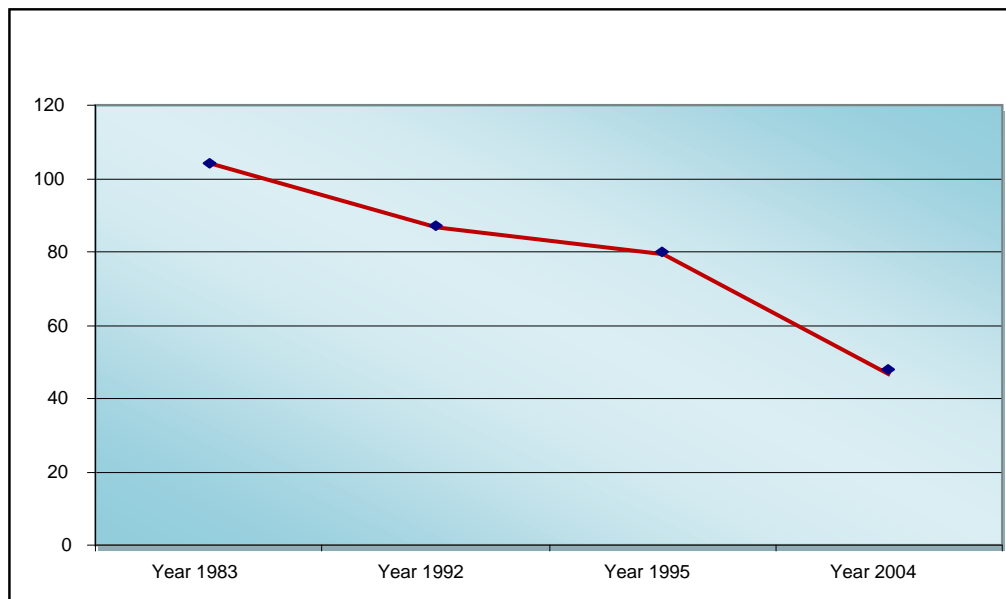
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*Conceptual Study of Collective Bargaining, Working Paper 07/130, Nov. University of Cape Town, Cape Town.*

<sup>804</sup> Some active federations are: Confederation of Employers of Southern Africa (Confesa); Steel and Engineering Industries Federation of South Africa (SEIFSA); and Federated Employers' Organisation of South Africa (FEOSA).



**Figure 3.4: Bargaining Councils in South Africa<sup>805</sup>**



In terms of statutory councils, only two statutory councils have been set up and registered.<sup>806</sup> Both were established through the initiative of trade unions and both are relatively stable, but neither has accomplished much so far in terms of collective bargaining. In addition, there currently exists a Statutory Council that has yet to be registered.<sup>807</sup> A number of other statutory councils were established after 1996 but never lasted the course to registration.<sup>808</sup>

In 2006, it was estimated that, of the approximately 9.5 million workers covered by the Labour Relation Act, about 25% were covered by bargaining council agreements. Nearly 5% of the workers covered by councils had employers who were not members of employer association party to the council, but who were registered with it. In 2006, less

<sup>805</sup> Shane Godfrey, Jan Theron and Margareet Visser (2007) *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining*, Working Paper 07/130, Nov. University of Cape Town, Cape Town, p. 15.

<sup>806</sup> Namely the Statutory Council for the Printing, Newspaper and, the Packaging Industry of South Africa and the Amanzi Statutory Council.

<sup>807</sup> Namely the Statutory Council for Squid and Related Fisheries.

<sup>808</sup> See Shane Godfrey, Jan Theron and Margareet Visser (2007) *The State of Collective Bargaining in South Africa: An Empirical and Conceptual Study of Collective Bargaining*, Working Paper 07/130, Nov. (Cape Town, University of Cape Town, Development Policy Research Unit).

than 5% of formal sector workers covered by bargaining councils were in this situation as a result of extension of agreements.<sup>809</sup>

In South Africa, there is very little bargaining taking place at the plant level. Firm and plant level bargaining is in decline, and seems to have largely disappeared within the jurisdictions of bargaining councils. This strongly suggests that organisational rights have not been an adequate substitute for the duty to bargain.<sup>810</sup>

### **Observations**

South Africa is perhaps unique in the continent in respect of industrial relations.<sup>811</sup> It is reasonable to suggest that South Africa has the most developed collective bargaining system in the African region.<sup>812</sup> Most provisions in South African labour law are compatible with the CILS on freedom of association and collective bargaining. This country's legislation provides very important experiences for Vietnam.

Freedom of association and the right to organise and to collective bargaining of both workers and employers are respectfully provided by the Constitution of South Africa. The right to organise recognised in the Constitution applies to all workers irrespective of where they may be employed, how they are employed or for how long. In employment relations, the right to organise has two aspects: the rights of an individual worker or employer and, the organisational rights of trade union or employer's organisation. Workers have the right to join, form trade unions of their own choosing in a plural trade union system. South Africa Law provides more than sufficient protection for workers and trade unions from anti union discrimination in exercising the right to organise before entering and during the employment relationship. South Africa Law also prohibits discrimination against the enjoyment of the right to organise of employers and their organisations.

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<sup>809</sup> *Ibid.*

<sup>810</sup> *Ibid.*

<sup>811</sup> Debbie Budlender (2009) *Industrial Relations and Collective Bargaining: Trends and Developments in South Africa*, International Labour Office, Geneva.

<sup>812</sup> Peter Nanyenya Takirambudde (1995) "Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa", *Journal of African Law*, vol. 39, No. 1, pp. 39-63.

The case of *SANDU v. Minister of Defence and Others* proves that the right to organise in South Africa is extended to all categories of workers including members of the armed forces. The decision of the Court in this case shows that freedom of association is a fundamental human right, which belongs to every individual citizen. Individual worker is also a citizen, therefore, this right must be granted to every worker irrespective of what his/ her job is. Legislation in South Africa and the decision of the South Africa Constitutional Court in this case also raises the problem whether the limitation of right to organise of the armed forces and the police is reasonable; it suggests the ILO should re-examine the provision that allows Member States to determine the enjoyment of the right to organise of the armed force and the police.

South Africa Law is silent on the right not to organise. One can say that it is the result of the silence of the CILS on this issue. However, the law in South Africa is not silent on the issue of closed-shop. Although both types of closed-shop agreements have been prohibited in the United Kingdom and in the EU, South Africa permits the existence of a post-entry closed-shop agreement. According to the law, a trade union party to a closed-shop agreement can refuse membership of workers in some circumstances. The law also allows employers to dismiss workers for refusing to join a trade union party to a closed shop agreement. Under the impact of these provisions, the right to organise of workers is not protected. Moreover, it can be learned from the experience of South Africa that over concentrating on trade union security will be harmful to individual workers' right to organise. The violation of the right to organise by legalising closed-shop agreements and the negative effects of closed-shop agreements recognised by the EU's experiences put pressure on the ILO to regulate the legal status of the right to not organise as well as to prohibit closed-shop agreements obviously in its jurisprudence.

In terms of collective bargaining, the law in South Africa does not provide for a duty to bargain, but renders the imposition of such duty possible by the use of economic and industrial weapons. Collective bargaining is a very important tool in developing industrial relations in South Africa, it is considered as an engine to make the industrial relations work and develop. Therefore, collective bargaining should be regarded as essential to promoting industrial relations in Vietnam.

Experience of South Africa shows that in order to promote collective bargaining, the law needs to create "places" for it to take place: the more "places" the better. These

“places” are created by South Africa law in its provisions on some types of institutions, such as bargaining councils, status councils and, workplace forums. Legislation on these institutions should be a good example for Vietnam.

*National Union of Metal Workers of South Africa and Others v. Bader Bop (Pty) Ltd and Another* raises the question of how to protect the right to strike (an intrinsic corollary to the right to organise) of workers who are members of a minority trade union. Different courts in South Africa have different approaches to this matter. The final decision of the Constitutional Court that the right to collective bargaining including the right to strike is granted for individual workers, and workers can exercise the right to strike either through majority unions or through minority unions at the workplace, raise the need to regulate the right to strike by an ILO’s instruments, which clearly recognise and define the right to strike of workers. In which, workers are entitled to the right to strike, a trade union irrespectively it is minority or majority, is entitled to go on strike. Being recognised internationally, the right to strike will be more easily interpreted and implemented in domestic courts. In addition, legislation in South Africa that gives trade union the right to access to an employer’s premises for the purposes of recruiting members can be a good lesson for Vietnam.

Although the CILS on freedom of association and collective bargaining have been appropriately incorporated into South African legislation, implementation of these provisions in the domestic context has shown many challenges. The low percentage of workers belonging to trade unions demonstrates the problem of the coverage of domestic law, as well as an increase in the informal sector which is one of the main challenges of the ILS mentioned in Chapter I. The decrease in the number of trade unions and employers’ organisations in the recent years reveals that incorporation and implementation of the CILS seems not contribute to increase the number of workers exercising the right to organise. The imbalance of trade union membership between sectors means that implementation of these standards has been challenging. These practices call for better technique assistance from the ILO to ratified Member States to ensure them to implement provisions of ratified Conventions in domestic context properly.

In terms of collective bargaining, the purpose of promoting collective bargaining seems not to be successful when the number of workers covered by collective bargaining is

very low, the number of bargaining council has decreased, and the status council is very scarce. These indicate that the law is very beautiful in the book but it is far from being implemented in reality.

All these show a gap between ratification and incorporation of the CILS into law on paper on the one hand and, implementation of the CILS in a national context on the other hand. In terms of legislation, no violation of the ILS has been made by ratified Member States, but in reality, the rights and interests recognised by the ILS are not implemented and enforced. All these factors contribute to reinforcing the point made in Chapter I that implementation of the ILS is still one of the main challenges for the ILO.

In addition, practical implementation of the CILS in South Africa shows that, in some cases, Member States of the ILO ratify Conventions, but cannot enforce them in the domestic context. On the other hand, it shows that desire to ratify ILO Conventions was not justified by the real needs of the nations. On the other hand, it shows the problem of domestic incorporation, which requires that incorporation of the CILS must be based on national context, rather than copying words by words from the ILO's instruments. These issues must be given careful consideration when incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system.

#### **3.4. Conceptualisation of the CILS on Freedom of Association and Collective Bargaining in China**

China is the most populated country in the world,<sup>813</sup> about a quarter of the world's working population live in China,<sup>814</sup> which makes China the factory of the world. By May 2010, China had ratified 22 Conventions of the ILO, of which 3 Conventions were denounced.<sup>815</sup> In terms of the eight core ILO Conventions, China has ratified only four Conventions and China has ratified neither the core Conventions on freedom of

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<sup>813</sup> China's population is 1,331 millions. See Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

<sup>814</sup> In 2008, China's workforce is 807 million while the world's workforce is 3,232 millions. Source: Centre Intelligent Agency, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2095rank.html> (last visited 20 January 2010).

<sup>815</sup> These are Convention Nos. 7, 15, 59. Source: <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited 20 January 2010).

association and effective recognition of the right to collective bargaining (Convention No. 87 and Convention No. 98) nor the core Conventions on forced labour (Convention No. 29 and Convention No. 105).<sup>816</sup>

In the case of Hong Kong, both Convention Nos. 87 and 98 are applied in Hong Kong even it is now a special administrative region of China.<sup>817</sup> In regards to Macau (a former Portuguese colony), Macau had ratified both Conventions Nos. 87 & 98 of the ILO, which are still in effect even since Macao was transferred back to China in 1999.<sup>818</sup>

This section studies freedom of association and collective bargaining in the China main land.

### **3.4.1. Freedom of Association**

#### ***The Right to Organise***

The notion of freedom of association as understood in the West is a new phenomenon in China that emerged only in the 1980s and expanded in the 1990s in line with administrative reform generated by the need for economic development.<sup>819</sup> Freedom of association in China refers to the right to set up social organisations that can be characterised as “registration with the appropriate agency, dual responsibility (to both the sponsor and the registrar) and management according to administrative level”.<sup>820</sup> However, trade unions are not included in the definition of social organisations.<sup>821</sup>

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<sup>816</sup> Source: *Ibid.*

<sup>817</sup> Source: [http://www.labour.gov.hk/eng/rbo/List\\_41\\_ILCs\\_e.doc](http://www.labour.gov.hk/eng/rbo/List_41_ILCs_e.doc) (last visited 25 February 2010).

<sup>818</sup> See <http://www.dsal.gov.mo/law/E87.htm> (last visited 25 February 2010).

<sup>819</sup> Yuwen Li (2005) “A Critical Examination of the Legal Environment for Social Organisation in China” in *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, p. 18.

<sup>820</sup> Xie Haiding (2005) “The Dilemma of Legitimacy Facing China’s Civil Society Organisations” in *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, p. 118.

<sup>821</sup> Article 3 of the Regulation concerning the Registration of Social Organisations, 1989. See also Wu Yuzhang (2005) “Government Administration of Social Organisations - Its Model and Effects” in *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, pp. 71-101, p. 75, Yuwen Li (2005) “A Critical Examination of the Legal Environment for Social Organisation in China” in *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, p. 21, Xie Haiding (2005) “The Dilemma of Legitimacy Facing China’s Civil Society Organisations” in *Freedom of*

In the early twentieth century, the first batch of trade unions in the real sense arose in China, although they were still in the embryonic stage and scattered only in some cities and industries. With the founding of the Communist Party of China in 1921, the Secretariat of the China Labour Association was set up to take charge of the nationwide labour movement. In 1922, the first national labour congress was held to make preparations for the establishment of a national trade union organisation. On 01 May 1925, the second national labour congress held in Guangzhou City, Guangdong Province, proclaimed the founding of the All China Federation of Trade Unions (ACFTU).<sup>822</sup>

In China, the first Trade Union law was enacted in 1950.<sup>823</sup> This Act provides that all permanent or temporary workers without discrimination as to the essence of their work (mental or physical), without discrimination as to field of work (enterprises, Government organs or schools), who work to earn their living from wages have the right to form trade unions.<sup>824</sup>

During the Cultural Revolution (1966-1976), all social organisations were eliminated;<sup>825</sup> as a result the operation of ACFTU was suspended until Deng Xiaoping rehabilitated national trade unions in the late 1970s.<sup>826</sup> After that, freedom of association was recognised by Article 35 of the Constitution of China 1982<sup>827</sup> as “Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”

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*Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, p. 114.

<sup>822</sup> ACFTU (2009) *A Brief History of the ACFTU’s Development*. Available at <http://www.acftu.org.cn/template/10002/file.jsp?cid=65atWorkaid=214> (last visited 11 December 2009).

<sup>823</sup> Adopted on 28/6/1950, consists of 26 Articles regulating the rights of trade unions, organisational structure of trade union, trade union fund, etc. Text Available at [http://www.novexc.cn/trade\\_union\\_law.html](http://www.novexc.cn/trade_union_law.html) (last visited 9 December 2009).

<sup>824</sup> Article 1 of the Trade Union law 1950.

<sup>825</sup> Yuwen Li (2005) “A Critical Examination of the Legal Environment for Social Organisation in China” in *Freedom of Association in China and Europe: Comparative Perspectives in Law and Practice*, ed. Yuwen Li, Martinus Nijhoff, Leiden, p. 28.

<sup>826</sup> Chang Hee Lee (2009) *Industrial Relations and Collective Bargaining in China. Working paper No. 7*, International Labour Office, Geneva, p. 4.

<sup>827</sup> Adopted in 1982, amended in 1988, 1999 and 2004. Text Available at <http://www.china.org.cn/english/features/89012.htm> (last visited 10 December 2009).

The crucial period for laying legal foundations for freedom of association at work was the 1990s when the two most important legal documents were promulgated: the Trade Union Law 1992 (revised in 2001) and the Labour Law 1994.<sup>828</sup> The Trade Union Law provides that:

all working people who rely on wage income as a main source of living expenses, regardless of their nationality, race, sex, occupation, religious beliefs and educational level, have the right to participate in and organise trade unions in accordance with the law.<sup>829</sup>

According to the Labour Law, workers have the right to participate in, and organise, trade unions in accordance with the law.<sup>830</sup> It is interesting that, according to the wording of these provisions, China Law seems not allow workers to form or to establish trade unions, instead, workers can just engage in the activities of trade unions. However, in fact, worker can establish one trade union at an enterprise.

The establishment of a grass roots trade union must be approved by trade unions at a higher level which is affiliated to and under the umbrella of the ACFTU. China does not allow unions to be established without the approval of the ACFTU.<sup>831</sup> Before the amendment in 2001, only workers in enterprises employing more than 25 workers could set up a trade union.<sup>832</sup> Current trade union law allows the establishment of trade unions in small enterprises which employ fewer than 25 workers.<sup>833</sup>

In terms of the right to organise of employers, there are no provisions referring to the right to organise of employers in the Labour Law 1995, the Trade Union Law 1992 or the Trade Union Law 2001 as well as the new Labour Contract Law 2007<sup>834</sup>. Employers can organise their association in the form of a social organisation which needs prior authorisation by the Government office.<sup>835</sup> At national level, the China Enterprise

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<sup>828</sup> Texts Available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwechi.htm> (last visited 15 December 2009).

<sup>829</sup> Sec. 3 of the Trade Union Law 1992.

<sup>830</sup> Article 7 of the Labour Law 1994.

<sup>831</sup> Sec. 13 of the Trade Union Law 1992.

<sup>832</sup> Sec. 12 of the Trade Union Law 1992.

<sup>833</sup> Article 10 of the Trade Union Law 2001.

<sup>834</sup> Text Available at <http://www.lexadin.nl/wlg/legis/nofr/oeur/lxwechi.htm> (last visited 15 December 2009).

<sup>835</sup> Sec. 9 of the Regulation concerning the Registration of Social Organisations, 1989.



Confederation (CEC)/China Enterprise Directors Association (CEDA), is the representative of employers in China. It is a non-Governmental institution established in 1988.<sup>836</sup>

### *The Monopoly Trade Union System in China*

The monopoly system of trade unions in China was firstly guaranteed by the Trade Union Law 1950, which stated that the ACFTU is the leading body of trade unions in China.<sup>837</sup> In China, all workers have the right to join trade unions including the armed forces and the police.<sup>838</sup> However, workers are not free to join a trade union of their own choosing. At an enterprise, only one trade union is allowed to be established, which is under the supervision of a higher level trade union. Independent trade unions are illegal, and enforcement of labour laws is poor. By law, all unions must belong to the state-controlled ACFTU,<sup>839</sup> which functions more as an arm of the state used to control workers than as a genuine vehicle for representing their interests. This characteristic makes it pointless to have regulations on closed-shop agreements in China because only one trade union can be established at an enterprise; therefore there is no point for both employer and trade union to make a closed-shop agreement.

Contrary to the ILO standards, as a communist country, the Chinese Government recognises only one “state-like” system of trade union. There are confederations of trade unions at the same level as the level of Government’s departments, which play roles as subordinate organs of the Government. At national level, trade union organisations across the country form the ACFTU.<sup>840</sup>

The law also creates a new chance for representatives’ diversity in China. In addition to trade unions, representatives of workers are recognised for the purpose of negotiating employment conditions with the employer,<sup>841</sup> and for the purposes of mediation,

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<sup>836</sup> Source [http://www.cec-ceda.org.cn/english\\_version/](http://www.cec-ceda.org.cn/english_version/) (last visited 26 February 2010).

<sup>837</sup> Article 3 of the Trade Union law 1950.

<sup>838</sup> Article 3 of the Trade Union Law 2001, Article 1 of the Constitution of Chinese Trade Union 2008 (text available at).

<sup>839</sup> Article 2 of the Trade Union Law 2001.

<sup>840</sup> Sec. 12 of the Trade Union Law 1992. See also Constitution of Chinese Trade Union 2008.

<sup>841</sup> Article 33 of the Labour Law 1994, Article 4, 51 of the Employment Contract Law 2007.

arbitration or litigation activities in dealing with labour disputes.<sup>842</sup> In some provincial legislation, the regulations state that where there is no trade union in the enterprise, the workers' representatives in the negotiations should be "democratically elected by a majority of workers." Where there is a union, representatives should be recommended by the union, and scrutinised by the workers' congress.<sup>843</sup> However, representatives of workers are allowed to exist only at enterprise level with very limited power.

### *Dependent Role of Trade Unions*

The law provides that trade unions carry out their activities independently<sup>844</sup> but in fact, the trade unions system in China is not independent from Government. Government's subsidiaries are one of the main sources of incomes of trade unions.<sup>845</sup> In the previous planned economy, trade unions operated as the Party's transmission belt.<sup>846</sup> Today, the basic duties of trade unions in China are to protect and safeguard the legitimate rights and interests of workers,<sup>847</sup> but it seems that the political function is still one of the main duties of trade unions in China. The law requires trade unions to observe and safeguard the Constitution, take it as the fundamental criterion for their activities, take economic development as the central task, uphold the socialist road, the people's democratic dictatorship, leadership by the Communist Party of China, and Marxist-Leninism, Mao Zedong's Thought and Deng Xiaoping's Theory, persevere in reform and the open policy, and conduct their work independently in accordance with the Constitution of trade unions.<sup>848</sup>

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<sup>842</sup> Article 7 of the Law on Mediation and Arbitration of Labour Disputes 2007 (Text Available at <http://tradeinservices.mofcom.gov.cn/en/b/2007-12-29/27880.shtml> (last visited 14 December 2009)) provides that:

Where the party in a labour dispute consists of more than 10 labourers, and they have a joint request, they may recommend a representative to participate in mediation, arbitration or litigation activities.

<sup>843</sup> Summary Available at <http://www.clb.org.hk/en/node/100188> (last visited 20 January 2010).

<sup>844</sup> Article 7 of the Labour Law 1994.

<sup>845</sup> Sec. 36 of the Trade Union Law 1992.

<sup>846</sup> Wolfgnag Daubler and Qian Wang (2009) "The New Chinese Employment Law", *Comparative Labour Law and Policy Journal*, vol. 30, pp. 395-408.

<sup>847</sup> Article 6 of the Trade Union Act 2001.

<sup>848</sup> Article 4 of the Trade Union Law 1992.

### ***The Right not to Organise***

China Law is silent on the right not to organise of workers. There is only one trade union allowed at an enterprise; therefore this trade union will represent all the workers in the enterprise. It means that the workers who do not even want to be represented or to be members of this monopoly trade union have no other choices. The right of workers not to organise cannot be guaranteed in practice.

The law is also silent about regulating the right not to join a union of employers. In practice, employers in China are not required to join organisations and they are free to decide whether to form organisations of their own or not.

### ***Promotion of and Protection from Anti-union Discrimination***

The monopoly trade union system is strenuously promoted by the Chinese Government with the purpose that trade unions will help to control and stabilise employment relations that lead to social stability and maintain the power of the communist party State.

A trade union exists as an autonomous business. No organisations or individuals may dissolve or merge trade union organisations at will. In cases of grass roots trade unions, a grass roots trade union may be dissolved accordingly only when the enterprise or institution or Government department to which it belongs is terminated or dissolved.<sup>849</sup>

Trade unions leaders are given sufficient protection in China: no trade union chairman or vice-chairman may be arbitrarily transferred to another unit before the expiration of his tenure of office. Moreover, if trade union leaders must be transferred due to the requirement of the work, the transfer must be approved by the trade union committee at the corresponding level and the trade union at the next higher level.<sup>850</sup> The period of contract of a fulltime trade union leader is automatically extended until he/she finishes his/her term as trade union leader, except where he/she commits serious mistakes during the term of office or reaches retirement age.<sup>851</sup>

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<sup>849</sup> Article 12 of the Trade Union Law 1992.

<sup>850</sup> Article 17 of the Trade Union Law 2001.

<sup>851</sup> Article 18 of the Trade Union Law 2001.

## *The Right to Strike*

The right to strike was removed from China's Constitution in 1982, on the grounds that the political system in place had "eradicated problems between the proletariat and enterprise."<sup>852</sup> At the time of writing (January 2010), the right to strike was not recognised in China. There is no provision mentioning the word "strike" in the Labour Law 1994, the recent Employment Contract Law 2007 nor the Law on Mediation and Arbitration of Labour Disputes 2007. The term "strike" is mentioned only once in the Trade Union Act 2001 referring to two types of strikes: work-stoppage strike and/or slow-down strikes.<sup>853</sup> The right to strike is also indirectly referred to in the new Employment Contract Law 2007, which states that in cases where a dispute arising from the performance of the collective contract is not resolved following consultations, the labour union may apply for arbitration and institute an action according to law.<sup>854</sup>

Furthermore, in terms of the role of trade unions prescribed by law,<sup>855</sup> there is no provision confirming the role of leading or organising strikes by trade unions. Instead, work-stoppage is recognised and regulated by the Trade Union Law 2001, which provides:

In cases of work-stoppage or slow-down strikes in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultations with the enterprise or institution or the parties concerned, present the opinions and demands of the workers and staff members, and make proposals for solutions. With respect to the reasonable demands made by the workers and staff members, the enterprise or institution shall try to satisfy them.<sup>856</sup>

Although it is denied by national law, the right to strike has been recognised in several provincial legislatures. Most recently, Shenzhen province has passed new regulations<sup>857</sup> recognising strikes by making work stoppage within the cooling-off period in some

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<sup>852</sup> Chang Hee Lee (2009) *Industrial Relations and Collective Bargaining in China*. Working paper No. 7, International Labour Office, Geneva, p. 4.

<sup>853</sup> Article 27 of the Trade Union Law 2001.

<sup>854</sup> Article 56 of the Employment Contracts Law 2007.

<sup>855</sup> See Trade Union Law 2001, Labour Law 1994, Employment contract Law 2007, Chinese Trade Union Constitution 2008.

<sup>856</sup> Article 27 of the Trade Union Law 2001.

<sup>857</sup> Regulations for the Promotion of Harmonious Labour Relations in the Shenzhen Special Economic, ratified on 29 May 2008, took effect from 1 November 2008.

sectors unlawful,<sup>858</sup> which means, on the other hand, that stoppage of work (strike) outside the cooling-off period is lawful.

### **3.4.2. Collective Bargaining**

#### ***The Right to Collective Bargaining***

In China, the right to collective bargaining is regarded as the right to negotiate a collective contract. The right to collective bargaining is not explicitly mentioned in the China Constitution as well as in national law. In addition, there is currently no national law governing collective bargaining procedures specifically but only regulations on collective contracts. However, all workers in China have the right to join trade unions and, as a result of that, all workers in China are entitled to the right to negotiate collective contracts.<sup>859</sup>

While the law at national level on collective bargaining is poor, many provinces have promulgated their own detailed regulations on collective bargaining.<sup>860</sup> The Shanghai Collective Contract Rules, which came into effect in January 2008, govern three major areas: collective bargaining, collective contracts and related dispute resolution,<sup>861</sup> another example is Hebei province, which implemented the new Regulations on Enterprise Collective Consultations from 1 January 2008, which states that the consultation process should give equal weight to the interests of the enterprise and the workers.<sup>862</sup>

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<sup>858</sup> Article 53 of Regulations for the Promotion of Harmonious Labour Relations in the Shenzhen Special Economic provides that:

In the event that a collective work stoppage, go-slow or lockout due to labour dispute in an employing unit in the water, electricity and gas utilities and public transport sectors has resulted in or could result in consequences of the serious impairment of public interest, such as endangering public security and upsetting normal socioeconomic order and people's everyday life, the city and Special Economic Zone Governments may issue an order demanding the employing unit or workers to stop the action and restore normal order. The period within 30 days of the issuance of this order is called the "cooling off period", during which time the employing unit and workers may not take actions to aggravate the situation.

<sup>859</sup> See also Article 51, 53 of the Employment Contract Law 2007; Article 33 of the Labour Law 1994; Article 20 of the Trade Union Law 2001.

<sup>860</sup> By 2009, 22/31 provinces have adopted provincial regulations on collective bargaining.

<sup>861</sup> Text Available at [www.shanghai.gov.cn](http://www.shanghai.gov.cn) (last visited 15 December 2009).

<sup>862</sup> Summary Available at <http://www.clb.org.hk/en/node/100188> (last visited 15 December 2009).

### ***Parties, Subjects and Content of Collective Bargaining***

Parties to collective bargaining are an employer (or employer association) on the one hand and a trade union or representative of workers where a trade union does not exist on the other hand.<sup>863</sup> As once established there is only one trade union in a bargaining unit, therefore recognition of trade union to be a party in collective bargaining in an enterprise is not a big issue in China. The obligation of each party to negotiate in collective bargaining is provided by law that a proposal for collective bargaining shall not be refused without legitimate justification;<sup>864</sup> nevertheless the law does not define what legitimate justification is, and what the consequences of refusing to participate in collective bargaining are.

The content of collective bargaining covers all aspects of employment, such as labour compensation, working hours, rest, leave, work safety and hygiene, insurance, benefits.<sup>865</sup> Due to the fact that there is only one trade union or one representative of workers in one collective bargaining unit in China, this trade union or representative,

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<sup>863</sup> Article 20 of the Trade Union Law 2001, Article 33 of the Labour Law 1994.

<sup>864</sup> Article 32 of the Decree 22/2003 of the Ministry of Labour and Social Security provides:

Either party may propose in writing to the other side to commence collective bargaining. The law provides that within 20 days upon receiving the written proposal the concerned party must have reply in writing.

<sup>865</sup> Article 51 of the Employment Contract Law 2007. Details of the content of collective agreement are set by Article 8 of the Decree 22/2003 of the Ministry of Labour and Social Security, China. These are:

1. Wages.
2. Hours of work.
3. Rests and holidays.
4. Labour safety and health.
5. Supplementary insurance and welfare.
6. Special protection for women workers and under-age workers.
7. Vocational skill training.
8. Supervision of labour contracts.
9. Rewards and punishments;
10. Layoffs.
11. The duration of the collective contract.
12. Procedures for modifying and cancelling the collective contract.
13. Negotiated settlements in case of dispute regarding the performance of the collective contract.
14. Liabilities for collective contract violations.
15. Any other subject on which the two sides consider necessary to negotiate.

therefore, represents all workers in the unit and the law provides that a collective agreement shall be binding on all workers in the bargaining unit.<sup>866</sup>

In China, standards and conditions laid down by the law are minimum standards; parties to collective bargaining cannot agree to reduce standards and conditions provided by law.<sup>867</sup> In addition, the content of collective agreements is the minimum standard and the individual employment contract in the enterprise cannot contain lower standards than the standards stipulated in the collective agreement.<sup>868</sup>

### ***Principles of Collective Bargaining***

In China, the law requires that the following principles should be observed in negotiating collective agreements:<sup>869</sup>

- (i) Abiding by the laws, regulations and rules and any other stipulations by the State.
- (ii) Mutual respect and negotiation on equal basis.
- (iii) Honesty and good-faith, and fairness and cooperation.
- (iv) Keeping in mind the legal rights and interests of both parties.
- (v) No extremist behaviour allowed.

Because right to strike is denied by law, workers cannot force the employer to bargain with them. In this context, the unclarity of the obligation to bargain may exclude many workers in China from enjoying the interest of the right to collective bargaining.

The CILS require the principle of free choice in collective bargaining, which means collective bargaining, is possible at any level, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels.<sup>870</sup> In China, collective contracts can be negotiated at enterprise level, at industrial level or at area level with limitation,<sup>871</sup> but China Law is silent on national level collective bargaining.

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<sup>866</sup> Article 35 of the Labour Law 2001.

<sup>867</sup> Article 55 of the Employment Contract Law 2007.

<sup>868</sup> Article 35 of the Labour Law 1994.

<sup>869</sup> Article 5 of the Decree 22/2003 of the Ministry of Labour and Social Security, China.

<sup>870</sup> ILO (2006) *Digest*, p. 197 (para. 988). See also Case No. 1845, Report No. 302, para. 514; Case No. 1906, Report No. 306, para. 553; Case No. 1926, Report No. 308, para. 629.

<sup>871</sup> Article 51 of the Employment Contract Law 2007.

In terms of procedure, the draft of a collective agreement must be discussed and adopted by the congress of workers or all workers<sup>872</sup> before a conclusion is reached between the two parties. Upon conclusion, the agreement must be sent to the labour administration authority for screening. If no objections are raised by the administrative authority within fifteen days of the receipt of the text of the agreement; the collective agreement will come into effect.<sup>873</sup>

### ***Settlement of Disputes***

In China, the law provides an appropriate system required by the CILS to deal with labour disputes in collective bargaining. Disputes arising from the collective bargaining process and implementation of collective agreements are resolved by consultation at enterprise level, through mediation<sup>874</sup> and arbitration<sup>875</sup> based on principles of lawfulness, fairness, timeliness and mediation-oriented to protect the rights and legal interests of the parties concerned. Government administrative authorities may interfere to coordinate with the parties to settle the disputes<sup>876</sup>, and courts for civil and labour law are the final bodies to settle the disputes.<sup>877</sup>

The court is the institution that finalises labour disputes. However, the court in China must base its decision on the law (statute court).<sup>878</sup> This results in a problem where

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<sup>872</sup> Article 33 of the Labour Law 1994, Article 20 of the Trade Union Law 2001.

<sup>873</sup> Article 34 of the Labour Law 1994, Article 54 of the Employment Contract Law 2001.

<sup>874</sup> The Law on Mediation and Arbitration of Labour Disputes 2007 provides that mediation can be carried out at one of three types of mediation institutions: enterprise labour disputes mediation commissions, basic level people's mediation institutes, and institutes with the function of labour disputes mediation established in towns, villages and districts. Mediation agreement is binding on both parties.

<sup>875</sup> The Law on Mediation and Arbitration of Labour Disputes 2007 states that if the mediation process is unsuccessful or one of the parties fails to implement the mediation agreement within the time limit, parties can apply for an arbitration process. A labour disputes arbitration commission can be established at the county and municipal level but they are not set up according to administrative area level by level. The labour disputes arbitration commission has to decide the case within 45 days of the acceptance of the application (this period can be extended 15 days further). Arbitration is mandatory and a prerequisite for a court to have jurisdiction in China labour law. If no arbitral award is made after the above period either party can bring the case to the court. When the arbitral award has been made, if one of the parties does not agree with the decision of the labour disputes arbitration commission, this party can bring the case to the court within 15 days after the day the arbitral decision is received. Otherwise the arbitral decision will take effect if after this period no party has litigation action.

<sup>876</sup> Article 84 of the Labour Law 1994.

<sup>877</sup> Wolfgang Daubler and Qian Wang (2009) "The New Chinese Employment Law", *Comparative Labour Law and Policy Journal*, vol. 30, pp. 395-408.

<sup>878</sup> Article 126 of China Constitution provides that:



collective disputes arise from a new issue (labour disputes over interest<sup>879</sup>) that has not been provided for by law, the court is unable to find any provision in law to deal with the case; for example, where workers in an enterprise take collective action to demand that employer raise their salary (even where their current salary is higher than the national minimum salary), after unsuccessful mediation and arbitration, the workers bring the case to court. Here the court will not be able to find any status provision to decide the case because the employer has obeyed the law. For the workers, they do not have any other means to demand for improved rights and interests because they are not allowed to go on strike.

### **3.4.3. Implementation of Freedom of Association and Collective Bargaining in China**

In addition to the lack of legislation, a problem for the protection of the right to organise and collective bargaining of workers in China is a lack of legal implementation and enforcement.<sup>880</sup> Many workers believe that the law exists only on paper and lacks real enforcement.<sup>881</sup> There are three main channels to implement labour law: enforcement by State authorities, disputes resolution process and monitoring by trade unions. In China, the burden of implementing labour law is placed more heavily on administrative agencies than in other countries.<sup>882</sup>

The right to organise is granted to all workers in China, but due to the monopolistic nature of trade unions, ACFTU is the only national trade union and all local and regional trade unions fall under its umbrella. Membership of ACFTU had reached 212

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The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organisation or individual.

<sup>879</sup> Labour disputes can be divided into two categories: disputes over interests (new issues that are not stated in labour contracts, collective agreements or the law) and disputes over rights (issues that are stated in labour contract, collective agreements or the law). See Section 3.1.

<sup>880</sup> Sean Cooney (2007) "China's Labour Law, Compliance and Flaws in Implementing Institutions", *Journal of Industrial Relations*, vol. 49, pp. 673-686.

<sup>881</sup> Han Dongfang (2008) *The Prospects for Legal Enforcement of Labour Rights in China Today: A Glass Half Full* [Homepage of China Labour Bulletin], [Online]. Available at [www.clb.org.hk](http://www.clb.org.hk) (last visited 12 December 2009).

<sup>882</sup> Sean Cooney (2007) "Making Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People's Republic of China", *Fordham International Law Journal*, vol. 30, pp. 1050-1054.

million in 2008 of more than 800 million workers.<sup>883</sup> Thus only a quarter of people at working age officially exercise the right to organise in China.

Trade unions in China are virtually impotent when it comes to representing workers.<sup>884</sup> As the right to strike is not recognised, it is hard for trade unions in China to put pressure on employers even when they receive strong support from the Government. In addition, no independent trade unions are allowed to exist; all attempts at establishing independent workers' organisations are repressed and organisers are often arrested.<sup>885</sup>

A recent survey of local trade union chairpersons has shown that:

Although trade unions in foreign owned firms and in firms dealing with foreign firms are beginning to resemble trade unions in the West, in the majority of firms a State corporatist model of trade unions continues, with chairmen appointed by the party, with many of them occupying simultaneously party and trade union positions, and thinking it right to do so, and having power bases and networks in both the party and the trade union, with initiatives for protecting workers' interests coming from the top down, rather than the bottom up, and with collective negotiation and democratic participation in union affairs continuing to be a mere formality.<sup>886</sup>

The China Enterprise Confederation (CEC) is the only officially designated organisation of employers in China. By now, CEC comprises 436,000 members, including all kinds of ownership enterprises and individual employers representing 34 industrial sectors in 30 provinces, 260 industrial cities and regions.<sup>887</sup> However the CEC does not have any branches at lower levels.

Labour disputes have been increasing continuously in China, from 35,000 in 1995 to more than 300,000 in 2005. There are no official statistics on strikes in China (as a strike is not recognised by law) but collective protests of various kinds rose six folds

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<sup>883</sup> Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

<sup>884</sup> David Metcalf and Jianwei Li (2006) "Chinese Unions: An Alice in Wonderland" in *Advances in Industrial and Labour Relations. Vol 15*, eds. David Lewin and Bruce Kaufman, Emerald Group Publishing Limited, Bingley, p. 213.

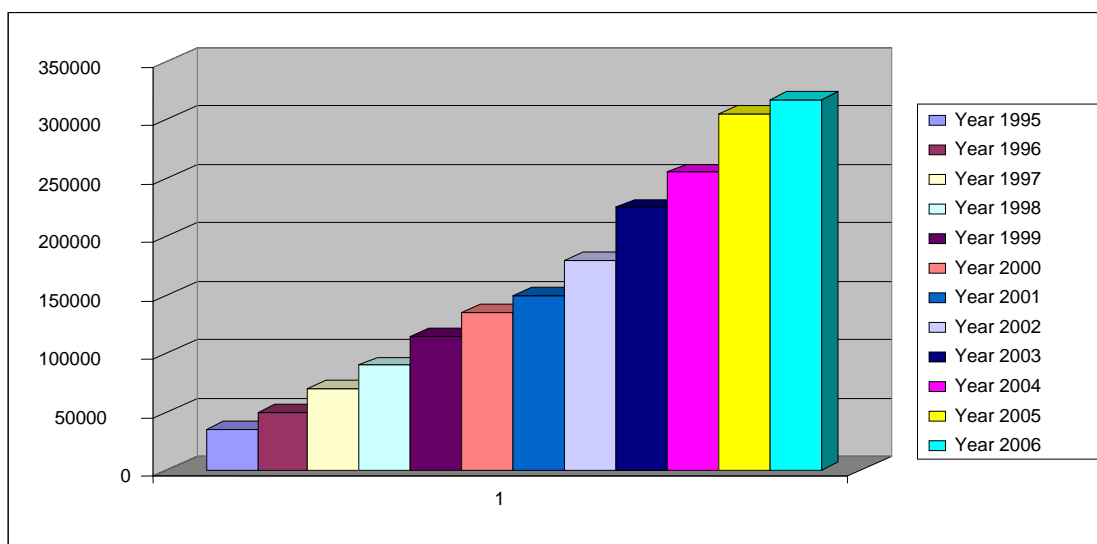
<sup>885</sup> ICFTU (2006) *Internationally Recognised Core Labour Standards in the People's Republic of China*. Available at <http://www.icftu.org/displaydocument.asp?Index=991223671&WorkLanguage=EN> (last visited 8 December 2009).

<sup>886</sup> Masaharu Hishida, Kazuko Kojima, Tomoaki Ishii and Jian Qiao (2009) *China's Trade Unions - How Autonomous Are They?*, Routledge, Oxford.

<sup>887</sup> See [www.cec-ceda.org.cn](http://www.cec-ceda.org.cn) (last visited 25 December 2009).

from 10,000 in 1993 to 60,000 in 2003, with labour-related protests (similar to strikes provided by the CILS) accounting for 46,9%.<sup>888</sup>

**Figure 3.5: Labour Disputes in China**



Labour dispute arbitration cases increased dramatically from 19,098 in 1994 to about 317,000 in 2006. In 2006 the number of collective labour disputes reached about 14,000 cases. Out of a total of 306,027 cases filed and settled in the arbitration process, 104,308 cases were mediated, whilst 131,745 cases were settled by arbitration. The other 23% were dispensed with by withdrawals, rejections, and the like. Workers prevailed in 145,352 cases, employers in 39,401, and there were split decisions in 121,274 cases.<sup>889</sup> The number of labour dispute cases appealed to the courts from labour arbitration decisions has grown dramatically from 28,285 in 1995 to 114,997 in 2004 and to 122,480 in 2005. In 2005, 121,516 court cases were settled (resolved); 62,608 by court judgment, 27,944 by mediation, and 20,998 were withdrawn, with 7,115 rejected. Interestingly, the court successfully mediated nearly one third of the settled cases.<sup>890</sup>

<sup>888</sup> Chang Hee Lee (2009) *Industrial Relations and Collective Bargaining in China*. Working paper No. 7, International Labour Office, Geneva, p. 3. Other statistics show that there are 327,152 labour disputes in 2000 and 8,247 collective actions, see Stephen Frost (2002) *Labour Standards in China, the Business and Investment Challenge*, Association for Sustainable and Responsible Investment in Asia, Hongkong, p. 7.

<sup>889</sup> Ron Brown (2008) *China Labour Dispute Resolution* [Homepage of The Foundation for Law, Justice and Society], [Online]. Available at [www.flis.org](http://www.flis.org) (last visited 20 December 2009).

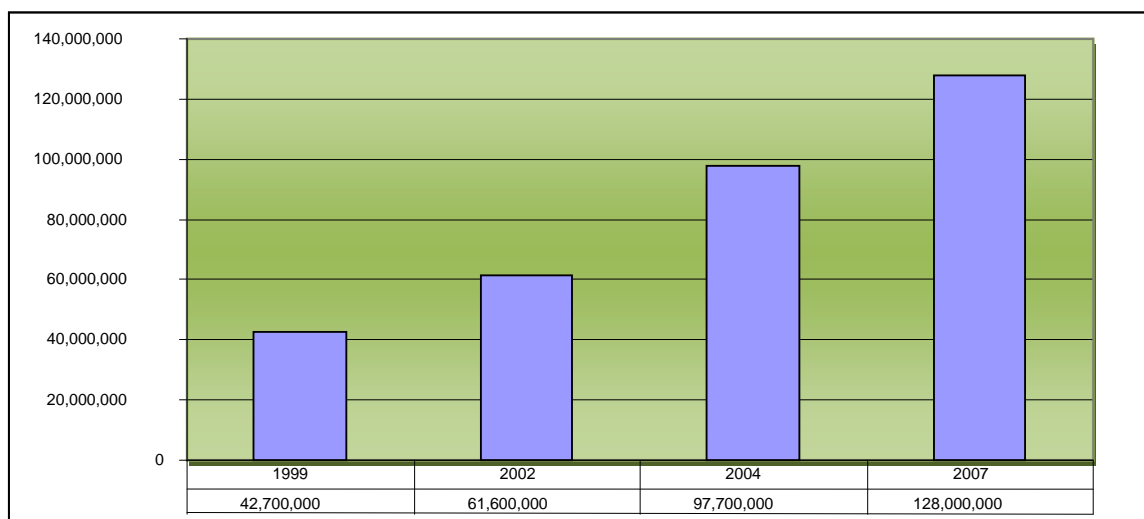
<sup>890</sup> *Ibid.*

The role of trade unions in leading and organising strikes is not recognised. If a strike happens, the role of trade unions is to get workers back to work as soon as possible. Below is an interesting example:

In 1994, 800 workers at a Japanese company in southern China went on strike over the failure of wages to keep pace with inflation. Almost immediately, the regional ACFTU office dispatched a senior union official to visit the strike leaders at their living quarters. Siding with the Japanese company, he strongly encouraged the striking workers to return to the workplace because China needed foreign investment. He scolded the strike leaders for bringing shame on China, and argued that if the Japanese company withdrew from the area it would have disastrous effects on the workers, the factory, and the economy. Asking them to compare the relatively high wages they earned in the factory with the poorer wages they might earn in their hometowns or villages, the official castigated them for being greedy. He was proud that his personal intervention convinced the strikers to return to work in a short time.<sup>891</sup>

Regarding collective bargaining in China, this is likely to grow significantly at the workplace level.<sup>892</sup> But a large proportion of collective agreements are signed by unions and employers without collective consultation or bargaining. Many workers do not know or care about the existence of collective agreements because they do not feel the effects or impact of these contracts as they do not set new labour terms.<sup>893</sup>

**Figure 3.6: Number of Workers Covered by Collective Bargaining in China<sup>894</sup>**



<sup>891</sup> Stephen Frost (2002) *Labour Standards in China, the Business and Investment Challenge*, Association for Sustainable and Responsible Investment in Asia, Hongkong, p. 7.

<sup>892</sup> Jie Shen and John Benson (2008) "Tripartite Consultation in China: A First Step towards Collective Bargaining?", *International Labour Review*, vol. 147, No. 2-3, pp. 231-248.

<sup>893</sup> *Ibid.*

<sup>894</sup> Chang Hee Lee (2009) *Industrial Relations and Collective Bargaining in China. Working paper No. 7*, International Labour Office, p. 8.

Even though the number of collective agreements has risen quickly, there are still serious deficiencies in the present collective bargaining system in China in terms of both the quality of the agreements (when many collective agreements just copy the content of the law) and the bargaining process (when the real voice and demand of workers concerned are not heard properly). These demonstrate the impotence of the monopoly and dependent trade unions in promoting rights and interests of workers. The increase in the number of collective agreements in China can be explained by bureaucratic competition to reach the target, rather than by a real increase in collective bargaining.<sup>895</sup>

### **Observations**

Freedom of association is recognised in the Constitution of China but considered as a right to form social organisations. In industrial relations, the right to organise in China is recognised by labour law and trade union law as the right to participate in and to organise in trade unions. All categories of workers have the right to join trade unions including the armed forces and the police.

Bound by the political ideology, legislation on the right to organise in China is extremely different from and not in conformity with the CILS. China has a monopoly system of trade union. At an enterprise, only one trade union is recognised, which is under the management of a higher level confederation of trade unions, and plays the role of a representative for all the workers in the enterprise. Nationwide, there is only one monopolistic system of trade unions which is not independent of the State. Workers do not have freedom of choice in exercising their right to organise. Legislation in China shows the reliance of recognition, protection and promotion of freedom of association in general and the right to organise in particular on the political ideology and principles of the ruling party where monopoly in politics might be the most important factor creating monopoly in the trade union system. It also shows that there is no need to regulate the right not to organise as the issue of closed-shop agreements does not exist in a monopoly trade union system.

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<sup>895</sup> Simon Clarke, Chang Hee Lee and Qi Li (2004) "Collective Consultation and Industrial Relations in China", *British Journal of Industrial Relations*, vol. 42, No. 2, pp. 235-254.

In China, even though it is recognised, the implementation of the right to organise in the real sense is impossible while the Party State is still unwilling and reluctant to accept, recognise, protect and promote freedom of association and the right to organise in the real senses. Reluctance and unwillingness of the Chinese Party State to grant these rights to its people for the reason that they may undermine the leadership of the Party State emphasises the role in social stability and democratic development of freedom of association and the right to organise that was discussed in Chapter I.

In the context that China has not ratified the ILO's core Conventions on freedom of association and collective bargaining, the lack of China law in protecting these rights of workers shows the importance and influence of ratifying ILO core Conventions in recognition and protection of relevant rights of workers in domestic law, which was also mentioned in Chapter I. Therefore, ratification of the ILO Conventions on freedom of association and collective bargaining is one important step in recognising and protecting the right to organise and collective bargaining in employment relations in Vietnam.

In China, the number of workers who do not have a chance to organise is many times higher than of organised workers. For those who are able to, this right is not as same as provided by the CILS. Therefore, a quarter of the world's workers have been deprived of enjoying the true right to organise and collective bargaining. This fact highlights the problem that the ILO faces in carrying out its role as the world's most competent agency to protect workers' rights internationally.

The denial of the right to strike in China Law proves that workers are not granted the most powerful weapon to protect their rights and interests. The increase in labour disputes and particularly in disputes similar to strikes in China shows the impotence of trade unions and suggests that trade unions just exist and play the role as an extension of the arm of the Party State. This is because trade unions are neither independent from the party and the State nor properly established by the workers, consequently, trade unions tend to side with the Party State over the fights for rights and interests of workers. This experience of China, once again, confirms the importance of trade unions independence provided by the CILS discussed in Chapter II. Trade unions can only function properly when they are independent from both the State and the employers. Therefore, independence of trade unions must be carefully examined when making labour law in Vietnam.

The interference of Chinese Government in industrial relation by prohibiting the right to strike of workers has led to the impotence of the Chinese Courts in dealing with labour disputes over interests. If the right to strike is not granted, there is no way for the Government (through the courts), for the workers and for the employers to find a way to resolve collective labour disputes over interests. Therefore, the interference of States in industrial relations should be limited; States should focus on providing mechanisms and tools or weapons for each party to bargain and to negotiate with each other.

In terms of collective bargaining, the number of collective bargaining agreements has increased rapidly in the last few years. However, the content of these agreements is similar to the law and thus does not improve working conditions for the workers concerned. This shows that the weakness of trade unions in demanding rights and interests for the worker that are better than rights and interests provided by law, furthermore, this trend also shows the weak linkage between the rights, interests of workers and benefits of trade unions.

Even though China has not ratified both of the ILO fundamental Conventions of freedom of association and collective bargaining, and the ACFTU is a monopoly trade union system, a representative of the ACFTU was still elected to the Governing Body of the ILO for the term 2008-2011.<sup>896</sup> This membership raises the question of how the ILO can defend its competence and role in promoting freedom of association and collective bargaining all over the world when it has given international legitimacy to a trade union organisation that makes no commitment to supporting freedom of association and the right to organise in its own country.<sup>897</sup>

In summary, China Law is not in conformity with the CILS on freedom of association and collective bargaining. It does not provide a sufficient mechanism for the recognition, protection and promotion of the right to organise and collective bargaining. On the one hand, China may be a good example for Vietnam in legislating freedom of association and collective bargaining for the purpose of stabilising the ruling of the Party State. On the contrary, China Law and practice do not provide any benefit for the

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<sup>896</sup> See Composition of the Governing Body of the International Labour Office (as elected on 2nd June 2008) Available at [www.ilo.org](http://www.ilo.org) (last visited 20 January 2010).

<sup>897</sup> Lee Cheuk-yan cited by Stephen Frost (2002) *Labour Standards in China, the Business and Investment Challenge*, Association for Sustainable and Responsible Investment in Asia, Hongkong, p. 8.

recognition, protection and promotion of the right to organise and collective bargaining of Vietnamese workers and trade unions.

The violation of the CILS in China coincides with the fact that the Chinese economy has been achieving the highest development in the world in the past decades. While the linkage between implementing the CILS on freedom of association and collective bargaining and economic performance has been studied in Chapter II, the practice in China raises the need to examine whether there is any linkage between violating the CILS on freedom of association and collective bargaining and economic development, particularly in the case of China.

## **Conclusion**

Examination of four different legislations has shown differences in the recognition, promotion and protection of the right to organise and collective bargaining provided by the ILO. Of the countries that recognise unions and collective bargaining, it is obvious that the legal systems, industrial relations systems, and traditions and values differ to varying degrees from country to country. These support the idea that the employment relations regimes of States are strongly influenced by the peculiarities of their own histories and their political aspirations.

In terms of the right to organise and the right to collective bargaining, differences occur in many aspects, such as the right to organise of the armed forces and the police is allowed in China and South Africa but not in the United Kingdom; the right to strike is not granted in China but recognised and protected in the other three countries; the levels of collective bargaining differ from country to country; the duty to bargain collectively is also different, it is obligatory in China and in the United States but not in the United Kingdom and in South Africa, etc.

Law and practice on the right to organise and collective bargaining of the four jurisdictions have highlighted some challenges for the ILO in pursuing its goal of creating social justice for all by establishing a universal labour code for the purpose of preventing the occurrence or development of conditions of privation and hardship to so many people that the peace and security of the world is imperilled. Law and practice of



the countries discussed above also reveal challenges for the ILO in making itself relevant to Member States like Vietnam that may be looking to it for renewal and modernisation in the 21<sup>st</sup> century. Analysis in this Chapter also demonstrates significant challenges for the ILO as outlined in Chapter I in the area of implementation, enforcement of the ILS as well as in the application of the ILS in ILO Member States' practice. Implementation and enforcement of the CILS are still challenging. Violation of the CILS on freedom of association and collective bargaining is found in both developed countries and developing countries. Misinterpretation of the CILS on freedom of association and collective bargaining is noticed in ratified Member States and the limitation and deprivation of the right to organise and to collective bargaining are seen in non ratified Members.

The United States, the world's biggest power, does not seem to use the ILO mechanism in promoting and implementing the CILS, instead, the United States uses its own trade mechanism to enforce the CILS. The denial of true right to organise to Chinese workers, which derives a quarter of the world's working population from enjoying properly this very essential right, raises the problem of the role of the ILO as a promoter of the CILS internationally. In a country where the CILS on freedom of association and collective bargaining are recognised and sufficiently incorporated into domestic law, such as South Africa, the mechanism of enforcing is still problematic and weak, with the result that the law is very beautiful on paper but is very different in reality. This once again raises the problem of the real influence of the CILS on domestic practice and it calls for more technique support from the ILO to be put on post ratification implementation of ILO Conventions.

Misinterpretation of the CILS is still a problem for the ILO. While the CILS on freedom of association and collective bargaining allow Member States to regulate the right to organise of the armed forces and the police, the case of *GCHQ* shows the misinterpretation of the CILS by the United Kingdom Courts, which resulted in a violation of the right to organise of a certain category of workers. Another example is while the CILS state that the right to collective bargaining is considered an indispensable right of the right to organise, in the EU there is no separate right to collective bargaining and it is considered merely a social principle.

The practice of the CILS on freedom of association and collective bargaining in these four examples analysed shows the silence of the CILS on some vital aspects of the right to organise and collective bargaining. This indicates that the ILO may do well to consider revision of some of its CILS and adoption of new standards; for example, standards on the right not to organise, standards on closed-shop agreements and, standards on the right to strike, etc.

Studies in this Chapter have demonstrated some implications for Vietnam in incorporating the CILS on freedom of association and collective bargaining into legislation and enforcing them in practice. They also provide some examples of good practice for Vietnam on strategies for evolving a new Labour Code that harnesses synergies from its history, aspirations and attempts to modernise to meet its obligations to the ILO and to liberalise its economy in line with obligations arising from membership of the WTO.

All of the four countries studied are Members of the WTO. Except for China, which joined the WTO in December 2001,<sup>898</sup> the United Kingdom, the United States and South Africa were founding members of the WTO.<sup>899</sup> The main purpose of the WTO is liberalising international trade; it is the only international organisation dealing with the global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.<sup>900</sup> The failure of the attempt to include a social clause into the WTO together with the reemphasis of the role of the ILO in dealing with the CILS<sup>901</sup> have shown the challenges between following liberalised trade policy and protecting the core rights of workers at international level.

Vietnam has opened up its economy since *Doi Moi*, which started in 1986.<sup>902</sup> Since then Vietnam has been creating and building a market economy and integrating into the

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<sup>898</sup> China joined the WTO on 11/12/2001. Source: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited 20 March 2010).

<sup>899</sup> Since 1/1/1995. Source: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited 20 March 2010).

<sup>900</sup> See the *Agreement Establishing the World Trade Organisation*, Available at [www.wto.org/english/docs\\_e/legal\\_e/04-wto.pdf](http://www.wto.org/english/docs_e/legal_e/04-wto.pdf) (last visited 20 March 2010). See also *Understanding the WTO*, Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/whatis\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm) (last visited 20 March 2010).

<sup>901</sup> For more details, see Chapter II.

<sup>902</sup> For intensive analysis, see Chapter IV.

world's economy. Vietnam has recently joined the WTO in 2007.<sup>903</sup> Integrated into the world and being a member of the WTO, Vietnam has been receiving benefits as well as suffering negative impacts of globalisation particularly in the field of labour and labour legislation.<sup>904</sup> Therefore, the experiences of these countries in recognising, promoting and protecting the right to organise and the right to collective bargaining on the one hand and, to fulfil the obligations of being members of the WTO on the other hand are crucial for Vietnam – a newcomer to the WTO.

In terms of the right to organise, experiences of these countries suggest that the right to organise, as part of the right to freedom of association, should be recognised and regulated by the highest level document – the Constitution. Experiences of the United States show that many categories of workers are excluded from the right to organise and collective bargaining due to the definition of employees and the scope of the labour law. Therefore, attention should be paid on these issues in order not to exclude any categories of workers from the right to organise and to collective bargaining provided by the CILS. In addition, workers and employers should be protected by law from discrimination when exercising their right to organise.

Experiences from South Africa and China prove that the right to organise and to collective bargaining can be granted to all categories of workers including the armed forces and the police. The interference of the State in limiting the right to organise the armed forces and the police in the United Kingdom suggests that this limitation should be carefully regulated in order not to violate the CILS on freedom of association and collective bargaining. Furthermore, from the experiences of the United States, a balance should be created between the right to private property of employers on the one hand and the right to organise of workers and trade unions on the other hand.

The right to organise has a dual aspect; therefore, legislation should cover both the right to join, to form trade unions and the right not to join or to establish trade unions. The right to organise is not a right of the workers or employers themselves but also a right of their organisations. Therefore, it is necessary to balance the right to organise of workers

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<sup>903</sup> Vietnam applied to be member of the WTO since 1995 and joined on 11/1/2007. Source: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited 20 March 2010).

<sup>904</sup> The impact of joining the WTO on labour in Vietnam is explored in Chapter IV. For the social impacts of globalisation see World Commission on the Social Dimension of Globalisation (2004) *A Fair Globalisation: Creating Opportunities for All*, International Labour Office, Geneva.

and employers and the interests of their organisations. While workers or employers can enjoy the right not to organise, the law should allow trade unions to decide their membership by themselves.

Closed-shop agreements emerge from the regulation of union security. Even though closed-shop agreements are accepted by the law subject to certain conditions, it is a violation of the right to organise and should be prohibited. Therefore, in regulating the issue of union security, the law should avoid the creation of closed-shop agreements. In addition, workers must be protected from anti union discrimination. However, closed-shop is not an issue in a monopoly system of trade union like China.

Discrimination against workers who exercise their right to organise should be prohibited both before and during the implementation of employment relationship. Trade unions are more protected by the State when they are dependent on the State and considered as an extension hand of the State.

The establishment of more than one trade union in a bargaining unit is legal and allowed by the CILS and in the United Kingdom, the United States and South Africa where plurality in political system is recognised and promoted. On the contrary, the law in China creates a monopoly system of trade union. Experiences of China reveal that the monopoly of trade union system might be a result of the monopoly in political system. The monopoly in trade union system coincides with the dependence of trade unions on the Party State, which is a violation of the CILS and leads to the impotence of trade unions in protecting and promoting workers' rights and interests.

The right to strike is the most important weapon of the workers in defending their rights and interests. The right to strike must be recognised by law. The law should create mechanisms to protect the right to strike of workers by prohibiting the replacement of strikers, allowing secondary boycotts and sit-down strikes. The no strike employment contracts should be treated as violation of the right to strike.

In terms of collective bargaining, the CILS and experiences in the four countries provide that the right to collective bargaining is an indispensable element of the right to organise and must be recognised by the law. Collective bargaining can be enhanced and fostered through the creation of institutions for the two parties to cooperate and

negotiate with each other like work councils, bargaining councils, work place forums, etc.

Collective bargaining must be carried out as a voluntary process and in good-faith between workers' representatives and employers' representatives. The legal obligation to negotiate differs from country to country. However, imposition of this obligation should be based on the capacity of trade unions and the legality of strikes. If the trade unions are strong (they can strike), they will be able to force the employers into the table to negotiate without support from the law. On the contrary, if the trade unions are weak and they are not granted the most important weapon (the right to strike); it is necessary to impose a legal obligation to negotiate in regulation of collective bargaining.

Where there is more than one trade union in a bargaining unit, recognition of the most representative trade union in case of should be regulated by law. Recognition of exclusive trade union by a majority vote of workers should be avoided because it may lead to situation where no trade union in a bargaining unit receives a majority vote to be recognised representatives of the workers. In this case, workers would not have representatives to exercise their right to collective bargaining.

The content of collective bargaining is very wide. It is not bound by conditions of work. Rather, it should be open to any other matters of mutual interest between workers and employers. Legal effects of collective agreements should be provided by law. The law should provide in detailed conditions about and the scope of collective agreements that are binding

Experiences of these countries also demonstrate that mechanism to resolve disputes arising from collective bargaining must be set out by law. Priority must be given creating chances for the two parties to negotiate and resolve the disputes by themselves. The interference of the states by the courts is only the last solution. Collective bargaining disputes should be resolved through mediation, conciliation and arbitration and finally the courts.

Experiences of these countries show that ratification of ILO fundamental Conventions on freedom of association and collective bargaining results in a useful balancing of the

power dynamic in employment relations that enhances the welfare of both the workers and the employers. Countries with more efficient and determinate labour relations policies appear to also have ratified the CILS on freedom of association and collective bargaining are those have ratified ILO Convention No. 87 and Convention No. 98. Countries with less efficient labour relations policies appear to be characterised especially by the absence of determinate and efficient principles governing such matters as freedom of association and collective bargaining.

However, ratification of the ILO core Conventions will be meaningless if the CILS are not incorporated into legislation and implemented in domestic practice. Therefore, in order to achieve true recognition, promotion and protection of the CILS on freedom of association and collective bargaining in Vietnam, it is a pre-condition that possibilities of incorporation of the CILS on freedom of association and collective bargaining into domestic legislation must be studied and measured, and the feasibilities of implementation of these incorporated standards must be defined before ratification. In addition, mechanisms to enforce and to evaluate the implementation of these incorporated standards in domestic practice must be created after ratification.

The practices of the United Kingdom, the United States, South Africa and China provide invaluable lessons for States seeking to incorporate the CILS on freedom of association and collective bargaining into their domestic labour relations laws. Their implications for Vietnam's current efforts to incorporate the CILS on freedom of association and collective bargaining are analysed in the following Chapters.

## **Chapter IV**

### **The Vietnam Legal System and the Regulation of Labour Relations**

#### **Introduction**

Discussions in the previous Chapters strongly recommend the view that that ratification, and implementation of the core ILO Conventions is critical to the recognition, promotion and protection of human rights in the workplace, which in turn contribute to national stability and social and economic development. Nevertheless, unless the domestic legal system is suited through its basic structure and constitutional laws to receive the CILS, serious inconsistencies between the two could result in procedural and substantive chaos for employment tribunals caught up between two opposed value systems. Therefore, in order to successfully incorporate the core international labour standards (CILS) on freedom of association and collective bargaining into Vietnam's legal system, it is a precondition that the legal system and the regulation of labour relations in Vietnam be investigated and analysed.

In the first section, this Chapter analyses the evolution and characteristics of the Vietnam's legal system. On that basis, it examines the relation between Vietnam law and international law in order to find out possibilities for ratification of international treaties and the opportunities as well as challenges of incorporating and implementing ratified international treaties in Vietnam's practice.

In the second section, this Chapter examines fundamental issues of labour relations in Vietnam and find out how Vietnam can regulate labour relations to strike a balance between fulfilling its international obligations to protect the rights at work as a member of the ILO and pursuing its goal of economic liberalisation due to economic integration as a member of the WTO in the context of globalisation.

#### 4.1. The Legal System in Vietnam

Vietnam is a country located in the Indochina peninsular. It consists of an S-shaped mainland and more than 3,000 islands, of which two biggest islands are Hoang Sa Island and Truong Sa Island. Geographically, the longitude of Vietnam is from 102°09' to 109°30' east, and the latitude is from 8°10' to 23°24' north. The mainland area is 331,690 km<sup>2</sup>, with a distance by air between the Northernmost point and the Southernmost point of 1,650 km. The widest place (distance East-West) is 600 km, and the narrowest place (distance East-West) is 50 km (Quảng Bình, Central Part)<sup>905</sup>.

On the land, Vietnam borders with China (a length of 1400km), with Lao (a length of 2067km) and Cambodia (a length of 1080km).<sup>906</sup> On the sea, Vietnam faces the Eastern Sea to the East and the Gulf of Thailand to the South and Southwest. The country has a long coastline of 3,260 km running from Mong Cai in the North to Ha Tien in the Southwest. Vietnam's territorial waters in the Eastern Sea extend to the East and Southeast, including the continental shelf and many islands and archipelagos.<sup>907</sup>

**Figure 4.1: Map of Vietnam**



Source: [www.chinhphu.vn](http://www.chinhphu.vn)

<sup>905</sup> Source: *Overview of Vietnam Geography*. Available at [http://www.chinhphu.vn/cttdtcp/en/about\\_vietnam08.html](http://www.chinhphu.vn/cttdtcp/en/about_vietnam08.html) (last visited 6 January 2010).

<sup>906</sup> Source: Department of Border, Ministry of Foreign Affairs, Vietnam. See also Le Thong and Nguyen Van Phu, Nguyen Minh Tue (2004) *Dia Ly Kinh Te Xa Hoi Viet Nam [trans: Vietnam's Economic and Social Geography]*, Chinh Tri Quoc Gia, Hanoi, p. 10.

<sup>907</sup> Ministry of Foreign Affairs, Vietnam (2009) *General Information about Vietnam*. Available at [http://mofa.gov.vn/en/tt\\_vietnam/](http://mofa.gov.vn/en/tt_vietnam/) (last visited 6 January 2010).



Geographic position has had a strong influence on Vietnam history and of course its social, economic, and legal system including the regulation of labour issues.

#### **4.2.1. The Evolution of the Legal System**

Due to many different historical factors, the Vietnamese legal system evolved from influences of the feudal States, French colonialisation and borrowing from socialist legal systems.

##### ***The Influence of Feudal Law***

The first State in Vietnam was established in the seventh century BC. Thanks to their hard work and creativity, Van Lang (and then Au Lac) residents created a civilisation that influenced the entire Southeast Asian region. Together with the formation of the first State in Vietnam's history, there was the evolution of a diverse economy and advanced culture known as the Red River civilisation (or Dong Son civilisation) symbolised by the Dong Son bronze drum, a heritage reflecting the quintessence of the lifestyle, traditions and culture of the ancient Vietnamese.<sup>908</sup>

In the cause of national building, Vietnamese people also had to cope with foreign aggression, particularly from China which has a long border with Vietnam. Over twelve centuries from resistance against the Qin dynasty in the third century BC until the late twentieth century, the Vietnamese had to endure hundreds of wars and uprisings against foreign aggression. Since the second century BC, for over a thousand years, Vietnam had been dominated by different Chinese dynasties. During this period, the existence of the nation had been challenged, which helped give rise to a spirit of indomitability and staunchness of the Vietnamese in their struggle to maintain the nation's vitality, preserve and build on the quintessence of its culture and determination to gain national independence. The Bach Dang victory in 938 opened up a new era in Vietnam's history – the era of development of an independent feudal State, national construction and defence. As a result, a State with a centralised-administration was established under the

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<sup>908</sup> Source [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 6 January 2010). See also Vu Minh Giang (2009) *Lich Su Vietnam: Truyen Thong va Hien Dai* [trans; *Vietnamese History: Tradition and Modern*], Giao Duc Publishing House, Hanoi; Faculty of Law (1997) *Giao Trinh Lich Su Nha Nuoc va Phap Luat Viet Nam* [trans: *Textbook on the History of State and Law in Vietnam*], Vietnam National University Publishing House, Hanoi; Le Minh Tam and Vu Thi Nga (2003) *History of the State and Law of Vietnam* Cong An Nhan Dan Publishing House, Hanoi.

Ngo (938-965), Đinh (969-979) and earlier Le (980 - 1009) dynasties. After this, Vietnam entered a period of renaissance and development under the Ly (1009-1226), Tran (1226-1400), Ho (1400-1407) and Le So (1428-1527) dynasties. Dai Viet, the name of the country under the Ly, Tran, Le So dynasties, was known as a prosperous country in Asia. This period marked the golden age of Vietnam's history with the development of agriculture, irrigation (with the construction of the Red River dike) and the establishment of traditional handicrafts.<sup>909</sup>

In ancient times, Vietnam's legal concepts were built on the wet rice farming culture, social rules and religious traditions. However, when Vietnam came under the domination of different Chinese dynasties, for more than a thousand years from the second century BC until 938 AD,<sup>910</sup> traditional Vietnamese legal concepts became heavily influenced by China law and political traditions and thoughts.<sup>911</sup> Similar to China and other feudal nations at this time, the King had the highest authority in all law making, executing and dispensing justice throughout the nation. The manner in which Kings exercised their power and customs in villages were the main sources of ancient law in antiquity.<sup>912</sup> The Bach Dang victory in 938 opened up a new era in Vietnam's history – the era of development of an independent feudal State, national construction and defence.

During the period of Vietnam's feudal dynasties, there were two most important legal substantive law codes passed named the Le dynasty's National Criminal Legal Code [Quốc Triều Hình Luật] and the Le Dynasty's National Procedural Code [Quốc Triều

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<sup>909</sup> One important achievement in the Ly-Tran dynasties was the introduction of Nom scripts, Vietnam's own writing system based on the reform of Chinese Han scripts. This period was called the Civilised Age of Dai Viet. Thang Long (the old name of Ha Noi capital) was officially recognised as the imperial city of Dai Viet according to the Proclamation on the transfer of the capital to Hanoi in 1010 by King Ly Thai To. See also Vu Minh Giang (2009) *Lich Su Vietnam: Truyen Thong va Hien Dai [trans; Vietnamese History: Tradition and Modern]*, Giao Duc Publishing House, Hanoi; Faculty of Law (1997) *Giao Trinh Lich Su Nha Nuoc va Phap Luat Viet Nam [trans: Textbook on the History of State and Law in Vietnam]*, Vietnam National University Publishing House, Hanoi; Le Minh Tam and Vu Thi Nga (2003) *History of the State and Law of Vietnam* Cong An Nhan Dan Publishing House, Hanoi.

<sup>910</sup> See *Ibid.*

<sup>911</sup> For example, in 113 BC, when King An Dương Vương failed to protect ancient Vietnam from the Han China Empire, all of the existing Vietnam Laws were replaced by the Chinese political and legal system. See Ta Van Tai (1988) *The Vietnamese Tradition of Human Rights*, Institute of East Asian Studies, Berkeley, p. 37.

<sup>912</sup> Pham Duy Nghia (2001) *Essentials of Vietnam's Business Law*, The Gioi Publishing House, Hanoi, p. 13.

Khám Tụng Điều lệ].<sup>913</sup> The National Criminal Legal Code is the most ancient law code recorded, to date, in Vietnam's legal history.<sup>914</sup> The National Procedural Law Code<sup>915</sup> is the second most prominent law code and the first procedural law code of feudal times.<sup>916</sup> Another legal document promulgated during the feudal period in Vietnam is the Gia Long Code.<sup>917</sup> However, in comparison with the above mentioned codes, the Gia Long Code was broadly a copy of the Chinese Qing Code in both structure and detailed stipulations.<sup>918</sup> Feudal law and feudal tradition has great influence on Vietnamese people and particular Vietnamese workers when workers were regarded as servants of the King and they were not entitled to any right particularly the right to organise and to collective bargaining. This historical value also results in a highly disciplined characteristic of Vietnamese people and Vietnamese workers.

### ***The Influences of French Law***

In the nineteenth century, Western capitalist countries embarked on a period of imperialism and colonialism. Through missionaries and trade, the French gradually dominated Vietnam. For the first time in history, Vietnam had to cope with the invasion of a Western country in all aspects of life including the legal system.

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<sup>913</sup> Created during the time of the Le Dynasties (1428-1788).

<sup>914</sup> Quốc Triều Hình Luật consists of 722 articles in 13 Chapters and 30 volumes. This code covered various branches of law such as criminal law, civil law, family law, and administrative law. This law code was created during the feudal regime but it represents significant advances when compared to the Chinese feudal legal regime or even the European legal system at the same time; for example, women could have the same share of inherited property as men; the wife could divorce if her husband didn't take care of her for five months (article 308), or if the son-in-law blamed the parent-in-law (article 333) after divorce, both the man and woman could remarry; if the husband died, the wife could manage all their property; and women could own land rights. The rights of the grass roots and poor people had also been protected; if royal family members or mandarins broke the law, they would receive penalties in the same way as the normal citizens would have. In addition, civil and criminal procedures were regulated by high quality law making.

<sup>915</sup> Quốc Triều Khám Tụng Điều lệ consists of 31 Chapters with 133 articles that regulated the procedural details of both case and statute law. See also Nguyen Ngoc Nhuan, Le Tuan Anh and Tran Thi Kim Anh (2006) *Mot So Van Ban Dien Che va Phap Luat Viet Nam* [trans: *Some Historic Legal Documents of Vietnam*], Khoa Hoc Xa Hoi Publishing House, Hanoi.

<sup>916</sup> Le Minh Tam and Vu Thi Nga (2003) *Lich Su Nha Nuoc va Phap Luat Viet Nam* [trans: *History of the State and Law of Vietnam*], Cong An Nhan Dan Publishing House, Hanoi, pp. 308-318.

<sup>917</sup> The Gia Long Code consists of 398 articles and was divided into 22 Chapters.

<sup>918</sup> Pham Duy Nghia (2001) *Essentials of Vietnam's Business Law*, The Gioi Publishing House, Hanoi, p. 15.

The French occupied Vietnam throughout nineteenth and twentieth centuries.<sup>919</sup> The French used their power under the pretext of legal mandates to confiscate land and property in order to create a more productive export colony. The French civil law system which was introduced in Vietnam by the French invaders, however, was not widely implemented in Vietnam's society.

Under French rule, Vietnam was divided into three regions with three different kind of political and legal status. The South of Vietnam which was directly ruled by the French enjoyed colonial status, while the Central area became a French protectorate and North of Vietnam had semi-protectorate status.<sup>920</sup> Feudal law was not abolished but used in parallel with colonial law. The civil law system originating from metropolitan France was applied to French or European individuals, while the feudal law and customary rules and practices governed indigenous Vietnamese people continually.<sup>921</sup>

The French believed that with the universality and superiority of its laws, they (the colonists) would be able to find the right answer to any local problem through simple terms of the code. Therefore, no efforts were made to incorporate or to recognise Vietnam laws or customs.<sup>922</sup> On the contrary, unlike the reception of Western laws into Japan or other East Asian countries, the French laws had never been accepted by Vietnamese people because they were not transplanted voluntarily, but were imposed by a colonial regime in order to protect property and privileges of the French.<sup>923</sup> Nonetheless, the application of civil law system and the creation of new institutions such as a court system and a law school<sup>924</sup> appear to be the most important French civil law legacy in Vietnam.

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<sup>919</sup> Vietnam was a colony of France for nearly 100 years from 1858 to 1945.

<sup>920</sup> See Peace Treaty signed between France and Nguyen Dynasty in 1883.

<sup>921</sup> John Gillespie (2002) "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam", *International and Comparative Law Quarterly*, vol. 51, pp. 641-672. See also Vu Minh Giang (2009) *Lich Su Vietnam: Truyen Thong va Hien Dai [trans; Vietnamese History: Tradition and Modern]*, Giao Duc Publishing House, Hanoi.

<sup>922</sup> Alexander Woodside (1998) "Exalting the Latecomer State: Intellectuals and the State during the Chinese and Vietnamese Reform", *The China Journal*, vol. 40, pp. 9-36.

<sup>923</sup> Pham Duy Nghia (2001) *Essentials of Vietnam's Business Law*, The Gioi Publishing House, Hanoi, p. 22.

<sup>924</sup> Đại học Đông Dương [The Indochina University] established by the French in 1906, consisted of five schools including the first Vietnam Law school.

### ***Borrowing of Socialist Law Model***

The formation of the Communist Party of Vietnam (CPV) in 1930<sup>925</sup> marked the prevailing strength of the working class and revolutionary movements led by the proletarians. In August 1945, under the leadership of the Communist Party headed by Nguyen Ai Quoc (later known as President Ho Chi Minh), the Vietnamese people, and the Armed Propaganda Unit for National Liberation (now the People's Army) successfully launched a general uprising to seize power. The victory of Cách Mạng Tháng Tám [August Revolution], marked by the National Independence Declaration on 2 September 1945<sup>926</sup> led to the establishment of the legal regime of the Democratic Republic of Vietnam – the first democratic nation in the region.<sup>927</sup> Through the Declaration of Independence, Vietnam announced that it would overthrow the feudal regime as well as repeal the colonial legal framework in Vietnam and denounce its international commitments arising from colonial rule.<sup>928</sup> Only the French colonial legal normative documents that were not contrary to the principles and objectives of the newly independent nation were applied.<sup>929</sup>

In 1946, the first Constitution of the Democratic Republic of Vietnam (1946 Constitution) was adopted.<sup>930</sup> It was the first cornerstone for the national legal system of the new democratic nation. The 1946 Constitution regulated the main sectors of a national legal regime including the following: the political system; the rights and duties of citizens; legislative power of the People's Parliament; the executive authority of the Government; the administrative system and the court system. The 1946 Constitution

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<sup>925</sup> For History of Vietnamese Communist Party see Ministry of Education and Training (2006) *Giao Trinh Lich Su Dang Cong San Viet Nam [trans: Textbook on the History of The Communist Party of Vietnam]*, Chinh Tri Quoc Gia Publishing House, Hanoi, p. 6.

<sup>926</sup> Text available at <http://www.marxists.org/reference/archive/ho-chi-minh/works/1945/declaration-independence.htm> (last visited 12 January 2010).

<sup>927</sup> For history of Vietnamese Communist Party, see Ministry of Education and Training (2006) *Giao Trinh Lich Su Dang Cong San Viet Nam [trans: Textbook on the History of The Communist Party of Vietnam]*, Chinh Tri Quoc Gia Publishing House, Hanoi.

<sup>928</sup> The Declaration stated that “people at the same time have overthrown the monarchic regime that has reigned supreme for dozens of centuries” and that “we repeal all the international obligation that France has so far subscribed to on behalf of Vietnam and we abolish all the special rights the French have unlawfully acquired in our Fatherland”.

<sup>929</sup> Order No. 47 on 10/10/1945 took effect until 1955; this assisted in the smooth transition for the development of law making for the young Republican Democratic State.

<sup>930</sup> Adopted by the National Assembly on 9/11/1946, consist of 7 Chapters and 70 Articles. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 14 January 2010).

confirmed the leadership of the communist party,<sup>931</sup> but defined Vietnam as a “democratic republic where all State powers belong to the people”<sup>932</sup> with the aim of building a socialist country in Vietnam in both economic and social senses being recognised.<sup>933</sup> The 1946 Constitution gives a “Western democratic”<sup>934</sup> impression to the reader in that it does not deal with economic theory and does not make use of stereotypical communist phrases.

During this period, the legal system in Vietnam was shaped, though it was inadequate and premature because it was a wartime legal system. The most common form of legal document in such a system was Decree issued by the Government.<sup>935</sup> This limitation could be attributable to the arduous war, in which the National Assembly could hardly hold regular sessions. Furthermore, it had to be hasty, flexible and prompt in guiding the direction of the war.<sup>936</sup>

Not long after Vietnam declared independence in 1945, the French came back to Vietnam. The earthshaking victory of Dien Bien Phu (May 1954) and the Geneva Accord (July 1954) put an end to the war of resistance against the French colonialists, opening up a new era of independence and freedom for the Vietnamese nation in which North Vietnam embarked upon the transitional period towards socialism. According to the Geneva Agreement, South Vietnam was under temporary control of the French and the Americans in the run-up to the general elections. Nevertheless, the general elections could never be held due to the interference of the United States.<sup>937</sup>

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<sup>931</sup> The Preamble of the 1946 Constitution.

<sup>932</sup> Article 4 of the 1946 Constitution.

<sup>933</sup> Article 9 and 11 of the 1946 Constitution.

<sup>934</sup> Bernard Fall (1954) *The Viet-Minh Regime: Government and Administration in the Democratic Republic of Vietnam*, Institute of Pacific Relations, New York, pp. 13-14. See also Bernard Fall (1960) “North Vietnam’s Constitution and Government”, *Pacific Affairs*, vol. 33, No. 3, pp. 282-290; Mark Sidel (2008) *The Constitution of Vietnam: A Contextual Analysis*, Hart Publishing, London, pp. 27-44.

<sup>935</sup> According to Ministry of Justice there were about 400 Degrees issued in this period.

<sup>936</sup> Dao Tri Uc (2007) “The Socialist Rule of Law State of Vietnam - Major Achievements over a Sixty-year Process of Its Building and Development”, *Social Sciences Information Review*, vol. 1, No. 2, pp. 3-12.

<sup>937</sup> The Republic of South Vietnam headed by Ngo Dinh Diem was established by the United States. Vietnam continued to be divided for more than 20 years. See George Ginsburgs (1962) “Local Government and Administration in North Vietnam, 1945 - 1954”, *The China Quarterly*, vol. 10, pp. 174-204.

Between 1954 and 1975, Vietnam had to fight another war for national liberation and unification. With untold hardships, the war came to a successful end following the victory of the historic Ho Chi Minh Operation in 1975. Since then, a unified Vietnam has ushered in a new era of peace, unification and national construction.

In terms of the legal system, two constitutions were adopted in 1959 and in 1980. The adoption of the 1959 Constitution<sup>938</sup> reflects the adaptation of the former Soviet Union's legal system, which is considered the first communist constitution in Vietnam.<sup>939</sup> This copy of a socialist legal model continued to be re-affirmed by the 1980 Constitution.<sup>940</sup> It can be inferred from these two constitutions that the Government has incorporated the core principles of socialist legal thought, by which Vietnamese legal system was built on the principles of three pillars: social legality (interchanging policy for law by the Party),<sup>941</sup> democratic centralism (uniform application of policy through a centralised Party State),<sup>942</sup> and collective mastery (subverting individualism and class).<sup>943</sup> Perpetuation of these doctrines created a particular conception of law in Vietnam during this period, where (i) law is not above the State, but rather emanates from the State; (ii) the party and the State possess prerogative powers to substitute policy for law; and (iii) the central party leads the State and the society.<sup>944</sup>

Therefore, in this period (from 1945 to 1985)<sup>945</sup> the legal system in Vietnam had been strongly influenced by socialist political notions, especially from the former Soviet Union and the People's Republic of China. Most of the main law documents and legal procedures during that period were copies of the former Soviet Union's legal models.

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<sup>938</sup> Adopted on 31/12/1959, consist of 112 Articles.

<sup>939</sup> Bernard Fall (1960) "North Vietnam's Constitution and Government", *Pacific Affairs*, vol. 33, No. 3, pp. 282-290.

<sup>940</sup> Adopted on 18/12/1980, consists of 147 Articles.

<sup>941</sup> Article 4 of the 1980 Constitution.

<sup>942</sup> Article 4 of the 1980 Constitution.

<sup>943</sup> Articles 3, 18 and 21 of the 1980 Constitution provide that state ownership and collective ownership were the main forms of economic ownership of Vietnam; only the Government and the SOEs could perform trade activities with foreign partners and other nations.

<sup>944</sup> John Gillespie (2005) "Changing Concepts of Socialist Law in Vietnam" in *Asian Socialism and Legal Change the Dynamics of Vietnamese and Chinese Reform*, eds. John Gillespie and Pip Nicholson, Asia Pacific Press, Canberra, pp. 45-75, p. 45.

<sup>945</sup> For more detail see Carol Rose (1998) "The "New" Law and Development in the Post-Cold War Era: A Vietnam Case Study", *Law and Society Review*, vol. 32, No. 1, pp. 93-140.

Even though, during the war, the roles and resolutions of the Communist Party were more powerful than the State law.<sup>946</sup>

The borrowing of socialist legal model had strong influence on labour relations and labour regulation in Vietnam. In which the State was the only and the biggest employer, all workers were employees of the State and there was not true employment relation of the market economy.

### ***Impact of Doi Moi [Renewal] on the Legal System***

Before the period of *Doi Moi* that took place after 1986, Vietnam had been centrally planned economy.<sup>947</sup> After adopting and implementing a major plan for reforms, the economy had been transformed to a market based economy and integrated into the world's economy.<sup>948</sup> However, it was only in 1989 that it actually adopted a comprehensive and radical reform package aimed at stabilising and opening up the economy, as well as enhancing freedom of choice for economic units and competition.<sup>949</sup> This marked an important milestone in the new stage of development of

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<sup>946</sup> See also Mark Sidel (2008) *The Constitution of Vietnam: A Contextual Analysis*, Hart Publishing, London, pp. 44-82.

<sup>947</sup> Central planning economy consists of three elements:

- (i) allocation of resources through central planning and elimination of markets for goods and labour;
- (ii) ownership of all major means of production by the state, representing the whole society, and elimination of private enterprise; and
- (iii) distribution of income according to labour input and the elimination of wage differentials based on labour markets.

See also Melanie Beresford (2008) "Doi Moi in Review: The Challenges of Building Market Socialism in Vietnam", *Journal of Contemporary Asia*, vol. 38, No. 2, pp. 221-243.

<sup>948</sup> The sixth National Congress of the CPV in 1986 set forth the renovation guidelines. First, the economic thinking was reformed: recognising a multi-sector economy; abolishing the economic management regime based on central plans and subsidy, constructing a new mechanism compatible with the objective rules and the development level of the economy; applying the commodity-currency relationship appropriately; production to be connected with the market and must protect the legitimate interests of labourers. The Congress put special emphasis on improving and enhancing the effectiveness of external economics. In building a new management system, a big reform in the State apparatus was carried out (to clearly differentiate the State's administrative-economic function from the function of production and business control). On 5/8/1988, the Politburo launched Resolution 10-NQ/TW on the reform of agricultural management (called Contractual system ten). Families of the cooperative members became economic entities. They had absolute right to their land and the yield they produced. Apart from the contract-based land and other contracts signed with the cooperatives, they were then allowed to actively produce and do business under various forms that used to be impossible. The Resolution signalled a turning point in agricultural development in Vietnam.

<sup>949</sup> In March 1989, the sixth Plenum of the 6th Party Central Committee released a resolution on twelve major policies designed to strengthen the renovation process with an emphasis on the most important



the Vietnam. In *Doi Moi*, the central planning and command economy is replaced by a market oriented socialist economy under State guidance.<sup>950</sup>

The *Doi Moi* policy was consistently reaffirmed throughout later Party Congresses. With the implementation of socio-economic development plans, Vietnam, from a food importing country, has become the second largest rice exporter in the world (just after Thailand).<sup>951</sup> The economy has attained a high growth rate in the late twentieth century and the early years of the twenty-first century, people's lives have been significantly improved and social policy has received greater attention.

The *Doi Moi* process with the development of a socialist oriented market economy replacing the old centrally planned economy, has created a basis for comprehensive reform of the country. In *Doi Moi*, gradual world market integration and the intensification of international trade relations had become a central pillar of Vietnam's economic policy.<sup>952</sup> Under the impact of *Doi Moi*, the State has changed from "hard authoritarian" to "soft authoritarian".<sup>953</sup> In *Doi Moi*, the old legal system, which was influenced by feudal law, colonial heritage and formed by a centrally planned economy, had been incapable of carrying the burden of new and modern economic mechanisms.<sup>954</sup> In *Doi Moi*, the legal system of a central planning economy collided with the legal

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issues of adjusting economic management, concentrating on the key targets of three economic programmes (agricultural production, consumer goods, and exports), consistently conducting the policy of a *multi-sector economy*, developing all production capacities, strongly shifting to business accounting and focusing on the market, considering it the basis and the object of the planning.

<sup>950</sup> Le Dang Doanh (1996) "Economic Reform in Vietnam: Legal and Social Aspects and Impacts", *Australian Journal of Corporate Law*, vol. 6, pp. 289-307. See also Melanie Beresford (2006) "Vietnam: the Transition from Central Planning" in *The Political Economy of South-East Asia : Markets, Power and Contestation*, eds. Garry Rodan, Kevin Hewison and Richard Robison, 3rd edn, Oxford University Press, Oxford, pp. 206-232.

<sup>951</sup> Source: <http://news.bbc.co.uk/1/hi/7317989.stm> (last visited 6 June 2006).

<sup>952</sup> Uwe Schmidt (2004) "Vietnam's Integration into the Global Economy. Achievements and Challenges", *Asia Europe Journal*, vol. 2, pp. 63-83.

<sup>953</sup> See Carlyle Thayer (2009) "Challenges to the Legitimacy of Vietnam's One-Party State", *Workshop on "The Search for Legitimacy: Managing the Consequences of Asian Development"* (National University of Singapore 27-28/7/2009). Available at <http://www.scribd.com/doc/17805934/Thayer-Vietnam-Challenges-to-Political-Legitimacy> (last visited 25 May 2010).

<sup>954</sup> Bahrin Kamarul (1996) "Reforming Economic Law in the Asia Pacific Region", *Australian Journal of Corporate Law*, vol. 6, pp. 93-114.

mechanism required by the market economy, and the law began to look increasingly irrelevant. Therefore, reform in the legal system was recognised and implemented.<sup>955</sup>

In *Doi Moi*, policies on organic and operational reforms of the State apparatus have been reflected in laws and regulations creating a legal basis for successful reforms in the State apparatus. There has been a gradual move to distinguish between the State functions on the one hand and the functions of non-State organisations and enterprises on the other hand. This has allowed the State to focus on exercising macro management functions and created a legal basis for promoting autonomy of enterprises and organisation. The need to build a socialist rule of law State is mentioned and recognised.<sup>956</sup>

Due to *Doi Moi*, social democracy has been gradually broadened. This process not only creates favourable conditions for the people to participate in State governance, but also facilitates the performance of State agencies. The role of the press, of social organisations and NGOs has been gradually enhanced. Finally, the legal bases necessary for the implementation of social policies, preservation of national cultural identity and protection of the environment have been steadily put into place.

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<sup>955</sup> Details on legal reform in Vietnam, see Le Dang Doanh (1996) "Economic Reform in Vietnam: Legal and Social Aspects and Impacts", *Australian Journal of Corporate Law*, vol. 6, pp. 289-307; Brian Quinn (2002) "Legal Reform and Its Context in Vietnam", *Columbia Journal of Asian Law*, vol. 15, No. 2, pp. 219-291; Louis Holscher (1996) "Recent Legal and Politics Changes in Vietnam and the Role of the Courts in the Vietnam Criminal Justice System", *International Criminal Justice Review*, vol. 6, pp. 58-78; Nicholson Pip and Simon Pitt (2007) "Vietnamese Legal Reform: The Discourses of Aid?" Work shop on *Rule of Law on the International Agenda: Policy, Politics and Morality* (University of Umea, Sweden 15-16/6/2007). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1087015](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087015) (last visited 15 May 2010); John Gillespie (2005) "Changing Concepts of Socialist Law in Vietnam" in *Asian Socialism and Legal Change the Dynamics of Vietnamese and Chinese Reform*, eds. John Gillespie and Pip Nicholson, Asia Pacific Press, Canberra, pp. 45-75; Zhu Ying (2002) "Economic Reform and Human Resource Management in Vietnam", *Asia Pacific Business Review*, vol. 8, No. 3, pp. 115-135.

<sup>956</sup> Truong Trong Nghia (2000) "The Rule of Law in Vietnam" in *The Rule of Law: Perspectives from Pacific Rim*, ed. Mansfield Centre for Pacific Affairs, Mansfield Centre for Pacific Affairs, Washington, D.C., pp. 123-140. See also Dao Tri Uc (2007) "The Socialist Rule of Law State of Vietnam - Major Achievements over a Sixty-year process of Its Building and Development", *Social Sciences Information Review*, vol. 1, No. 2, pp. 3-12; Dao Tri Uc (2005) *Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Vietnam [trans: Building a Socialist Rule of Law State in Vietnam]*, Tu Phap Publishing House, Hanoi; Dror Ben - Asher (1999) "What's the Connection? Vietnam, the Rule of Law, Human Rights and Antitrust", *Houston Journal of International Law*, vol. 21, No. 3, pp. 427-449.

*Doi Moi* has created legal mechanisms for development of a multi-sector market economy by:<sup>957</sup>

1. Defining regimes and forms of ownership and the legal status of enterprises and merchants;
2. Providing freedom of business and freedom to make contracts; encouraging and protecting investment; and
3. Eliminating the regime of State monopoly on trade; reducing the intervention of State agencies by administrative measures in civil, economic, and trade relations.

A new Constitution was enacted in 1992 (the 1992 Constitution)<sup>958</sup> to replace the 1980 Constitution followed by the promulgation of many important legal documents,<sup>959</sup> especially the Labour Code – the most important legal document regulating labour relation in Vietnam was passed on 23 June 1994.

The 1992 Constitution proclaimed:

The State exercises the administration of society by means of the law; it shall unceasingly strengthen socialist legality. All State organs, economic and social bodies, units of the people's armed forces, and all citizens must seriously observe the Constitution and the law, strive to prevent and oppose all criminal behaviour and all violations of the Constitution and the law. All

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<sup>957</sup> Lawrence Grinter (2006) "Vietnam' Thrust into Globalisation: Doi Moi's Long Road", *Asian Affairs: An American Review*, vol. 33, No. 3, pp. 151-165. See also Melanie Beresford (2008) "Doi Moi in Review: The Challenges of Building Market Socialism in Vietnam", *Journal of Contemporary Asia*, vol. 38, No. 2, pp. 221-243; Carol Rose (1998) "The "New" Law and Development in the Post-Cold War Era: A Vietnam Case Study", *Law and Society Review*, vol. 32, No. 1, pp. 93-140.

<sup>958</sup> Adopted on 15/4/1992, consists of 147 articles. The 1992 Constitution has been revised once in 2001. The main contain of this amendment was on the structure and organisation of the State. See Mark Sidel (2008) *The Constitution of Vietnam: A Contextual Analysis*, Hart Publishing, London, pp 111-129.

<sup>959</sup> From 01/01/1992 to 01/01/2000, 59 law were passed, these include some main documents as:

1. Law on Land 1993
2. The Civil Code 1995
3. Law on State – Owned Enterprises
4. Law on Foreign Investment 1996
5. The Commercial Code 1997
6. Law on Promulgation of Legal Documents 1997
7. Law on Promotion of Domestic Investment 1998
8. Law on Enterprises 1999.

infringements of State interests, of the rights and legitimate interests of collectives and individual citizens shall be dealt with in accordance with the law.<sup>960</sup>

The 1992 Constitution, and legal documents promulgated due to the demands of *Doi Moi* have created the legal basis for the newly reformed economic system by providing protection to: (i) Property rights, including private ownership and land-use right;<sup>961</sup> (ii) Different types of enterprises, including private and foreign-owned enterprises;<sup>962</sup> and (iii) Disputes settlement procedures.<sup>963</sup>

Vietnam has achieved impressive progress since *Doi Moi* in terms of economic development. With regard to the legal system, many legal documents have been promulgated to foster economic reform. However, the legal system in Vietnam is still a communist legal system built on three core Marxist-Leninist notions: social legality, democratic centralism and, collective mastery.<sup>964</sup> The main characteristics and functions of law are: humanity, to confirm in action of policies of a market economy under the supervision of the State toward the orientation of socialism; enforceable; a mean to transform policies of the party.<sup>965</sup> The legal system in Vietnam is based on the following main principles: all State powers belong to the people; the principle of socialist democracy; the principle of humanity; the leadership of the Communist Party over the State and society; the principle of unity between rights and obligations; the principle of equality before the law; the right of the citizens to do everything that is not forbidden by

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<sup>960</sup> Article 12 of the 1992 Constitution.

<sup>961</sup> Tran Anh Hong (1995) "An Assessment of the Vietnamese Land Law and Regulation", *Wisconsin International Law Journal*, vol. 13, pp. 585-602. See also Le Dang Doanh (1996) "Economic Reform in Vietnam: Legal and Social Aspects and Impacts", *Australian Journal of Corporate Law*, vol. 6, pp. 289-307; Gary Vause (1989) "Doing Business with Vietnam - Prospects and Concerns for the 1990s", *Florida International Law Journal*, vol. 4, No. 2, pp. 231-287.

<sup>962</sup> Tang Thanh Trai Le (1995) "The Legal Aspects of Vietnam Foreign Investment in Vietnam", *International Trade and Business Law*, vol. 1, pp. 45-77.

<sup>963</sup> John McMillan and Christopher Woodruff (1999) "Dispute Prevention Without Courts in Vietnam", *The Journal of Law, Economics and Organisation*, vol. 15, No. 3, pp. 637-658; See also Louis Holscher (1996) "Recent Legal and Political Changes in Vietnam and the Role of the Courts in the Vietnam Criminal Justice System", *International Criminal Justice Review*, vol. 6, pp. 58-78.

<sup>964</sup> AusAid (2001) *Vietnam: Legal and Judicial Development*, AusAid, Canberra, pp. 4-5. See also John Gillespie (2005) "Changing Concepts of Socialist Law in Vietnam" in *Asian Socialism and Legal Change the Dynamics of Vietnamese and Chinese Reform*, eds. John Gillespie and Pip Nicholson, Asia Pacific Press, Canberra, pp. 45-75; Lawrence Grinter (2006) "Vietnam' Thrust into Globalisation: Doi Moi's Long Road", *Asian Affairs: An American Review*, vol. 33, No. 3, pp. 151-165.

<sup>965</sup> Hoang Thi Kim Que (2007) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat [trans: Textbook on General Theory of State and Law]*, Dai Hoc Quoc Gia Ha Noi Publishing House, Hanoi, pp. 337-343. See also Dai Hoc Luat Ha Noi (1996) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat [trans: Textbook on General Theory of State and Law]*, Tu Phap Publishing House, Hanoi.

law; and the right of the State and State officials to do only what the law allows.<sup>966</sup> In terms of labour law, *Doi Moi* has created reformation in employment relation systems in which the true labour relations and the true labour market emerged and developed, which are studied in Section 4.2.

#### 4.1.2. The Role of Political Institutions in Legislation

Vietnam's political system is a single party system,<sup>967</sup> with the CPV playing the sole leadership role. The CPV is the core of Vietnam's political system, while the State is the centre and the Fatherland Front is the basis of the political system.<sup>968</sup> Since the victory of the August Revolution, the domination of the CPV has been recognised constitutionally by the first 1946 Constitution,<sup>969</sup> the 1959 Constitution,<sup>970</sup> the 1980 Constitution,<sup>971</sup> and the current 1992 Constitution.

According to the current constitution, the role of the CPV is:

The Communist Party of Vietnam, the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the working people and the whole nation, who adhere to Marxism- Leninism and Ho Chi Minh's thought, is the force leading the State and society.<sup>972</sup>

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<sup>966</sup> Nguyen Minh Doan (2006) *Cac Nguyen Tac Phap Luat Xa Hoi Chu Nghia Viet Nam Thoi Ky Doi Moi va Hoi Nhap Quoc Te [trans: The Principles of Vietnamese Socialist Law in the Era of Renovation and International Integration]*, Tu Phap Publishing House, Hanoi, pp. 55-100.

<sup>967</sup> See also Carlyle Thayer (2009) "Vietnam and the Challenge of Political Civil Society", *Contemporary Southeast Asia*, vol. 31, No. 1, pp. 1-27.

<sup>968</sup> See Hoang Thi Kim Que (2007) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat [trans: Textbook on General Theory of State and Law]*, Dai Hoc Quoc Gia Ha Noi Publishing House, Hanoi, pp. 337-343. See also Dai Hoc Luat Ha Noi (1996) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat [trans: Textbook on General Theory of State and Law]*, Tu Phap Publishing House, Hanoi.

<sup>969</sup> Preamble of the 1946 Constitution provides that:

From 1930 onward, under the leadership of the Indochinese Communist Party - now the Vietnam Lao-Dong Party - the Vietnamese revolution advanced into a new stage. The persistent struggle, full of hardship and heroic sacrifice, of our people against imperialist and feudal domination won great success: the August Revolution was victorious; the Democratic Republic of Vietnam was founded; and, on 2/9/1945, President Ho Chi Minh proclaimed Vietnam's independence to the people and the world. For the first time in their history, the Vietnamese people had founded an independent and democratic Vietnam.

<sup>970</sup> Preamble of the 1959 Constitution reconfirms the role of the CPV recognised by the 1946 Constitution.

<sup>971</sup> Article 4 of the 1980 Constitution provides that "The CPV ... is the only force leading the State and the society".

<sup>972</sup> Article 4 of the 1992 Constitution.

Being the party in power whose mission is to lead the country in all fields, the Party directs State and socio-political organisations through:<sup>973</sup>

1. Deciding on political programs, strategies, and guidelines for national construction and defence; carrying out the leadership through ideological work, personnel management, and supervision over the implementation of its political programs, guidelines, and strategies.
2. Consistently directing the personnel work and managing the contingent of cadres, at the same time promoting the responsibilities of organisations in the political system and their leaders in charge of personnel work.
3. Introducing competent cadres for posts in State agencies and in socio-political organisations.

All Party cells and members working in the State agencies as well as socio-political organisations must strictly observe the Party's resolutions and directions. The Party cells direct the concretisation of these documents into the State's laws and organisations' regulations as well as their implementation. The CPV's ideas are the sources of legislation in Vietnam.<sup>974</sup> Laws and regulations must institutionalise resolutions, decisions, and policies of the CPV.<sup>975</sup> According to the 1992 Constitution, the Constitution institutionalises the relationship between the CPV as leader, the people as master and the State as administrator. Conclusions of the National Party Congress,

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<sup>973</sup> Article 41 of the Charter of the CPV. Text available at [www.cpv.org.vn](http://www.cpv.org.vn) (last visited 20 February 2010).

<sup>974</sup> From the experience of the author: The legislation program of the National Assembly is based on the Resolution of each CPV Congress. Before the CPV 2006 Congress, the Resolution of each Congress stated clearly the name of the law that needed to be adopted. Since the latest CPV Congress in 2006, the CPV only points out the area that must be regulated by law.

<sup>975</sup> Dai Hoc Luat Ha Noi (1996) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat* [trans: *Textbook on General Theory of State and Law*], Tu Phap Publishing House, Hanoi, p. 257. See also Dao Tri Uc (2005) *Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Vietnam* [trans: *Building a Socialist Rule of Law State in Vietnam*], Tu Phap Publishing House, Hanoi; Hoang Thi Kim Que (2007) *Giao Trinh Ly Luan Chung ve Nha Nuoc va Phap Luat* [trans: *Textbook on General Theory of State and Law*], Dai Hoc Quoc Gia Ha Noi Publishing House, Hanoi; Nguyen Dang Dung (2006) *Giao Trinh Luat Hien Phap Viet Nam* [trans: *Textbook on the Constitutional Law of Vietnam*], Dai Hoc Quoc Gia Publishing House, Hanoi; Nguyen Minh Doan (2006) *Cac Nguyen Tac Phap Luat Xa Hoi Chu Nghia Viet Nam Thoi Ky Doi Moi va Hoi Nhap Quoc Te* [trans: *The Principles of Vietnamese Socialist Law in the Era of Renovation and International Integration*], Tu Phap Publishing House, Hanoi.

decisions and resolutions issued by the Political Bureau are implemented in practice by the State's legal documents.<sup>976</sup>

The basis of the political system in Vietnam is the mass organisation, which include the Fatherland Front and the so-called socio political organisations.<sup>977</sup> The mass organisation and its members play an important role in Vietnamese society and, also, interestingly, get their funding primarily from the State. The 1992 Constitution stipulates that:

The Vietnam Fatherland Front and its member organisations constitute the political base of the people's administration. The Front fosters the tradition of national unity, strengthens political and moral cohesion among the people, takes part in building and consolidating the people's power, and together with the Government attends to and protects the legitimate rights of the people, encourages the people to exercise their rights as master scrupulously respect the Constitution and the law, and monitors the activities of the State agencies, elected deputies, State officials and employees. The State creates favourable conditions for the Fatherland Front and its member organisations to work efficiently.<sup>978</sup>

In terms of legislation, the Fatherland Front and its members have the right to submit drafts of law as well as comments on drafts of law to the State.<sup>979</sup>

In Vietnam, the political system exists in close and parallel relation to the State system. The structure and operation of the CPV and socio-political organisations in Vietnam are organised at the same levels as the administrative system. State budgets play an important part in the expenses of the CPV and all socio-political organisations. This

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<sup>976</sup> Preamble of the 1992 Constitution states:

The present Constitution determines Vietnam's political economic, socio-cultural, military and security system, the basic rights and obligations of Vietnamese citizens, the structure, organising and operating principles of State offices; and institutionalises the inner workings of the set up wherein the people are masters, the State provides management and the Party leadership.

See also Dao Tri Uc (2005) *Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Vietnam [trans: Building a Socialist Rule of Law State in Vietnam]*, Tu Phap Publishing House, Hanoi, pp 15-20.

<sup>977</sup> Recognised socio-political organisations in Vietnam are: Vietnam General Confederation of Labour, Vietnamese Farmers Union, Vietnamese Women Union; Ho Chi Minh Youth League; Vietnamese Veterans Union.

<sup>978</sup> Article 9 of the 1992 Constitution.

<sup>979</sup> Article 87 of the 1992 Constitution. According to the legislation program of the current NA, the Confederation of Trade Union is in charge of making the draft of the Law on Trade Union, which will be presented to the NA in May 2010.

characteristic has strong influence on the structure, function and operation of trade unions in Vietnam, which will be examined in Chapter VI.

### **4.1.3. Legislative Bodies**

#### *The State System*

In Vietnam, State power is unity with delegation of power to, and co-ordination among State bodies in exercising legislative, executive and judicial rights.<sup>980</sup> There is no separation of State power in Vietnam; all State power belongs to the people whose foundation is the alliance between the working class and the peasantry and the intelligentsia.<sup>981</sup> The people exercise State power through the National Assembly and the People's Councils, bodies representing the will and aspirations of the people and which are elected by and accountable to the people.<sup>982</sup>

In Vietnam, the central State system consists of the National Assembly, the State President, the Government, the People's Supreme Court and the People's Supreme Procuracy. At local levels,<sup>983</sup> the local State system consists of the People's Councils, People's Committees, People's Courts and People's Procuracies. All of the bodies of the State system are entitled to issue legal documents.

All branches of State authorities are strongly attached to and under the influences of the CPV. To consolidate its full leadership, the Party does not directly cover all activities but works through its affiliates, in line with the Constitution and laws. In the elected State agencies and socio political organisations at the central level and in provinces, the CPV set up Party bodies at the same level, composed of some Party members who work for the related organisations and some members appointed by the same level Party committees. The role of the Party bodies is to lead and make other members of the organisations implement the guidelines and policies of the Party, increase the influence of the Party, improve the close relationship between the Party and the people, realise the

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<sup>980</sup> Article 4 of the 1992 Constitution.

<sup>981</sup> Article 6 of the 1992 Constitution.

<sup>982</sup> Article 6 of the 1992 Constitution. See also Louis Holscher (1996) "Recent Legal and Political Changes in Vietnam and the Role of the Courts in the Vietnam Criminal Justice System", *International Criminal Justice Review*, vol. 6, pp. 58-78.

<sup>983</sup> According to Article 18 of the 1992 Constitution, there are four administrative levels in Vietnam: Central level, provincial level, district level, and township level.



Party's resolutions on organisation and personnel management and decide matters of organisation and personnel management in line with the duties assigned by the Politburo.<sup>984</sup>

In judicial and executive bodies (the Government, ministries, courts, the inspection agency, etc.) at the central level and in provinces, Party committees set up the Party boards at the same level, which are composed of some Party members who work for the related bodies and some appointed by the same-level Party committees, including the secretaries. The role of the Party boards is: (i) to make other members of the bodies understand and implement the Party's guidelines and policies; (ii) to give advice to the Party committees on operation, duties, organisation, and personnel management; (iii) make decision within their competence; and (iv) to observe the implementation of the Party's guidelines and policies.<sup>985</sup>

For the security and armed forces, there are the central military committees and the security Party committees<sup>986</sup> which are the supreme leaders of the armed forces and the police.

### ***The National Assembly***

In Vietnam, the National Assembly (NA) is the highest representative body of the people, the highest State authority in the Socialist Republic of Vietnam. The NA consists of no more than 500 members,<sup>987</sup> directly elected by the citizens.<sup>988</sup> The term of each legislature of the NA is five years,<sup>989</sup> each year the NA holds two sessions.<sup>990</sup> The

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<sup>984</sup> Article 42 of the Charter of the CPV. Text available at [www.cpv.org.vn](http://www.cpv.org.vn) (last visited 28 February 2010).

<sup>985</sup> Article 43 of the Charter of the CPV.

<sup>986</sup> Articles 25, 26, 27, 28, 29 of the Charter of the CPV.

<sup>987</sup> Article 8 of the Law on the Election of National Assembly Members 2001. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 28 February 2010).

<sup>988</sup> According to Article 1 the Law on the Election of National Assembly Members 2001, the principles of NA election in Vietnam are: Equal, popular, directly and secret.

<sup>989</sup> Article 85 of the 1992 Constitution. The current National Assembly has the term of 4 years (2007-2011).

<sup>990</sup> Article 86 of the 1992 Constitution, Article 62 of the Law on Organisation of the National Assembly.

composition of the current NA members<sup>991</sup> contributes to show the strong relation between the NA and the CPV.

The current NA consists of the Standing Committee, the Ethnic Council and nine other Committees.<sup>992</sup> The Standing Committee is an elected body of the NA. The duties and powers of the Standing Committee include interpretation of the Constitution, laws and the issuing of ordinances on matters assigned to it by the NA. The Standing Committee conducts the routine tasks of the NA in between sessions. The Office of the NA is responsible for all research and services for all activities of the NA.

The NA has three main rights:<sup>993</sup> (i) The sole right to draw up and amend the constitutions, laws and decrees as well as the program of Vietnam law making; (ii) the right to decide fundamental issues of the countries;<sup>994</sup> and (iii) the right to exercise supreme supervision. Of the nine Committees of the NA, the Committee on Social Affairs is in charge of labour issues, which has the right to supervise the implementation of labour law, to comment and evaluate legal documents on labour issues before it is heard by the NA.

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<sup>991</sup> There are 493 representatives in the XII Vietnamese National Assembly (the current tenure); in which only 43 members are not CPV members; only 25% are full-time representatives which includes representatives from the central level (like Chairman of NA, Deputy Chairmen of NA, Chairman and Vice Chairmen of the NA Committees), other full-time representatives are from the local NA delegations. The part-time representatives normally work for the executive system, judicial system and business sector, with a small number from non-Governmental organisations (NGOs), societies and the private sector. Of the 493 NA representatives, 473 have either an undergraduate or post-graduate degree, accounting for 95.94% of the delegates. Source: National Assembly Office.

<sup>992</sup> Namely: Committee on Law; Committee on Judicial Issues; Committee on Economy; Committee on Finance and Budget; Committee National Defence and Security; Committee on Science, Technology and Environment; Committee on Foreign Affairs; Committee on Culture, Education, Youth and Teenagers; Committee on Social Affairs.

<sup>993</sup> Article 84 of the 1992 Constitution; Article 1 of the Law on the Organisation of the National Assembly 2001. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 28 February 2010). See also Nguyen Dang Dung (2006) *Giao Trinh Luat Hien Phap Viet Nam [trans: Textbook on the Constitutional Law of Vietnam]*, Dai Hoc Quoc Gia Publishing House, Hanoi, pp. 347-370.

<sup>994</sup> Such as: domestic and foreign policies; national defence and security systems; the essential principles on governing, organisation and activity of the Government, the social relations and activities of Vietnam's citizens; elect, suspend and revoke the President, the Vice-President, the Chairman and Vice-Chairmen and the members of the Standing Committee of the National Assembly, the Prime Minister of the Government; the Chief Justice of the Supreme People's Court, the Chief Prosecutor of the People's Inspectorate General; to ratify the appointment, suspension and revocation of Deputy Prime Ministers, Ministers and other members of the Government upon the proposal of the Prime Minister.

In terms of legislation, the NA adopts constitutions and passes laws and resolutions, while the NA Standing Committee issues Ordinances and Resolutions.<sup>995</sup> The Ethnic Council and the Committees of the NA cannot promulgate legal documents.<sup>996</sup>

### ***The State President***

The President is the Head of State and is the representative of Vietnam's internal and external affairs. The President is elected by the NA from among its members.<sup>997</sup> The working term for each President follows the five year working term of the NA. When the term of a legislature of the NA expires, the President of the State shall remain responsible until the new legislature of the NA has elected its new President.<sup>998</sup> The

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<sup>995</sup> Article 91 of the 1992 Constitution.

<sup>996</sup> The Committees of the National Assembly study and examine bills, legislative initiatives, drafts of Ordinances and other drafts of legal documents and reports assigned by the National Assembly or the Standing Committee of the National Assembly. They provide their opinions to the National Assembly and the Standing Committee of the National Assembly on the legislative programme. They supervise and conduct investigations within their competency and exercise other powers as stipulated by laws. They also make recommendations on issues relevant to their fields of activity.

<sup>997</sup> Article 101 of the 1992 Constitution.

<sup>998</sup> Article 101 of the 1992 Constitution provides the following duties and powers of the President as:

- To promulgate the Constitution, law and ordinances.
- To assume command of the people's armed forces and the position of Chairman of the Council for National Defence and Security.
- To recommend to the National Assembly the election, removal or dismissal of the Vice president, the Prime Minister, Chief of the Supreme People's Court, and Chief of the Supreme People's Prosecution.
- To appoint, remove and dismiss Deputy Prime Ministers, Ministers and other members of the Government on the basis of resolutions of the National Assembly.
- To proclaim decisions on declaration of a state of war, to sign decrees granting general amnesties on the basis of resolutions of the National Assembly.
- Following resolutions of the National Assembly's Standing Committee, to proclaim decision on general or local mobilisation; to declare a state of emergency; in the case where the National Assembly's Standing Committee fails to convene, to proclaim a state of emergency in the whole country or in localities.
- To recommend to the Standing Committee of the National Assembly to review ordinances within 10 days of their approval; if these ordinances or resolutions are still approved by the National Assembly's Standing Committee but the President does not concur, they can be submitted by the President to the National Assembly for decision at the earliest session.
- To appoint, remove and dismiss the Deputy Chief and Judges of the Supreme People's Court, the Deputy Chief of the Supreme People's Prosecution and members of the Supreme People's Prosecution.
- To decide on granting of senior officials' ranks and titles in the armed forces, ambassadorial titles and ranks, and State titles and ranks in other fields, and to decide on conferral of State awards, orders, medals and other honorific State titles.

Vice President of the State is also elected by the NA representatives. The Vice President helps the President in the conduction of his duties, and acts as President in the event that the President cannot discharge his duties for a long period of time. In the case of vacancy of the position of President, the Vice President shall serve as acting President until the NA elects a new President. In terms of legislation, the President issues orders and decisions to ensure the discharge of his duties and powers.<sup>999</sup>

### ***The Government***

The Government of Vietnam is the executive body of the National Assembly and the highest administrative State body.<sup>1000</sup> The Government consists of the Prime Minister, Deputy Prime Ministers, Ministers and other members.<sup>1001</sup> The Prime Minister is elected by the NA on the proposal of the President of State, and other members of the Government are approved by the NA on the recommendation of the Prime Minister.<sup>1002</sup> Other members of the Government are approved by the NA. The Prime Minister plays two roles, as the head of the Government, and as the Prime Minister.<sup>1003</sup> Apart from the

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- To appoint or recall extraordinary and plenipotentiary diplomatic representatives of Vietnam; to receive foreign extraordinary and plenipotentiary diplomatic representatives; to conduct on behalf of the State of Vietnam negotiations and sign international treaties, except where they must be submitted to the National Assembly for determination.
  - To decide on the granting, withdrawal or deprivation of Vietnamese citizenship.
  - To sign decrees granting amnesties.

<sup>999</sup> Article 106 of the 1992 Constitution. See also Nguyen Dang Dung (2006) *Giao Trinh Luat Hien Phap Viet Nam [trans: Textbook on the Constitutional Law of Vietnam]*, Dai Hoc Quoc Gia Publishing House, Hanoi, pp. 423-437.

<sup>1000</sup> Article 109 of the 1992 Constitution.

<sup>1001</sup> The current Government (2007-2011) consists of 22 Ministries and has 26 members: 1 Prime Minister, 5 Deputy Prime Ministers and 20 Ministers (2 Deputy Prime Ministers also in charge of Ministers: Minister of Foreign Affairs and Minister of Education and Training). Source: [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 February 2010).

<sup>1002</sup> Article 84 of the Law on the Organisation of the National Assembly 2001.

<sup>1003</sup> Article 114 of the 1992 Constitution provides the duties and powers of the Prime Minister are:

- To direct the work of the Government, the Government members, the People's Councils at all levels; to chair Cabinet meetings.
- To propose to the National Assembly to set up or disband ministries and organs of ministerial rank; to present to the National Assembly or, when the latter is not in session, to its Standing Committee, for approval, proposals on the appointment, release from duty, or dismissal of Deputy Prime Ministers, Cabinet Ministers and other members of the Government.
- To appoint, release from duty, or dismiss Vice-Ministers and officials of equal rank; approve the election, release from duty, secondment, and dismissal of Chairmen and Deputy Chairmen of People's Committees of provinces and cities under direct central rule.

Prime Minister, other members of the Government need not necessarily be representatives to the National Assembly.<sup>1004</sup>

The Government assumes responsibility for unifying administration of the implementation of all political, economic, cultural, social, national defence, security and external activities of the State. The Government has the duty to ensure the effectiveness of the State apparatus from the centre down to the grass roots level; ensures respect for and observance of the Constitution and the law; promotes the people's rights as masters in national construction and defence, ensures the stabilisation and improvement of the material and cultural life of the people.<sup>1005</sup>

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- To suspend or annul decisions, directives and circulars of Cabinet Ministers and other Government members, decisions and directives of People's Councils and Chairmen of People's Committees of provinces and cities under direct central rule that contravene the Constitution, the law, and other formal written documents of superior State organs.
  - To suspend the execution of resolutions of People's Councils of provinces and cities under direct central rule that contravene the Constitution, the law, and formal written orders of superior State organs; at the same time to propose to the Standing Committee of the National Assembly to annul them.
  - To make regular reports to the people through the mass media on major issues to be settled by the Government.

<sup>1004</sup> Article 110 of the 1992 Constitution.

<sup>1005</sup> Article 112 of the Constitution provides the role of the Government are:

- To direct the work of the ministries, the organs of ministerial rank and the organs of the Government, the People's Committees at all levels; to build and consolidate the unified system of the apparatus of State administration from the centre to the grass roots; to guide and control the People's Councils in their implementation of the directives of superior organs of State administration; to create favourable conditions for the People's Councils to fulfil their duties and exercise their powers as laid down by law, to train, foster, dispose and use State officials and employees.
- To ensure the implementation of the Constitution and the law in State organs, economic bodies, social organisations, units of the armed forces, and among the citizens; to organise and direct propaganda and educational work among the people concerning the Constitution and the law.
- To present draft laws, decree-laws and other projects to the National Assembly and its Standing Committee.
- To ensure the overall management of the building and development of the national economy; to carry into effect national financial and monetary policies; to manage and ensure the effective use of property in the ownership of the entire people; to promote the development of culture, education, health care, science and technology; to carry out the plan for socio-economic development and to give effect to the State budget.
- To take measures to protect the rights and legitimate interests of the citizen, to create conditions for him to exercise his rights and fulfil his duties, to protect the property and interests of the State and society; to protect the environment.
- To consolidate and strengthen national defence by the entire people and the people's security; to ensure national security and social order; to build the people's armed forces; to carry into

In the field of legislation, on the basis of the Constitution, laws and resolutions of the National Assembly, decrees and resolutions on the Standing Committee of the National Assembly, decrees and decisions of the President of the State, the Government issues resolutions, and decrees while the Prime Minister issues decisions and instructions, and controls implementation of these texts.<sup>1006</sup>

In terms of labour issues, the Government uniformly carries out State administration of labour. The Ministry of Labour, War Invalids and Social Affairs (MOLISA) is responsible before the Government to carry out State administration of labour.<sup>1007</sup> Minister of MOLISA issues Circulars, which are legal documents, to regulate labour relations.

### ***The Local People's Council and the People's Committee***

Vietnam is divided into 63 provinces.<sup>1008</sup> A province is divided into districts; a district is divided into communes and townships.<sup>1009</sup> People's Councils and People's Committees are set up at all provincial, district and township levels.<sup>1010</sup>

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effect general mobilisation, to proclaim the state of emergency and all other necessary measures to defend the country.

- To organise and direct the conduct of State inventories and statistics; State inspection and control; to fight bureaucratism and corruption in the State machinery; to settle complaints and denunciations by citizens.
- To ensure the overall management of the State's external relations; to sign, join, approve international agreements on behalf of the Government; to direct the implementation of international agreements subscribed to or joined by the Socialist Republic of Vietnam; to protect the interests of the State and the legitimate interests of Vietnamese citizens and organisations in foreign countries.
- To implement social policies, nationalities policies, policies on religion.
- To take decisions in the adjustment of the boundaries of administrative units below the level of the province and the city under direct central control.
- To coordinate its efforts with those of the Vietnam Fatherland Front and all mass organisations in the fulfilment of their duties and exercise of their rights; to create conditions for their effective functioning.

<sup>1006</sup> Article 115 of the 1992 Constitution.

<sup>1007</sup> Article 181 of the Labour Code.

<sup>1008</sup> Source: [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 December 2010).

<sup>1009</sup> Article 118 of the 1992 Constitution.

<sup>1010</sup> See Law on Organisation and Operation of the People's Councils and the People's Committees 2001. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 28 February 2010).

The People's Council is the local organ of State power; it represents the will, aspirations, and mastery of the people; it is elected by the local people and is accountable to them and to the superior State organs.<sup>1011</sup> On the basis of the Constitution, the law, and the formal written orders of superior State organs, the People's Council shall pass resolutions on four main areas: (i) measures for the serious implementation of the Constitution and the law at local level; (ii) plans for socio-economic development and the execution of the budget; (iii) national defence and security at local level; (iv) measures for stabilising and improving the people's living conditions, fulfilling all duties entrusted by the superior authorities and all obligations to the country as a whole.<sup>1012</sup> Resolutions of the People's Councils are legal documents.<sup>1013</sup> Each People's Council has a department of Labour and Social Affairs which is in charge of labour issues in the area.

The People's Local Committee elected by the People's Council is the latter's executive organ, the organ of local State administration. It is its responsibility to implement the Constitution, the law, the formal written orders of superior State organs and the resolutions of the People's Council. They are the States' local administrative bodies which are responsible for implementing the Constitution, law and the regulations that are adopted and resolved by the higher State authorities of the People's Councils.<sup>1014</sup> In terms of legislation, the People's Committees issue decisions and directives which are legal documents.<sup>1015</sup> Each People's committee has a department, which is in charge of labour and social issues including the responsibility of implementing labour law and regulations.

### ***The Judicial System***

The judicial system of Vietnam consists of the court system and the prosecution service. The Chief of the Supreme People's Court and the Chief of the Supreme People's

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<sup>1011</sup> Article 119 of the 1992 Constitution.

<sup>1012</sup> Article 120 of the 1992 Constitution.

<sup>1013</sup> Article 1 of the Law on the Promulgation of Legal Documents 2008. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 28 February 2010).

<sup>1014</sup> Article 123 of the 1992 Constitution.

<sup>1015</sup> Article 1 of the Law on the Promulgation of Legal Documents 2008.

Prosecution are elected by the NA on the recommendation of President of the State.<sup>1016</sup> The terms of office for both of these leadership positions corresponds directly with the term of the NA. These Chiefs are responsible to and report directly to the NA. When the NA is not in a formal session, they will be responsible to and report to the Standing Committee of the NA and the President of the State.<sup>1017</sup>

The national judicial system is organised on three levels: the district, the provinces/cities and the central.<sup>1018</sup> The provision of appointments, removals, dismissals and the term of office of the judge, and the election and term of office of the people's jurors of the court are all determined by the law.<sup>1019</sup> At the central and provincial level, there are six types of courts namely the Administrative, Labour, Civil, Criminal, and Economic Courts; and the Military Tribunal which is a special court for military crimes.<sup>1020</sup> At the district level, the court is not divided in to subjects but it has Judges in charge of each subject.

The People's Prosecution is in charge of exercising the right to initiate public prosecution and to ensure rigorous and consistent implementation of the law. The system of the People's Prosecution is similar to the Court system. The prosecution system is also divided into three levels: district level, provincial level and central level. The main duty of the prosecution organ is to ensure that cases are prosecuted objectively and accurately and with due process.<sup>1021</sup> The prosecution system supervises the lawfulness of the activities of the law enforcement agency such as criminal

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<sup>1016</sup> Article 85 of the Law on the Organisation of the National Assembly 2001.

<sup>1017</sup> Article 135 and Article 139 of the 1992 Constitution.

<sup>1018</sup> Article 134 of the 1992 Constitution provides:

The Supreme People's Court is the highest judicial body of the Socialist Republic of Vietnam. The Supreme People's Court shall supervise the proceedings of local People's Courts, Military Courts and other Tribunals. The Supreme People's Court shall supervise the proceedings of the Special Courts and other Court unless the National Assembly decides when setting up these Courts.

<sup>1019</sup> Article 128 of the 1992 Constitution.

<sup>1020</sup> See Law on the Organisation of the People's Courts 2002. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 8 March 2010).

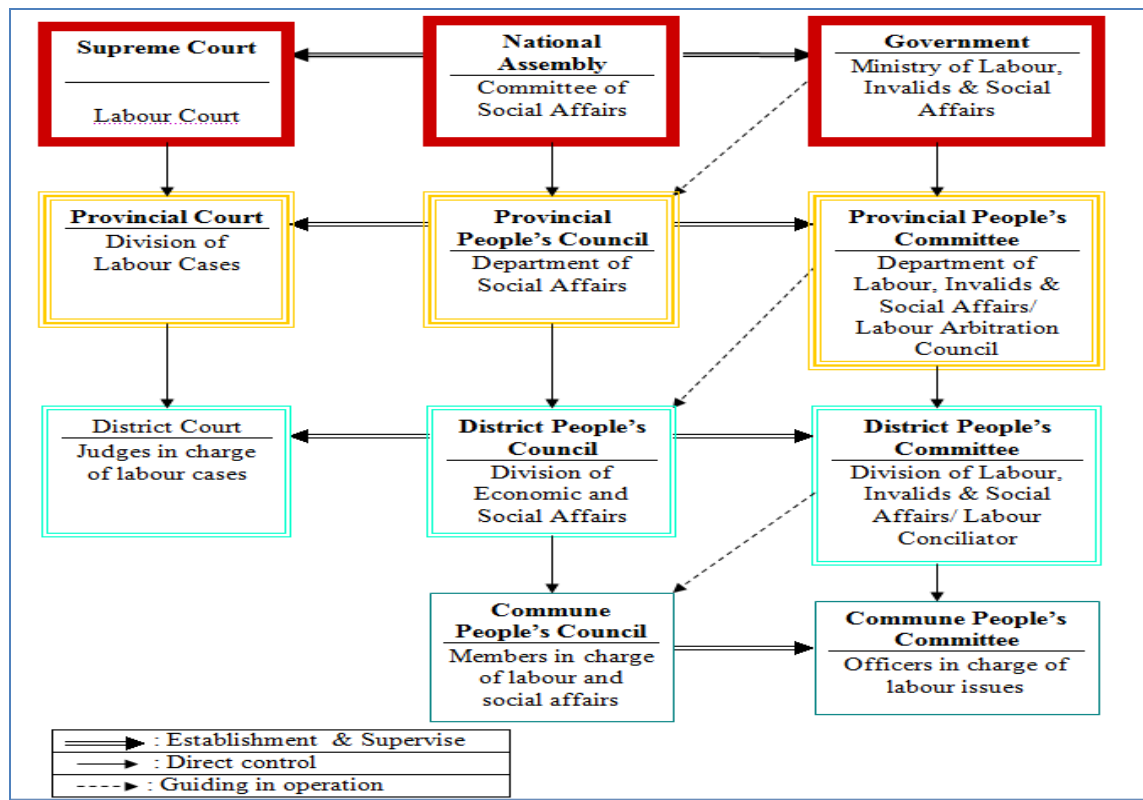
<sup>1021</sup> Article 137 of the 1992 Constitution. Before the amendment of the 1992 Constitution in 2001, the procuracy agency has the right to supervise the implementation of law of both citizens and State officials.



investigations and enforcement of judgments. It is also responsible for protection of citizens' rights.<sup>1022</sup>

In terms of legislation, the Judges' Councils of the People's Supreme Court can issue resolutions, these documents are legal documents.<sup>1023</sup> The Chief of the People's Supreme Procuracy can issue circulars which are also legal documents.<sup>1024</sup>

**Chart 4.1: State Management of Labour in Vietnam**



#### 4.1.4. The Sources of Law

Vietnamese legal system derived from the French legal system and the socialist legal system. The current legal system in Vietnam belongs substantially to the civil law system, in which the law consists of status law and further implementation

<sup>1022</sup> See Law on the Organisation of the People's Procuracies 2002. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 8 March 2010).

<sup>1023</sup> Before the promulgation of the new Law on Legal documents, the Chief Justice has the right to issue Circulars, which are legal documents.

<sup>1024</sup> Article 1 of the Law on the Promulgation of Legal Documents 2008.

regulations.<sup>1025</sup> Legal documents are promulgated by authorised different State agencies with different names as well as legal values and they are the main (and to a certain extent) the only source of law in Vietnam. The legal system is divided into branches of law [nganh luat], each of which has different subjects and different methods of enforcement.<sup>1026</sup>

**Table 4.1: Legal Documents in Vietnam and Their Issuing Bodies**

Legal Documents	Promulgated Organisations
Constitution, Laws and Resolutions	The National Assembly
Ordinances and Resolutions	The National Assembly Standing Committee
Orders and Decisions	The State President
Degrees <sup>1027</sup>	The Government
Decisions <sup>1028</sup>	The Prime Minister
Circulars <sup>1029</sup>	The Ministers and the Head of the ministerial level agencies
Decisions <sup>1030</sup>	Chief General Auditor
Joint Resolutions	Between the National Assembly Standing Committee or Government and the central offices of socio-political organisations
Resolutions	The Judges' Council of the Supreme People's Court
Joint Circulars	Between Chief Justice of the Supreme People's Court and the Chief of the Supreme People's Procuracy and

<sup>1025</sup> Pham Duy Nghia (2008) "Ban ve Du Thao Luat Ban Hanh Van Ban Quy Pham Phap Luat" [trans: On the draft of Law on the Promulgation of Legal Documents], *Legislative Studies Journal*, vol. 8, pp. 31-35.

<sup>1026</sup> For example: Criminal law; civil law; labour law; business law; marriage and family law. See also Pham Duy Nghia (2004) *Chuyen Khao Luat Kinh Te*, Nha Xuat Ban Dai Hoc Quoc Gia Ha Noi, Ha Noi ; Tran Ngoc Duong (1998) *Cac Nganh Luat Co Ban trong He Thong Phap Luat Viet Nam* [trans: Main Branches of Law in Vietnam Legal System], Chinh Tri Quoc Gia Publishing House, Hanoi; Vo Khanh Vinh (2004) "Xay Dung He Thong Phap Co He Thong va Dong Bo" [trans: Building a Systematic and Compliant Legal System], *Legislative Studies Journal*, vol. 10, pp. 28-36.

<sup>1027</sup> According to the old Law on the Promulgation of Legal Documents 1997, Resolutions of the Government are also legal documents.

<sup>1028</sup> According to the old Law on the Promulgation of Legal Documents 1997, Directives of the Prime Minister are also legal documents.

<sup>1029</sup> According to the old Law on the Promulgation of Legal Documents 1997, Decisions and Directives of the Minister are also legal documents.

<sup>1030</sup> This issue was not regulated in the old Law on the Promulgation of Legal Documents 1997. The State Audit of Vietnam was an executive institution of the Government from 1994 to 2006. From 1/1/2006, the State Audit is an independent agency under the supervision of the NA.

	Ministers; Between Ministers
Resolutions	People's Councils
Decision and Directives	People's Committees

#### 4.1.5. The Relation between Domestic Law and International Law

*Doi Moi* created a new perspective on foreign policy of Vietnam. The old foreign policy, which bound Vietnam to relations only with communist countries,<sup>1031</sup> was replaced. The new Vietnamese foreign policy is to implement consistently independence in foreign policy autonomy, self-reliance, peace, cooperation and development. In foreign relations, Vietnam implements a foreign policy of openness and diversification and multi-lateralisation in international relations, and proactively and actively engages in international economic integration while expanding international cooperation in other fields. Vietnam is a friend and reliable partner of all countries in the international community, actively taking part in international and regional cooperation processes.<sup>1032</sup>

By December 2009, Vietnam held membership of 63 International Organisations and maintained relations with over 650 Non-Governmental Organisations worldwide. Through its activities, Vietnam has been playing an increasingly important role within the UN as a member of the UN Security Council, ECOSOC, UNDP, UNFPA and UPU Executive Councils, as well as in, among others, the Non-Aligned Movement, Francophone and ASEAN.<sup>1033</sup> Vietnam has also been a member of various international treaties and bearing member obligations from these treaties. According to statistics, Vietnam has concluded more than 1000 bilateral treaties and is a party to more than 180 multilateral treaties.<sup>1034</sup>

<sup>1031</sup> The Preamble of the 1980 Constitution stated that Vietnam only maintains foreign relationship with communist countries.

<sup>1032</sup> Source: The Political Report of The Central Committee at the Party's 10th National Congress 2006.

<sup>1033</sup> Source: Ministry of Foreign Affairs.

<sup>1034</sup> Source: Ministry of Foreign Affairs. See also Dang Cong San Viet Nam (2001) *Chien Luoc Phat Trien Kinh Te Xa Hoi 2001-2010 [trans: Socio-Economic Development Strategies 2001-2010]*, Chinh Tri Quoc Gia, Hanoi.

Vietnam ratified the Vienna Convention on the Law of Treaties 1969<sup>1035</sup> on 10 October 2001;<sup>1036</sup> therefore, Vietnam has to apply the *pacta sunt servanda* principle,<sup>1037</sup> in which ratified international treaties are applied directly in Vietnam. In fact, before 2005, the law was silent on the relationship between international treaties and domestic legal documents in Vietnam.<sup>1038</sup> Before the final decision made by the adoption of a law on international treaties, there have been many debates and opinions among Vietnamese legal scholars about the relationship between international treaties and domestic law.<sup>1039</sup>

The Law on Conclusion, Accession to, and Implementation of International Treaties 2005<sup>1040</sup> makes clear the relation between international treaties, in which Vietnam is a party and domestic law. This law provides that where there is a conflict between domestic law and international treaty where Vietnam is a member, the international treaty will be applied. In these cases, if the international treaties concerned contain detailed regulations and if it is feasible to implement them, they will be applied directly. On the other hand, if it is not possible to apply them directly, incorporation into domestic law must be carried out to implement the provisions of international treaties.<sup>1041</sup> Moreover, Vietnam law requires that the promulgation of any new law

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<sup>1035</sup> Adopted on 23/5/1969, came into effect on 27/01/1980. Text available at [http://untreaty.un.org/ilc/texts/instruments/english/Conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/Conventions/1_1_1969.pdf) (last visited 6 June 2010).

<sup>1036</sup> Source: Ministry of Foreign Affairs. See also <http://treaties.un.org> (last visited 6 June 2010).

<sup>1037</sup> Article 26 of the Vienna Convention on the Law of Treaties 1969. Text available at <http://treaties.un.org> (last visited 6 June 2010).

<sup>1038</sup> The 1992 Constitution, Ordinance dated 20/8/1998 of the Standing Committee of the National Assembly on Conclusion, Accession to and Implementation of International Treaties as well as the Law on the Promulgation of Legal Documents 1997 does not mention this issue.

<sup>1039</sup> Some found it necessary to incorporate international treaties to which Vietnam is a party into domestic law disagree with the view that “treaties should be directly applied in Vietnam and the issue of incorporation of treaties should not be raised. Others insisted that “the position of treaties in the Vietnamese legal system should be enshrined in the Constitution,” or “general provisions on incorporation (of international treaties) should be added to the Law on Promulgation of Legal Documents.” Some argued that Vietnam lacks a complete and clear mechanism for enforcement of treaties and “an appropriate and dynamic environment should be created for enforcement of treaties. See also Le Mai Anh (2006) *Giao Trinh Luat Quoc Te* [trans: *Textbook on International Law*], Cong An Nhan Dan Publishing House, Hanoi.

<sup>1040</sup> Passed by the National Assembly on 14/6/2005, took effect on 01/01/2006, consists of 9 Chapters and 107 Articles. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 6 June 2010).

<sup>1041</sup> Article 6 of the Law on Conclusion, Accession to and Implementation of International Treaties 2005. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 10 June 2010).

cannot obstruct the implementation of any international treaties where Vietnam is a member.<sup>1042</sup>

Therefore, under Vietnam law, ratified ILO Conventions are a part of Vietnam's legal system and provisions of ratified Conventions are direct sources of law which is regarded higher value than domestic regulation. In addition, Vietnam law requires the transformation or incorporation of ratified ILO Conventions into the domestic legal system if the provisions of the Conventions are not detailed enough to apply directly.

#### **4.1.6. The Problems of Law Implementation and Enforcement**

##### ***The Use of Jungle Law***

Although the rule of law is mentioned in the 1992 Constitution,<sup>1043</sup> it is still not adequately understood and applied in day to day activities by State organs and their officials. Consequently, individual rights are frequently infringed. There is a big gap between the law on the book and the law in practice in the legal system of Vietnam. After more than twenty years of reform, the State organs of Vietnam have issued a considerable number of laws and regulations.<sup>1044</sup> However, instead of using laws, people prefer to rely on a great deal of informal institutions, such as social norms and

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<sup>1042</sup> Article 3(5) of the Law on the Promulgation of Legal Documents 2008. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 10 June 2010).

<sup>1043</sup> Realising the importance of the rule of law to economic reform, Vietnamese leaders have been gradually recognising and introducing the concept "rule of law" into their legal system. Since 1991, the official political documents of the Communist party of Vietnam have provided that the State of Vietnam governs society by laws. The seventh Party Congress of the CPV in 1991 introduced a notion "*nha nuoc phap quyen*" translated as "rule of law" state or "law-based" state. The policy report of the eighth National Congress of CPV in 1996 reaffirmed the necessity of building up a state governed by law in Vietnam. The term "socialist state governed by the rule of law" was finally accepted and mentioned in policy reports of the CPV and the legal system of Vietnam since the ninth National congress of the CPV in 2001. Accordingly, the rule of law concept latterly was stipulated in the amendment of 1992 Constitution in 2001 [Article 2]. See also Dao Tri Uc (2005) *Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Vietnam* [trans: *Building a Socialist Rule of Law State in Vietnam*], Tu Phap Publishing House, Hanoi; Truong Trong Nghia (2000) "The Rule of Law in Vietnam" in *The Rule of Law: Perspectives from Pacific Rim*, ed. Mansfield Centre for Pacific Affairs, Mansfield Centre for Pacific Affairs, Washington, pp. 123-140.

<sup>1044</sup> There is no official statistic of legal document in Vietnam, but from my personal statistics during the period from 01/01/1992 to 01/01/2010, there are about 210 laws, 131 ordinances, 2126 decrees, 3778 circulars were promulgated in Vietnam.

family rules to solve their daily transactions. Therefore, a phrase currently used in Vietnam is “Vietnam has to use jungle law in a jungle of laws.”<sup>1045</sup>

### *The Prevalence of Lower Level Legal Documents*

Another issue surrounding implementation of law in Vietnam has resulted from weakness in the legislation mechanism.<sup>1046</sup> The NA is in charge of legislative power; however, the law codes promulgated by the NA provide only a general legal framework. In order to be implemented in practice, provisions of law passed by the NS must be guided by documents of Government and ministries. In some cases, the guiding documents change the notion of the laws. Moreover, it normally takes a long time after the law has come in to effect for the guiding document to be adopted. As a result, many law codes are in legal force, but they cannot be enforced because the legal documents for implementing them have not yet been issued by the relevant executive organisations.<sup>1047</sup> In fact, the regulations, which are implemented in practice, are the regulations of the guiding documents not the regulations provided by law; therefore the guiding documents prevail over the primary documents.

Furthermore, limitations arising from the lawmaking approach have led to the issuing of a huge number of unnecessary guiding documents from ministerial agencies and local authorities. The large numbers of implementation documents indicate the continuing challenge to Vietnam’s legal regime. Because the law generally provides only a general framework it then needs to be guided by plenty of secondary normative regulations.<sup>1048</sup> In terms of labour law, according to MOLISA’s statistics, about 160 legal documents

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<sup>1045</sup> Pham Duy Nghia (2005) “Sau Muoi Nam Di San Phap Luat Viet Nam tu Nam 1945” [trans: On the 60 Years of Vietnamese Legal Heritage since 1945], *State and Law Journal*, vol. 8, pp. 3-9. See also John McMillan and Christopher Woodruff (1999) “Dispute Prevention Without Courts in Vietnam”, *The Journal of Law, Economics and Organisation*, vol. 15, No. 3, pp. 637-658.

<sup>1046</sup> Mark Sidel (2008) *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective*, Cambridge University Press, Cambridge, p. 25.

<sup>1047</sup> By 01/01/2010, there were 15 new laws and 1 new Ordinance which had come into effect [some took effect since 01/01/2009] but their guideline documents have not been issued, these include 44 Decrees, 29 Decisions – See Decision No. 32/QD-TTg dated 09/01/2010 of the Prime Minister.

<sup>1048</sup> For example, according to Dr. Nguyen Dinh Cung in 2008, there were more than eight pages of an implementing guiding document for an average page of law code, the rates are varied, but in the land law area the rate is 19.5/1, whereas it is 12.5/1 in construction law and 8/1 in investment law. Statistics by Dr. Le Dang Doanh in 1996 showed that there were about 10,000 applicable by-law issued by the Government in the period from 1986 to 1996. See Le Dang Doanh (1996) “Economic Reform in Vietnam: Legal and Social Aspects and Impacts”, *Australian Journal of Corporate Law*, vol. 6, pp. 289-307.

(Decrees of the Government, and Circulars of Ministries) have been promulgated providing guidance for implementing the Labour Code.<sup>1049</sup>

### ***The Inefficient Law Enforcement System***

Vietnam's law enforcement system is becoming too complex and ineffective. There are many related State ministerial agencies but none of which are effective enough in enforcing the law. The overloaded and powerless status of the enforcement system has been identified as an emergency problem.<sup>1050</sup> There are many reasons for the backlog of law enforcement in Vietnam, which include:

1. Work overload due to the number of cases – old and new.<sup>1051</sup>
2. Unclear and unrealistic judgments.<sup>1052</sup>
3. Overlapping of functions and power between different authorities.<sup>1053</sup>
4. Lack of human resources.<sup>1054</sup>

In terms of labour issues, labour law are enforced mostly by labour inspectors, who have the function of inspection of labour policies, occupational safety, and labour hygiene. However, according to MOLISA's statistics, by 31 December 2009, there were totally 409 labour inspectors (62 inspectors under MOLISA level and 347 under provincial department of labour, invalids and social affairs). In 2009, these inspectors

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<sup>1049</sup> See also Mai Duc Thien (2010) "Sua Doi, Bo Sung De Hoan Thien Bo Luat Lao Dong" [trans: Revision and Supplement to Upgrade the Labour Code], *Legislative Studies Journal*, vol. 167, pp. 28-34.

<sup>1050</sup> According to the Ministry of Justice, by July 2008 only 42.5% of all cases, and 24.72% of pecuniary penalties in civil sentences, had been enforced. There are 340,000 cases currently waiting to be enforced and these numbers are likely to continue increasing. In Ho Chi Minh City, the biggest city of Vietnam with a population of around 5 million, only 1,016 offenders had been sentenced to imprisonment; however, these sentences have not been enforced.

<sup>1051</sup> According to the Report of the Supreme Court, in 2008, the Courts received 217,581 cases and had decided 261,416 cases (83.2%). See Document No. 18/BC-TA dated 24/12/2008.

<sup>1052</sup> According to Report of the Supreme Court, in 2008, 5.2% of the Court's decisions on criminal cases and 4.7% decisions on civil cases were repealed or revised. See Document No. 18/BC-TA dated 24/12/2008 of the People's Supreme Court.

<sup>1053</sup> For example, in the field of labour law, MOLISA is in charge of safety at work and labour relations, but Ministry of Health in charge of occupational health at work; or Criminal judgments are enforced by the Ministry of Public Security, while other types of judgments [including civil, labour, administrative judgments] are enforced by the Ministry of Justice.

<sup>1054</sup> The total number of officials working for the courts (including judges and clerks) in 2008 was 11,437 and there were still 523 vacancies that need to be filled.

carried out 2,601 visits to enterprises,<sup>1055</sup> which accounts for just only 1.5% of the total enterprises in Vietnam.<sup>1056</sup>

Weakness in the judicial system and enforcing institutions as well as the hesitant attitude towards litigation may lead to a negative reputation that encourages parties to rely on non-State mechanisms for solving the disputes,<sup>1057</sup> including labour disputes, which are examined later in this Dissertation. This, among other things, increases the use of jungle law in Vietnam.

## **4.2. The Regulation of Labour Relations in Vietnam**

### **4.1.1. Labour Issues in the Context of Globalisation**

#### ***Key Economic Indicators***

Since *Doi Moi*, a new wave of economic reforms has been stirred up with emphasis on private sector development, further trade, and investment liberalisation with deeper international economic integration. Accession to the World Trade Organisation (WTO) marked a new milestone in the country's economic reform and development. Through the market oriented reforms and WTO driven adjustments, Vietnam has made remarkable achievements in the country's economic growth and stability, foreign trade expansion, attraction to foreign investment, poverty reduction, and human development.<sup>1058</sup>

Vietnam has had a high gross domestic product (GDP) growth rate in the past 5 years. The Government's target of a rate of between 7.5% and 8% GDP growth in the period

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<sup>1055</sup> Source: Report of the Inspection Department of MOLISA in 2009.

<sup>1056</sup> Source: GSO 2008.

<sup>1057</sup> Tran Thi Bich, Crafton Quentin and Tom Kompas (2009) "Institutions Matter: the Case of Vietnam", *The Journal of Socio-Economics*, vol. 38, pp. 1-12.

<sup>1058</sup> More details on Vietnam economy can be obtained by consulting [www.srv.org](http://www.srv.org); [www.chinhphu.vn](http://www.chinhphu.vn); [www.mpi.gov.vn](http://www.mpi.gov.vn); [www.worldbank.org](http://www.worldbank.org); [www.adb.org](http://www.adb.org).



from 2006 to 2010<sup>1059</sup> rate has not been fulfilled. In fact, due to many factors, average GDP growth in Vietnam during this period is about 6.9%.

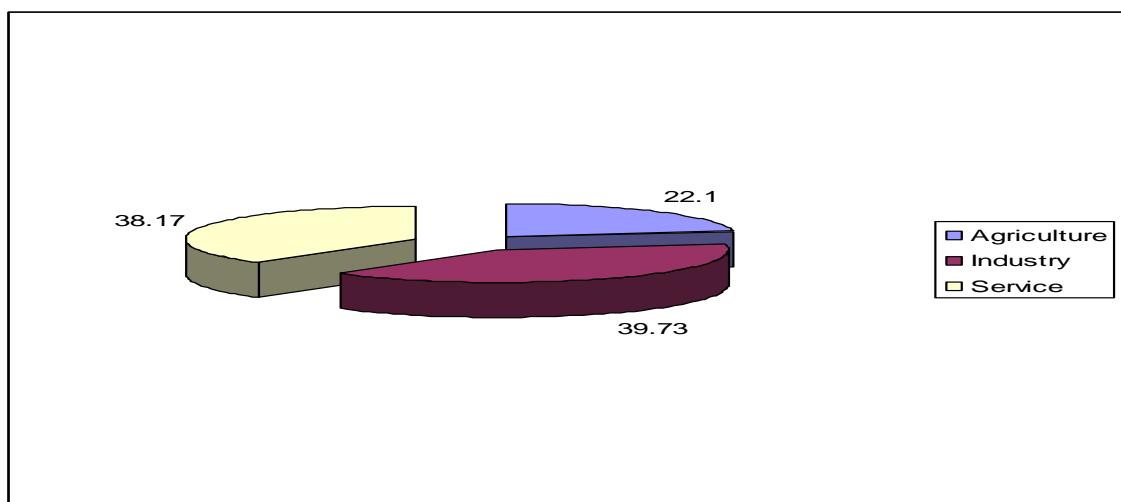
**Table 4.2: Gross Domestic Product in Vietnam**

Main indicators	2006	2007	2008	2009
GDP (billions USD)	60.93	71.13	89.83e	89.20e
GDP (constant prices, annual % change)	8.2	8.5	6.2	3.3e (5,32 –GSO)
GDP per capita (USD)	722	835e	1,040	1,019e

*Source: The World Bank; IMF; GSO*

The composition of GDP in Vietnam is divided into 3 main sectors: industry, services and agriculture. Although most of the people live and work in agriculture, industry and services make an important contribution to Vietnam’s GDP, accounting for nearly 80% of the GDP while agriculture contributes only 22% to the GDP.

**Figure 4.2: Gross Domestic Product Contribution in Vietnam (%)**



*Source: GSO 2009<sup>1060</sup>*

<sup>1059</sup> Source: Social and Economic Plan for the period from 2006 to 2010.

<sup>1060</sup> According to the Central Intelligence Agency (CIA), contribution by sectors to Vietnam’s GDP in 2008 were: agriculture: 22%, industry: 39.9%, services: 38.1%. See CIA (2009) *The World Fact Book*.

Foreign trade has been growing very fast in Vietnam. The total foreign trade (export and import) turnovers increased threefold in 2008 in comparison with in 2003. Vietnam has a deficit in foreign trade and the gap between import and export revenue has increased in the past few years.

**Table 4.3: Exports and Imports in Vietnam (in million USD)**

Foreign trade indicators	2003	2004	2005	2006	2007	2008
Imports of goods (million USD)	25,255	31,968	36,761	44,891	62,764	80,713
Exports of goods (million USD)	20,149	26,485	32,447	39,826	48,561	62,685

*Source: GSO*

### ***A Young Population***

At present, statistics on Vietnam’s population are not consistent.<sup>1061</sup> With a population of 86,2 million in 2008<sup>1062</sup> as the Government statistic, Vietnam is the third most populated country in South-East Asia (after Indonesia and the Philippines), and the thirteenth most populated country in the world.<sup>1063</sup> Rapid population increase is a big issue in Vietnam. Even though strict birth control policies, which include limiting the number of children that a family may have to two,<sup>1064</sup> have been applied, the population

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Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited 6 January 2010).

<sup>1061</sup> According to national statistics in 2008, the population of Vietnam in 2008 was 86,2 millions – see <http://www.gso.gov.vn/default.aspx?tabid=387&didmid=3&ItemID=8637> (last visited 6 January 2010). However, the latest national population and housing survey taken on 1/4/2009 showed the population of Vietnam was 85,789,573. According to the Population Reference Bureau the population of Vietnam in mid 2009 was 87,3 millions – see Population Reference Bureau (2009) *2009: World Population Data Sheet*, Population Reference Bureau, Washington, D.C.

<sup>1062</sup> Due to the inconsistency of statistic results, in this Chapter, the figures announced by the General Statistics Office (GSO) in 2008 are used.

<sup>1063</sup> CIA (2009) *The World Fact Book*. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited 6 January 2010).

<sup>1064</sup> In 2003, the National Assembly Standing Committee passed the Ordinance on Population, Ordinance No. 06/2003/PL-UBTVQH11, Article 10 of this document provided that “every couple has the right to decide the number of children they have”. After a few years, due to the rapid increase in the birth rate, this provision was finally repealed by Ordinance No. 08/2008/PL-UBTVQH12, which provides that “every couple shall have from 1 to 2 children except for particular circumstances prescribed by the Government”. Texts available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 16 January 2010).

in Vietnam has been increasing steadily. In 1999, the population of Vietnam stood at 76 million, ranked fourteenth in the world.<sup>1065</sup> After 10 years, 10 million people have been added to the country's population. According to expert forecasts, Vietnam population may reach 100 million in 2020, and will stabilise at 125 million by 2050.<sup>1066</sup>

Population varies greatly across Vietnam's regions<sup>1067</sup> and provinces.<sup>1068</sup> A current survey has shown that there is a big difference in population between regions in Vietnam. About 43% of the population lives in the two biggest deltas: Dong Bang Song Hong [Red River Delta] and Dong Bang Song Cuu Long [Mekong River Delta]. These regions are where the land is very good for agriculture. By contrast, in the mountainous and highland areas, where the infrastructure is not developed and the land is not suitable for agriculture, there is only 19% of the population. Due to the process of industrialisation and modernisation, the number of people living in urban areas has been rising. In 2009, about 30%<sup>1069</sup> of the Vietnam population lived in the urban in comparison with 23.5% in 1999.<sup>1070</sup> The difference in economic development and population density between regions and provinces creates the problem of domestic migration in Vietnam when workers move from mountainous, low density populated provinces to more developed provinces to find jobs while the population density in these developed provinces is already high.

### ***The Labour Market***

More than half of the population is of working age. In conjunction with an increase in the population, the number of people added to the working force in Vietnam has been

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<sup>1065</sup> CIA (2009) *The World Fact Book*. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited 6 January 2010).

<sup>1066</sup> Carl Haub and Phuong Thi Thu Huong (2010) *An Overview of Population and Development in Vietnam*. Available at <http://www.prb.org/Articles/2003/AnOverviewofPopulationandDevelopmentinVietnam.aspx?p=1> (last visited 6 January 2010).

<sup>1067</sup> Vietnam is divided into 8 economic regions. These are: Red River Delta; North East; North West; North Central Coast; South Central Coast; Central Highland; South East; Mekong River Delta.

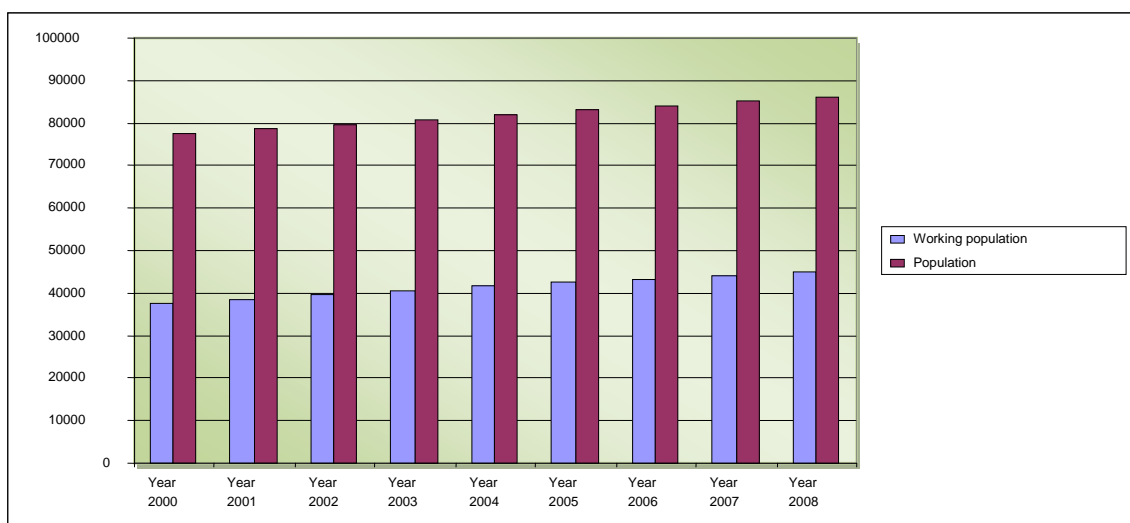
<sup>1068</sup> Vietnam is divided into 58 provinces, and 5 municipalities: Hanoi Capital; Hochiminh city; Haiphong city; Danang city; Cantho city.

<sup>1069</sup> Source: GSO 2009.

<sup>1070</sup> Source: GSO 1999.

rising. In 2008, there were 44.9 million people of working age,<sup>1071</sup> of which 21.9 million people were working in agriculture; 6.3 million people were working in manufacture industry; 5.3 million people were working in hotels and restaurants.<sup>1072</sup> There are no official statistics for the number of workers in the informal sector in Vietnam. However, the total number of employees (having employment relationship) in 2007 was 16,716,760.<sup>1073</sup> It is assumed that the rest of the working population accounting for 28.2 million people (44.9 – 16.7), was working in the informal sector.

**Figure 4.3: Number of People of Working Age (in thousands)**



*Source: GSO*

The number of State owned enterprises (SOEs) has been in decline from 5759 in 2000 to 3493 in 2007 resulting in a decrease in the number of workers in SOEs from 2,088,531 to 1,763,117 respectively. However, the number of other types of enterprises has been increasing rapidly in Vietnam. Non-State enterprises have increased from 35,004 using 1,040,902 workers in 2000 to 147,316 enterprises using 3,933,182 workers in 2007. Foreign invested enterprises also rose from 1525 in 2000 using 407,565 workers to 4961 enterprises using 1,685,861 workers in 2007.<sup>1074</sup> The increase in the

<sup>1071</sup> According to CIA, the workforce in Vietnam in 2008 is 47.41 million, ranked 12th in the world. See CIA (2009) *The World Fact Book*. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited 6 January 2010).

<sup>1072</sup> Source: GSO 2008.

<sup>1073</sup> Source: GSO 2007.

<sup>1074</sup> Source: GSO 2008.

number of enterprises has contributed to job creation as shown by the increase in workers employed in different enterprises.

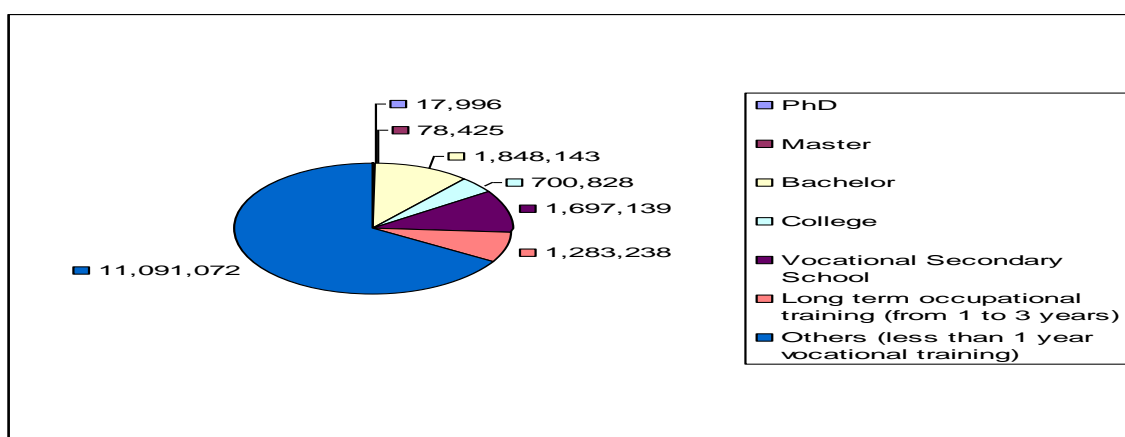
**Table 4.4: Workers in Enterprises in Vietnam**

No.	Year 2004	Year 2005	Year 2006	Year 2007
Enterprises	91756	112950	131318	155771
Workers	5770671	6237396	6715166	7382160

*Source: GSO*

Although the general literate is high, most employees in Vietnam lack training and qualifications. More than 66.36 % of employees do not have vocational training lasting more than one year.<sup>1075</sup>

**Figure 4.4: Number of Employees by Qualifications in Vietnam (in person)**



*Source: GSO*

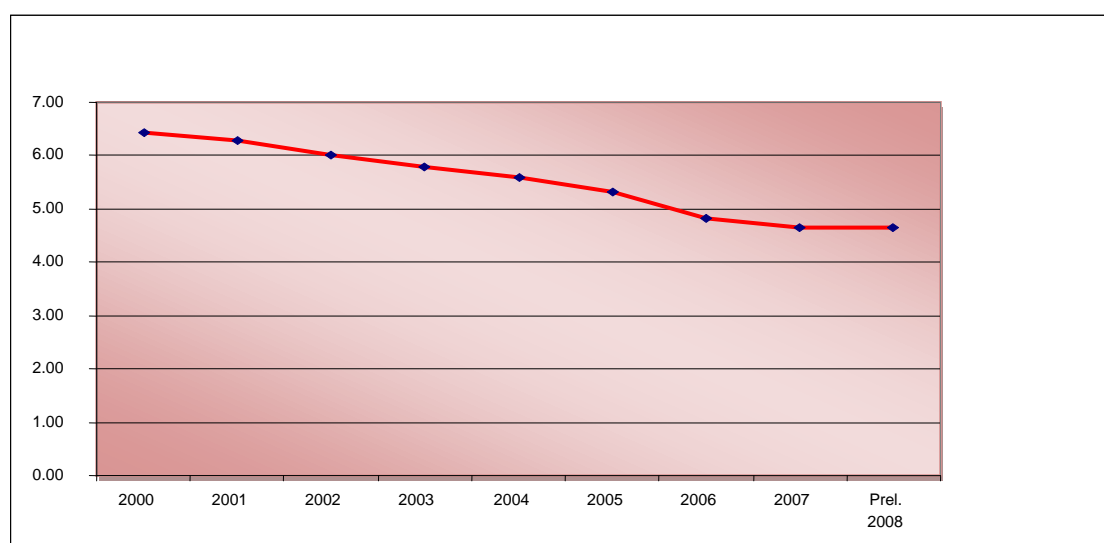
As shown above, about 1 million people are added to the population in Vietnam every year. At the same time, about 1,4 million people<sup>1076</sup> enter the workforce. The Government goal is to create 8 million jobs<sup>1077</sup> in the period 2006-2011. According to national statistics, as a consequence of economic development, the unemployment rate has been declining slightly during the past 8 years.

<sup>1075</sup> Source: GSO 2006.

<sup>1076</sup> Source: GSO 2008.

<sup>1077</sup> Source MOLISA. See also Decision No. 101/2007/QĐ-TTg dated 6/7/2007 of the Prime Minister.

**Figure 4.5: Unemployment Rate in Vietnam (%)**



*Source: GSO*

### ***Export in Highly Labour Intensive Products***

Exports accounted for a massive 72% of the Vietnam's GDP in 2008.<sup>1078</sup> Most of the exports from Vietnam are highly labour intensive products, such as textiles, footwear, and fish products. Furthermore, statistics have shown that the FDI sector has accounted for over 50% of the total export turnover of Vietnam.<sup>1079</sup> This reveals that FDI enterprises in Vietnam export most of their products. So what does the foreign investor look for in Vietnam? Is it the cheap labour force of Vietnam?<sup>1080</sup> If it is the case, it raises the problem of balancing protecting the workers from being exploited by foreigner investors with maintaining the country's FDI attraction in labour legislation.

**Table 4.5: Vietnam's Main Export Products Except for Crude Oil (in million USD)**

Products	2003	2004	2005	2006	2007	2008
Textile	3609.1	4429.8	4772.4	5854.8	7732.0	9120.4
Footwear	2260.5	2691.1	3038.8	3595.9	3999.5	4767.8
Rice	3810.0	4063.1	5254.8	4642.0	4580.0	4741.9

<sup>1078</sup> Source: GSO 2008.

<sup>1079</sup> Source: GSO 2008.

<sup>1080</sup> See also Patrick Belser (2000) *Vietnam: On The Road to Labour-Intensive Growth?*, The World Bank, Hanoi, p. 27.

Fishery	2199.6	2408.1	2732.5	3358.0	3763.4	4510.1
Wood	608.9	1101.7	1561.4	1943.1	2384.6	2829.3
Electrics	854.7	1062.4	1427.4	1807.8	2165.2	2638.4
Coffee	749.4	976.2	912.7	980.9	1232.1	1059.5

*Source: GSO*

#### **4.2.2. Brief History of the Regulation of Relations**

Vietnamese labour law is greatly influenced by and reflection of in the economic mechanisms of the country in each period. Under the feudal and colonial period, labour regulation was poor and not in existence. Since the August Revolution, the regulation of labour issues in Vietnam can be divided into three main periods: from 1945 to 1954, from 1955 to 1986 and from 1986 to date. Each period reflects the country's different economic circumstances: the period of 1945-1954 was the period of the new Government in the war with the French; while 1955-1986 was the period when the country ran a centrally planned economy and the period from 1986 onwards is when a market economy had been recognised and developed in Vietnam.

##### ***From 1945 to 1954***

Labour regulation was one of the priorities of the new Vietnam Government. After the August Revolution, the interim Government was established, which consisted the Ministry of Labour. The Ministry of Labour<sup>1081</sup> issued many legal documents to regulate labour relationships in order to protect workers. These included regulations on dismissal,<sup>1082</sup> working hours,<sup>1083</sup> regulations on wages of workers,<sup>1084</sup> regulations on working conditions,<sup>1085</sup> retirement,<sup>1086</sup> etc. Document No 29/SL on 12 March 1947 was

<sup>1081</sup> Document No. 226/SL dated 26/11/1946 provided the organisation and functions of the Ministry of Labour. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1082</sup> Document No. 24/SL dated 18/12/1946 of the President of State. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1083</sup> Document No. 22C/SL dated 18/12/1946 of the President of State. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1084</sup> Document No. 56/SL dated 29/4/1946 of the President of State. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1085</sup> Document No. 29/SL dated 12/3/1947 of the President of State. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1086</sup> Document No. 54/SL dated 3/11/1945, Document No. 105/SL dated 14/6/1946 of the President of State. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

the most important legal document regulating labour relations in this period. This document regulated the working relationship between Vietnamese or foreign employers and Vietnamese workers in industry, mines, trade, business and self – employed workers.<sup>1087</sup> The first Labour Code of Vietnam was adopted in 1946, and the first Trade Union Law was enacted in 1957 but because of the circumstance of the war, these Acts were not published for implementation.<sup>1088</sup>

### ***From 1955 to 1985***

During the period from 1955 to 1985, many legal documents were issued to regulate the multiple aspects of labour relationships. The right to work and other rights of workers were recognised by both the 1959 Constitution<sup>1089</sup> and the 1980 Constitutions.<sup>1090</sup> Other aspects of labour relations were regulated by various documents, most notably recruitment,<sup>1091</sup> trade union,<sup>1092</sup> vocational training,<sup>1093</sup> wages,<sup>1094</sup> social security,<sup>1095</sup> and disciplinary at work.<sup>1096</sup> However, in this period, under strong influences of the socialist model, Vietnam ran a centrally planned economy and a socialist legal system. The socialist legal system of Vietnam in this period had a strong impact on the regulation of labour and the role of trade union in enterprises. There was not real labour

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<sup>1087</sup> Article 1 of Document No. 29/SL dated 12/3/1946 of the President of State. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1088</sup> Dao Tri Uc (2007) “The Socialist Rule of Law State of Vietnam - Major Achievements over a Sixty-year Process of Its Building and Development”, *Social Sciences Information Review*, vol. 1, No. 2, pp. 3-12.

<sup>1089</sup> Article 21, 24, 30, 31, 32 of the 1959 Constitution.

<sup>1090</sup> Article 58, 59, 63 of the 1980 Constitution.

<sup>1091</sup> Circular No. 2-LD/TT dated 12/2/1962 of the Minister of Labour. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 January 2010).

<sup>1092</sup> The Trade Union Law 1957. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 26 January 2010).

<sup>1093</sup> Circular No 29/TT-LD, Decision No. 328/DN-DT dated 19/11/1984 of the Minister of Labour. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 January 2010).

<sup>1094</sup> Decree No. 16/CP dated 15/1/1981 of the Minister Council. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 January 2010).

<sup>1095</sup> Decree No. 218/CP dated 27/12/1961, Decision No. 219/CP on 29/5/1981 of the Minister Council. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 January 2010).

<sup>1096</sup> Decree No. 195/CP dated 31/12/1964 of the Prime Minister. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 28 January 2010).



relationship between employers and employees. The State was the only and the biggest employer so all workers worked for the State authorities or for SOEs.<sup>1097</sup>

### ***From 1986 to Date***

*Doi Moi* process, as explained above, has had a great impact on Vietnam's legal system in general and Vietnamese labour law in particular. The transformation of the economy from centrally planned economy to a socialist market oriented economy led to the creation of a labour market in Vietnam.<sup>1098</sup> The private sector has been recognised and developed.<sup>1099</sup> Thus, labour relations outside State sectors have been recognised. In addition to the State authorities or SOEs as the only employers, private employers were recognised and entitled to recruit employees. This created two types of employment relations in Vietnam. The traditional labour relations between the State and its officials are regulated by a separated body of law concerned State officials; and the newly emerging labour relations between employed workers and their employers, which are regulated by labour law.

Since the emergence of the true employment relationship, Vietnam has established a rights based system for the regulation of employment relation. The first important step in labour legislation in this period was the adoption of Decision No 217/CP on 14 November 1987. This Decision allows enterprises to recruit employees directly,<sup>1100</sup> and provides the forms of recruitment instead of receiving workers distributed by the State.<sup>1101</sup> This Decision also provided a legal basis for the creation of labour contracts,

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<sup>1097</sup> Truong Dai Hoc Luat Ha Noi (2008) *Giao Trinh Luat Lao Dong Viet Nam [trans: Textbook on Vietnamese Labour Law]*, Cong An Nhan Dan Publishing House, Hanoi, p. 12. See also Pham Cong Tru (2005) "60 Nam Phap Luat Lao Dong Viet Nam" [trans: 60 Years of Vietnamese Labour Law], *State and Law Journal*, vol. 8, pp. 7-16.

<sup>1098</sup> Zhu Ying (2002) "Economic Reform and Human Resource Management in Vietnam", *Asia Pacific Business Review*, vol. 8, No. 3, pp. 115-135. See also Melanie Beresford (2008) "Doi Moi in Review: The Challenges of Building Market Socialism in Vietnam", *Journal of Contemporary Asia*, vol. 38, No. 2, pp. 221-243.

<sup>1099</sup> Hensik Schaumburg - Muller (2005) "Private-sector Development in a Transition Economy: the Case of Vietnam", *Development in Practice*, vol. 15, No. 3-4, pp. 349-361. See also Pham Van Thuyet (1995) *The Emerging Legal Framework for Private Sector Development in Vietnam's Transitional Economy*. World Bank Working paper No. 1486/1995. Available at [www.worldbank.org](http://www.worldbank.org) (last visited 20 December 2009).

<sup>1100</sup> Article 45 of the Decision No. 217/CP dated 14/11/1987 of the Minister Council. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 16 January 2010).

<sup>1101</sup> Before that, the state had controlled totally the entire supply and demand of the labour force and assigned/selected employees for each enterprise.

in which a worker has the right to bargain before entering into a labour contract with the employer through different types of labour contract, such as short term labour contracts, long term labour contracts.<sup>1102</sup> However, provisions of this Decision were applied only to SOEs.<sup>1103</sup>

The Ordinance on Labour Contracts, issued on 30 August 1990,<sup>1104</sup> was the highest level legal document issued so far to regulate labour relations in both the State sector and non-State sector. For the first time since 1954, labour relations in the non-State sector were recognised and regulated by law.<sup>1105</sup> The Ordinance provides a relatively adequate legal platform for negotiating,<sup>1106</sup> concluding<sup>1107</sup> and implementing labour contracts,<sup>1108</sup> and a mechanism to resolve disputes arising from labour contracts.<sup>1109</sup>

Economic reform in *Doi Moi*, which has resulted in the changing nature of labour relations, requires the renewal of trade unions system in Vietnam marked by the sixth Congress of Vietnam Federation of Trade Unions. In this Congress, the General Secretary of CPV pointed out the main challenges and renewal requirements for trade unions in Vietnam, including:

- (i) to renew the content and methods of activities, organisations and staff;
- (ii) to expand their work into emerging private sector in a multi component society;
- (iii) to change the name to Vietnam General Confederation of Labour;
- (iv) to ensure their independent character in terms of organisation;
- (v) to voice ideas of their own, not opinions borrowed from the Party or from the management;
- (vi) to change the composition of the cadres so what they would not have to be party members as long as they were trained at the grass roots level or via trade union work.<sup>1110</sup>

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<sup>1102</sup> Article 46 of the Decision No. 217/CP dated 14/11/1987 of the Minister Council.

<sup>1103</sup> Pham Cong Tru (2005) “60 Nam Phap Luat Lao Dong Viet Nam” [trans: 60 Years of Vietnamese Labour Law], *State and Law Journal*, vol. 8, pp. 7-16.

<sup>1104</sup> Consists of 34 Articles and divided onto 5 Chapters. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 16 January 2010).

<sup>1105</sup> Article 2 of the Ordinance on Labour Contracts provides “Labour Contracts apply to organisations, individuals of all economic sectors employing workers, and to all employees working to earn wages”.

<sup>1106</sup> Article 3 of the Ordinance on Labour Contracts provides the principles of negotiating labour contracts.

<sup>1107</sup> Article 9, 10, 11, 12, 13, 14, 15 of Chapter II of the Ordinance on Labour Contracts.

<sup>1108</sup> Chapter III of the Ordinance on Labour Contracts.

<sup>1109</sup> Chapter IV of the Ordinance on Labour Contracts.

<sup>1110</sup> Speech of General Secretary of the CPV at the sixth Congress of Vietnam Federation of Trade Unions in 1988. Source: VGCL.

In the spirit of this renovation, a Trade Union law was enacted in 1990 to replace the Trade Union Law 1957. The Trade Union Law 1990 focuses more on the function of protecting members and aims at separating management, party State and the trade unions.<sup>1111</sup>

The right to work recognised in the previous constitutions is reconfirmed by the 1992 Constitution, which provides “Work is the right and obligation of citizens. The State and society are to draw up plans to create an increasing number of jobs for the workers.”<sup>1112</sup> The 1992 Constitution requires the State to regulate many aspects of labour relations, such as labour protection policies and provisions, working hours and provisions regarding salary, rest and social insurance for public employees and other wage earners; it also encourages other forms of social insurance for the workers.<sup>1113</sup>

After more than ten years of drafting,<sup>1114</sup> the first labour code of Vietnam was enacted in 1994.<sup>1115</sup> The purpose of the 1994 Labour Code is stated in its Preamble:

Inheriting and developing the labour laws of Vietnam since the August Revolution of 1945, this Code institutionalises the “renewal” policy of the Communist Party of Vietnam and provides for detailed implementation of the provisions of the 1992 Constitution of the Socialist Republic of Vietnam on labour, and its utilisation and management.<sup>1116</sup>

The Labour Code 1994 regulates the labour relationship between a wage earning worker and the employer, and social relationships, which are directly related to the labour relationship.<sup>1117</sup> The Labour Code applies to all workers, and organisations or individuals utilizing labour based on a labour contract in any sector of the economy and in any form of ownership. This Code also applies to trade apprentices, domestic

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<sup>1111</sup> Extensive analysis in Chapter VI.

<sup>1112</sup> Article 55 of the 1992 Constitution.

<sup>1113</sup> Article 56 of the 1992 Constitution.

<sup>1114</sup> The Drafting Committee of the Labour Code was established and commenced working in 1982. See also Luu Binh Nhung (2007) “Luật Lao Động Việt Nam Thời Kỳ Đổi Mới” [trans: Vietnamese Labour law in Doi Moi Period], *Legal Studies Journal*, vol. 1, pp. 27-35.

<sup>1115</sup> Passed on 23/6/1994 and came into effect on 01/01/1995, consist of 198 Articles and divided into 17 Chapters. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 16 January 2010).

<sup>1116</sup> Preamble of the Labour Code.

<sup>1117</sup> Article 2 of the 1994 Labour Code.

servants, and other forms of labour stipulated in the Code.<sup>1118</sup> The Labour Code 1994 has been amended three times in 2002,<sup>1119</sup> 2006,<sup>1120</sup> and 2007.<sup>1121</sup>

In recent years, together with various amendments to the Labour Code 1994, many high level legal documents have been issued to regulate labour relations in Vietnam.<sup>1122</sup> However, at present, the Labour Code 1994 [as amended]<sup>1123</sup> is the most important legal document and the main source of Vietnamese labour law system.

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<sup>1118</sup> Article 3 of the 1994 Labour Code.

<sup>1119</sup> Amendment in 2001 many institutions such as labour contracts, collective bargaining, labour disputes, etc. See also Do Ngan Binh (2002) “Nhưng Diem Moi trong Luat Sua Doi Bo Sung Mot So Dieu cua Bo Luat Lao Dong [trans: New Regulations of the Law on the Amendment of the Labour Code]”, *Legal Studies Journal*, vol. 5, pp. 6-11; Luu Binh Nhuong (2002) “Hop Dong Lao Dong Trong Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong [trans: Labour Contract in the Law on the Amendment of the Labour Code]”, *Legal Studies Journal*, vol. 5, pp. 47-52; Nguyen Huu Chi (2002) “Nhưng Diem Moi cua Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong ve Giai Quyet Tranh Chap Lao Dong” [trans: New Regulations on Labour Disputes of the Law on the Amendment of the Labour Code], *Democracy and Law Journal*, vol. 12, pp. 24-27; Nguyen Kim Phung (2003) “Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong - Buoc Phat Trien Moi trong Linh Vuc Bao Ve Nguoi Lao Dong [trans: Law on the Amendment of the Labour Code: New Progress in the Protection of workers]”, *Legal Studies Journal*, vol. 2, pp. 37-47; Tran Thuy Lam (2003) “Mot So Diem Moi ve Thoa Uoc Lao Dong Tap The theo Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong va Van Ban Huong Dan Thi Hanh” [Some New Regulations on Collective Bargaining of the Law on the amendment of the Labour Code and its Implementing Documents], *Legal Studies Journal*, vol. 3, pp. 47-50; Nguyen Xuan Thu (2003) “Nhưng Diem Moi ve Hop Dong Lao Dong trong Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong” [trans: New Regulations on Labour Contract of the Law on the Amendment of the Labour Code], *Legal Studies Journal*, vol. 3, pp. 41-47.

<sup>1120</sup> The Author was a member of the Drafting group of the amendment in 2006. The amendment in 2006 took place when labour disputes leading to strikes were rising rapidly and threatened to undermine social stability in Vietnam. Therefore, this amendment revised all the content of provisions on labour disputes in Chapter 14 of the 1994 Labour Code. See also Nguyen Tan Long (2007) “Nhưng Noi Dung Co Ban trong Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong 2006 [trans: Main Content of the Law on the Amendment of the Labour Code 2006]”, *Prosecutions Journal*, vol. 2, pp. 49-5; Pham Cong Bay (2007) “Mot So Noi Dung Co Ban cua Luat Sua Doi, Bo Sung Mot So Dieu cua Bo Luat Lao Dong” [trans: Main Content of the Law on the Amendment of the Labour Code], *State and Law Journal*, vol. 6, pp. 58-69.

<sup>1121</sup> Amendment in 2007 revised only one Article [Article 73] of the 1994 Labour Code, adding one more public holiday [fully paid day off for the employees] – The King Hung’s anniversary day on the 10 March of the Lunar Calendar.

<sup>1122</sup> Law on Vocational Training 2006, Law on Social Insurance 2006, Law on Vietnamese Workers Working Overseas 2006. Texts available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 20 January 2010).

<sup>1123</sup> Hereafter the Labour Code.

### 4.2.3. Principles and Subject Matter of Vietnam Labour Law

#### *Principles of Vietnam Labour Law*

Labour law in Vietnam is built on the principles of protecting the employees, protecting the rights and legal interests of the employers, and harmonising economic policies with social policies.<sup>1124</sup> The Labour Code commits itself to:

[It] protects the right to work, benefits, and other rights of employees and, at the same time, protects the legal rights and benefits of employers, thereby creating conditions for harmonious and stable labour relations, contributing to the development of the creativity and talents of intellectual and manual workers and of labour managers in order to achieve productivity, quality and social advancement in labour, production, and services, effective utilisation and management of labour, and contributing to industrialisation and modernisation of the country, for a wealthy and strong country, and a fair and civilised society.<sup>1125</sup>

The 1992 Constitution stipulates that working is the right and obligation of every citizen in Vietnam.<sup>1126</sup> Therefore, every person has the right to work, to choose freely the type of work or trade, to learn a trade, and to improve his/her professional skill without being discriminated against on the basis of gender, race, social class, beliefs, or religion. The law prohibits maltreatment of workers and all forms of forced labour.<sup>1127</sup>

The State and society are to draw up plans to create an increasing number of jobs for the workers.<sup>1128</sup> Any activity which creates employment, which is a form of self-employment, which teaches a skill or trade to assist others to find work, and any production or business activity which employs a high number of workers is encouraged, facilitated or assisted by the State.<sup>1129</sup>

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<sup>1124</sup> Truong Dai Hoc Luat Ha Noi (2008) *Giao Trinh Luat Lao Dong Viet Nam [trans: Textbook on Vietnamese Labour Law]*, Cong An Nhan Dan Publishing House, Hanoi, pp. 18-30.

<sup>1125</sup> Preamble of the Labour Code.

<sup>1126</sup> Article 55 of the 1992 Constitution.

<sup>1127</sup> Article 5 of the Labour Code.

<sup>1128</sup> Article 55 of the 1992 Constitution.

<sup>1129</sup> Article 5 of the Labour Code.

### ***Subject Matter of Vietnam Labour Law***

Vietnamese labour law is limited to two types of relationships: (i) the labour relationship between a wage earning worker and his employer; and, (ii) the social relationships which are directly related to the labour relationship.<sup>1130</sup> Therefore, informal workers and self-employed workers are not covered by the Labour Code.

In regulating the relationship between employees and employers, labour law in Vietnam regulates issues such as<sup>1131</sup> working age,<sup>1132</sup> rights of employees and employers in labour contracts,<sup>1133</sup> trade unions,<sup>1134</sup> collective bargaining,<sup>1135</sup> working conditions,<sup>1136</sup> wages,<sup>1137</sup> time of work, time of rest,<sup>1138</sup> labour discipline,<sup>1139</sup> labour disputes.<sup>1140</sup>

In addition, the social relationships, which are directly linked to the labour relationship, which are subjects of labour law, include<sup>1141</sup> job creation,<sup>1142</sup> vocational training,<sup>1143</sup> compensation at work,<sup>1144</sup> social insurance,<sup>1145</sup> administration of labour.<sup>1146</sup>

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<sup>1130</sup> Article 2 of the Labour Code.

<sup>1131</sup> Truong Dai Hoc Luat Ha Noi (2008) *Giao Trinh Luat Lao Dong Viet Nam [trans: Textbook on Vietnamese Labour Law]*, Cong An Nhan Dan Publishing House, Hanoi, pp. 7-10.

<sup>1132</sup> Normal working age in Vietnam is 15.

<sup>1133</sup> Chapter 4 of the Labour Code.

<sup>1134</sup> Chapter 13 of the Labour Code, Trade Union Law 1990.

<sup>1135</sup> Chapter 5 of the Labour Code.

<sup>1136</sup> Chapter 9 of the Labour Code.

<sup>1137</sup> Chapter 6 of the Labour Code.

<sup>1138</sup> Chapter 7 of the Labour Code.

<sup>1139</sup> Chapter 8 of the Labour Code.

<sup>1140</sup> Chapter 14 of the Labour Code .

<sup>1141</sup> Truong Dai Hoc Luat Ha Noi (2008) *Giao Trinh Luat Lao Dong Viet Nam [trans: Textbook on Vietnamese Labour Law]*, Cong An Nhan Dan Publishing House, Hanoi, pp. 11-14.

<sup>1142</sup> Chapter 2 of the Labour Code.

<sup>1143</sup> Chapter 3 of the Labour Code, Law on Vocational Training 2006.

<sup>1144</sup> Chapter 9 of the Labour Code.

<sup>1145</sup> Chapter 12 of the Labour Code, Law on Social Insurance 2006.

<sup>1146</sup> Chapter 16 of the Labour Code.

#### 4.2.4. Relationship between Vietnam and the ILO

In the light of the new foreign policy generated by *Doi Moi*, Vietnam rejoined the ILO in 1993 and has served as Deputy-member of the ILO Governing body since 2002.<sup>1147</sup> Since then cooperation between Vietnam and the ILO has developed intensively. The ILO's Vietnam office, based in Hanoi, was opened on 17 February 2003, and marked the beginning of comprehensive provision of technical assistance to its tripartite national partners in the field of employment creation, enterprise development, social protection and labour market governance. Mme Nguyen Thi Kim Ngan, Minister of Labour, Invalids and Social Affairs noted:

With the official opening of the ILO Office in Vietnam, the relationship between the ILO and Vietnamese constituents has been even closer and more effective and the cooperation has become even more productive. It has contributed positively to the country in building its constitution, developing policies and strengthening capacity for Vietnam's counterparts.<sup>1148</sup>

The ILO has provided technical assistance to the Government of Vietnam and the social partners - the workers' and the employers' organisations in Vietnam since the *Doi Moi* process was initiated. The ILO has been playing a very important role in the process of making labour law in Vietnam. The ILO supports the formulation and implementation of labour law; strengthening of labour administration and of industrial relations institutions and actors. ILO technical assistance in Vietnam is delivered through research and analysis, advocacy and awareness raising, advisory services, technical cooperation projects, fellowships and study tours and training carried out locally and at the regional and international levels.<sup>1149</sup>

On 12 June 2006, the *National Cooperation Framework on Promoting Decent Work (2006 – 2010)* was signed by the ILO and Vietnam. It sets out a strategic framework within which the Government and employers' and workers' organisations agree to work in partnership towards achieving the goal of decent work for all in Vietnam. The

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<sup>1147</sup> The South Vietnam joined the ILO in 1950 and had ratified 22 Conventions. After uniting the country in 1975, the Government repealed all international treaties of the South Vietnam, and did not take over the South Vietnam ILO member status. The new Vietnam joined the ILO in 1980 and withdrew in 1983 for many reasons, especially financial reason.

<sup>1148</sup> Speech of Minister of MOLISA Nguyen Thi Kim Ngan at the 90<sup>th</sup> Anniversary of the ILO in Hanoi.

<sup>1149</sup> The ILO has many technical projects in Vietnam. In the period of 2004-2005, the author was working as the Secretary for the National Steering Committee of the ILO project "Occupational Safety and Health and an Integrated Labour Inspection".

Framework is intended to support the development strategies and policies that underpin the country's transition to a socialist market economy and the Government's efforts to ensure that social and economic advancement occur in tandem. Its frame of reference and point of departure are the country's *Ten Year National Socio-Economic Development Strategy* (2001–2010) and its second *Five Year Socio-Economic Development Plan* (2006–2010). Its concerns are reflected in the *United Nations Development Assistance Framework* (2006–2010). The Framework comprises four themes: i) labour institutions; ii) labour markets and employment; iii) social security and occupational safety and health, and; iv) vulnerable groups.<sup>1150</sup>

Since rejoining the ILO, Vietnam has ratified eighteen Conventions<sup>1151</sup> of the ILO. MOLISA has set out a plan to ratify one more Convention each year in the next five years.<sup>1152</sup> According to the ILS, when a Member State ratifies a Convention, the State is bound to two main obligations: implementation and reporting. In terms of ratified core Conventions, beside the obligations of incorporating and implementing them into the domestic legal system, which will be examined later, Vietnam has been fulfilling its reporting obligations required to the ILO.<sup>1153</sup>

#### **4.2.5. The Impact of Access to the WTO on Labour Issues**

Economic integration is regarded as one of the main factors in reforming the Vietnamese economy since the process of *Doi Moi* in 1986. Due to *Doi Moi*, Vietnam has opened up its economy to the world on the one hand and actively integrated into the global market on the other hand. Vietnam filed its request for accession in January

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<sup>1150</sup> Source MOLISA. See also ILO 2008, , *The ILO in Vietnam*. Available at [http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS\\_098445/index.htm](http://www.ilo.org/asia/whatwedo/publications/lang--en/docName--WCMS_098445/index.htm) [2010, 1/16].

<sup>1151</sup> See Appendix 2 for List of ILO Conventions ratified by Vietnam.

<sup>1152</sup> Source: Plan to Study and Ratify ILO Conventions of MOLISA in the period of 2010-2015. Six Conventions will be ratified, namely: Convention No. 105 (2010); Convention No. 122 (2011); Convention No. 159 (2012); Convention No. 88 (2013), Convention No. 95 (2014), Convention No. 131 (2015).

<sup>1153</sup> The author was the person in charge of drafting Vietnam reports to the ILO. The procedure is:

- (i) first drafts are prepared by MOLISA;
- (ii) first drafts are sent to relevant Ministries for comments;
- (iii) second drafts are finalised based on comments from Ministries;
- (iv) second drafts are sent to workers' and employers' organisations for comments;
- (v) reports are finalised, translated and sent to the ILO.



1995, set a goal of acceding to the WTO by 2005, and finally joined the WTO in January 2007.<sup>1154</sup>

The Agreement Establishing the WTO<sup>1155</sup> recognises that relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand. However, failure of the attempt to include a social clause in the WTO, as analysed in Chapter II, has had the result that, in principle, labour is not linked to trade under the WTO. Nonetheless, accession to the WTO still creates impacts on Vietnam's employment and labour issues because labour is an essential input for production, and labour is one of the decisive factors in competitiveness of each enterprise and each economy that interact with the goal of free trade promoted by the WTO.

### ***The Principle of National Treatment***

The WTO is built on two main principle: MFN (most favoured nation) and NT (national treatment). MFN requires that countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. NT principle requires the same treatment between domestic and foreign goods, services, investments, patents.<sup>1156</sup>

In terms of labour legislation, Vietnam maintains different minimum wages between domestic enterprises and FDI enterprises. In Vietnam minimum wages are determined by four zones:<sup>1157</sup> In these zones, the minimum wages of domestic enterprise have always been lower than that of foreign enterprises. In order to fulfil its obligation to the WTO incurred by the principle of NT, the Government has been trying to increase

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<sup>1154</sup> Source: [www.wto.org](http://www.wto.org) (last visited 25 April 2010).

<sup>1155</sup> Text available at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto.doc](http://www.wto.org/english/docs_e/legal_e/04-wto.doc) (last visited 25 April 2010).

<sup>1156</sup> Source: [www.wto.org](http://www.wto.org) (last visited 25 April 2010).

<sup>1157</sup> Zone 1: Urban districts in Hanoi and Ho Chi Minh city; Zone 2: Most rural district in Hanoi and Ho Chi Minh city as well as entirety of Danang, Can Tho and the town of Ha Long. Parts of Hai Phong city as well as the Southern provinces of Dong Nai, Binh Duong and Ba Ria Vung Tau; Zone 3: Some rural districts in Hanoi, parts of Bac Ninh, Bac Giang, Hung Yen, Hai Duong, Vinh Phuc, Quang Ninh, Quang Nam, Lam Dong, Khanh Hoa, Tay Ninh, Binh Duong, Binh Phuoc, Dong Nai, Long An and Baria Vung Tau provinces as well as parts of Can Tho and Hai Phong cities; Zone 4: All cities and districts not listed in Zone 1, 2, 3.

minimum wage in domestic enterprise to close the gap between these two types of minimum wages. Increasing the minimum wages increases income of workers on the one hand, but on the other hand, it imposes difficulties on employers and affects the competitive capacity of employers that may lead to a reduction in business which, consequently, reduces the use of labour, and may be harmful to economic development.

**Table 4.6: Minimum Wages in Vietnam (in VND)**

Year	Economic zone	Domestic enterprises	FDI enterprises
2008 <sup>1158</sup>	Zone 1	620,000	1,000,000
	Zone 2	580,000	900,000
	Zone 3	540,000	800,000
2009 <sup>1159</sup>	Zone 1	800,000	1,200,000
	Zone 2	740,000	1,080,000
	Zone 3	690,000	950,000
	Zone 4	650,000	920,000
2010 <sup>1160</sup>	Zone 1	980,000	1,340,000
	Zone 2	880,000	1,190,000
	Zone 3	810,000	1,040,000
	Zone 4	730,000	1,000,000

The Government is trying to create a balance between the minimum wages of domestic and foreign invested enterprises in the year 2012.

In addition, foreign invested capital is easier to move from Vietnam to other countries than Vietnamese workers. Therefore, besides the obligation to provide equal treatment between domestic and FDI enterprises, labour policies and labour regulation in Vietnam are under the threat of relocation of FDI. In this context, labour regulation must meet the demands of both attracting FDI and protecting domestic workers. In fact, in order to attract FDI, the law gave more favourable treatment in terms of labour to FDI

<sup>1158</sup> Decrees Nos. 167/2007/ND-CP and 168/2007/ND-CP dated 16/11/2007 of the Government. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 April 2010).

<sup>1159</sup> Decrees Nos. 110/2008/ND-CP and 111/2008/ND-CP dated 10/10/2008 of the Government. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 April 2010).

<sup>1160</sup> Decrees Nos. 97/2009/ND-CP and 98/2009/ND-CP dated 30/10/2009 of the Government. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 April 2010).

enterprises than domestic enterprises, e.g. FDI enterprises were not obliged to contribute to trade union funds until 2008.<sup>1161</sup>

### ***Impact on Employment***

WTO accession has impacts on employment in two ways: increasing employment in some economic sectors and, at the same time reducing employment in other economic sectors. These changes in employment depend partially on the opportunities and challenges of international trade and investment and partially on the internal strength of the economy, the quality and quantity of resources. Being a member of the WTO, Vietnam will benefit from increases in FDI as well as in export. The country's FDI has also increased remarkably during the period, hitting a record high of 63 billion USD.<sup>1162</sup> Increases in FDI lead to an increase in employment in this sector. In addition, Vietnam's export growth rates of 21.3% and 29.5% in 2007 and 2008<sup>1163</sup> – the first two years of WTO membership. Growth in the export sector contributes to growth in employment in exporting enterprises. In this context, labour regulation must strike a balance between increasing export competitiveness, on the one hand, and protecting workers from being exploited, on the other hand.

On the contrary, WTO accession also creates pressure on many domestic enterprises. Vietnam's accession to the WTO forces local enterprises to boost their competitiveness by many measures including human resources and reducing labour costs. For SOEs, ineffective SOEs must be reformed and reorganised or dissolved. For other domestic private enterprises, some have to reduce production, cut labour or dissolve due to their failure in competition with foreign rivals. Therefore, employment in these sectors might be reduced. In this context, labour regulation has to provide a safety net to protect workers from being thrown out of the labour market due to the negative impacts of integration.

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<sup>1161</sup> FDI enterprises were exempted from trade union fee as a means to foster FDI in Vietnam provided by Decision No. 53/1999/QĐ-TTg dated 26/3/1999 of the Prime Minister until 2008 this privilege was removed by Decision No. 133/2008/QĐ-TTg dated 1/10/2008 of the Prime Minister. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 April 2010).

<sup>1162</sup> Source: GSO 2009.

<sup>1163</sup> Source: *Ibid.*

### ***Impact on Labour Market***

The surge in trade and investment after joining WTO will have an effect on economic structure, thus affecting labour structure by sector and by region. Consequently, migration of labour among regions, sectors and occupations will occur. For example, because workers are more attracted to FDI or exporting sectors with higher pay this causes a flow of migrant labour from rural to urban areas, from agricultural regions to industrial parks, from low-income to high-income areas. Even though these flows of labour help maximise the effectiveness of labour utilisation, they also cause problems in the structure of the labour market such as the disparity of skilled labour in urban areas and severe shortage of labour in poor areas. In addition, labour migration incurs social problems that require the intervention of the State, which impose more duties on labour administration agencies.

The impact of the access to the WTO means the regulations on labour relations in Vietnam have to reform, improve and modernise legal provisions regulating labour standards so that workers' need for security and employers' need for flexibility can be met in a balanced and fair manner in today's modern market economy.

#### **4.2.6. The Draft of the New Labour Code**

Vietnam has developed quickly in recent decades, and integrated more into the world economy especially through joining the WTO in 2007.<sup>1164</sup> Rapid economic development and integration are changing the labour relations system in Vietnam. However, some of provisions of the Labour Code (albeit revised 3 times in the past 8 years) are not suitable for the current context; many new issues requiring new legal regulation have emerged in industrial relations.<sup>1165</sup>

Therefore, a new Labour Code is being drafted in Vietnam to replace the current Labour Code. According to the legislative programme, the draft of the new Labour Code will be presented to the NA in May 2010 for the first hearing and in October 2010 for the

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<sup>1164</sup> Vietnam joined the WTO on 11/1/2007.

<sup>1165</sup> Le Thi Hoai Thu (2006) "Hoan Thien Phap Luat Lao Dong" [trans: Upgrading Labour Law], *Vietnam National University Science Journal*, vol. 24, pp. 84-92. Luu Binh Nhung (2009) "Thuc Tien Ap Dung Bo Luat Lao Dong va Huong Dan Hoan Thien Phap Luat Lao Dong" [trans: Practical Implementation of the Labour Code and Directions to Upgrade Labour Law System] ", *Legislative Studies Journal*, vol. 138, pp. 36-41.

second hearing. At the time of writing [2/2010], the second draft of the new Labour Code was open to public comments on the Government website.<sup>1166</sup> The draft of the new Labour Code is divided into 17 Chapters and consists of 270 Articles, of which 53 articles are new, 159 articles are revised and 58 articles are the same as in the current Labour Code. The draft of the new Labour Code focuses on following principles:<sup>1167</sup>

- (i) Implementing the provisions of the 1992 Constitution, transforming the ideas, policies of the Party Congresses on enhancing and improving the market economy under the management of the State, including the labour market and industrial relations;
- (ii) Creating a legal framework for the efficient operation of enterprises; encouraging strong labour relations, increasing social responsibilities of enterprises, at the same time increasing labour inspection and punishment of violations;
- (iii) Creating a legal framework to implement the policy of the Party that requires bring into play the human factor in the development firstly of the workers, and protecting rights and legal interests of employers;
- (iv) Learning from the experiences of implementing the current Labour Code after fourteen years and reflecting the context of labour management;
- (v) Enhancing and reforming state management of labour; the state has no interference in the business of enterprises, in the right to collective bargaining of parties pursuant to the law;
- (vi) Learning from and referencing to foreign experiences in regulating labour relations, particularly from ASEAN countries; international customs and ratified treaties in order to find a suitable model of labour relations for Vietnam.

The draft of the new Labour Code revises almost all institutions of the Labour Code and some of the important regulations of this draft are related to the terms of labour contract, void labour contracts, work agency, house workers, collective bargaining, representation of employees; working hours, salary, etc. The main content of the draft on each matter is regulated by the CILS and will be also discussed in the following Chapters.

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<sup>1166</sup> Available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 26 April 2010).

<sup>1167</sup> Document No. 17/TTr-LDTBXH dated 18/3/2010 on the Government's Proposal of the draft of the new Labour Code.

## **Conclusion**

Vietnam located on the Indochina peninsula. Historical analysis of Vietnam's legal system has shown the influences of feudal as well as French legal systems and borrowing from socialist legal theory. Under the feudal law, there was no labour relation between workers and employers, thus there was no space for the regulation of labour. The reception of French legal system contributed to the changes in legal thoughts in Vietnam where customary of the feudal legal system was replaced by the status law of the civil law system. Under the strong influence of the socialist model, labour relationship is only recognised between the state (the employers) and its workers (the employees), in this period, the true labour relation between employers and workers did not exist and labour law was in fact the law to govern the relations between the State and its officials.

The present Vietnamese legal system is still a communist legal system. In Vietnam, law has not only the function of regulating social relations but also has the function of transforming policies of the ruling Communist Party. In terms of State power, Vietnam is a republic country. At the central level, the NA is the highest State power, which has the right to elect the State President, to approve the member of Government and to appoint chief of the Supreme Court and Supreme Prosecution. At the local level, the local People Councils hold the State power and have the right to set up, to supervise the work of the local People's Committees and local courts and local prosecution agencies.

Only legal documents are sources of law in Vietnam, and case law is not used as a source of law. Legal documents are promulgated by different State agencies with different name and legal values, of which the Constitution and Acts passed by the NA have the highest value. Even though many efforts have been made in building and upgrading the legal system in Vietnam, implementation and enforcement of laws are still big challenges in Vietnam.

In relation to international law, the Vietnamese legal system is open to ratification of international treaties. Vietnam is a party State of the Vienna Convention on the Law of Treaties 1969; therefore, Vietnam is a monist country, in which, ratified international treaties are a direct source of domestic law, and ratified international treaties prevail over domestic law. However, where provisions of ratified international treaties are not

possible for direct application, the law requires incorporation of these standards into the domestic legal system. These characteristics show, in principle, that it is possible to ratify and incorporate and to implement the CILS in Vietnam.

Vietnam has a young population. People of working age account for more than 50% of the total population. However, most of Vietnamese working population is in the agricultural sector with no employment relationships. For those who work in formal sector with employers, their qualification is low and most work in highly labour density production.

Regulation of labour relations has just taken place in a real sense in Vietnam only since the start of *Doi Moi*. Labour law in Vietnam covers almost all aspects of labour relations in the work place. Vietnam has promulgated many important legal documents to regulate employment relations. The right to work and is recognised by the Constitution. Vietnam law provides for the right to organise of workers, fixes minimum working age, working hours, minimum wage, etc. Labour law also prohibits the use of forced labour and discrimination at work.

Vietnam has been thoroughly integrated into the world's economy, marked by access to the WTO since 2007. Labour issues in Vietnam have been under strong impact of globalisation and integration into the global economy, particularly the access to the WTO. Economic integration creates more opportunities on the one hand but it also brings back many challenges for workers and the regulation of labour on the other hand. At the time of writing, a new Labour Code is being drafted in Vietnam to regulate labour issues to meet both its international obligations to the ILO and to promote trade liberalisation and development required by the WTO.

Vietnam has been developing a strong relationship with the ILO since it rejoined in 1993. Up to 2010, Vietnam has ratified eighteen Conventions of the ILO, of which five are core Conventions containing the CILS relating to forced labour, child labour and discrimination at work. The success and challenges of incorporating these core Conventions and standards into Vietnam are examined in the next Chapter.

# **Chapter V**

## **Experiences of Incorporating Ratified Core International Labour Standards into Vietnam's Legal System**

### **Introduction**

Chapter IV showed that there are very strong possibilities of successfully incorporating ILO Conventions into Vietnam's legal system. It demonstrated that Vietnam has a monist legal system in which ratified international treaties prevail over domestic law. It also revealed that if the ratified international treaty is not specific enough to apply directly, transformation into domestic law is carried out usually by a legislative provision.

Vietnam has ratified five of eight core Conventions of the ILO relating to elimination of forced labour, abolition of child labour and elimination of discrimination at work. Obligations of ratified Member States of the ILO, as analysed in Chapter I, include reporting and most importantly incorporation into domestic legal system and implement provisions of ratified Convention in practice

This Chapter examines the content of the CILS on forced labour, child labour and discrimination at work, which derive from relevant instruments the ILO. On that basis, this Chapter evaluate the incorporation into the legal system and implementation in practice of these standards in Vietnam.

The successes and challenges of incorporating the ratified core international labour Conventions in Vietnam's context are explored and analysed in this Chapter in order to provide practical basis for the incorporation of the CILS on freedom of association and collective bargaining into Vietnam's legal system.



## 5.1. Incorporation of the CILS on Elimination of Forced Labour

Freedom from slavery, servitude, forced and compulsory labour forms part of the classic rights to liberty and the integrity of the person.<sup>1168</sup> Forced labour contravenes their overarching objectives. The abusive control of one human being over another is the antithesis of decent work and impedes poverty reduction.<sup>1169</sup>

International action against forced or compulsory labour has historically been directed towards the fight against slavery.<sup>1170</sup> The international regulation of forced labour followed upon the work of the adoption of the League of Nations on Mandated Territories and the adoption of the 1926 Slavery Convention.<sup>1171</sup> In 1926, the ILO Governing Body appointed a Committee of Experts on Native Labour whose first task was to study the systems of forced or compulsory labour existing at that time. The work of this Committee led to adoption of the Forced Labour Convention, 1930 (Convention No. 29).<sup>1172</sup> After the World War II, the United Nations and the ILO created an ad hoc committee on forced labour, which was entrusted with carrying out an inquiry into allegations relating to the existence of certain forms of forced labour. The work of this ad hoc committee revealed the existence in the world of systems of forced labour of a serious nature as a mean of political coercion for economic purposes.<sup>1173</sup> This led to the adoption of the Abolition of Forced Labour Convention, 1957 (Convention No. 105).<sup>1174</sup> While Convention No. 29 calls for the general abolition of forced or compulsory labour in all its forms<sup>1175</sup> – subject to the exceptions set out in Article 2,<sup>1176</sup> Convention No. 105 requires the abolition of any form of forced or compulsory labour

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<sup>1168</sup> Lammy Betten (1993) *International Labour Law: Selected Issues*, Kluwer, Boston, p. 125.

<sup>1169</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 39.

<sup>1170</sup> ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 4. See also Daniel Roger Maul (2007) “The International Labour Organisation and the Struggle against Forced Labour from 1919 to Present”, *Labour History*, vol. 48, No. 4, pp. 477-500.

<sup>1171</sup> Signed at Geneva on 25/9/1926, came into force on 9/3/1927. Text available at <http://www2.ohchr.org/english/law/slavery.htm> (last visited 6 June 2010).

<sup>1172</sup> Text available at [www.ilo.org](http://www.ilo.org) (last visited 10 June 2010).

<sup>1173</sup> Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 109.

<sup>1174</sup> Text available at [www.ilo.org](http://www.ilo.org), (last visited 10 June 2010).

<sup>1175</sup> Article 1 of the Convention No. 29.

<sup>1176</sup> Para 2 Article 2 of the Convention No. 29.

only in the five cases.<sup>1177</sup> In addition to the two above Conventions, the ILO has at its disposal several other instruments, which address the issue of forced labour, either directly or indirectly.<sup>1178</sup>

### **5.1.1. The CILS on Elimination of Forced Labour**

#### ***Definition of Forced labour***

Forced labour is a legal term as well as an economic phenomenon. It will not be possible to “respect, promote and realise” the principle of the elimination of all forms of forced or compulsory labour without knowing what the phrase means.<sup>1179</sup> Article 1 of Convention No. 29 defines forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”<sup>1180</sup> There are three aspects of this definition that need to be considered to ascertain the general scope of the Convention: the notion of “work or service”;<sup>1181</sup> the “menace of any penalty”;<sup>1182</sup> and the criteria for not having “offered oneself voluntarily”<sup>1183</sup>.

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<sup>1177</sup> Article 1 of the Convention No. 105.

<sup>1178</sup> Such as: The Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35); the Special Youth Schemes Recommendation, 1970 (No. 136); the Employment Policy Convention, 1964 (No. 122); the Worst Forms of Child Labour Convention, 1999 (No. 182); the Indigenous and Tribal Peoples Convention, 1989 (No. 169), which revised an earlier instrument; the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Migration for Employment Convention (Revised), 1949 (No. 97); the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143). Texts available at [www.ilo.org](http://www.ilo.org) (last visited 10 June 2010).

<sup>1179</sup> ILO (2001) *Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2001*, ILO, Geneva, p. 9.

<sup>1180</sup> Article 1 of the Convention No. 29.

<sup>1181</sup> “Work or service” means any work or service except for cases in which an obligation is imposed to undergo compulsory education or compulsory scheme of vocational training. It is concluded that compulsory education and a compulsory scheme of vocational training, by analogy with and considered as an extension to compulsory general education, does not constitute compulsory work or service within the meaning of the Convention No. 29. However, vocational training usually entails a certain amount of practical work, and for that reason, the distinction between training and employment is sometimes difficult to draw. It is therefore only by reference to the various elements involved in the general context of a particular scheme of training that it becomes possible to determine whether such scheme is unequivocally one of vocational training or on the contrary involves the exaction of work or service within the definition of “forced or compulsory labour”. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 20.

<sup>1182</sup> “Menace of any penalty”: The penalty here in question need not be in the form of penal sanctions, but might take the form also of a loss of rights or privileges. This may occur, for instance, where persons who refuse to perform voluntary labour may lose certain rights, advantages or privileges, in a situation when such rights, privileges or other benefits (e.g. promotion, transfer, access to new employment, the acquisition of certain consumer goods, housing or participation in university programmes) depend on the

## *Exception from Scope of Forced Labour*

According to the CILS, certain forms of compulsory work or service, which have fallen under the general definition of “forced labour” as explained above, are excluded from its scope:<sup>1184</sup>

1. Compulsory military service.<sup>1185</sup>
2. Normal civic obligation.<sup>1186</sup>
3. Prison labour.<sup>1187</sup>

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merits that have been accumulated and noted in the worker’s work book. Moreover, the menace of a penalty can take multiple different forms. Arguably, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. There can also be subtler forms of menace, sometimes of a psychological nature. Other penalties can be of a financial nature, including economic penalties linked to debts, the non-payment of wages, or the loss of wages accompanied by threats of dismissal if workers refuse to do overtime beyond the scope of their contract or of national law. Employers sometimes also require workers to hand over their identity papers, and may use the threat of confiscation of these documents in order to exact forced labour. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, pp. 20-21.

<sup>1183</sup> “Offered oneself voluntarily” means that the worker him/herself has consent to work, willing to work. This reveals workers’ the workers’ right to free choice of employment, freedom to leave their employment, even in cases where employment is originally the result of a freely concluded agreement. “Offered oneself voluntarily” is considered through a certain number of different aspects: the form and subject matter of the consent; the role of external or indirect constraints for which the State or the employer may be accountable or not; the possibility for a minor (or his or her parents) to give a valid consent; and the possibility of revoking a freely given consent. ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, pp. 20-22.

<sup>1184</sup> Para 2, Article 2 of the Convention No. 29.

<sup>1185</sup> “Compulsory military service” is excluded from forced labour if it is used “for work of purely military character”. This means that states cannot use forced or compulsory labour as a mean of mobilising and using labour for the purpose of economic development. There are, however, specific circumstances in which a non-military activity performed within the framework of compulsory military service or as an alternative to such service remains outside the scope of Convention No. 29. For example, conscripts, like any other citizens, may be called to work in cases of emergency, their use in such circumstances for non-military purposes would then be covered by the other exception in respect of work or service exacted in cases of emergency. It is also accepted that conscripts performing their service in engineering or similar units may be made to join in the building of roads and bridges as a part of their military training. Furthermore, the Convention does not mention specifically the issue of conscientious objectors, in such cases conscientious objectors are in a more favourable position than in countries where their status is not recognised and where refusal to serve is punishable with imprisonment. Otherwise, the Convention therefore does not deal with the use of persons serving in the armed forces on a voluntary basis and consequently is not opposed to the performance of non-military work by these persons. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 23.

<sup>1186</sup> “Normal civic obligations” of the citizens of a fully self-governing country are excluded from the scope of Convention No. 29. “Normal civic obligations” specifically mentioned in the Convention as exceptions from its scope, are: compulsory military service; work or service in cases of emergency; and minor communal services. Other examples of normal civic obligations of citizens could be compulsory jury service and the duty to assist a person in danger. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 24.

<sup>1187</sup> “Prison labour” is excluded from the scope of the Convention only if a certain number of conditions are met, some of which concern the basis for the obligation to work and others the conditions in which penal labour may be used. These are:

4. Force majeure.<sup>1188</sup>
5. Minor communal service.<sup>1189</sup>

### ***Other Forms of Forced and Compulsory Labour Banned by Convention No. 105***

The CILS on forced labour also require the each Member of the International Labour Organisation which ratifies Convention No. 105 undertakes to suppress and not to make use of any form of forced or compulsory labour:<sup>1190</sup>

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- (i) the prisoners must have been convicted in a court of law: prisoners awaiting trial or persons detained without trial – should not be obliged to perform labour, prisoners must be found guilty by judicial body not by administrative body;
  - (ii) the work or service is carried out under the supervision and control of a public authority: In connection with the work of prisoners in privately run prisons, the public authority still has the right to inspect the premises periodically; and
  - (iii) the said person is not hired to or placed at the disposal of private individuals, companies or associations.

See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 25.

<sup>1188</sup> “Work or service exacted in cases of emergency” is excluded from the scope of forced labour. Emergency involves a sudden, unforeseen happening calling for instant countermeasures. These are: in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population. The enumeration of examples in the Convention is “an indication of a restrictive character as to the nature of cases of emergency”, and helps to clarify the concept of emergency for the purposes of the Convention, which includes cases of force majeure. In order to respect the limits of the exception provided for in the Convention, the power to call up labour should be confined to genuine cases of emergency, or force majeure. Moreover, the duration and extent of compulsory service, as well as the purpose for which it is used, should be limited to what is strictly required by the exigencies of the situation. On the other hand, this provision should not be understood as allowing the exaction of any kind of compulsory service in case of war, fire or earthquake; this exception can be invoked only for work or service that is strictly required to counter an imminent danger to the population. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 32.

<sup>1189</sup> “Minor communal services” are excluded from the scope of forced labour if they meet the following criteria:

- (i) the services must be “minor services”, i.e. relate primarily to maintenance work and, in exceptional cases, to the erection of certain buildings intended to improve the social conditions of the population of the community itself (a small school, a medical consultation and treatment room, etc.);
- (ii) the services must be “communal services” performed “in the direct interest of the community”, and not relate to the execution of works intended to benefit a wider group;
- (iii) the “members of the community” (i.e. the community which has to perform the services) or their “direct” representative (e.g. the village council) must “have the right to be consulted in regard to the need for such services.

Such “minor services”, which should not impinge upon the performance of ordinary employment, might also include works connected with village cleanliness, sanitation, the maintenance of paths and tracks, of watering places, cemeteries in the immediate vicinity of the communities concerned, village night-watching, the clearance of silt in small irrigation channels and streams of purely local interest, etc. The small scale of such works must also be reflected in their short duration, which should be such as to make these services really “minor”. See Sec e Para 2 Article 2 Convention No. 29; ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 34.

1. As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system.<sup>1191</sup>
2. As a method of mobilising and using labour for purposes of economic development.<sup>1192</sup>
3. As a means of labour discipline.<sup>1193</sup>
4. As a punishment for having participated in strikes.<sup>1194</sup>
5. As a means of racial, social, national or religious discrimination.<sup>1195</sup>

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<sup>1190</sup> Article 1 of Convention No. 105.

<sup>1191</sup> According to the Universal Declaration of Human Rights, limitations may be imposed by law on the rights and freedoms when they are used “for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. Otherwise, any sanctions involving forced or compulsory labour as a result of the expression of views or of opposition to the established political, social or economic system, whether such prohibition is imposed by law or by a discretionary administrative decision is a violation of Convention No 105. See ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 47.

<sup>1192</sup> The terms “mobilising” and “economic development” used here are aimed at circumstances where recourse to forced or compulsory labour has a certain quantitative significance and is used for economic ends. The prohibition applies even where recourse to forced labour as a method of mobilizing and using labour for purposes of economic development is of temporary or exceptional nature.<sup>1192</sup> Participation in special youth schemes (i.e. schemes designed to enable young people to take part in activities directed to the economic and social development of their country and to acquire education, skills and experience facilitating their subsequent economic activity and promoting their participation in society) should be voluntary. See ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 91; Special Youth Schemes Recommendation, 1970 (No. 136).

<sup>1193</sup> Forced or compulsory labour as a means of labour discipline may be of two kinds:

- (i) measures to ensure the due performance by a worker of his or her service under compulsion of law (in the form of physical constraint or the menace of a penalty);
- (ii) a sanction for breaches of labour discipline with penalties involving an obligation to perform work.

See ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 48.

<sup>1194</sup> It seems evident that the Convention No. 105 does not prohibit the punishment of breaches of public order (acts of violence, assault or destruction of property) committed in connection with the strike. Furthermore, in particular such penalties might be imposed where there were “national laws prohibiting strikes in certain sectors or during conciliation proceedings” or where “trade unions voluntarily agreed to renounce the right to strike in certain circumstances”. Therefore, any sanctions (even involving compulsory labour) for the offences of this kind obviously fall outside the scope of the Convention No. 105. See also ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 48; ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 99.

<sup>1195</sup> This provision requires the abolition of any discriminatory distinctions made on racial, social, national or religious grounds in exacting labour for the purpose of production or service. Any discriminatory distinction made on the above grounds should be abolished under this provision. However, it should be noted that provisions of Convention No. 105 do not deal with discrimination on the above grounds; its purpose is to suppress forced or compulsory labour as a means of discrimination. See also ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 48; ILO (2007) *Eradication of Forced Labour*, ILO, Geneva, p. 108.

### **5.1.2. The CILS on Elimination of Forced Labour in Vietnam**

Vietnam ratified Convention No. 29 on 05 March 2007 but Vietnam has not ratified Convention No. 105.<sup>1196</sup> The substantive content of Convention No. 29, as analysed above, is not detailed enough to be applied directly. According to the Law on Conclusion, Accession to and Implementation of International Treaties 2005,<sup>1197</sup> Vietnam has to incorporate the provisions of Convention No. 29 into domestic law. It is also required by Vietnam law that, before ratifying any international treaties, a comparison between domestic law and provisions of the concerned treaty must be made to find out which provisions of the treaties can be applied directly, which provisions need to be incorporated and which provisions of domestic law must be revised to be compliant with the treaty. Therefore, incorporation of the Convention No. 29 into Vietnam took place not only after ratification but also before ratification.

#### ***Incorporation of the CILS on Elimination of Forced Labour into the Legal Framework***

The basic obligation undertaken by a Member State which ratifies Convention No. 29 is “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.<sup>1198</sup> This obligation to suppress the use of forced or compulsory labour, as defined in the Convention, includes for the Member States both an obligation to abstain and an obligation to act. The Member States must neither exact forced or compulsory labour nor tolerate its exaction and it must repeal any laws and statutory or administrative instruments that provide or allow for the exaction of forced or compulsory labour, so that any such exaction, be it by private persons or public servants, is found illegal in national law.<sup>1199</sup>

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<sup>1196</sup> Both Conventions Nos. 29 and 105 were studied with a view to ratification from 2005 by MOLISA. The ILO has provided technical support to an Inter-Ministerial Task Force on forced labour, established to review forced labour concerns in law and practice, and to oversee a comprehensive review of forced labour in the country. Ratification of both Conventions was submitted to the President for approval but only Convention No. 29 was ratified. The reason explaining why Vietnam has not ratified Convention No. 105 was that, at that time, it was concerned that some of Vietnamese practice (particularly the issue of prison labour) was not in conformity with the requirements of Convention No. 105. The ratification of this Convention is under progress at the time of writing [1/2010].

<sup>1197</sup> Article 6 of the Law on Conclusion, Accession to and Implementation of International Treaties 2005.

<sup>1198</sup> Article 1 of the Convention No. 29.

<sup>1199</sup> Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35). Text available at [www.ilo.org](http://www.ilo.org) (last visited 6 June 2010).

### *The Concept of Forced Labour – the Lack of a Clear Definition*

The definition of forced labour and its characteristics is clearly stated in Convention No. 29, which Vietnam has ratified. However, in Vietnam, domestic law, while providing (in principle) a punishment for forced labour, is still silent in defining forced labour. The Labour Code contains only one provision that generally prohibits both the ill-treatment of workers and the use of forced labour.<sup>1200</sup> The draft of the new Labour Code still keeps the same provision of the current Labour Code relating to forced labour and does not contain any provision defining forced labour in Vietnam.

Under Vietnam law, ill-treatment or forced labour is not defined by the Labour Code but by the guiding document as cases when workers are beaten, insulted or forced to do the work that is not suitable to their gender, affects their health, dignity or honour.<sup>1201</sup> This definition expresses the involuntariness characteristic of forced labour but it does not reveal the menace of any penalty put on the workers, which is one of the three elements in defining forced labour required by the CILS. It shows that there is no definition of forced labour in the Labour Code and, it also shows the prevalence of lower-level legal documents, which is one of the main challenges to implementation of law in Vietnam, as mentioned previously.

The draft of the new Labour Code divides the old regulation of the Labour Code on forced labour into two separate sections. Article 9 of this draft set out the prohibited activities relating to labour relations. Article 9(2) provides for the prohibition of maltreatment of workers, and sexual harassment of workers. The prohibition of forced labour is regulated separately by Article 9(3) as forced labour in any form is prohibited. The reason for this, in the view of the Chairman of the Drafting group, is to distinguish between maltreatment of workers and forced labour in order to provide different methods for dealing with each type of offence. There may be a clear definition of forced labour in the guiding document of this provision. This draft also allows workers who are

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<sup>1200</sup> Article 5 of the Labour Code.

<sup>1201</sup> Article 11 Decree No. 44/2003/ND-CP dated 9/5/2003 of the Government. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 10 June 2010).

victims of maltreatment and forced labour to terminate the labour relationship unilaterally with full compensation.<sup>1202</sup>

Due to a lack of definition, it is impossible to determine which activities are forced labour and must be sanctioned by law. It is also difficult to recognise victims of forced labour, and therefore there is no particular mechanism to protect and to support victims of forced labour in Vietnam.

### *Human Trafficking*

Despite the lack of a clear definition of forced labour, Vietnam law focuses more on human trafficking. Trafficking in human beings is a significant issue in Vietnam. Vietnam is both a source country for trafficking and a transit country, with people from China and the Middle East being taken through Vietnam to destinations including Australia, Canada and Europe.<sup>1203</sup> Vietnam has made many efforts to deal with human trafficking.

In terms of legislation, important legal documents have been promulgated and revised to combat trafficking in human beings. Trafficking in human beings is a criminal offence and punished by the Penal Code.<sup>1204</sup> The punishment ranges from two years to twenty years imprisonment.<sup>1205</sup>

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<sup>1202</sup> Article 44(3) of the draft of the new Labour Code.

<sup>1203</sup> Colin Fenwick and Thomas Kring (2007) *Rights At Work: An Assessment of the Declaration's Technical Cooperation in Select Countries*. Available: [http://www.carnegieendowment.org/files/Declaration\\_report.pdf](http://www.carnegieendowment.org/files/Declaration_report.pdf) (last visited 15 January 2009).

<sup>1204</sup> Article 119, 120, 275 of the Penal Code. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1205</sup> The Penal Code provides:

1. Those who traffic in women shall be sentenced to between two and seven years of imprisonment.
2. Committing the crime in one of the following circumstances, the offenders shall be sentenced to between five and twenty years of imprisonment:
  - a) Trading in women for the purpose of prostitution;
  - b) In an organised manner;
  - c) Being of professional character;
  - d) For the purpose of sending them overseas;
  - e) Trafficking in more than one person;
  - f) Trafficking more than once.



Before 2009, the law covered trafficking only in women and children. However, the new amendment to the Penal Code [in 2009] provides that trafficking in human beings (including men) is a criminal offence and must receive the same sentence of imprisonment.<sup>1206</sup> Further efforts in legislation are being made to combat trafficking in human beings. The Law on Anti human trafficking has been drafted and, according to the legislative programme, this draft is submitted to the NA for the first hearing in the second Session of 2010.<sup>1207</sup>

In terms of international cooperation, Vietnam commits to consideration of withdrawal of its reservations to Article 5 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.<sup>1208</sup> Vietnam is considering accession to the Convention against Torture, the Convention against Transnational Organised Crime, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.<sup>1209</sup>

In implementation, the National Action Programme on human trafficking 2005-2010 was adopted in 2005.<sup>1210</sup> This programme consists of four main projects:

1. Communication information communication and education on anti human trafficking.
2. Combating offences of women and children trafficking.
3. Receiving and rehabilitating victims of human trafficking.
4. Upgrading the legislation on human trafficking.

### *The Repeal of the Law on Compulsory Community Work*

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3. The offenders may also be subject to a fine of between five million and fifty million dong, to probation or residence ban for one to five years.

<sup>1206</sup> Law on the Amendment to the Penal Code 2009. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1207</sup> Resolution No. 31/2009/NQ-QH12 dated 17/6/2009 of the National Assembly. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1208</sup> Adopted on 25/5/2000. Text available at <http://www2.ohchr.org/english/law/crc-sale.htm> (last visited 6 June 2010).

<sup>1209</sup> Source: National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009.

<sup>1210</sup> Decision No. 312/2005/QĐ-TTg dated 30/11/2005 of the Prime Minister. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 15 June 2010).

In 1999, the Standing Committee of the NA issued the Ordinance on Community Work,<sup>1211</sup> which provided that all Vietnamese citizens aged from eighteen to forty-five (for men) and from eighteen to thirty-five (for women) are obliged to do community work<sup>1212</sup> for ten days a years.<sup>1213</sup> Community work is carried out in building and upgrading the local infrastructure such as roads, watering systems, hospitals, schools, military cemeteries, etc.<sup>1214</sup> Individuals recruited to do community work who cannot attend can pay by cash, or ask others to do the work on their behalf.<sup>1215</sup>

In studying Convention No. 29, MOLISA found that the Ordinance on Community Work is not in conformity with Convention No. 29 when it requires all citizens of a certain age to do community work, and the scope of community work did not meet the characteristics of minor community work as prescribed by Convention No. 29. Therefore, MOLISA proposed to repeal this Convention to make way for ratifying Convention No. 29 of the ILO. The proposal was approved in 2006 and the Standing Committees of the NA adopted Resolution No. 1014/2006<sup>1216</sup> to repeal the Ordinance on Community Work.

#### *Amendment to the Regulations on Prison Labour*

Under Vietnam law, all prisoners have to work during the period they carry out their sentences.<sup>1217</sup> Prisoners have to work eight hours a day and have one day-off during the weekend and other national holidays.<sup>1218</sup> All income from prisoners' work must be

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<sup>1211</sup> Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services took effect from 01/01/2000. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1212</sup> Article 7 of the Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.

<sup>1213</sup> Article 8 of the Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.

<sup>1214</sup> Article 9 of the Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.

<sup>1215</sup> Article 15 of Ordinance No. 15/1999/PL-UBTVQH10 dated 3/9/1999 of the Standing Committee of the National Assembly on Community Services.

<sup>1216</sup> Adopted on 5/4/2006 and took effect from 1/1/2007. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1217</sup> Article 22 of the Ordinance No. 10L/CTN dated 20/3/1993 of the Standing Committee of the National Assembly on Implementation of Criminal Sentences. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1218</sup> Article 21(1) of the Decree No. 60-CP dated 16/9/1993 on the Issuance of the Prison Regulations. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 10 June 2010).

remitted to the State budget to reinvest in production, infrastructure of the prisons, rewards to prison staff, and rewards to hard-working prisoners.<sup>1219</sup>

Before Convention No. 29 was ratified, a study found out that most of the provisions of domestic law on prison labour were in conformity with the requirements of Convention No. 29 such as the prisoner must be convicted by the court,<sup>1220</sup> and the work carried out under the supervision of prison staff.<sup>1221</sup> However, there was no regulation on the use of prison labour at the disposal of private individuals, companies or associations.

Immediately after Convention No. 29 was ratified, regulations on prison labour were revised to comply with provisions of the Convention. On 2 November 2007, the Standing Committee of the NA adopted Ordinance No. 01/2007<sup>1222</sup> to revise the Ordinance on Implementation of Criminal Sentences, 1993. In terms of prison labour, the new Ordinance does not allow prison labour to be used on private property.<sup>1223</sup> Prisoners have to work eight hours a day but the time used for education, vocational training is deducted from the working hours. In cases, where prisoners are required to work overtime, the limitation is no more than two hours extra per day and the prisoners can have time off or receive rewards for the overtime work that they have done. The new regulations ban the use of female prisoners and child prisoners in heavy and hazardous work.<sup>1224</sup> The new Ordinance also makes it clear that all income from prison labour must be set out in the financial records of the prison as required by the law on audit and statistics.<sup>1225</sup> Income from prison labour is now used for different purposes,

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<sup>1219</sup> Article 23(1) of the Decree No. 60-CP dated 16/9/1993 on the Issuance of the Prison Regulations.

<sup>1220</sup> Article 1 of the Ordinance on Implementation of Criminal Sentences, 1993.

<sup>1221</sup> Article 22 of the Ordinance on Implementation of Criminal Sentences, 1993.

<sup>1222</sup> Took effect from 01/01/2008. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1223</sup> Article 20 of Ordinance No. 01/2007/UBTVQH12 dated 19/10/2007 of the Standing Committee of the National Assembly on Implementation of Criminal Sentences.

<sup>1224</sup> Article 22 of the Decree No. 113/2008/ND-CP dated 28/10/2008 of the Government. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 10 June 2010).

<sup>1225</sup> Article 22(1) of the Ordinance No. 01/2007/UBTVQH12 dated 19/10/2007 of the Standing Committee of the National Assembly on Implementation of Criminal Sentences.

such as buying more food for prisoners; increasing the welfare fund of the prison; rewarding hard-working prisoners; investing in infrastructure of the prison.<sup>1226</sup>

*Guarantees for Cases Excluded from the Scope of Convention No. 29*

Convention No. 29 excludes some particular forms of compulsory work or service from its scope: compulsory military service; normal civic obligation; prison labour; force majeure; and minor communal service. The regulations on civic obligation and prison labour in Vietnam as analysed above, have been repealed and revised.

In terms of military service, the work undertaken by Vietnamese citizens for the armed forces is of a purely military character (soldier, commanding officers, military technicians and specialists, etc.). In the course of rendering the service, in addition to State officials, these people shall also be entitled to other preferential policies by the Government. Only under special circumstances prescribed by law, can these people prematurely leave the army or police. The Government has issued incentive policies for people who used to work for the army or police. Besides, economic units of the army and national defence sector can recruit workers on a contract basis according to the Labour Code to undertake work which is not purely of military character and a national defence purpose may be involved.<sup>1227</sup>

In Vietnam, work exacted in cases of emergency (force majeure) shall cease as soon as the circumstances that endanger the population or its normal living conditions no longer exist. The mobilisation of labour for compulsory works or services in emergency cases such as natural disasters, storms, floods, etc. is regulated by law.<sup>1228</sup> After the work is finished, participants will be paid at the rate provided by the Provincial People's Committee. Provincial People's Committees shall have to define specific rates for remuneration to suit local circumstances according to instructions issued by competent

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<sup>1226</sup> Article 22(2) of the Ordinance No. 01/2007/UBTVQH12 dated 19/10/2007 of the Standing Committee of the National Assembly on Implementation of Criminal Sentences, Article 24 of the Decree No. 113/2008/ND-CP dated 28/10/2008 of the Government.

<sup>1227</sup> Law on Military Service (adopted in 1981, revised in 1990, 1994 and in 2005); Law on officers of the People's Armed Forces of Vietnam (revised in 2008); Law on People's Police (2005). Texts available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

<sup>1228</sup> Law on Dams and Dykes, 2008; Ordinance No. 09L/CTN dated 20/03/1993 on Prevention and Mitigation of Storms and Floods (amended in 2000). Texts available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 15 June 2010).

ministries and Government agencies.<sup>1229</sup> People who are injured or who have lost their lives when participating in dyke protection activities shall be considered for compensation and benefits similar to the armed forces when they participate in dyke protection activities according to laws and regulations.<sup>1230</sup>

In terms of minor communal service, the commune authority can mobilise local people to perform minor services in the direct interest of the community (for example, constructing or repairing minor community infrastructure work of local hamlets, communes, or towns).<sup>1231</sup> The local People's Council shall have the right and responsibility to develop and adopt a plan on mobilisation of human resources to provide communal services at the request of the People's Committee of the same level under the principle of participation: "people know, people discuss, people execute and people supervise".

### ***Implementation and Challenges of Regulations on Elimination of Forced Labour in Vietnam***

#### *Lack of Penal Sanctions on Forced Labour*

The CILS on forced labour require that Member States must ensure that "the illegal exaction of forced or compulsory labour shall be punishable as a penal offence" and "that the penalties imposed by law are really adequate and are strictly enforced".<sup>1232</sup>

According to the law, violation of forced labour provided by the Labour Code could result in an administrative penalty from between VND 15 million to 20 million [\$750 to \$1,000].<sup>1233</sup> However, from 25 June 2010, the fine for this violation is reduced to between VND 5 million and 15 million.<sup>1234</sup> Workers who are subject to maltreatment

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<sup>1229</sup> Article 24, 37 of the Law on Dams and Dykes 2008.

<sup>1230</sup> Article 35 of the Law on Dams and Dykes 2008.

<sup>1231</sup> Article 111, 112, 113, 114, 115 and 124 of the Law on Organisation of People's Council and People's Committee 2003.

<sup>1232</sup> Forced Labour (Indirect Compulsion) Recommendation, 1930 (No. 35). Text available at [www.ilo.org](http://www.ilo.org) (last visited 15 June 2010).

<sup>1233</sup> Sec. 4 Article 10 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 10 June 2010).

<sup>1234</sup> Sec. 2 Article 17 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 15 June 2010).

and forced labour can unilaterally terminate the labour contract and receive termination allowance.<sup>1235</sup>

Some activities related to forced labour are illegal and punished by criminal punishments such as maltreatment of other persons,<sup>1236</sup> forcing workers to leave the work place,<sup>1237</sup> and trafficking in human beings.<sup>1238</sup> Because the Penal Code is the only source of criminal law in Vietnam, only offences prescribed in the Penal Code are criminal offences and incur a sentence.<sup>1239</sup> Therefore, some other types of activities that are forced labour defined by the CILS, such as menace in psychological nature or financial nature, but are neither regarded as criminal offences nor sentenced in Vietnam. Thus the penalty for the offence of forced labour as required by Convention No. 29 has not been incorporated properly into Vietnam.

#### *Lack of Official Statistics on Forced Labour*

According to the law, MOLISA is responsible to the Government for carrying out administration of labour.<sup>1240</sup> However, by the time of writing [1/2010] there were neither official statistics of forced labour nor a channel for reporting cases of forced labour in Vietnam. There are only statistics for human trafficking cases, which is the responsibility of the Ministry of Public Security. Most information about forced labour cases comes from the media.

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<sup>1235</sup> Article 37 of the Labour Code.

<sup>1236</sup> Article 110 of the Penal Code provides:

1. Those that cruelly treat persons dependent on them shall be subject to warning, non-custodial reform for up to one year or imprisonment of between three months and two years.
2. Committing the crime in one of the following circumstances, the offenders shall be sentenced to between one year and three years of imprisonment:
  - a) Against aged persons, children, pregnant women or disabled persons;
  - b) Against more than one person.

<sup>1237</sup> Article 128 of the Penal Code provides:

Those who, for their own benefits or other personal motivation, illegally force workers to leave their jobs, causing serious consequences shall be subject to warning, non-custodial reform for up to one year or a prison term of between three months and one year.

<sup>1238</sup> Article 119 of the Penal Code.

<sup>1239</sup> Article 2 of the Penal Code provides that “Chỉ người nào phạm một tội đã được Bộ luật hình sự quy định mới phải chịu trách nhiệm hình sự” [trans: Only those who commits an offence provided by the Penal Code is liable to criminal sentence].

<sup>1240</sup> Sec. 1 Article 181 of the Labour Code.

## *Enforcement*

While the criminal punishment for forced labour is still insufficient, administrative fines are used to punish the persons who use forced labour. Labour inspectors (under the management of MOLISA) are in charge of imposing administrative fines in these cases. However, from my personal experiences as a legal official and labour inspector (for two years 2003-2005) of MOLISA, no administrative fine in cases of forced labour had been imposed since the Labour Code came into effect on 1 January 1995. This fact also contributes to explaining why there are no official statistics on forced labour in Vietnam. Furthermore, according to the CILS, it is a violation if employers keep identity documents of workers. However, in Vietnam, a current survey has shown that 24.28% of workers had to hand over their identity documents to the employers in order to take the jobs.<sup>1241</sup>

## *The Use of Different Offences to Punish Forced Labour*

Another issue rising from the lack of penal punishment for forced labour is that offenders are prosecuted under different offences. In the most recent outstanding forced labour case – the Tan Hoang Phat case - the Government had to use other offences to prosecute the employers who had used forced labour. The most recent outstanding case is the Tan Hoang Phat Case summarised as follow:

Tan Hoang Phat is a company owned by Phan Cao Tri, which owns six massage centres in Ho Chi Minh city. According to the victims (all are girls), who come from southern provinces, they were recruited to work at Tan Hoang Phat massage centres. When they started working there, they had to sign a contract and document which stated that they owed Tri VND 24.0 million (\$1,500) for cosmetics, clothes, accommodations, etc. and massage training. Each month a massage staff was paid VND 500,000 (\$31) and they had to give all tips to Yen and Tri to pay off their debt. Tri employed a lot of tricks so many massage girls couldn't pay the debt with their tips and their debts increased. Tri organised a birthday party for staff every month and forced newly-recruited massage workers to give them congratulatory money of VND 500,000 and from VND 1.0 million to \$100 for senior massage workers. Any girl who wanted to visit her family had to sign a VND 15 million debt certificate. To go on holiday, they had to sign a debt certificate of VND 50 million. Massage workers who worked hard could earn VND 10 million (\$625) per month but most of the sum was paid to Tri. Girls had to work from 9 am to 2 am the next day. They were exploited and sexually abused under the watch of gangsters. Anyone who violated the rules or tried to run away would be

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<sup>1241</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

confined in dog cages. Tri also beat and pressed guns to the heads of massage girls to threaten them. Some girls tried to escape by jumping from the second storey to the ground and many of them broke their legs. Girls called home to ask for help but their families had to pay from 20 million to VND 24 million (\$1,200-1,500) to rescue their children. Many families had to give their house ownership certificates to Tri to take their daughters home.<sup>1242</sup>

This case was discovered in December 2008 and, it is still being tried. Tri was prosecuted under two counts, which do not express the forced labour essence of his offences: (i) illegal arrest, custody or detention of people (Article 123 of the Penal Code); and extortion of property (Article 135 of the Penal Code).<sup>1243</sup>

### *Information Communication and Disseminate of Law on Elimination of Forced Labour*

Since the ratification of Convention No. 29, some activities have been carried out to disseminate the content of this Convention to Government officials, workers, and employers. A Questions & Answers handbook on Convention No. 29 of the ILO was published in Vietnam in 2007. In the same year, training for labour inspectors throughout the country was organised (one in the North and one in the South) with an expert trainer from the ILO.<sup>1244</sup>

However, communication activities to disseminate information and improve knowledge about labour legislation in general and the Convention No. 29 in particular are not effective due to limitations in types of activities and resources.<sup>1245</sup>

### **Observations**

Forced labour had been prohibited in Vietnam law before the ratification of Convention No. 29. After ratifying Convention No. 29, Vietnam has made many efforts to harmonise domestic law with the requirements of Convention No. 29 as well as to incorporate the provisions of Convention No. 29 into the domestic legal system. Some regulations that were not in conformity with provisions of Convention No. 29 had been

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<sup>1242</sup> Source: Vietnamese media.

<sup>1243</sup> See [http://www.tin247.com/phe\\_chuan\\_quyet\\_dinh\\_khoi\\_to\\_bi\\_can\\_vu\\_tan\\_hoang\\_phat-6-21366006.html](http://www.tin247.com/phe_chuan_quyet_dinh_khoi_to_bi_can_vu_tan_hoang_phat-6-21366006.html) (last visited 20 March 2010).

<sup>1244</sup> The author was one of the organisers and interpreters of these activities.

<sup>1245</sup> Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009.



revised or repealed. Some aspects of forced labour are recognised and enforced by law, particularly human trafficking.

Despite these efforts, there are still regulations in Vietnam which are not in conformity with the CILS on forced labour. Most importantly, there is no clear definition of forced labour in Vietnam; the law regulates only some aspects of forced labour. Therefore, the scope of forced labour is limited. The lack of definition also results in the lack of penalties for forced labour offences. Limitations in the definition of forced labour in Vietnam also show the misinterpretation of the CILS on forced labour in the national context.

Besides legislations, the Government has carried out many activities and programmes to implement regulations on elimination of forced labour. However, enforcement is still weak due to a lack of human and capital resources. There is no mechanism to collect data on cases of forced labour; therefore, there are no official statistics on forced labour. Vietnam is still facing the problems of awareness and dissemination of law on elimination of forced labour. Weakness in implementation of Vietnam's regulation on elimination of forced labour has demonstrated the challenges of implementation of the ILS which was discussed in Chapter I. This weakness calls for attention in implementation if Vietnam ratifies core Conventions on freedom of association and collective bargaining in the future.

## **5.2. Incorporation of the CILS on Abolition of Child Labour**

Child labour is one of the priorities of both national and international labour standards. At the national level, the first labour law was the law setting the age and working hours of working children. These laws were passed throughout European countries during the eighteenth and nineteenth centuries, such as Austria in 1787, Holland in 1815, France in 1841, Belgium in 1889, Germany in 1839, Hungary in 1940, etc.<sup>1246</sup> At international level, action to combat the economic exploitation of children began in earnest in 1919

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<sup>1246</sup> Stanley L. Engerman 2003, "The History and Political Economy of International Labour Standards" in *International Labour Standards: History, Theory, and Policy Options*, ed. Kaushik Basu, Henrik Horn, Lisa Roman and Judith Shapiro, Blackwell publishing Ltd, Oxford, pp. 12- 21.

with the creation of the ILO.<sup>1247</sup> The protection of children from work and at work is part of the fundamental mandate assigned to the ILO in the Preamble of its Constitution, which calls for the “protection of children, young people”.

Since then, child labour has been dealt with by the ILO in two aspects. The first aspect is to fix a certain age of children from which children are allowed to work. The Minimum Age (Industry) Convention, 1919 (No. 5) was adopted at the first session of the International Labour Conference in 1919. Between 1919 and 1972, the Conference adopted and revised ten Conventions and four Recommendations on the minimum age for admission to employment or work in the various sectors.<sup>1248</sup> Of these the most important instruments that the ILO adopted are the Minimum Age Convention (No. 138)<sup>1249</sup> and Recommendation (No. 146), which apply to all sectors.

The second aspect of child labour legislation is to regulate the conditions of work of children and young persons whose employment was not prohibited by international standards, such as night work of young persons, as well as the medical examination of young persons. This aspect is dealt with in many ILO instruments,<sup>1250</sup> notably Convention No. 182.<sup>1251</sup>

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<sup>1247</sup> Dao Huu Tuong (1989) “ILO Standards for the Protection of Children”, *Nordic Journal of International Law*, vol. 58, No. 1, pp. 54-67. See also Nicolas Valticos and Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 216.

<sup>1248</sup> These are: the Minimum Age (Industry) Convention, 1919 (No. 5); the Minimum Age (Sea) Convention, 1920 (No. 7); the Minimum Age (Agriculture) Convention, 1921 (No. 10); the Minimum Age (Trimmers and Stokers) Convention, 1921 (No. 15); the Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33); the Minimum Age (Sea) Convention (Revised), 1936 (No. 58); the Minimum Age (Industry) Convention (Revised), 1937 (No. 59); the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No. 60); the Minimum Age (Fishermen) Convention, 1959 (No. 112); the Minimum Age (Underground Work) Convention, 1965 (No. 123); the Minimum Age (Non-Industrial Employment) Recommendation, 1932 (No. 41); the Minimum Age (Family Undertakings) Recommendation, 1937 (No. 52); the Minimum Age (Coal Mines) Recommendation, 1953 (No. 96); and the Minimum Age (Underground Work) Recommendation, 1965 (No. 124). Texts available at [www.ilo.org](http://www.ilo.org) (last visited 12 June 2010).

<sup>1249</sup> More details on Convention No. 138 can be found at Philip Alston (1989) “Implementing Children’s Rights: The Case of Child Labour”, *Nordic Journal of International Law*, vol. 58, pp. 35-53.

<sup>1250</sup> Other instruments are: The Night Work of Young Persons (Industry) Convention, 1919 (No. 6); the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79); the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90); the Night Work of Young Persons (Non-Industrial Occupations) Recommendation, 1946 (No. 80); the Night Work Recommendation, 1990 (No. 178); the Medical Examination of Young Persons (Sea) Convention, 1921 (No. 16); the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77); the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78); the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124); and the Medical Examination of

In 1989, the United Nations adopted the Convention on the Rights of the Child, which requires State Parties to recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.<sup>1252</sup> In 1992, the ILO launched a large-scale technical cooperation programme called the International Programme for the Elimination of Child Labour (IPEC), which aims at the progressive elimination of child labour worldwide, emphasising the eradication of the worst forms as rapidly as possible.<sup>1253</sup> However, despite the efforts made, the ILO found that child labour remained a matter of concern, particularly in view of the numbers of children involved, which remained very high.<sup>1254</sup> Considering these issues and moving from a sectoral to a comprehensive approach on a minimum age,<sup>1255</sup> in 1999, the ILO adopted the Worst Forms of Child Labour Convention (No. 182) and Recommendation (No. 190). Convention No. 182 applies to all branches of economic activity and requires immediate action, regardless of the level of economic development of the ratifying country.<sup>1256</sup> It is a clear statement of the need to take immediate action to eliminate the intolerable conditions many children face and to help them recover and lead healthy lives.<sup>1257</sup>

Recently, at The Hague Global Child Labour Conference on 11 May 2010, more than 450 delegates from 80 countries have agreed on a Roadmap for achieving the elimination of the Worst Forms of Child Labour by 2016 (Roadmap).<sup>1258</sup> The Roadmap specifically calls on Governments to “assess the impact of relevant policies on the worst

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Young Persons Recommendation, 1946 (No. 79). Texts available at [www.ilo.org](http://www.ilo.org) (last visited 12 June 2010).

<sup>1251</sup> More analysis on Convention No. 182 can be found at Emeé Vida Estacio and David Marks (2005) “Child Labour and the International Organisation’s Convention 182: A Critical Perspective”, *Journal of Health Psychology*, vol. 10, No. 3, pp. 475-484.

<sup>1252</sup> Sec 1, Article 32 the Convention on the Rights of the Child. Text available at [www2.ohchr.org/english/law/crc.htm](http://www2.ohchr.org/english/law/crc.htm) (last visited 15 June 2010).

<sup>1253</sup> ILO (2009) *International Programme for the Elimination of Child Labour (IPEC)*. Available: <http://www.ilo.org/ipec/programme/lang--en/index.htm> (last visited 10 March 2009).

<sup>1254</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 90.

<sup>1255</sup> Dao Huu Tuong (1989) “ILO Standards for the Protection of Children”, *Nordic Journal of International Law*, vol. 58, No. 1, pp. 54-67.

<sup>1256</sup> Article 1 of the Convention No. 182.

<sup>1257</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 23.

<sup>1258</sup> Text available at <http://www.ilo.org> (last visited 12 May 2010).

forms of child labour, taking into account gender and age, put in place preventive and time-bound measures and make adequate financial resources available to fight the worst forms of child labour, including through international cooperation”.<sup>1259</sup> It also calls on social partners to take “immediate and effective measures within their own competence to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency, including through policies and programmes that address child labour”.<sup>1260</sup>

### **5.2.1. The CILS on Abolition of Child Labour**

Children’s participation in work that does not affect their health and personal development or interfere with their schooling is generally regarded as something positive. This includes activities such as helping their parents around the home, assisting in a family business or earning pocket money outside school hours and during school holidays. These kinds of activities contribute to children’s development and to the welfare of their families; they provide them with skills and experience, and help to prepare them to be productive members of society during their adult life. However, there are cases where the participation of children in work deprives them of their childhood, their potential and their dignity, and that is harmful to physical and mental development<sup>1261</sup> – these cases are regarded as child labour.

Child labour is a violation of fundamental human rights and has been shown to hinder children’s development, potentially leading to lifelong physical or psychological damage. Evidence points to a strong link between household poverty and child labour, and child labour perpetuates poverty across generations by keeping the children of the poor out of school and limiting their prospects for upward social mobility. This lowering of human capital has been linked to slow economic growth and social

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<sup>1259</sup> Sec. 2 Part I of the Roadmap.

<sup>1260</sup> Sec. 9.1 Part I of the Roadmap.

<sup>1261</sup> It refers to work that:

- (i) is mentally, physically, socially or morally dangerous;
- (ii) harmful to children;
- (iii) interferes with their schooling by: depriving them of the opportunity to attend school, obliging them to leave school prematurely, or requiring them to attempt to combine school attendance with excessively long and heavy work.

See also ILO (2008) *Child Labour Statistics*, ILO, Geneva, pp. 7-10.

development.<sup>1262</sup> Indeed, exploitation of child labour is certainly one of the worst ills of poverty, if not the worst.<sup>1263</sup>

Therefore, the elements to decide whether a form of work can be called child labour are the child's age, the type and hours of work performed, the conditions under which it is performed and the objectives pursued by individual countries. The answer varies from country to country, as well as among sectors within countries.<sup>1264</sup> As noted in the previous section, the ILO deals with child labour in two ways: setting the minimum age of working and, setting the condition in which children can work including defining the worst forms of child labour that must be eliminated. Of which Conventions No. 138 and No. 182 are two most important instruments.

### ***Minimum Age of Children to Work***

#### *General Minimum Age*

The CILS require that the minimum age of children for admission to employment or work<sup>1265</sup> shall not be less than the age of completion of compulsory schooling<sup>1266</sup> and, in any case, shall not be less than 15 years,<sup>1267</sup> and no one under that age shall be admitted to employment or work in any occupation.<sup>1268</sup>

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<sup>1262</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 30.

<sup>1263</sup> Dao Huu Tuong (1989) "ILO Standards for the Protection of Children", *Nordic Journal of International Law*, vol. 58, No. 1, pp. 54-67.

<sup>1264</sup> ILO (2008) *Child Labour Statistics*, ILO, Geneva, p. 10.

<sup>1265</sup> The term "employment or work" is used to cover all labour by young people whether or not, it is performed under a contract of employment or not. The term "employment" is used together with the term "work" in order to cover all economic activities regardless of the formal employment status of the persons concerned. See ILO (1981) *General Survey, 1981 Child Labour*, ILO, Geneva, para. 61.

<sup>1266</sup> The aim to link the age to work to the age of completion school is to ensure that children's human capital is developed to its fullest potential, benefiting children themselves, their families and communities and society as a whole by the increased contribution they can, when grown, make to economic growth and social development. The reason why the CILS do not allow children to work during the time they do not have to attend school is, if a child is permitted to work while also attending school, his schooling may be prejudiced by the drain on his time and energies of having to work outside school hours as well.

<sup>1267</sup> Sec. 3 Article 2 of the Convention No. 138. There are two possibilities in applying this provision. In the first place, if the compulsory schooling age is over 15, the minimum age of admission to employment or work will not be less than that compulsory schooling age. On the other hand, if the compulsory schooling age is less than 15 does not exist, the minimum age of admission to employment or work must be no less 15. Indeed, if the two ages do not coincide, various problems may arise. If compulsory schooling comes to an end before the young persons are legally entitled to work, there may be a period of enforced idleness which may lead to problems such as delinquency. On the contrary, if the age of completion of compulsory schooling is higher than the minimum age for admission to work or

### *Minimum Age for Low Developed Member States*

The CILS allow that a Member State whose economy and educational facilities are insufficiently developed may initially specify a minimum age of 14 years after consultation with the organisations of employers and workers.<sup>1269</sup> A Member State, which has specified a minimum age of 14 years shall include in its reports under Article 22 of the ILO Constitution a statement of (i) its reason for doing so subsists; or (ii) renouncing its right to avail itself of the provisions in question as from a stated date.<sup>1270</sup>

### *Higher Minimum Age for Hazardous Work*

Because allowing younger people to perform hazardous operations and to handle dangerous material and substances before they have formed the judgement necessary to do so safely, will present a danger to the workers around them as well as themselves,<sup>1271</sup> the CILS provide special protection to young workers at and from work by requiring that:

the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety<sup>1272</sup> or morals of

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employment, then children required to attend school are also legally allowed to work and may thus be encouraged to leave school. Legislation on compulsory education and that on minimum age are mutually reinforcing. Nevertheless, legislation on compulsory school attendance is meaningless if school facilities are inadequate. See ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 94.

<sup>1268</sup> Sec. 1 Article 2 of the Convention No. 138.

<sup>1269</sup> Sec 4 Article 2 of the Convention No. 138. The educational reason is justified when the country is unable to provide possibilities of education (through a lack of educational infrastructure, trained teachers, etc.) until the age of 15. For economic reasons, adopting a minimum age of 14 is justified if it results from the necessity for children to begin working at a lower age than 15 to contribute to their families' support of their own. See also ILO (1981) *General Survey, 1981 Child Labour*, ILO, Geneva, para 121.

<sup>1270</sup> Sec 5 Article 2 of the Convention No. 138.

<sup>1271</sup> Neville Rubin, Evance Kalula and Bob Hepple (2005) *Code of International Labour Law: Law, Practice and Jurisprudence*, Cambridge University Press, Cambridge, p. 651.

<sup>1272</sup> The term "health" and "safety" obviously refer to physical dangers, through of different types. They would cover:

- (i) danger to certain process or substances which might have an effect on the general safety of those concerned; and
- (ii) immediate physical danger such as work with machinery or work in high places.

See also ILO (1981) *General Survey, 1981 Child Labour*, ILO, Geneva, para 215.

young persons (hazardous work<sup>1273</sup>) shall not be less than 18 years.<sup>1274</sup> Certain types of employment or hazardous work may be performed as from the age of 16 years.<sup>1275</sup>

The CILS also require Member States, where the minimum age for admission to hazardous work is below 18 years, to take immediate steps to raise it to 18 years.<sup>1276</sup>

### *Lower Minimum Age for Light Work*

According to the CILS, Member States may permit employment or work of persons 13 to 15 years of age on light work,<sup>1277</sup> and a Member State which has specified a general minimum age for admission to employment or work of 14 years may permit the employment or work of persons 12 to 14 years of age on light work,<sup>1278</sup> and the number of hours during which and the conditions of doing light work must be prescribed.<sup>1279</sup>

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<sup>1273</sup> The specific definition of hazardous work is determined by national laws or regulations or by the competent authority after consultation with the organisations of employers and workers concerned. In determining these types of employment or work, “full account should be taken of relevant international labour standards”, such as those concerning dangerous substances, agents or processes, including standards relating to ionizing radiations, the lifting of heavy weights and underground work. Moreover, the list of hazardous types of work should be re-examined periodically, “particularly in the light of advancing scientific and technical knowledge”. See also Sec 2 Article 3 of the Convention No. 138, Para 10 Recommendation No. 146.

<sup>1274</sup> Sec 1 Article 3 of the Convention No. 138.

<sup>1275</sup> Sec 3 Article 3 of the Convention No. 138. However, the following conditions must be met:

- (i) the organisations of employers and workers concerned must have been consulted beforehand;
- (ii) the health, safety and morals of the young people concerned must be fully protected; and
- (iii) they must have received adequate specific instruction or vocational training in the relevant branch of activity.

<sup>1276</sup> Paragraph 9 of the Recommendation No. 146.

<sup>1277</sup> The definition of light work is determined by competent authorities of Member States. There is no requirement that the types of light work should be specified in principal legislation; this determination may instead be left to regulations issued by the administrative authorities. However, this “light work” must be the work or employment which is:

- (i) not likely to be harmful to their health or development; and
- (ii) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received.

See also Sec. 1 Article 7 of the Convention No. 138; ILO (1981) *General Survey, 1981 Child Labour*, ILO, Geneva, para 186.

<sup>1278</sup> Sec 2 Article 7 of the Convention No. 138.

<sup>1279</sup> Sec 3 Article 7 of the Convention No. 138.

**Table 5.1: Minimum Ages for Admission to Employment or Work**

	<b>General Minimum Age</b>	<b>Light Work</b>	<b>Hazardous Work</b>
General rule: Not less than the age of completion of compulsory schooling and in any case not less than	15	13	18 (16 under certain conditions)
Exception when the economy and educational facilities are insufficient developed. Initially not less than	14	12	18 (16 under certain conditions)

### *Exceptions*

With a view to its adaptation to all national circumstances, Convention No. 138 permits a number of exceptions to its application. In addition to the possibility of specifying minimum ages according to the types of employment or work, a Member State may exclude from the application of the Convention limited categories of employment or work<sup>1280</sup> and limit the scope of the Convention to certain branches of economic activity<sup>1281</sup> and a Member State is not bound to apply the Convention to work done by

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<sup>1280</sup> Sec 1, 3 Article 4 Convention No. 138. It is possible to exclude from the application of the Convention on a temporary basis limited categories of employment or work in respect of which special and substantial problems of application arise. A Member State that wishes to avail itself of this provision must fulfil the following conditions:

- (i) the exclusion of limited categories of employment or work is permitted only in so far as necessary;
- (ii) the organisations of employers and workers concerned must have been consulted beforehand; and
- (iii) the limited categories of employment which have been excluded must be listed, giving the reasons for such exclusion, in the first report that the State has to submit on the application of the Convention under article 22 of the Constitution of the ILO.

The categories of employment or work which may be covered by such exclusion might include employment in family enterprises, domestic service in private households, and home work or other work outside the supervision and control of the employer, including young persons working on their own account. However, it is important to recall that the categories can not include dangerous work. See also ILO (1981) *General Survey, 1981 Child Labour*, ILO, Geneva.

<sup>1281</sup> Article 5 of the Convention No. 138. A Member which wishes to avail itself of this provision must fulfil the following conditions:

- (i) consult the organisations of employers and workers concerned;



children in educational or training institutions.<sup>1282</sup> Another exception of the CILS on minimum age is the CILS allow that children who have not attained the general minimum age are permitted admission to employment or work in activities such as artistic performances with some requirements.<sup>1283</sup> Nonetheless, it should be noted that the Convention does not lay down a minimum age for the participation of children in this type of activity.<sup>1284</sup>

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- (ii) specify, in a declaration appended to its ratification, the branches of economic activity or types of enterprises to which it will apply the provisions of the Convention; and
  - (iii) indicate, in the reports that it has to submit under Article 22 of the Constitution of the ILO, the general position as regards the employment or work of young persons and children in the branches of activity which are excluded from the scope of application of the Convention, and any progress which may have been made towards wider application of the provisions of the Convention.

Seven sectors which must as a minimum be covered by the Convention: mining and quarrying; manufacturing; construction; electricity; gas and water; sanitary services; and transport, storage and communication, as well as plantations and other agricultural enterprises producing mainly for commercial purposes, but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers.

<sup>1282</sup> Article 6 of the Convention No. 138 does not apply to “work done by children and young persons in schools for general, vocational or technical education or in other training institutions” and the Convention does not apply to work done by persons at least 14 years of age in enterprises where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organisations of employers and workers concerned, and where it is an integral part of:

- (i) a course of education or training for which a school or training institution is primarily responsible;
- (ii) a programme of training mainly or entirely in an enterprise, where the programme has been approved by the competent authority; or
- (iii) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training. However, measures should also be taken to safeguard and supervise the conditions in which children and young persons undergo vocational orientation and training and to formulate standards for their protection and development.

<sup>1283</sup> Article 8 of the Convention No. 138 provides these are:

- (i) permits must be granted in individual cases;
- (ii) the organisations of employers and workers concerned must be consulted beforehand; and
- (iii) the permits must limit the number of hours during which, and prescribe the conditions in which, employment or work is allowed.

<sup>1284</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 100.

### ***Conditions of Work of Children***

Children, who are allowed to work, are entitled to all rights prescribed in other ILO instruments in the same way as adults. Furthermore, when allowing children aged 12 to 15 to work, the CILS require special attention should be given to:<sup>1285</sup>

1. The provision of fair remuneration and its protection, bearing in mind the principle of equal pay for equal work.
2. The strict limitation of the hours spent at work in a day and in a week, and the prohibition of overtime, so as to allow enough time for education and training (including the time needed for homework related thereto), for rest during the day and for leisure activities.
3. The granting, without possibility of exception save in genuine emergency, of a minimum consecutive period of 12 hours night rest, and of customary weekly rest days.
4. The granting of an annual holiday with pay of at least four weeks and, in any case, not shorter than that granted to adults.
5. Coverage by social security schemes, including employment injury, medical care and sickness benefit schemes, whatever the conditions of employment or work may be.
6. The maintenance of satisfactory standards of safety and health and appropriate instruction and supervision.

### ***Abolition of Worst Forms of Child Labour***

The CILS require Member States to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.<sup>1286</sup>

The term “the worst forms of child labour” comprises four groups of work:<sup>1287</sup>

1. All forms of slavery or practices similar to slavery, such as the sale and trafficking of children,<sup>1288</sup> debt bondage<sup>1289</sup> and serfdom<sup>1290</sup> and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;<sup>1291</sup>

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<sup>1285</sup> Para 13 of the Recommendation No. 146.

<sup>1286</sup> Article 1 of the Convention No. 182.

<sup>1287</sup> Article 3 of the Convention No. 182.

2. The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;<sup>1292</sup>
3. The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;<sup>1293</sup>
4. Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (hazardous work).<sup>1294</sup>

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<sup>1288</sup> Trafficking in human being is defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. See also Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000. Text available at [www.treaties.un.org](http://www.treaties.un.org) (last visited 10 June 2010).

<sup>1289</sup> “Debt bondage” is the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined. See also the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956. Text available at [www.treaties.un.org](http://www.treaties.un.org) (last visited 10 June 2010).

<sup>1290</sup> “Serfdom” is the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status. See also the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956.

<sup>1291</sup> For forced and compulsory labour see Part 5.2 above.

<sup>1292</sup> The CILS do not provide definitions of prostitution and pornography. It allows application of national definitions when there are no international definitions. Internationally, child prostitution and child pornography are defined in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000. In this instrument, “Child prostitution” means the use of a child in sexual activities for remuneration or any other form of consideration; and “Child pornography” means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes. Furthermore, procuring or offering a child, which may also occur over the Internet, is covered by this provision of the Convention. The medium of dissemination and consumption of the material produced using children is not directly addressed, and is thus left to the national legislator. However, existence of pornographic material on the Internet would constitute proof of violation of the prohibition against using children to produce such material. See also ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 108.

<sup>1293</sup> There is no definition for “Illicit activities”, but the Convention target and include the production and trafficking of drugs as illicit activities. The relevant international treaties on the production and trafficking of drugs are the following: the Single Convention on Narcotic Drugs, 1961; the Convention on Psychotropic Substances, 1971; the Protocol amending the Single Convention on Narcotic Drugs, 1972; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. Texts available at [www.treaties.un.org](http://www.treaties.un.org) (last visited 10 June 2010).

<sup>1294</sup> Article 3 of the Convention No. 182 provides that the types of work shall be determined by national laws or regulations or by the competent authority, after consultation with the organisations of employers and workers concerned, taking into consideration relevant international standards. The list of activities or types of work which should be considered as hazardous work is established in Recommendation No. 190 as follows:

### 5.2.2. The CILS on Abolition of Child Labour in Vietnam

The rights of young people and the protection of children are central to policies in Vietnam and recognised in the Constitution. In Vietnam, parents are bound to bring up and educate their children into useful citizens of society. The State and society do not admit any discrimination among children of the same family.<sup>1295</sup> The State, society and the family are responsible for the protection, care and education of children.<sup>1296</sup> The State, society and family create favourable conditions for the studies, work and recreation of young people and for the development of their intellectual faculties and physical fitness; to inculcate in young people the national tradition and ethics, the sense of civic responsibility and the socialist ideal; to encourage them to be in the vanguard of creative labour and of defence of the Homeland.<sup>1297</sup>

Vietnam was the first country in Asia and the second in the world to ratify the Convention on the Rights of the Child (CRC), on 20 February 1990.<sup>1298</sup> Vietnam ratified both ILO core Conventions on elimination of child labour: Conventions No. 138 on 24 June 2003<sup>1299</sup> and, Convention No. 182 on 19 December 2000.<sup>1300</sup> Since then, the State of Vietnam has made great efforts to incorporate the CRC, and the CILS on abolition of child labour into its domestic legal system<sup>1301</sup> together with awareness raising activities on child rights, enhancement of State management over children's

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- (i) work which exposes children to physical, psychological or sexual abuse;
  - (ii) work underground, under water, at dangerous heights or in confined spaces;
  - (iii) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
  - (iv) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
  - (v) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

<sup>1295</sup> Article 64 of the 1992 Constitution.

<sup>1296</sup> Article 65 of the 1992 Constitution.

<sup>1297</sup> Article 66 of the 1992 Constitution.

<sup>1298</sup> Source: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&ndmtsg\\_no=IV-11&Chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&ndmtsg_no=IV-11&Chapter=4&lang=en) (last visited 24 March 2010).

<sup>1299</sup> This ratification denounced the ratification of the Convention No. 5 on Minimum Age (Industry) on 3/19, which was ratified on 3/10/1994.

<sup>1300</sup> Source: [www.ilo.org](http://www.ilo.org) (last visited 24 March 2010).

<sup>1301</sup> Some of the main documents are the Labour Code, 1994; the Law on Child Protection, Care and Education, 2004; Law on Education, 2005. Texts available at [ww.na.gov.vn](http://ww.na.gov.vn) (last visited 15 June 2010).

issues, and provision of increased resources for child development. Recently, on 29 March 2010, MOLISA and the ILO office in Hanoi signed a project supporting the design and implement a national action programme on the elimination of worst forms of child labour funded by the Spanish Agency for International Development Cooperation with a budget of 2.5 million USD.<sup>1302</sup>

### ***Incorporation of the CILS on Effective Abolition of Child Labour into the Legal Framework***

Member States, which ratify Convention No. 138, have to pursue a national policy designed to ensure effective abolition of child labour; and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.<sup>1303</sup> All necessary measures, including provision of appropriate penalties, have to be taken by the competent authority to ensure the effective enforcement of Convention No. 138. National laws or regulations or the competent authority must define the persons responsible for compliance with the provisions giving effect to the Convention, and they must prescribe the registers or other documents, which have to be kept and made available by employers.<sup>1304</sup>

### ***Minimum Working Age is 15***

Before ratifying Convention No. 5, Vietnam law had already set the minimum working age at 15.<sup>1305</sup> Immediately after this ratification, the requirement of minimum working age had been incorporated into the Labour Code. While Convention No. 5 established the minimum working age at 14,<sup>1306</sup> the Labour Code reconfirms the regulation of previous legislation and provides that “An employee shall be a person of at least 15

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<sup>1302</sup> Source: MOLISA.

<sup>1303</sup> Article 1 of the Convention No. 138.

<sup>1304</sup> Article 9 of the Convention No. 138.

<sup>1305</sup> Article 12 of the Ordinance on Labour Contracts, 1990. Texts available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 10 June 2010).

<sup>1306</sup> Article 2 of the Convention No. 5.

years of age who is able to work and has entered into a labour contract.”<sup>1307</sup> This minimum working age is still in effect after several revisions of the Labour Code.

By defining that the children are the persons under the age of 16, <sup>1308</sup> the Law on Child Protection, Care and Education provides better protection for children from working while also prohibiting “Abusing child labour, employing children for heavy or dangerous jobs, jobs with exposure to noxious substances or other jobs in contravention of the provisions of labour legislation”.<sup>1309</sup>

In Vietnam, the minimum working age is higher than the compulsory school age. All children in Vietnam have the right to study.<sup>1310</sup> Primary education is compulsory and free of charge.<sup>1311</sup> Primary education consists of five years of schooling, from the first to the fifth grade and, the age of commencement to the first class is six. Therefore, compulsory school age in Vietnam is 11.<sup>1312</sup> Thus, the minimum working age is higher than the compulsory school age.

#### *Minimum Age for Hazardous Work is 18*

In Vietnam, workers between the age of 15 and 18 are junior workers.<sup>1313</sup> The Labour Code has a separate section to deal with junior workers. It provides that:

An employer shall only be permitted to employ a junior worker in jobs, which are suitable to the health of the junior worker to ensure the development and growth of the worker's body, mind, and personality. An employer shall have the responsibility of looking after the interests of the junior worker in respect of labour, wages, health, and training during the working process.<sup>1314</sup>

In addition to prohibiting abuse of junior workers,<sup>1315</sup> the law also prohibits use of junior workers in hazardous work;<sup>1316</sup> furthermore, the law provides a list of

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<sup>1307</sup> Article 6 of the Labour Code.

<sup>1308</sup> Article 1 of the Law on Child Protection, Care, and Education.

<sup>1309</sup> Sec. 7 Article 7 of the Law on Child Protection, Care, and Education.

<sup>1310</sup> Article 15 of the Law on Child Protection, Care, and Education.

<sup>1311</sup> Article 59 of the 1992 Constitution.

<sup>1312</sup> Article 26 of the Law on Education.

<sup>1313</sup> Article 119 of the Labour Code.

<sup>1314</sup> Article 121 of the Labour Code.

<sup>1315</sup> Article 119 of the Labour Code.

occupations that are not permitted to recruit junior workers.<sup>1317</sup> Therefore, by prohibiting the use of workers under the age of 18 for hazardous work, the law establishes the minimum age for hazardous work in Vietnam as 18.

#### *Minimum Age for Artistic Work*

In Vietnam, the minimum working age is 15, and there is no general lower minimum age for light work as provided by the CILS. However, the law allows using persons under 15 years to carry out certain types of work.<sup>1318</sup> The only work that children under the age of 15 are allowed to undertake is:<sup>1319</sup>

- (i) art (dancing, singing, circus, stage art);
- (ii) traditional skilled work (pottery, painting);
- (iii) handicraft (embroidery; carpentry);
- (iv) sport.

The minimum age for the first category is 8 years, for the rest the minimum age is 12 years old.<sup>1320</sup> In addition, there must be approval of and monitoring by the parents or guardian when persons under 15 work.<sup>1321</sup>

#### *Conditions of Work of Workers under 18*

Workers under the age of 18 are junior workers in Vietnam. They are entitled to the same rights as adult workers in term of the right to organise, collective bargaining, salary, social security, etc. However, due to their special characteristics, the law provides higher protection for workers under the age of 18 in wages, working hours and

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<sup>1316</sup> Article 121 of the Labour Code. The list of hazardous work is issued by the Ministry of Labour, Invalids and Social Affairs and the Ministry of Health. Circular No. 09/TT-LB dated 13/4/1995 of MOLISA provides 65 occupations that prohibit junior workers. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 15 June 2010).

<sup>1317</sup> Joint Circular no. 21/2004/TTLT- BLĐTBXH-BYT dated 9/12/2004 of Ministry of Labour- Invalids and Social Affairs and the Ministry of Health. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 15 June 2010).

<sup>1318</sup> Article 120 of the Labour Code.

<sup>1319</sup> Circular No. 21/1999/TT - BLĐTBXH dated 11/09/1999 of MOLISA. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 15 June 2010).

<sup>1320</sup> Circular No. 21/1999/TT - BLĐTBXH dated 11/09/1999 of MOLISA.

<sup>1321</sup> Article 120 of the Labour Code.

the law also imposes more obligations on employers who employ workers under the age of 18.

As noted above, the law in Vietnam allows use of workers under 15 years old only in some artistic activities. In these cases, there are some requirements that must be met:<sup>1322</sup>

- (i) medical check by a district hospital;
- (ii) approval of parents and guardians;
- (iii) background approved by the local authority;
- (iv) working conditions must not be harmful to physical or psychological health of the workers;
- (v) working hours are not more than 4 hours per day or 24 hours per week and workers are not used for overtime and night shifts;
- (vi) schooling time of the workers concerned must be ensured.

In terms of junior workers, Vietnam law provides higher protection than the CILS. Working hours of junior workers are no more than seven hours a day and 42 hours a week. An employer shall be permitted to employ junior workers for overtime or night shift work only in a number of trades and occupations stipulated by MOLISA.<sup>1323</sup> In addition, employers who use workers under the age of 18 have to register with the local authorities and, must establish separate records containing the full names, dates of birth, current employment positions, and regular health reports of the junior workers, and must produce these records upon request by a labour inspector.<sup>1324</sup> Violation of these regulations may result in a fine of between VND 1 million and 5 million.<sup>1325</sup>

#### *The Worst Forms of Child Labour are Prohibited*

A Member State which ratifies Convention No. 182 has to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.<sup>1326</sup> In Vietnam, the law provide a relatively adequate mechanism for abolishing the worst forms of child labour recognised by the CILS relating to: forced labour, prostitution, illicit activities and, hazardous work. The law imposes criminal

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<sup>1322</sup> Circular No. 21/1999/TT - BLĐTBXH dated 11/09/1999 of MOLISA.

<sup>1323</sup> Article 119 of the Labour Code.

<sup>1324</sup> Article 120 of the Labour Code, Circular No. 21/1999/TT - BLĐTBXH dated 11/09/1999 of MOLISA.

<sup>1325</sup> Sec. 1 Article 15 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government; Sec. 1 Article 13 Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1326</sup> Article 1 Convention No. 182.



sentences on those who employ children to perform jobs which are heavy, dangerous or in contact with hazardous substances.<sup>1327</sup>

Vietnam law prohibits all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and, serfdom and forced or compulsory labour, including forced or compulsory recruitment of human beings including children for use in armed conflict.<sup>1328</sup> Sentences of imprisonment are imposed on those who trade in, fraudulently exchange or appropriate children in any form;<sup>1329</sup> or those who ill-treat children;<sup>1330</sup> Victims of human trafficking are protected and supported to rehabilitate them into society. The law provides a legal framework on the sequence, procedure, policies and mechanisms, responsibilities of competent agencies, arrangements for receiving and supporting social integration of trafficked women and children returning home from abroad.<sup>1331</sup>

In Vietnam, the law strictly prohibits the use, procuring or offering of a child for prostitution, for the production of pornography or violent products; producing, copying, transporting, circulating and storing child pornography; producing toys and games harmful to the healthy development of children. These regulations are enforced by criminal punishment.<sup>1332</sup> Prostitution is illegal in Vietnam.<sup>1333</sup> Therefore, Vietnam has

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<sup>1327</sup> Article 228 of the Penal Code provides:

- (i) Those who employ children to perform jobs which are heavy, dangerous or in contact with hazardous substances on the lists prescribed by the State, causing serious consequences, or who have already been administratively sanctioned for this act but continue to commit it, shall be subject to a fine of between five million dong and fifty million dong, non-custodial reform for up to two years or a prison term of between three months and two years.
- (ii) Committing the crime in one of the following circumstances, the offenders shall be sentenced to between two and seven years of imprisonment:
  - a) Committing the crime more than once;
  - b) Against more than one children;
  - c) Causing very serious or particularly serious consequences.

<sup>1328</sup> For more details, see Part 5.2 above.

<sup>1329</sup> Article 120 of the Penal Code.

<sup>1330</sup> Article 110 of the Penal Code.

<sup>1331</sup> Decision No. 17/2007/QĐ-TTg dated 29/1/2007 of the Prime Minister. Texts available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 15 June 2010).

<sup>1332</sup> Sec. 2 Article 253 of the Penal Code provides:

Those who make, duplicate, circulate, transport, sell or purchase, stockpile decadent books, newspapers, pictures, photographs, films, music or other objects for the purpose of dissemination thereof, or commit other acts of disseminating debauched cultural products to juveniles are sentenced to between three and ten years of imprisonment.

created a strong legal framework to prevent and, punish prostitution.<sup>1334</sup> More severe sentences are applied in cases against persons under the age of 18. Terms of imprisonment are imposed on those who harbour prostitutes,<sup>1335</sup> those who entice or procure prostitutes,<sup>1336</sup> and those who have paid sexual intercourse with a person under the age of 18.<sup>1337</sup> The law provides more protection of children from prostitution by sentencing any adults having sexual intercourse with children aged from between 13 and 16 to between one and five years of imprisonment.<sup>1338</sup> In addition, all cases of sexual intercourse with children under 13 years old are considered rape against children and offenders are sentenced to between twelve and twenty years of imprisonment, life imprisonment or capital punishment.<sup>1339</sup> Sexually abused children are assisted by their families, the State and society through consultancy measures, physical and psychological rehabilitation, and given conditions to stabilise their lives. Agencies, organisations, and individuals have the responsibility to undertake measures to educate about, prevent, stop and denounce acts of sexual abuse of children.<sup>1340</sup>

In terms of illicit activities, the use, production, and trafficking of drugs are illegal in Vietnam<sup>1341</sup> and prosecuted under the Penal Code.<sup>1342</sup> Therefore, not only procuring or offering of a child for the production and trafficking of drugs is illegal, Vietnam law also prohibits those who organise or harbour children to use drugs. The penal Code

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<sup>1333</sup> See the Ordinance on Prevention of Prostitution, 2003. Texts available at [ww.na.gov.vn](http://ww.na.gov.vn) (last visited 15 June 2010).

<sup>1334</sup> In addition to domestic legislation, Vietnam has signed on 8/12/2000 and ratified on 20/12/2001 the Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Source: <http://treaties.un.org> (last visited 10 June 2010).

<sup>1335</sup> Article 254 of the Penal Code sets a sentence between five and fifteen years of imprisonment if against person from 16 to 18 years old and, a sentence between twelve years and twenty years of imprisonment if against children from 13 to 16 years old.

<sup>1336</sup> Article 255 of the Penal Code sets a sentence between three and ten years of imprisonment if against person from 16 to 18 years old and, a sentence between seven and fifteen years of imprisonment if against children from 13 to 16 years old.

<sup>1337</sup> Article 256 of the Penal Code sets a sentence between one and five years of imprisonment if against person from 16 to 18 years old and, a sentence between three and eight years of imprisonment if against children from 13 to 16 years old.

<sup>1338</sup> Article 115 of the Penal Code.

<sup>1339</sup> Sec. 4 Article 112 of the Penal Code.

<sup>1340</sup> Article 56 Law on Child Protection, Care and Education.

<sup>1341</sup> See Law on Prevention and Fight against Drugs, 2000 [revised in 2008]. Texts available at [ww.na.gov.vn](http://ww.na.gov.vn) (last visited 15 June 2010).

<sup>1342</sup> Chapter 18 of the Penal Code.

imposes very severe sentences on these offences. The standard sentences range from between seven years to fifteen years imprisonment for:

- (i) those who use children in the manufacture, stockpiling, transport and/or trade in means and/or tools used in the illegal production or use of drugs; and those who sell drugs to children;<sup>1343</sup>
- (ii) those who organise the illegal use of drugs in any form for children from 13 to 16 years old of age,<sup>1344</sup> if the children involved are under 13 years old the sentence is raised to between fifteen and twenty years imprisonment;<sup>1345</sup>
- (iii) those who lease or lend places or commit any other act of harbouring the illegal use of drugs of children;<sup>1346</sup> and
- (iv) those who force or induce children into illegal use of narcotics;<sup>1347</sup> if the children involved are under 13 years old the sentence is raised to between fifteen and twenty years imprisonment.<sup>1348</sup>

Recognising the fact that street children are vulnerable children and, they are easily procured to do illicit work, Vietnam law requires People's Committees at all levels to create conditions for street children to live in a safe environment, not affected by social evils. Furthermore, street children with no one to rely on must be cared for and brought up in surrogate families or child-support establishments; street children from poor households must be given priority and support to eliminate hunger and alleviate poverty. For street children wandering with their families, the provincial level People's Committees of the localities where those children and their families live have to request and create conditions for them to settle down and stabilise their lives and to ensure that children can enjoy their rights.<sup>1349</sup>

In regard to hazardous work, Vietnam law prohibits use of junior workers in heavy or dangerous work, or work requiring contact with toxic substances, or work or workplaces which have adverse effects on their personality.<sup>1350</sup> Violation of these can

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<sup>1343</sup> Sec. 2 Article 194 of the Penal Code.

<sup>1344</sup> Sec. 2 Article 197 of the Penal Code.

<sup>1345</sup> Sec. 3 Article 197 of the Penal Code.

<sup>1346</sup> Sec. 2 Article 198 of the Penal Code.

<sup>1347</sup> Sec. 2 Article 200 of the Penal Code.

<sup>1348</sup> Sec. 3 Article 200 of the Penal Code.

<sup>1349</sup> Article 55 of the Law on Child Protection, Care and Education.

<sup>1350</sup> Article 121 of the Labour Code.

lead to a fine of between VND 5 million and 10 million.<sup>1351</sup> The law does not only provide a list of hazardous occupations,<sup>1352</sup> but further than that, it creates a list of occupations where it is not permitted to recruit junior workers.<sup>1353</sup> In Vietnam, children who have to do hazardous work are regarded as vulnerable children. The People's Committees at all levels have responsibility for detecting and resolving in a timely manner the state of children doing heavy or dangerous jobs or jobs with exposure to toxic chemicals; they must create conditions for those children to learn or do jobs suited to children's health and age group in their respective localities.<sup>1354</sup>

### ***Implementation and Challenges of Regulations on Abolition of Child Labour in Vietnam***

#### *Actions of the Government*

A Member State which ratifies the Convention No. 182 has to design and implement, in consultation with relevant Government institutions and employers' and workers' organisations, programmes of action to eliminate as a priority the worst forms of child labour.<sup>1355</sup> In Vietnam, in addition to incorporating the CILS on effective abolition of child labour into domestic law, the Government has made many efforts to implement and to enforce domestic regulations. Many actions plans have been adopted to contribute to the abolition of child labour as required by the CILS, e.g:

1. National action plan for children for the period 2001-2010;<sup>1356</sup>
2. National action plan for preventing and addressing street children, children who are victims of sexual exploitation and children working in toxic, hazardous and dangerous conditions for the period 2004-2010;<sup>1357</sup>

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<sup>1351</sup> Sec.2 Article 13 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1352</sup> Circular No. 21/1999/TT - BLĐTBXH dated 11/09/1999 of MOLISA.

<sup>1353</sup> Joint-Circular No. 21/2004/TTLT-BLĐTBXH-BYT dated 9/12/2004 of MOLISA and Ministry of Health.

<sup>1354</sup> Article 54 of the Law on on Child Protection, Care and Education.

<sup>1355</sup> Article 6 of the Convention No. 182.

<sup>1356</sup> Decision No. 23/2001/QĐ-TTg dated 13/3/2001 of the Prime Minister. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 10 June 2010).

<sup>1357</sup> Decision No. 19/2004/QĐ-TTg dated 12/2/2004 of the Prime Minister. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 10 June 2010).

3. National action plan on prevention and fighting against trafficking in women and children for the period 2004-2010;<sup>1358</sup>
4. National targeted programme for prevention and fighting against prostitution for the period 2006-2010.<sup>1359</sup>

Implementation of these action programmes has brought about some important achievements in protecting children and abolition of child labour in Vietnam. Development and consolidation of legislation on protection of children and elimination of child labour are the most important goals that they have achieved. The second goal aims at increasing the quality and quantity of supportive services to victims of child labour, such as creating models for supporting children in poor households at risk of early entry into the labour market and for monitoring and evaluating the current situation of activities preventing and resolving the issue of children working in highly hazardous occupations and environment.

In addition, at the time of writing [3/2010], MOLISA, in cooperation with the International Programme on the Elimination of Child Labour (IPEC), is drafting a National Target Program on Child Protection for the period of 2011-2015.

#### *Lack of Official Statistics on Child Labour*

In 2006, the Committee for Child Protection and Education was dissolved and responsibilities for child protection were tasked to MOLISA. The Department for Care and Protection of Children, a unit under MOLISA, has the responsibilities for and duties of assisting the Minister in execution of the State management role in the area of child protection and care.<sup>1360</sup> This Department also has responsibility for collecting data and making periodical and incidental reports on child protection and care.<sup>1361</sup> However, the

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<sup>1358</sup> Decision No. 130/2004/QĐ-TTg dated 14/7/2004 of the Prime Minister. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 10 June 2010).

<sup>1359</sup> Decision No. 52/2006/QĐ-TTg dated 8/3/2006 of the Prime Minister. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 10 June 2010).

<sup>1360</sup> Article 1, Decision No.168/QĐ-LDTBXH dated 24/1/2008 of the Minister of MOLISA on the Roles, Responsibilities, Duties, Authorities and Organisation of the Department of Child Care and Protection. Texts available at [ww.chinhphu.vn](http://ww.chinhphu.vn) (last visited 15 June 2010).

<sup>1361</sup> Sec. 12 Article 2, Decision No.168/QĐ-LDTBXH dated 24/1/2008 of the Minister of MOLISA on the Roles, Responsibilities, Duties, Authorities and Organisation of Department of Child Care and Protection.

question of whether this data consists of information on child labour has not been answered and, if it has, what the mechanism to collect this data is.

One of the core obstacles to effectively monitoring and describing the situation of child labour is the absence of a large-scale national survey to get a comprehensive understanding of the issue. Up to now, there has been no national large-scale survey on child labour in Vietnam. However, periodic surveys on Household Living Standards indicate that there has decreased in the percentage of children taking part in economic activities: from 41.2% in 1993 to 29.3% in 1998 and 18% in 2003.<sup>1362</sup> The latest Household Living Standards Survey carried out in 2006, reveals that an estimated 6.7% of children aged 6-14 years (almost 930,000 children) were economically active. It is also estimated that 503,389 children aged 12-14 years old were involved in heavy work and 633,405 children between 16 and 17 were working excessive hours.<sup>1363</sup>

**Table 5.2: Children in Vulnerable Circumstances in Vietnam in 2008**

Categories of Children	Total Number	percentage supported
Working in hazardous conditions	26,027	64.71
Street children	28,528	93.29
Victims of sexual abuse	1,427	51.7
Drug addicted	1,291	75.28
Victims of trafficking	208	60.66

*Source: MOLISA*

#### *Child Labour is still common due to Poverty*

According to the ILO, most child labour is rooted in poverty.<sup>1364</sup> Studies have proved that child labour is common in countries with low per capita GDP because per capita GDP explains 80% of world wide variation of child labour,<sup>1365</sup> and increases in per

<sup>1362</sup> Source: GSO 2007.

<sup>1363</sup> Source: *Ibid.*

<sup>1364</sup> Source:

[http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang--en/WCMS\\_126840/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang--en/WCMS_126840/index.htm) (last visit 30 April 2010).

<sup>1365</sup> Alan Krueger (1996) *Observation on International Labour Standards and Trade*. NBER Working paper No. T0254. Available at [www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3201](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3201) (last visited 15 June 2010).

capita expenditure contribute to decreases in child labour.<sup>1366</sup> Per capita GDP in Vietnam is low; in 2009 it was just around \$1,000. Although there are no official statistics on child labour in Vietnam, the most recent survey relating to child labour which took place in eight provinces shows that child labour is common in all eight visited provinces, in both rural and urban areas, in both informal and formal sectors. In rural areas, working children mainly engaged in agriculture and small-scale household businesses where they work as hired labour in the agriculture, forestry, and fishery sectors. A smaller number of children in rural areas work as self employed for instance selling lottery tickets or shining shoes. In urban areas, child labour is mainly prevalent in the service sector and craft industries.<sup>1367</sup>

**Table 5.3: Working Children in 8 Provinces in Vietnam**

No.	Provinces/cities	Children in total	Working children		Non- working children	
			6-14 years old	15 - <18 years old	6-14 years old	15 - < 18 years old
1	Lao Cai	48	20	20	4	4
2	Hanoi	66	28	28	5	5
3	Quang Ninh	30	9	9	6	6
4	Ha Tinh	48	20	20	4	4
5	Quang Nam	48	20	20	4	4
6	Gia Rai	30	12	12	3	3
7	HCM City	66	23	23	10	10
8	An Giang	48	18	18	6	6
	<b>Total</b>	<b>384</b>	<b>150</b>	<b>150</b>	<b>42</b>	<b>42</b>

*Source: MOLISA: Survey of Working Children in Eight Province 2009*

The survey on child labour in eight provinces reconfirms that poverty is the main reason for child labour in Vietnam. In poor households, parents are unable to ensure the minimum survival subsistence of their children; income from parents' and other adult family members is not enough to cover children's needs. Therefore, children in one or other way have to work to contribute to the survival of the family and for

<sup>1366</sup> Eric Edmonds (2003) *Does Child Labour Decline with Improving Economic Status?*. Available: [www.nber.org/papers/w10134](http://www.nber.org/papers/w10134) (last visited 20 February 2009).

<sup>1367</sup> Source: MOLISA Survey of Working Children in 8 Province 2009.

themselves.<sup>1368</sup> This demonstrates that, the implementation of the CILS on child labour does not just only depend on the incorporation into the legal framework but it also strongly depends on the level of economic development of the countries concerned.

### *Enforcement*

The law, as mentioned previously, limits the working hours of children to no more than 7 hours per day. However, in some special cases, in production establishments such as garments, food processing, during high season, children work up to 8-9 hours, even 10-12 hours per day. Furthermore, working children are suffering from psychological pressure such as low pay, delay of payment, or insults from employers, or are forced to live far from their family and exposed to adult behaviour.<sup>1369</sup>

The law prohibits use of children in hazardous work. On the contrary, the survey shows about 50% of the working children surveyed were working in a bad and hazardous environment that might have serious consequences for both their physical and psychological development. These factors include humidity, light, dust, hazardous substance, noise, and narrow working space.<sup>1370</sup>

### *Awareness and Knowledge of Child Labour*

Studies have proved that public awareness is critical for a reduction in child labour.<sup>1371</sup> In Vietnam, community and people have limited awareness of child labour issues. Not a small segment of population considers that child labour is normal practice; many of them are not concerned about the problem of child labour in their locality. Local people's understanding and awareness of legislation on child labour is very limited. A

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<sup>1368</sup> In Vietnam, Working children are often from disadvantaged households, such as:

- (i) poor households;
- (ii) households with absence of father or mother as the result of divorce, separation, death; and,
- (iii) households with member involved in social problems such as drug addiction, or person with HIV/AIDS).

Source: MOLISA Survey of Working Children in 8 Provinces 2009.

<sup>1369</sup> Source: *Ibid.*

<sup>1370</sup> Source: *Ibid.*

<sup>1371</sup> Furio Camillo Rosati and Zafiriz Tzannatos (2006) "Child Labour in Vietnam", *Pacific Economic Review*, vol. 11, No. 1, pp. 1-31.



large proportion of people do not know that employment of children in work, especially small children, is against Vietnam law.<sup>1372</sup>

Many people are not aware of the need to reduce working hours of children. According to the *Survey on Implementation of Labour Law at Enterprises*, which was conducted in 1500 enterprises in Vietnam in 2009, 27.02% of employers, 31.58% of workers and 27.02% of trade union leaders said that it is not necessary to reduce the working hours of junior workers to a lower level than those of adult workers.<sup>1373</sup>

### **Observations**

The substance of the CILS on elimination of child labour provided by Conventions No. 138 and No. 182 of the ILO has been properly incorporated into Vietnam's legal system. Vietnam law on the minimum working age and conditions of work of children has been in conformity with the CILS. Vietnam law prohibits all worst forms of child labour recognised by the CILS. However, some of these regulations were adopted before the date that Vietnam ratified Conventions No. 138 and No. 182 of the ILO. Since ratification, provisions of Conventions No. 138 and No. 182 have been incorporated into domestic legal documents. The law also imposes very strict punishments on use of the worst forms of child labour. Besides legislation, many programmes of action have been set up to implement the regulations on child labour in Vietnam. This demonstrates Vietnam's fulfilment of its obligation as a Member State of Conventions No. 138 and No. 182.

In terms of implementation, the percentage of child labour has declined, which shows the impact of ratification and implementation of the CILS on abolition of child labour in Vietnamese practice. However, although the law on abolition of child labour is more than adequate, enforcement is still a problem. For many reasons, most importantly poverty and law enforcement, child labour is still common in Vietnam although there are no official statistics of child labour throughout the country. Even though Vietnam ratified the core ILO Conventions on elimination of child labour a long time ago and has incorporated these provisions into domestic law, awareness of child labour issues is

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<sup>1372</sup> Source: MOLISA Survey of Working Children in 8 Provinces 2009.

<sup>1373</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

still very inadequate among Government officials, employers, trade unions and the workers themselves.

### **5.3. Incorporation of the CILS on Elimination of Discrimination at Work**

Discrimination in one form or another occurs every day in the world of work.<sup>1374</sup> Discrimination in itself has a humiliating character, and is incompatible with human dignity as all human beings are born free and equal in dignity and rights.<sup>1375</sup> A more equal distribution of job opportunities, productive resources and assets between men and women of different races, religions, or ethnic origin, contributes to higher growth and political stability.<sup>1376</sup>

Since the ILO was founded in 1919, the question of discrimination has been one of its fundamental objectives. The Constitution of the ILO calls for “recognition of the principle of equal remuneration for work of equal value”.<sup>1377</sup> The Philadelphia Declaration affirmed “all human beings, irrespective of race, creed or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.<sup>1378</sup> In the field of discrimination in employment, the ILO’s standards have a double aim: to eliminate inequality of treatment and to promote equality of opportunity.<sup>1379</sup>

In 1951, the ILO adopted the first binding international instrument the Equal Remuneration Convention, 1951 (No. 100) with the specific objective of promoting equality and eliminating discrimination. This Convention was complemented by the Recommendation on Equal Remuneration (No. 90). Following a Resolution of the Economic and Social Council of the United Nations, the ILO adopted in 1958 the

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<sup>1374</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 27.

<sup>1375</sup> Article 1 of the Universal Declaration on Human Rights, 1948.

<sup>1376</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 28.

<sup>1377</sup> Preamble of the ILO Constitution.

<sup>1378</sup> Part II (a) the Philadelphia Declaration.

<sup>1379</sup> Nicolas Valticos & Geradold von Potobsky (2005) *International Labour Law*, Kluwer Law and Taxation, Boston, p. 118.

Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111).<sup>1380</sup>

### 5.3.1. The CILS on Elimination of Discrimination at Work

#### *Definition of Discrimination at Work*

Discrimination in employment and occupation takes many forms and occurs in all kinds of work settings. However, all discrimination shares a common characteristic that is treating people differently because of race, colour, sex, age, social origin or religion.<sup>1381</sup>

Sec 1(a) Article 1 Convention No. 111 defines discrimination as:

any distinction, exclusion or preference made on race, colour;<sup>1382</sup> sex;<sup>1383</sup> religion;<sup>1384</sup> political opinion,<sup>1385</sup> national extraction<sup>1386</sup> or social origin,<sup>1387</sup> which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>1388</sup>

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<sup>1380</sup> Texts available at [www.ilo.org](http://www.ilo.org) (last visited 8 June 2010).

<sup>1381</sup> ADB (2006) *Core Labour Standards Handbook*, ADB, Manila, p. 29.

<sup>1382</sup> These grounds are generally examined together since difference of colour is only one, albeit the most apparent, of the ethnic characteristics that differentiate human beings. However, they are not considered identical as colour differences may exist between people of the same race. The term “race” or “racism” is often used to refer to linguistic communities or minorities whose identity is based on religious or cultural characteristics, or even national extraction. Any discrimination against an ethnic group is considered to be racial discrimination within the terms of the Convention. See ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 61; ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 14.

<sup>1383</sup> Discriminations based on sex are those actions, which use the biological characteristics and functions that differentiate men from women. These distinctions include explicitly or implicitly to the detriment of one sex or the other. While in the great majority of cases, and particularly in cases of indirect discrimination, they are detrimental to women, protection against discrimination applies equally to either sex.

Discrimination on grounds of sex also includes discrimination based on civil status, marital status, pregnancy and confinement. These distinctions are not discriminatory *in themselves*, and only become so when they have the effect of imposing a requirement or condition on an individual of a particular sex that would not be imposed on an individual of the other sex.

“Sexual harassment” or “unsolicited sexual attention” is particular forms of discrimination on the basis of sex. In order to constitute sexual harassment in employment, an act of this type must, in addition, be justly perceived as a condition of employment or precondition for employment, or influence decisions taken in this field, and/ or affect job performance. Sexual harassment may also arise from situations, which are generally hostile to one sex or the other.

See ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, pp. 14-16; ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 62.

<sup>1384</sup> The Convention protects against discrimination based on denomination or faith, whether it is because of not being of a particular faith, or because of having a belief in a particular faith, or having no belief. It not only protects against discrimination based on belief in a religion, but also protects the expression and manifestation of the religion.

The CILS excludes three categories of measures, which shall not be deemed to be discrimination. These are: (i) those based on the inherent requirements of a particular job;<sup>1389</sup> (ii) those warranted by the protection of the security of State;<sup>1390</sup> and (iii) measures of protection or assistance.<sup>1391</sup>

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Discrimination on the ground of religion may happen when a religion prohibits work on a day different from the day of rest established by law or custom, when the exercise of a religion requires a special type of clothing or work conditions, or when taking up a certain position requires an oath incompatible with a religious belief or practice. In these cases, the worker's right to practise his or her faith or belief needs to be weighed against the need to meet the requirements inherent in the job. However, this right may be restricted within the limits imposed by the principle of proportionality, taking care to avoid arbitrary repercussions on employment and occupation, particularly in public sector.

See ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, pp. 15-16; ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 62.

<sup>1385</sup> Discrimination on the basis of political opinion is prohibited. Convention No. 111 protects the activities of expressing or demonstrating opposition to established political principles and opinions, and it may also cover discrimination based on political affiliation. However, this Convention does not apply if violent methods are used to express or demonstrate these opinions. The general obligation to conform to an established ideology or to sign an oath of political allegiance would be considered discriminatory. However, cases in which the ground of political opinion is taken into consideration as a prerequisite for a given job should be objectively examined, under judicial scrutiny, to determine if this prerequisite is really justified by the inherent requirements of the job.

See ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, pp. 17-18; ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 62.

<sup>1386</sup> The term "national extraction" in the Convention is not aimed at the distinctions that may be made between the citizens of the country concerned and those of another country, but covers distinctions made on the basis of a person's place of birth, ancestry or foreign origin. It may be understood that discrimination based on national extraction means that action which may be directed against persons who are nationals of the country in question, who have acquired their citizenship by naturalisation or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction or origin living in the same State. See ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 16.

<sup>1387</sup> This criterion refers to situations in which an individual's membership of a class, socio-occupational category or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or because he or she is only assigned certain jobs. In addition, social origin can also give rise to a presumption of certain political opinions which may work either to the advantage or to the disadvantage of the person concerned; this can also be seen to be true in the case of religion, race and colour. See ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 17.

<sup>1388</sup> The term "employment and occupation" include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

<sup>1389</sup> Sec. 2 Article 1 of the Convention No. 111. The term "inherent requirements" refers to the necessary qualifications that are required by the characteristics of a particular job. A qualification may be brought to bear as an inherent requirement but it may not be applied to all jobs in a given sectors of activity and especially in the public sector. See also ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 39.

<sup>1390</sup> Article 4 of the Convention No. 111. These measures must be ones that affect an individual on account of activities he or she is justifiably suspected is proven to have undertaken. If these measures are taken because of membership of a particular group or community, they are discriminatory. This exception refers only to activities qualifiable as prejudicial to the security of the State, whether such activities are proved or whether consistent and precise elements justify suspecting such activities. Irrespective of whether the measures are based on "lack of loyalty", "the public interest" or "anti- democratic behaviour", among others, the application of such measures must be examined in the light of bearing

### ***Direct and Indirect Discrimination***

According to Convention No. 111, discrimination can be in law or in practice; it can be direct discrimination or indirect discrimination.<sup>1392</sup> It is direct when rules, practices, and policies exclude or give preference to certain individuals just because they belong to a particular group. Forms of direct discrimination include job advertisements stating that persons above a certain age need not apply, or human resource practices that require regular pregnancy tests of female employees with a view to refusing to hire or even dismissing those who happen to be pregnant.<sup>1393</sup> Indirect discrimination refers to apparently neutral situations, regulations, or practices, which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment, or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons because of certain characteristics or who belong to certain classes with specific characteristics such as race, sex or religion, and is not closely related to the inherent requirement of the job.<sup>1394</sup>

### ***Equal Remuneration***

Convention No. 100 requires Member States to take measures to promote, ensure, encourage or facilitate application of the principle of equal remuneration for men and women workers for work of equal value.<sup>1395</sup>

According to the ILO, remuneration includes the ordinary, basic or minimum wage or salary and any additional emoluments<sup>1396</sup> whatsoever payable directly or indirectly,<sup>1397</sup>

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which activities concerned may have on the actual performance of the job, task or occupation of the person concerned. See also ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 40.

<sup>1391</sup> Article 5 of the Convention No. 111. There are two kinds of special measures of protection and assistance: measures of protection and assistance provided for in the ILO instruments, and measures taken by the Member States after consultation with employers' and workers' organisations and designed to meet particular requirements of persons who require special protection or assistance. See also ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 40.

<sup>1392</sup> ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 12.

<sup>1393</sup> ILO (2007) *Equality at Work : Tackling the Challenges. Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work. Report of the Director-General, 2007*, ILO, Geneva, p. 9.

<sup>1394</sup> ILO (1996) *Equality in Employment and Occupation*, ILO, Geneva, p. 13.

<sup>1395</sup> ILO (1986) *Equal Remuneration. General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva, p. 7.

whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.<sup>1398</sup> Equal remuneration for men and women workers for work of equal value refers to rates of remuneration established without discrimination based on sex.

The Convention uses the “value of work” as the point of comparison. However, the term “value” is not defined<sup>1399</sup> in Convention No. 100 and Recommendation No. 90, but the Convention refers to objective appraisal of jobs on the basis of the work to be performed when decide the value of work.<sup>1400</sup> The key element to calculate the value of work is “job content”.<sup>1401</sup> According to the survey by Committee of Experts, “job content” usually includes hours of works and seniority, workers’ skill and output, efficiency, quantity and quality of work.<sup>1402</sup>

### **5.3.2. The CILS on Elimination of Discrimination at Work in Vietnam**

Equality between citizens is recognised in the first Constitution of Vietnam adopted in 1946<sup>1403</sup> and the current 1992 Constitution, which provides that “All citizens are equal before the law.”<sup>1404</sup> However, in terms of equality, Vietnam law focuses more on prohibiting discrimination based on gender, men and women, than other grounds of discrimination. The reason for this might be that historically family and society in Vietnam were strongly influenced by the feudal traditions, which gives absolute power over family and society to the male and created a imbalance power as well as protection

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<sup>1396</sup> The term “any additional emoluments whatsoever” includes any increment, supplement, margin, bonus, allowance or other addition and all the benefits and advantages. It is therefore, remuneration in the Convention includes, inter alia, wage differentials or increments based on seniority or marital status, cost of living allowance, paid by the employer, and benefits in kind such as allotment and laundering of working clothes (informs). See ILO (1986) *Equal Remuneration. General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva, p. 8.

<sup>1397</sup> The term “indirect” refers to certain emoluments, which are not paid to the workers concerned directly. The Convention covers all components of remuneration direct and indirect, which arise out of the employment relationship. See *Ibid*, p. 9.

<sup>1398</sup> See a Article 1 of the Convention No. 100.

<sup>1399</sup> Neville Rubin, Evance Kalula and Bob Hepple (2005) *Code of International Labour Law: Law, Practice and Jurisprudence*, Cambridge University Press, Cambridge, p. 451.

<sup>1400</sup> Article 3 of the Convention No. 100.

<sup>1401</sup> ILO (1986) *Equal Remuneration. General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva at 10.

<sup>1402</sup> *Ibid*, at 3-34.

<sup>1403</sup> Articles 7, 8, 9 of the 1946 Constitution.

<sup>1404</sup> Article 52 of the 1992 Constitution.

for men and women's role in the society. Therefore, the 1992 Constitution clearly states that:

All citizens regardless of their sex have equal rights in all respects, political, economic, cultural, social and in family life. Any discrimination against women and violation of women's dignity is strictly prohibited.<sup>1405</sup>

In addition, the Penal Code imposes a warning, non-custodial reform for up to one year or a prison term of between three months and one year on those who use violence or commit serious acts to prevent women from participating in political, economic, scientific, cultural and social activities.<sup>1406</sup>

Vietnam ratified both Conventions Nos. 100 and No. 111 of the ILO on 7 October 1997. Since then, Vietnam has fulfilled its reporting obligations required by the ILO as noted in Chapter I and has made efforts to incorporate into its legal system and implement the CILS on elimination of discrimination at work in the domestic context.

### ***Incorporation of the CILS on Elimination of Discrimination at Work into the Legal Framework***

Convention No. 111 requires that each Member State, which ratifies this Convention, undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination.

### ***Prohibition of Discrimination at Work***

Following the Constitutional principle of "equality for all citizens," the Labour Code, which was adopted before ratifying Convention Nos. 100 and 111 provides the principle of anti discrimination at work as:

All people have the right to work, choose their profession, learn a trade, and improve their skills without discrimination based on sex, ethnic origin, social class, or religious belief.<sup>1407</sup>

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<sup>1405</sup> Article 63 of the Constitution 1992.

<sup>1406</sup> Article 130 of the Penal Code.

<sup>1407</sup> Sec. 1 Article 5 of the Labour Code.

In Vietnam, after ratification of Convention No. 111, detailed regulations to eliminate discrimination based on the grounds of ethnicity and religion have been promulgated. According to these regulations, ethnic minority groups are enabled to access land and water, and they are entitled to receive free primary education and vocational training.<sup>1408</sup> Discrimination based on religion is strictly prohibited in Vietnam; workers are protected against religious discrimination in employment, including workers whose religion does not correspond to any of the religious organisations recognised by the Government.<sup>1409</sup>

Discrimination in employment is prohibited, but no sanctions to punish violation of this regulation are provided by law. Except for violation of regulations on female workers, the most important legal document dealing with violation of labour law does not contain any provision dealing with discrimination in employment,<sup>1410</sup> even the latest regulation.<sup>1411</sup> Furthermore, there are two grounds of discrimination recognised by the CILS but not enshrined in Vietnam law; these are political opinion and national extraction. Discrimination at work is prohibited in principle but there is no guiding or documents detailing for implementation except for discrimination based on sex even here the law does not cover some aspects of discrimination based on sex. According to the CILS, “sexual harassment” or “unsolicited sexual attention” is particular forms of discrimination on the basis of sex. However, in Vietnam, there is no provision defining these terms as well as providing any punishment in the cases of “sexual harassment” or “unsolicited sexual attention” in employment relations. In addition, Vietnam law is silent on indirect discrimination in employment.

### *Protection of Female Workers*

As noted previously, Vietnam law focused more on elimination of discrimination based on sex. According to the Labour Code, female workers are defined as a special category of workers who are provided special protection: in recruitment, during the time of employment and terminating employment relations.<sup>1412</sup> According to the Labour Code,

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<sup>1408</sup> Decision No. 267/2005/QĐ-TTg dated 31/10/2005 of the Prime Minister regarding to vocational training for Ethnic minority groups. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 13 June 2010).

<sup>1409</sup> Ordinance No. 21/2004/PL-UBTVQH dated 18/6/2004 of the Standing Committee of the National Assembly on Religions. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 12 June 2010).

<sup>1410</sup> Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1411</sup> Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1412</sup> Chapter X of the Labour Code.



the right to work of female workers is recognised and they are protected against any discrimination.<sup>1413</sup> Violation of these provisions may lead to an administrative fine of between VND 1 million and 10 million.<sup>1414</sup>

In recruiting workers, an employer must give preference to a female who satisfies all recruitment criteria for a vacant position which is suitable for both males and females in an enterprise.<sup>1415</sup> The State applies some preferential policies in order to encourage hiring of female workers by giving tax reductions to enterprises employing many female workers.<sup>1416</sup>

In the course of employment, employers are strictly prohibited from conduct which is discriminatory towards a female employee or conduct which degrades the dignity and honour of a female employee.<sup>1417</sup> Use of female workers in mines or in deep water is strictly prohibited irrespective of their age.<sup>1418</sup> Moreover, employers are not allowed to use female workers in hazardous work.<sup>1419</sup>

An employer is prohibited from dismissing a female employee or unilaterally terminating the labour contract of a female employee for reason of marriage, pregnancy, taking maternity leave, or raising a child under twelve months old, except where the enterprise ceases its operation.<sup>1420</sup> Indeed, during pregnancy, maternity leave, or raising a child under twelve months old, a female employee shall be entitled to postponement of unilateral termination of her labour contract or to extension of the period of consideration for labour discipline, except where the enterprise ceases its operation.<sup>1421</sup>

One of the most important achievements of Vietnam in incorporating the CILS on elimination of discrimination at work into its legal system is the adoption of the Law on

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<sup>1413</sup> Article 109 of the Labour Code.

<sup>1414</sup> Article 15 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Article 13 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1415</sup> Sec. 2 Article 111 of the Labour Code.

<sup>1416</sup> Sec. 2 Article 110 of the Labour Code.

<sup>1417</sup> Sec. 1 Article 111 of the Labour Code.

<sup>1418</sup> Sec. 2 Article 113 of the Labour Code.

<sup>1419</sup> Sec. 1 Article 113 of the Labour Code.

<sup>1420</sup> Sec. 3 Article 111 of the Labour Code.

<sup>1421</sup> Article 112 of the Labour Code.

Gender Equality in 2006. This law requires equality of treatment between men and women in many fields, such as politics,<sup>1422</sup> the economy,<sup>1423</sup> employment,<sup>1424</sup> education and training,<sup>1425</sup> science and technology,<sup>1426</sup> culture, information,<sup>1427</sup> physical exercises and sports,<sup>1428</sup> public health,<sup>1429</sup> and in the family.<sup>1430</sup>

In terms of employment, the Law on Gender Equality provides:

Man and woman are equal in terms of qualifications and age in recruitment, are treated equally in the workplace regarding work, payment and bonus, social insurance, labour conditions and other working conditions. Man and woman are equal in terms of qualifications and age in promotion or appointment to hold titles in the title-standard professions.<sup>1431</sup>

### *Equal Remuneration*

Each Member State, which ratifies Convention No. 100 has to ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.<sup>1432</sup> According to the CILS, the principle of equal remuneration for men and women workers for work of equal value may be applied by means of:<sup>1433</sup>

- (i) national laws or regulations;
- (ii) legally established or recognised machinery for wage determination;
- (iii) collective agreements between employers and workers; or
- (iv) a combination of these various means.

Equality in remuneration between men and women is recognised in Vietnam law. However, the scope of remuneration is limited to wages, wage increases, bonuses, and

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<sup>1422</sup> Article 11 of the Law on Gender Equality, 2007.

<sup>1423</sup> Article 12 of the Law on Gender Equality, 2007.

<sup>1424</sup> Article 13 of the Law on Gender Equality, 2007.

<sup>1425</sup> Article 14 of the Law on Gender Equality, 2007.

<sup>1426</sup> Article 15 of the Law on Gender Equality, 2007.

<sup>1427</sup> Article 16 of the Law on Gender Equality, 2007.

<sup>1428</sup> Article 17 of the Law on Gender Equality, 2007.

<sup>1429</sup> Article 18 of the Law on Gender Equality, 2007.

<sup>1430</sup> Article 19 of the Law on Gender Equality, 2007.

<sup>1431</sup> Article 13 of the Law on Gender Equality 2007.

<sup>1432</sup> Sec 1 Article 2 Convention No. 100.

<sup>1433</sup> Sec 2 Article 2 Convention No. 100.

social insurance. The Constitution of Vietnam provides that women and men receive equal pay for equal work. Women workers are entitled to maternity benefits. Women who are public employees or salary earners are entitled to pre and post natal paid leave, as provided by the law.<sup>1434</sup> The Labour Code requires “An employer must implement the principle of equality of males and females in respect of recruitment, utilisation, wage increases, and wages”.<sup>1435</sup> The Law on Gender Equality states that man and woman are treated equally in the workplace regarding work, payment, bonuses and social insurance.<sup>1436</sup>

In Vietnam, the wage of an employee is agreed by the two parties in the labour contract and shall be paid in consideration of rate of production, and the quality and result of the work performed. The wage of an employee must not be lower than the minimum wage stipulated by the Government.<sup>1437</sup> In addition to wages, workers are entitled to bonuses provided by employers. The Labour Code stipulates that the employer shall pay bonuses to employees working for the enterprise based on the annual production and business results of an enterprise and the performance of employees.<sup>1438</sup> In terms of social insurance, both male and female workers employed from more than three months are entitled to compulsory social insurance scheme. Otherwise they can enrol in a voluntary social insurance scheme.<sup>1439</sup>

While Convention No. 100 requires equal payment between men and women for work of equal value, Vietnam law requires only equality in remuneration for equal work (same job) between male workers and female workers. The value of different work is not taken into consideration in Vietnam law and it is silent on the equal remuneration in work of equal value required by the CILS. Even the draft of the new Labour Code does not include the issue of work of equal value within its scope.

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<sup>1434</sup> Article 63 of the Constitution 1992.

<sup>1435</sup> Sec. 1 Article 111 of the Labour Code.

<sup>1436</sup> Article 13 of the Law on Gender Equality, 2007.

<sup>1437</sup> Article 55 of the Labour Code.

<sup>1438</sup> Article 64 of the Labour Code.

<sup>1439</sup> The Law Social Insurance adopted by the NA on 29/6/2006, came into effect on 01/01/2007. Text available at [www.na.gov.vn](http://www.na.gov.vn) (last visited 12 June 2010).

Each Member State, which ratifies Convention No. 100 has to ensure equal remuneration for men and women workers for work of equal value by means appropriate to the methods in operation for determining rates of remuneration.<sup>1440</sup> In determining wages, the measures that Vietnam applies do not involve gender stereotypes and whether the work is undertaken by men or women. The law provides:

The wage of an employee shall be agreed by the two parties in the labour contract and shall be paid in consideration of rate of production, and the quality and result of the work performed. The wage of an employee must not be lower than the minimum wage stipulated by the State.<sup>1441</sup>

At present, Vietnam provides two wage scales and twenty wage tables to be applied in all SOEs. Based on this hierarchy, the salary, and other types of benefits shall be determined according to the law or according to the negotiation between employers and workers. For non-State enterprises, the employer shall develop a wage scale and wage table by following a number of general principles issued by the Government; this should include the multiple of wage scales and wage tables is the highest wage rate of workers with highest level of management, technical skill divided by that of workers with lowest level of skill.<sup>1442</sup> Therefore, regulations on determining wages in Vietnam do not involve the issue of gender equality.

### ***Implementation and Challenges of Regulations on Elimination of Discrimination at Work in Vietnam***

#### *Government Action Programs*

Many action programmes have been adopted by the Vietnamese Government to implement the regulations on elimination of discrimination at work, including the National Strategy on the Advancement of Women until 2010;<sup>1443</sup> and the National Program on Providing Land, Houses and Water for Ethnic Minority Groups.<sup>1444</sup> At the

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<sup>1440</sup> Sec 1 Article 2 Convention No. 100.

<sup>1441</sup> Article 55 of the Labour Code.

<sup>1442</sup> Decree No. 114/2002/ND-CP dated 31/12/2002 of the Government on detailing and guiding the implementation of provisions on wages of the Labour Code. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 12 June 2010).

<sup>1443</sup> Decision No. 19/2002/QD-TTg dated 21/1/2002 of the Prime Minister. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 12 June 2010).

<sup>1444</sup> Decision No. 134/QD-TTg dated 20/7/2004 of the Prime Minister. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 12 June 2010).

time of writing [3/2010], Vietnam was drafting the National Strategy on Gender Equality for the period of 2011-2020.

Institutional capacity has also been enhanced to deal with equality. In 2008, the Department for Gender Equality was established under MOLISA. This department has these duties: to draft law and policies on gender equality; supervising and inspecting the implementation of law on gender equality; collecting data and statistics on gender issues, etc.<sup>1445</sup>

### *Gender Equality in Practice*

Along with the overall socioeconomic achievements since the reforms of *Doi Moi*, women's status and gender equality in Vietnam have also been improved significantly. Vietnam has recorded encouraging achievements in ensuring women's rights. Women account for 25.76% of all members of the NA in the 2007-2011 terms, ranking fourth in the Asia Pacific Region.<sup>1446</sup>

In terms of employment, 83% of working-age women are employed. Women are represented in almost every State administrative agency and SOEs where 68.7% of the public servants and 30% of employers are female. They also participate in numerous political and social organisations, accounting for 30% of these organisations' executive members at different levels.<sup>1447</sup> Women's urban unemployment rate decreased from 6.98% to 6.14%, compared to a decrease in the overall urban unemployment rate from 6.28% in 2003 to 5.31% in 2008. During the same period, some 5,326 persons received vocational training, 33% of whom were women.<sup>1448</sup> However, women are not always competing on a level playing field. Among other things, they lack access to the same opportunities for skills training, and face discrimination in recruitment. Furthermore,

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<sup>1445</sup> Decision No. 363/QĐ-LĐTBXH dated 18/3/2008 of the Minister of MOLISA on organisational structure and functions of the Department of Gender Equality. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 12 June 2010).

<sup>1446</sup> Source: National Assembly Office.

<sup>1447</sup> Source: National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009.

<sup>1448</sup> Source: MOLISA.

ethnic minority<sup>1449</sup> women and girls lag behind ethnic minority men and Kinh women in accessing health and education services and economic opportunities.<sup>1450</sup>

#### *Enforcement of Provisions on Enterprises that Use More Female Workers*

Vietnam law provides preferential treatment on financial and tax issues to enterprises using a high volume of female workers. According to the law, an enterprise is considered to be using a high number of female workers if more than 50% [where it has from 10 to 100 workers] or more than 30% [where it has more than 100 workers] of the total workers are female workers.<sup>1451</sup> These type of enterprises can obtain low interest rate loans or support from the job creation fund; they are also entitled to benefits tax<sup>1452</sup> reduction and can use this money to support female workers.<sup>1453</sup> In addition, if these enterprises do not make a profit, expenses incurred from using a high volume of female workers are calculated as legal expenditure of the enterprises.<sup>1454</sup>

In practice, there are about 300 enterprises meeting the requirements of using a high volume of female workers. However, all have not received any special treatment or privilege from the Government. It has been criticised that the procedure to claim this special treatment is very complex and difficult to follow.<sup>1455</sup>

#### *Gap in Remuneration between Male and Female Workers*

The law requires the equality in payment between men and women. In practice, survey data have shown a big gap in income between men and women in different types of

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<sup>1449</sup> Vietnam is a country of diverse nationalities with 54 ethnic groups. The *Viet (Kinh)* people account for 87% of the country's population and mainly inhabit the Red River Delta, the central coastal delta, the Mekong Delta and major cities. The other 53 ethnic minority groups, totalling over 8 million people, are scattered over mountain areas (covering two-thirds of the country's territory) spreading from the North to the South. Source: [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 15 June 2010).

<sup>1450</sup> The World Bank, ADB, DFID and CIDA (2006) *Viet Nam Country Gender Assessment*, World Bank, Washington, D.C.

<sup>1451</sup> Article 5 Decree No. 23/CP dated 18/4/1996 of the Government. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 14 June 2010).

<sup>1452</sup> Sec. 2 Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

<sup>1453</sup> Sec. 3 Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

<sup>1454</sup> Sec. 4 Article 7 Decree No. 23/CP dated 18/4/1996 of the Government.

<sup>1455</sup> Source: Comments on the Implementation of the Labour Code, prepared by MOLISA 2009.

enterprises as well as in different economic sectors. This survey demonstrates that men's income is about 1.5 times that of women.

**Table 5.4: Gap in Pay between Men and Women in Vietnam  
(in thousand VND)**

	Overall	Men	Women	Differentials (times)
<b>1. By types of ownership</b>				
Individual household	861	958	694	1.44
State owned sector	1417	1466	1353	1.10
Collective sector	963	967	956	1.01
Private sector	1312	1454	1102	1.32
Foreign invested sector	1512	1908	1250	1.53
<b>2. By economic sector</b>				
Agriculture, forestry, and fisheries	744	802	644	1.25
Mining	1740	1843	1292	1.43
Processing industry	1091	1250	937	1.33
Other services	1386	1653	1159	1.43

*Source: Surveys on Household Living Standards 2006*

#### *Awareness and Knowledge of Regulation on Remuneration*

Knowledge of their rights is an important tool for workers to protect themselves from being discriminated against at work, particularly discrimination in remuneration. However, a recent survey has shown that there was still 7.96% of workers are not aware of the regulations on minimum wages. Furthermore, while the law imposes on employers an obligation to set up regulations on bonuses in enterprises, which provides detailed information on the bonuses of workers, this survey has shown that about 17.8% of the workers do not know about the regulations on bonuses in their enterprises.<sup>1456</sup>

<sup>1456</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

### *Communication and Dissemination of Legal Information*

Communication and dissemination information on regulations of eliminating discrimination at work provided by the CILS as well as domestic legal documents are weak. A current survey has shown that only fewer than 40% of workers are provided with information about gender equality and the rights of female workers in employment.<sup>1457</sup>

**Table 5.5: Workers Provided Information on Gender Issues in Vietnam (%)**

<b>Types of Ownership</b>	<b>Percentage</b>
State-owned enterprises	37.98
Private enterprises	36.54
Foreigner invested enterprises	34.32
Cooperatives	29.06

*Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009*

### **Observations**

Equality is recognised in Vietnam by the 1992 Constitution. In terms of employment, most regulations on elimination of discrimination in employment in Vietnam were adopted before ratification of the ILO Conventions No. 100 and No. 111. Vietnam law prohibits discrimination based on sex, race, social class, beliefs, or religion but the law is silent on discrimination based on political opinions and national extraction, which are required by the CILS. Vietnam law focuses more on prohibiting discrimination based on sex than on other grounds of discrimination in employment. Female workers are strictly protected in Vietnam law. Nonetheless, there is no provision, which impose sanction on sexual harassment or unsolicited sexual attention as required by the CILS.

In terms of equal remunerations while the CILS require equal pay for work of equal value Vietnam law requires equal payment for men and women in doing the same jobs. The law does not regulate work of equal value. Furthermore, the law is still lacking sanctions to deal with violations of equality in employment.

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<sup>1457</sup> Source: MOLISA Survey on the Dissemination and Communication of Labour Law 2009.



In terms of implementation, even though many efforts have been made and despite some achievements, there are still some problems of discrimination in employment in Vietnam. Women, particularly ethnic minority women, are given fewer opportunities in accessing employment than men. The gap in pay between men and women is still high (1.5 times). Workers' knowledge and awareness about regulations on discrimination at work are low. The communication and dissemination of legal information is still challenging, two thirds of workers in all types of enterprises are not provided with information about the law on elimination of discrimination at work.

## **Conclusion**

Vietnam has ratified five core Conventions of the ILO relating to three fundamental principles and rights at work: elimination of forced labour (Convention No. 29), abolition of child labour (Convention No. 138 and No. 182), and elimination of discrimination in employment (Conventions No. 100 and No. 111). Experiences of Vietnam in ratification of core ILO Conventions reveal that conformity with domestic law must be taken into consideration before ratification and ratification usually happens after domestic law is mostly compatible with substantive provisions of the CILS.

This fact raises two issues. The first issue is the real impact of the CILS on domestic law. It can be seen from Vietnam's experiences that ratification provided momentum to national action to implement domestic law rather than putting pressure on adopting and revising domestic law to make domestic law conform to the CILS. It indicates that the opportunity of ratifying Conventions No. 87 and No. 98 is mostly based on current domestic law on freedom of association and collective bargaining. More conformity between domestic law and the CILS provides more chance for ratification. The second issue is the impact of ratification of ILO core Conventions on Vietnam. Although domestic law had been in conformity with substantive provisions, ratification encourages Vietnam to implement and to enforce domestic law by fulfilling obligations provided by the implementation and supervision mechanism of the ILO.

Since ratification, active efforts have been made to incorporate into legislation and to implement in practice the ratified core Conventions in Vietnam. In terms of legislation,

new laws and regulations have been adopted; several irrelevant provisions have been repealed or revised. Legislation in Vietnam shows incorporation of the CILS into domestic legal system is not balanced in all of three areas. Standards on elimination of child labour have been incorporated adequately into domestic law. However, on other subjects, some provisions of the CILS have not been incorporated properly into the legal system; for example, the definition of forced labour; discrimination based on political opinion or national extraction, etc. In addition, domestic law in some cases focuses on only certain aspects of the CILS; for example, the law focuses more on human trafficking than on other issues related to forced labour, and in terms of discrimination at work, the law concentrates more on the ground of sex than other grounds provided by the CILS. In terms of equal remuneration, Vietnam's practice show the misinterpretation of the CILS when its law only provides for the equal pay between men and women in doing the same work and the law does not regulate the equal pay for work of equal value.

In terms of implementation, even though the CILS are recognised and incorporated into domestic law, their implementation is still a challenge. Some key issues in implementation of core ILO Conventions can be listed as: weakness of law enforcement, lack of statistics, low awareness of workers, employers and Government officials, limited communication and dissemination of legal information. This fact reconfirms the challenges of ILS noted in Chapter I and the challenges of law enforcement in Vietnam explored in Chapter IV. It calls for more technique assistance in the field of implementation should be made by the ILO to ratified Member States in order for the CILS to be implemented properly in Member States' practice. Together with technique supports, measures to improve economic development should be carried out to lay the economic foundation for the implementation of the CILS. Furthermore, it suggests that issues of implementation should be treated with caution in order to achieve success in incorporating the CILS on Freedom of association and collective bargaining into Vietnam.

Ratification, incorporation, and implementation of the CILS in Vietnam have been taking place parallel with great socio economic development of Vietnam over the past two decades. This emphasises the role of ILS in general and the role of the CILS in particular, which were highlighted in Chapter I. It also contributes to the assumption in

Chapter II that ratification, incorporation, and implementation of the CILS have positive effects on economic development. Experiences of ratified CILS provide a platform for defining opportunities and challenges of the ratification, incorporation and implementation of the CILS on freedom of association and collective bargaining into Vietnam; these are the subject of the next Chapter.

# **Chapter VI**

## **Incorporating the Core International Labour Standards on Freedom of Association and Collective Bargaining into Vietnam's Legal System**

### **Introduction**

Analysis in the first two Chapters showed that, if they are respected, protected and promoted, the Core International Labour Standards (CILS) can play an important role in the advancement of the socio-economic development of nations. This Chapter examines the probability of reconciling the requirements of the core ILO Conventions on freedom of association and collective bargaining with Vietnam's constitutional requirements.

Chapter III had arrived at the conclusion that assessment of the question whether a State was ready or not to ratify and implement the CILS on freedom of association and collective bargaining depended strongly on the socio-economic conditions, political and legal requirements of any one State at any one time. The previous two Chapters showed that it was possible and indeed beneficial for Vietnam to ratify and to incorporate CILS into national law. They also demonstrated that ratification of ILO core Conventions often occurred in Vietnam only when domestic law is suitable overall to the CILS. This Chapter examines the peculiarities of Vietnam's political, social and economic cultures. The purpose is to enable an evaluation of Vietnam's immediate and long term potential to comply with the requirements of the ILO CILS. This Chapter also makes legislative and implementation recommendations.

### **6.1. Is There a Need to Transform the CILS on Freedom of Association and Collective Bargaining into Vietnam's Legal System?**

#### **6.1.1. The Purposes of the CILS on Freedom of Association and Collective Bargaining**

Discussion in Chapter I showed that the ILO has elevated certain of its Conventions to the status of CILS in order to achieve many purposes relating to many aspects of

employment relations. Generally, International Labour Standards (ILS) seek to ensure also a fair international competition policy by creating an equal playing field in terms of labour conditions; and social justice for all by promoting and protecting sustainable social progress. The International Labour Conference regards the adoption and implementation of ILS as vehicles to consolidate national labour legislation and policies in the field of labour and social affairs.<sup>1458</sup>

To achieve these goals, the ILO had to regulate on freedom of association and collective bargaining in employment relations by adopting Conventions No. 87 and No. 98 respectively.<sup>1459</sup> The main purpose of these Conventions is to set up the principle of freedom of association for all workers, employers and the right to organise and to promote voluntary collective bargaining between them.

In order to establish freedom of association in employment, Convention No. 87<sup>1460</sup> guarantees the right to establish and join organisations of their own choosing without distinction whatsoever, without previous authorisation of all workers and employers.<sup>1461</sup> It makes an exception in the case of members of the armed forces and the police by providing that the extent to which the Convention shall apply to armed forces and the police shall be determined by national laws or regulations.<sup>1462</sup> It guarantees to employers' and workers' organisations, the right to draw up their constitutions and rules, to elect their representatives in complete freedom, to organise their administration and activities and to formulate their programmes.<sup>1463</sup> It calls upon public authorities to refrain from any interference that would restrict this right or impede the lawful exercise

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<sup>1458</sup> For extensive analysis of these purposes, see Chapter I.

<sup>1459</sup> Bernard Gernigon (2009) *Collective Bargaining - Sixty Years after Its International Recognition*, ILO, Geneva, p. 1.

<sup>1460</sup> For extensive analysis of the ILS on freedom of association, see Chapter II. See also Geradold von Potobsky (1998) "Freedom of Association: The Impact of Convention No. 87 and ILO Action", *International Labour Review*, vol. 137, No. 2, pp. 195-221; ILO (1948) "The ILO and the Problem of Freedom of Association and Industrial Relations", *International Labour Review*, vol. 58, No. 5, pp. 575-600; Jean M. Servais (1984) "ILO Standards on Freedom of Association and Their Implementation", *International Labour Review*, vol. 123, No. 6, pp. 765-781; Tonia Novitz (1998) "Freedom of Association and 'Fairness at Work' - An Assessment of the Impact and Relevance of ILO Convention No. 87 on Its Fiftieth Anniversary", *Industrial Law Journal*, vol. 27, No. 3, pp. 169-191.

<sup>1461</sup> Article 2 of the Convention No. 87.

<sup>1462</sup> Article 9 of the Convention No. 87.

<sup>1463</sup> Sec. 1 Article 3 of the Convention No. 87.

thereof.<sup>1464</sup> It seeks to protect employers' and workers' organisations from dissolution or suspension by administrative authority.<sup>1465</sup> It provides that the conditions for acquisition of legal personality by employers' and workers' organisations should not be of such a character as to restrict the rights guaranteed.<sup>1466</sup> It also guarantees to employers' and workers' organisations the right to establish and join federations and confederations and the right of such organisations, federations and confederations to affiliate with international organisations of workers.<sup>1467</sup> It commits Member States, for which the Convention is in force, to take all necessary and appropriate measures to ensure that workers may freely exercise the right to organise.<sup>1468</sup> It provides that the law of the land shall not be such as to impair nor should it be applied in a manner so as to impair the rights guaranteed under the Convention.<sup>1469</sup>

In the area of collective bargaining, Convention No. 98<sup>1470</sup> calls for the establishment of machinery appropriate to national conditions, where necessary, to ensure respect for the right to organise guaranteed under Convention No. 87.<sup>1471</sup> It seeks to promote collective bargaining by imposing on Member States an obligation to take measures appropriate to national conditions, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations with a view to regulation of the terms and conditions of employment by means of collective agreements.<sup>1472</sup> To achieve that purpose, it guarantees workers adequate protection against acts of anti-union discrimination in respect of their employment.<sup>1473</sup> Furthermore, the Convention seeks to protect employers' and workers' organisations against acts of interference by each other

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<sup>1464</sup> Sec. 2 Article 3 of the Convention No. 87.

<sup>1465</sup> Article 4 of the Convention No. 87.

<sup>1466</sup> Article 7 of the Convention No. 87.

<sup>1467</sup> Article 5 of the Convention No. 87.

<sup>1468</sup> Article 11 of the Convention No. 87.

<sup>1469</sup> Sec. 2 Article 8 of the Convention No. 87.

<sup>1470</sup> For extensive analysis of the CILS on collective bargaining, see Chapter II. See also Bernard Gernigon, Alberto Odero and Horacio Guido (2000) "ILO Principles Concerning Collective Bargaining", *International Labour Review*, vol. 139, No. 1, pp. 33-55; ILO (1994) *Freedom of Association and Collective Bargaining*, ILO, Geneva.

<sup>1471</sup> Article 3 of the Convention No. 98.

<sup>1472</sup> Article 4 of the Convention No. 98.

<sup>1473</sup> Sec. 1 Article 1 of the Convention No. 98.

or each other's agents or members in their establishment, functioning and administration.<sup>1474</sup> It clarifies that acts which are designed to promote the establishment of workers' organisations under the domination of employers' organisations or to support workers' or other organisations by financial or other means, with the object of placing such organisations under the control of employers' or employers' organisations shall be deemed to constitute acts of interference.<sup>1475</sup> Like Convention No. 87, it provides that the extent to which the guarantees in the Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.<sup>1476</sup> The Convention clarifies that it does not deal with the position of public servants engaged in the administration of the State nor should it be construed as prejudicing their rights or status in any way.<sup>1477</sup>

Previous studies also demonstrate that the legal system (in general) and the regulation of labour (in particular) in Vietnam<sup>1478</sup> are subject to two kinds of pressures. Firstly, there is the pressure of liberalising the labour market in order to achieve free trade required by the WTO as well as to attract foreign direct investment (FDI). Secondly, there is pressure to protect workers from being exploited in the context of international, on the one hand and, domestic competition on the other hand, in order to have sustainable social and economic development. As a socialist State, Vietnam faces a particular dilemma regarding how it could serve as a protectorate of the working class while promoting foreign investment.<sup>1479</sup>

The purposes of the CILS on freedom of association and collective bargaining mentioned above as well as their roles and the benefits of incorporating these standards into Vietnam law - which are subjects of the later sections, will demonstrate that incorporation of the CILS on freedom of association and collective bargaining will better serve the socialist goals of protecting workers from the extreme requirements of capital.

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<sup>1474</sup> Sec. 1 Article 2 of the Convention No. 98.

<sup>1475</sup> Sec. 2 Article 2 of the Convention No. 98.

<sup>1476</sup> Sec. 1 Article 5 of the Convention No. 98.

<sup>1477</sup> Article 6 of the Convention No. 98.

<sup>1478</sup> For extensive analysis of Vietnam's legal system and regulation of labour, see Chapter IV.

<sup>1479</sup> Paul Walsh (1995) "Vietnam Labour Law: Can Labour Peacefully Coexist with Foreign Investment, Economic Development, and Structural Reform?", *The Transnational Lawyer*, vol. 8, pp. 125-157.

### 6.1.2. The Roles of the CILS on Freedom of Association and Collective Bargaining

It has been established in Chapter I that ILS play an important role in creating decent work, which constitutes a very important part of people's lives particularly the lives of workers. In addition, ILS are helpful in the protection of workers and society from the unintended worst effects of globalisation. It has been argued that globalisation can be given a human face only by the simultaneous and efficient application of ILS.<sup>1480</sup> Examination in Chapter I also showed the importance of ILS in enhancing economic development, improvement of social welfare and eradication of poverty.<sup>1481</sup> Chapter II showed that incorporation and compliance with the CILS should be one of the goals of development strategies of all countries.<sup>1482</sup> Besides, the CILS on freedom of association and collective bargaining have in themselves some other very important particular roles.

At an international level, freedom of association, including the right to form and join unions for the protection of one's rights and interests, has been recognised as one of the fundamental human rights deriving from the inherent dignity of the human person. It is set down in the Preamble of the ILO Constitution that freedom of association is essential to sustainable progress.<sup>1483</sup> Unless they can organise themselves for the specific purpose of promoting and protecting their interests workers will always find themselves at the thin end of the bargaining game in labour relations. Freedom of association and collective bargaining empower workers to express their aspirations, strengthen their position in collective bargaining and enable them to participate in the framing and implementing of economic and social policy. It is furthermore a prerequisite for cooperation on equal footing between workers, employers and

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<sup>1480</sup> See Bob Hepple (2006) "Globalisation and the Future of Labour Law – Book review", *International Law Journal*, vol. 35, No. 4, pp. 450-451.

<sup>1481</sup> For extensive analysis of these roles, see Chapter I, part 1.2. See also Bernard Gernigon (2009) *Collective Bargaining - Sixty Years after Its International Recognition*, ILO, Geneva; Geradold von Potobsky (1998) "Freedom of Association: The Impact of Convention No. 87 and ILO Action", *International Labour Review*, vol. 137, No. 2, pp. 195-221; ILO (1948) "The ILO and the Problem of Freedom of Association and Industrial Relations", *International Labour Review*, vol. 58, No. 5, pp. 575-600; Jean M. Servais (1984) "ILO Standards on Freedom of Association and Their Implementation", *International Labour Review*, vol. 123, No. 6, pp. 765-781;

<sup>1482</sup> Remi Bazillier (2004) *Core Labour Standards and Economic Growth*. Available at <ftp://mse.univ-paris1.fr/pub/mse/cahiers2004/Bla04088.pdf> (last visited 15 January 2009). See also James Heintz (2002) *Global Labour Standards: Their Impact and Implementation. Working Paper Series No. 46*. Available at [www.umass.edu/peri](http://www.umass.edu/peri) (last visited 20 May 2009), p. 19.

<sup>1483</sup> Preamble of the ILO Constitution.



Government.<sup>1484</sup> This is hardly inconsistent with Vietnam's socialist culture of valuing workers.

Freedom of association and the right to collective bargaining are human rights promulgated in the Universal Declaration of Human Rights,<sup>1485</sup> the International Covenant on Civil and Political Rights<sup>1486</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>1487</sup> The notion that freedom to form a union and bargain collectively is a fundamental human right follows directly from the concept that every human being has value and should be treated with respect and dignity. If human beings have value and should be treated with respect and dignity, they are entitled to participate in important decisions affecting their lives, such as determination of the terms and conditions of their employment. Denying any person the right to participate in these decisions is an affront to human dignity.<sup>1488</sup> Nonetheless, trade union action opens the way for more effective implementation of other ILS. Therefore, the exercise of the right to organise is a means to bring about better working conditions that are cognisant of the inherent dignity of individuals.<sup>1489</sup>

At the national level, freedom of association is regarded as the mother of all rights.<sup>1490</sup> Chapter III has shown that freedom of association is the foundation of society in the most developed countries in the world, such as the United Kingdom and the United States.<sup>1491</sup> In employment relations, freedom of association is the bedrock of workers' rights because all other labour rights appear to depend upon it.<sup>1492</sup> In the workplace,

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<sup>1484</sup> ILO (2010) *Workers and Freedom of Association*. Available at <http://www.ilo.org/public/english/dialogue/themes/fa.htm> (last visited 20 April 2010).

<sup>1485</sup> Sec. 4 Article 23 of the Universal Declaration of Human Rights 1948.

<sup>1486</sup> Article 22 of the International Covenant on Civil and Political Rights 1966.

<sup>1487</sup> Sec. 1 Article 8 of the International Covenant on Economic, Social and Cultural Rights 1966.

<sup>1488</sup> AFL-CIO (2005) *The Silent War: The Assault on Workers' Freedom to Choose a Union and Bargain Collectively in the United States*. Available at [http://www.aflcio.org/joinaunion/how/upload/vatw\\_issuebrief.pdf](http://www.aflcio.org/joinaunion/how/upload/vatw_issuebrief.pdf) (last visited 28 September 2009).

<sup>1489</sup> Bernard Gernigon (2009) *Collective Bargaining - Sixty Years after Its International Recognition*, ILO, Geneva, p. 1.

<sup>1490</sup> Nakazael Tenga and Chris Peter (1996) "The Right to Organise as Mother of All Rights: The Experiences of Women in Tanzania", *Journal of Modern African Studies*, vol. 34, No. 1, pp. 143-162.

<sup>1491</sup> *Shelton v. Tucker*, 364 U.S. 479 (1960).

<sup>1492</sup> *Wilso and Palmer, NUJ v. United Kingdom*. IRLR 128 (2002). See also Human Rights Watch (2000) *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*. Human Rights Watch Organisation, Washington, D.C, p. 19.

freedom of association is manifested in the right of workers and employers to organise to defend their economic and social interests through collective bargaining. The right to freedom of association is recognised in the most important legal documents – the Constitutions - of both developed and developing countries, such as the European Union (EU) and South Africa.<sup>1493</sup> Chapter III also showed that the ratification and implementation of ILO Conventions result in better promotion and protection of the right to organise and the right to bargain collectively of domestic workers. Therefore, because they contain standards which regulate the right to organise and bargain collectively, the CILS play an important role in recognising, promoting and protecting human rights at the work place in a national context.

The special supervisory mechanism of the CILS on freedom of association and collective bargaining also contributes to the protection of this internationally recognised right in a national context. Soon after the adoption of Conventions No. 87, the ILO concluded that the principle of freedom of association needed a further supervisory procedure to ensure compliance in states that had not ratified the relevant Conventions.<sup>1494</sup> As a result, in 1951 the ILO set up the Committee on Freedom of Association (CFA) for the purpose of examining complaints about violations of freedom of association, whether or not the State concerned had ratified the relevant Conventions.

The CFA is a Governing Body Committee, and is composed of an independent chairperson and three representatives each of Governments, employers, and workers.<sup>1495</sup> Complaints may be brought against a Member State by employers' and workers' organisations. If the CFA decides to receive the case, it establishes the facts in dialogue with the Government concerned. If it finds that there has been a violation of freedom of 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 State has ratified the relevant instruments, legislative aspects of the case

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<sup>1493</sup> For extensive analysis of the role of freedom of association and collective bargaining in the United Kingdom, the United States, South Africa and China, see Chapter III.

<sup>1494</sup> ILO (2008) *Guide to International Labour Standards*, ILO, Geneva, p. 272

<sup>1495</sup> Eric Gravel, Isabelle Duplessis and Bernard Gernigon (2001) *The Committee on Freedom of Association. Its impact over 50 years*, ILO, Geneva, p. 3.

may be referred to the Committee of Experts.<sup>1496</sup> 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.<sup>1497</sup>

By providing the chance to make complaints to workers’ and employers’ organisations, even when the concerned State has not ratified Conventions No. 87 and No. 98, the CILS enhance the supervision of freedom of association and collective bargaining at national level. By granting the CFA the right to make recommendations and to request to the Governments concerned, the CILS require law to be upgraded and actions thus contribute to the recognition, promotion and protection of freedom of association and collective bargaining in a national context.

In addition, the standards of the CILS on freedom of association are indispensable for trade unions in promoting and defending rights and interests of their members. Implementation of the CILS on collective bargaining is one of the fundamental means of achieving this objective. Collective bargaining serves a dual purpose. On the one hand, it provides a means of determining the wages and conditions of work that apply to the group of workers covered by the ensuing agreement through free and voluntary negotiations between the two independent parties concerned; on the other hand, it enables employers and workers to define by agreement the rules governing their relationship.<sup>1498</sup>

Both Conventions No. 87 and No. 98 are particularly significant because they both recognise and protect an individual’s right to organise for the furtherance of their welfare at work. Collective bargaining can contribute to a better balance between the parties in an employment relationship because workers can be represented by trade union organisations that can engage in discussions leading to collective agreements. It provides an approach to labour relations which is both pragmatic and efficient and which takes into account both the legitimate aspiration of the workers and the

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<sup>1496</sup> *Ibid*, pp. 3-4.

<sup>1497</sup> ILO (2005) *Rule of the Game: An Introduction to International Labour Standard*, ILO, Geneva, p. 84. See also Jean M. Servais (1984) “ILO Standards on Freedom of Association and Their Implementation”, *International Labour Review*, vol. 123, No. 6, pp. 765-781.

<sup>1498</sup> ILO (2010) *Collective Bargaining*. Available at <http://www.ilo.org/public/english/dialogue/themes/cb.htm> (last visited 30 April 2010).

constraints faced by the employers. To a certain extent it is reasonable to state that the CILS on freedom of association is a precondition for the recognition, promotion and protection of human rights at work, which provide decent work for all and respect for human dignity.

### **6.1.3. What Advantages Would Accrue to Vietnam's Ratification and Incorporation of the CILS on Freedom of Association and Collective Bargaining?**

The reasons for ratifying, incorporating into the legal framework and implementing in practice of the CILS on freedom of association and collective bargaining in Vietnam are justified by both the utility test and the benefit test.

#### ***The Utility Test***

The utilitarian movement originated in Great Britain during the eighteenth and nineteenth centuries in the works of philosophers, notably Jeremy Bentham and John Stuart Mill who criticised various aspects of the common law. Bentham, the progenitor of the movement, criticised the law for being written in dense and unintelligible prose. He sought to cut through the thicket of legal verbiage by reducing law to what he thought were its most basic elements — pain and pleasure. Bentham believed that all human behaviour is motivated by a desire to maximise pleasure and avoid pain. He observed that law is often written in vague terms of rights and obligations. Bentham thought that law could be simplified by translating the language of rights and obligations into a pain-pleasure calculus.<sup>1499</sup> Mill, who argues that the moral worth of actions is to be judged in terms of the consequences of those actions, then developed ideas of Bentham. Mill believes that law must be made to conform to its most socially useful purpose.<sup>1500</sup>

According to Mill, an action is “right if it produces as much or more of an increase in happiness of all affected by it than any alternative action, and wrong if it does not” and that “the sole evidence it is possible to produce that anything is desirable, is that people

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<sup>1499</sup> Jeremy Bentham (2003) “An Introduction to the Principles of Moral and Legislation” in *Utilitarianism and On Liberty*, ed. Mary Warnock, 2nd edn, Blackwell, Oxford, pp. 17-51. See also Michael Freeman (2001) *Lloyd's Introduction to Jurisprudence*, 7th edn, Sweet and Maxwell Ltd., London.

<sup>1500</sup> John Stuart Mill (1968) *Utilitarianism, Liberty and Representative Government: Introduction by Lindsay*, Dent and Son Ltd., London.

do actually desire it. If the end which the utilitarian doctrine proposes to itself were not, in theory and in practice, acknowledged to be an end, nothing could ever convince any person that it was so”.<sup>1501</sup> The basis for this argument is the idea that pleasure and happiness are intrinsically valuable, that pain and suffering are intrinsically invaluable, and that anything else has value only in its causing happiness or preventing suffering.<sup>1502</sup>

Utilitarianism measures the desirability of human conduct by the amount of happiness it generates in society. In terms of legislation, its proponents maintain that the ultimate aim of any law should be to promote the greatest happiness for the greatest number of people.<sup>1503</sup> Studies in the previous sections have shown that the implementation of the CILS on freedom of association and collective bargaining can be advantageous for both workers and employers. Freedom of association enables workers and employers to organise to defend their economic and social interests through collective bargaining. For workers, collective bargaining, more so than individual employment relations, ensures adequate wages and working conditions by providing them with a “collective voice”. It also allows them to influence personnel decisions and to achieve a fair distribution of gains from technological progress and productivity increases. For employers, collective bargaining helps to stabilise industrial relations by maintaining industrial peace that otherwise may be disrupted by labour unrest. Through collective bargaining, employers can also address the need for adjustment to facilitate modernisation and restructuring.<sup>1504</sup>

According to the utilitarian theory, a law’s usefulness, or utility, may be defined in terms of its ability to increase happiness, wealth, or justice in society or in other words, a law’s utility can be measured by its ability to decrease unhappiness, poverty, or injustice.<sup>1505</sup> Furthermore, an action is right if it tends to promote happiness and wrong

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<sup>1501</sup> *Ibid*, pp. 33-38.

<sup>1502</sup> See *Introduction to Utilitarianism*. Available at <http://www.utilitarian.org/utility.html> (last visited 15 April 2010).

<sup>1503</sup> John Stuart Mill (1968) *Utilitarianism, Liberty and Representative Government: Introduction by Lindsay*, Dent and Son Ltd., London, pp. 33-38.

<sup>1504</sup> ILO (2010) *Collective Bargaining*. Available at <http://www.ilo.org/public/english/dialogue/themes/cb.htm> (last visited 30 April 2010).

<sup>1505</sup> *Introduction to Utilitarianism*. Available at <http://www.utilitarian.org/utility.html> (last visited 15 April 2010).

if it tends to produce the reverse of happiness, not just the happiness of the performer of the action but also that of everyone affected by it.<sup>1506</sup> For society, when workers and employers have the right to bargain with each other collectively at all levels, employment relations at all levels will be more democratic, more stable and developed. A stable employment relation system is an important element in the stability and development of a society and contributes to increasing happiness, wealth, and justice in society. In addition, the right to freedom of association and collective bargaining enables workers and employers to participate in dialogue with each other and with the State. This dialogue improves democracy in the work place, creates industrial democracy and contributes to social democracy in the country.

It is reasonable to conclude that implementation of the CILS on freedom of association and collective bargaining is a right action under utilitarianism because it increases happiness for workers, employers and the society. Implementation of the CILS on freedom of association and collective bargaining plays an important role in promoting rights and interests of workers, employers and in increasing happiness, wealth, justice in society so that it meets all the criteria of and passes the utility test. Therefore, it is necessary to incorporate the CILS on freedom of association and collective bargaining into Vietnam.

### ***The Benefit Test***

The utility test above shows that workers, employers and society can obtain many benefits from implementation of the CILS on freedom of association and collective bargaining; however, it is necessary to establish the legislative, political and economic benefits that Vietnamese Government can achieve through the incorporation of the CILS on freedom of association and collective bargaining into Vietnam's legal system.

### ***Legal Benefits***

The legal benefits of incorporating the CILS on freedom of association and collective bargaining into Vietnam can be measured by its promotion and protection of the relevant right which is recognised in the Constitution of Vietnam.

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<sup>1506</sup> John Stuart Mill (1968) *Utilitarianism, Liberty and Representative Government: Introduction by Lindsay, Dent and Son Ltd.*, London, pp. 33-38.

In Vietnam, the right to freedom of association is recognised in the Constitution as:

Citizens are entitled to freedom of speech and freedom of the press; they have the right to receive information and the right of assembly, association, and demonstration in accordance with the law.<sup>1507</sup>

On the one hand, this provision shows that, the right to freedom of association in Vietnam is considered together with other rights, such as right to freedom of speech, freedom of the press and right to demonstration. On the other hand, this provision also shows the right to freedom of association is not an absolute right when it is limited by the condition “in accordance with the law”.

Freedom of association is enforced by penal sanction in Vietnam, which means violation can result in a penal punishment.<sup>1508</sup> However, in Vietnam, as in China, freedom of association is normally mentioned as the right to form social association and does not include the right to form or to join a trade union in the context of employment. The right to form a social association is strictly regulated by several Decrees of the Government.<sup>1509</sup> Up to now, these have been the most important legal documents regulating the right to form associations in Vietnam. The irrelevance of this legal provision might be one of the reasons explaining for the low number of associations in Vietnam. By December 2009, there had been only 380 associations created in Vietnam with nation-wide and inter-provincial/city operations.<sup>1510</sup>

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<sup>1507</sup> Article 69 of the 1992 Constitution.

<sup>1508</sup> Article 129 of the Penal Code provides that:

Those who commit acts of obstructing citizens from exercising their rights to assembly and/or to association, which conform to the interests of the State and the people, and who have been disciplined or administratively sanctioned for such acts but continue to commit violations shall be subject to warning, non-custodial reform for up to one year or a prison term of between three months and one year.

<sup>1509</sup> Decree No. 88/2003/ND-CP dated 30/7/2003 of the Government deals with the formation, operation, and state management of associations and currently constitutes the legal basis for registering and operating most Vietnamese social organisations and their subordinate foundations. From 1/7/2010, this Decree will be replaced by the Decree No. 45/2010/ND-CP dated 21/4/2010 of the Government. Decree No. 148/2007/ND-CP dated 25/9/2007 of the Government spells out details concerning the establishment, structure, organisation and governance of social funds and charitable funds. Decree No. 151/2007/ND-CP dated 10/10/2007 of the Government on the Organisation and Activities of CoLLabourative Groups was promulgated by the Government to regulate this burgeoning sector. There is, however, some uncertainty surrounding the types of organisations covered by the Decree.

<sup>1510</sup> Source: National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009.

The current legal framework is neither sufficiently comprehensive nor facilitative of freedom of association. Since 1992, a draft of the Law on Associations has been under consideration in Vietnam, mostly by a drafting committee convened by the Ministry of Home Affairs. The draft has been the subject of intense debate and was submitted to the National Assembly for discussion in May 2006. However, due to many significant differences between Government agencies and associations, and within the Government community, it was set aside for further discussion and re-drafting.

Ratification of Conventions No. 87 and No. 98 result in practice in a spontaneous harmonisation by Governments of their legislation either before or after ratification. Studies of the four countries in Chapter III showed that countries that ratify ILO Conventions have more adequate legislation on freedom of association and collective bargaining. Better legislation on freedom of association and collective bargaining, in turn, lead to a better promotion and protection of freedom of association and collective bargaining.

In this context, ratification, incorporation and implementation of the CILS play an important role in protecting values and rights provided by the Constitution of Vietnam in three ways. Firstly, they help to fill the gap within current regulations by being the direct source of Vietnam law. As discussed in Chapter IV, Vietnam is a monist country, in which, ratified international treaties are direct sources of law and prevail over domestic law.<sup>1511</sup> Therefore, after ratification, provisions of the ILO core Conventions on freedom of association are direct sources of Vietnam law. Thus, these provisions contribute to protecting freedom of association provided by the Constitution.

Secondly, they create momentum for the actions of the Government. In Vietnam, most domestic law has been in conformity with the substantive provisions of the CILS before relevant Conventions have been ratified.<sup>1512</sup> However, experiences of Vietnam analysed in Chapter IV show that ratification is still an incentive force for the Government to take actions to implement domestic regulations in concerned matters. Therefore, ratification and incorporation of the CILS on freedom of association generate energy for

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<sup>1511</sup> For extensive analysis, see Chapter IV.

<sup>1512</sup> For extensive analysis, see Chapter V.



enforcement and implementation of domestic regulations on the right to freedom of association protected by the Constitution.

Finally, ratification and incorporation of the CILS on freedom of association and collective bargaining enhance implementation in practice by imposing an obligation of enforcement on the State and by the supervising mechanism of the ILO. Although domestic law might have been in conformity with the ILO's substantive provisions, procedural provisions of the ILO's Conventions require Governments to carry out certain obligations provided by the supervisory mechanism of the ILO, for example, consulting workers' and employers' organisations in making reports, replying to requests from the ILO, etc. There have been cases showing that Governments have succeeded in upgrading their legislation in accordance with the requests of the ILO.<sup>1513</sup>

### *Political Benefits*

Political benefits of incorporating the CILS on freedom of association and collective bargaining into Vietnam law can be measured by their potential to enable Vietnam to achieve political aspirations in terms of democracy, human resource and social development, and foreign relations.

Freedom of association and collective bargaining play an important role in promoting and protecting democracy. It has been argued that if freedom of association is not recognised as a human right at work, the very foundations of a democratic political system will necessarily be shaken.<sup>1514</sup> The Constitution of Vietnam states that the CPV is the force leading the State and society.<sup>1515</sup> The aim of the CPV is to make Vietnam a strong, independent, prosperous and democratic country with an equitable and civilised society, to realise socialism and ultimately, communism. In order to do so, the CPV respects and promotes the mastery of the people over the country, and is under the people's supervision. The Party relies on the people to strengthen its organisation, unites and leads the people in the revolutionary cause. The Party combines genuine patriotism with the undiluted internationalism of the working class, proactively

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<sup>1513</sup> Geradold von Potobsky (1998) "Freedom of Association: The Impact of Convention No. 87 and ILO Action", *International Labour Review*, vol. 137, No. 2, pp. 195-221.

<sup>1514</sup> Karen Curtis (2010) *Democracy, Freedom of Association and the ILO*. Available at [http://training.itcilo.org/ils/ils\\_freedom/training\\_materials/english/curtis.pdf](http://training.itcilo.org/ils/ils_freedom/training_materials/english/curtis.pdf) (last visited 15 April 2010).

<sup>1515</sup> Article 4 of the 1992 Constitution.

contributing to the struggle for peace, national independence, democracy and social progress of the world's people.<sup>1516</sup>

Of all the aspects of freedom of association, it is trade union rights that have contributed most profoundly to the expansion of liberty and equality in the world. Therefore, incorporating the CILS on freedom of association and collective bargaining furthers democracy, which contributes to achievement of the goal of the Party State in Vietnam in building a more democratic and civilised society. Furthermore, it has been proved in recent times that free trade unions have been essential to the emergence and consolidation of democracy in many countries, notably Poland,<sup>1517</sup> South Africa,<sup>1518</sup> Zimbabwe,<sup>1519</sup> etc.

In relation to the right to organise and collective bargaining, implementing this right allows workers and employers participate more in policymaking. Freedom of association gives workers a voice with which to express their aspirations, strengthens their position in collective bargaining and enables them to participate in the framing and implementing of economic and social policy. The right to organise allows workers to associate with others to generate collective power that makes them stronger in fighting for their rights and interests through collective bargaining and through strike action.<sup>1520</sup>

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<sup>1516</sup> Preamble of the Charter of the CPV.

<sup>1517</sup> The acceptance of freedom of association and the right to organise led to the creation of independent trade unions in Poland, whose work contribute to the development of political democracy in Poland society.

<sup>1518</sup> The development of a non-racial trade union movement and the increasing extent to which it had been composed of black workers were noteworthy aspects of the social developments in the country. In default of other outlets to direct attention on urgent matters of social and economic concern, it was inevitable that the trade union movement would fill the institutional void. During the reign of apartheid, the union movement played a vital function in preserving the hope of freedom and of basic rights. The South African trade union movement's continuing focus on these rights, which largely contributed to the gradual change of public opinion that led to the Convention for a Democratic South Africa in December 1991 and ultimately to the election of Nelson Mandela in 1994. See ILO (1992) *Prelude to Change: Industrial Relations Reform in South Africa. Report of the Fact-finding and Conciliation Commission on Freedom of Association concerning the Republic of South Africa*. Official Bulletin, vol. 75, Series B.

<sup>1519</sup> The Zimbabwe Congress of Trade Unions is the dominant central trade union federation in Zimbabwe. ZCTU was formed on February 28, 1981 through the merger of six trade union centres. In the 1990s ZCTU grew increasingly opposed to the Government of Robert Mugabe. ZCTU was the main force behind the formation of the Movement for Democratic Change, which plays an important role in the process of democratisation in Zimbabwe.

<sup>1520</sup> Centre for Global Development (2007) *Labour Standards*. Available at <http://www.globaldevelopmentmatters.org/qa-Labour-standards.asp#4> (last visited 15 February 2009).

In the context of globalisation, human resources are the most valuable asset of a country. Therefore, protecting workers, promoting workers' rights, interests and developing workers' skills and qualifications are at the heart of Vietnam human resource policies. Ratification, incorporation and implementation of the CILS on freedom of association and the right to organise play an important part in the success of these policies. The United Nations has recognised that freedom of association is essential to the improvement of workers' lives and their economic well-being.<sup>1521</sup> Furthermore, the right to freedom of association allows solidarity among workers while the right to collective bargaining provides procedures that allow workers to demand improved rights and interests. These rights empower workers in the negotiating process and protect workers from being exploited. They enable workers to make demands for other interests, including skills training and education.

In terms of foreign affairs, Vietnam implements a foreign policy of openness and diversification and multi-lateralisation of international relations. Proactively and actively, it engages in international economic integration while expanding international cooperation in other fields. Vietnam is a friend and a reliable partner of all countries in the international community, actively taking part in international and regional cooperation processes.<sup>1522</sup> Ratifying, incorporating and implementing the CILS on freedom of association and collective bargaining into Vietnam demonstrates Vietnam's active role in the field of protecting and promoting inherent human rights at work. It also reveals the implementation of obligations imposed by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights that Vietnam ratified since 1982.<sup>1523</sup> It contributes to making Vietnam more reliable and more respected in international relations. It enables Vietnam to avoid severe criticism from foreign countries<sup>1524</sup> and foreign organisations<sup>1525</sup> relating to

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<sup>1521</sup> ILO (1948) "The ILO and the Problem of Freedom of Association and Industrial Relations", *International Labour Review*, vol. 58, No. 5, pp. 575-600.

<sup>1522</sup> Source: The Political Report of The Central Committee, CPV, 9th Tenure, at The Party's 10th National Congress 2006.

<sup>1523</sup> Vietnam ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 24/9/1982. Source: Ministry of Foreign Affairs.

<sup>1524</sup> In the discussion of National Report of the Socialist Republic of Vietnam under the Universal Periodic Review of the United Nations Human Rights Council 2009, Vietnam received 41 comments from other Member States of the United Nations. Many of them blamed Vietnam for failure in recognising, protecting and promoting freedom of speech, freedom of religion and, freedom of association including the right to organise and collective bargaining. Source: <http://www.un.org/webcast/unhrc/archive.asp?go=090508> (last visited 25 June 2010).

allegations of human rights and workers' rights. In addition, ratification, incorporation and implementation of the CILS on freedom of association and collective bargaining into Vietnam demonstrate Vietnam's active role as a Member State of the ILO and also increase the status of Vietnam within the ILO, which helps the Vietnam avoid criticism arising from the supervisory mechanism of the ILO.

### *Economic Benefits*

Studies in Chapter II show no negative effect in ratifying and implementing the CILS on freedom of association and collective bargaining on national competitiveness in attracting FDI as well as economic performance.<sup>1526</sup> On the contrary, according to the World Bank, ensuring freedom of association and collective bargaining can go a long way towards promoting labour market efficiency and better economic performance.<sup>1527</sup> If the right to organise and collective bargaining is recognised, promoted and protected, it will ensure stability of employment relationships, which plays an important role in maintaining social and political stability of countries. Consequently, socio – political stability can foster economic growth and, in turn, economic growth is an advantage for attracting FDI.<sup>1528</sup>

In addition, Vietnam's labour force has many characteristics that attract foreign investors. The workforce is highly literate, with primary education widespread across the country.<sup>1529</sup> The population is young, hard working and disciplined. The numerical predominance of the homogenous King ethnic group reduces the chances of splintering along ethnic, religious, racial and linguistic which play an important role in the socio-politic stability in Vietnam.<sup>1530</sup> In this situation, incorporating the CILS on freedom of association and collective bargaining into Vietnam, among other thing, creates an adequate legal framework regulating labour relations, which contributes to maximise

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<sup>1525</sup> Such as: Human Right Watch, Amnesty International, International Trade Union Congress, etc.

<sup>1526</sup> For extensive analysis on the impacts of the CILS on economic performance, see Chapter II.

<sup>1527</sup> World Bank (2005) *World Development Report 2005: A Better Investment Climate for Everyone*. World Bank, Washington, D.C, p. 141.

<sup>1528</sup> Nicholas Billington (1999) "The Location of Foreign Direct Investment: An Empirical Analysis", *Applied Economics*, vol. 31, No. 1, pp. 65-76.

<sup>1529</sup> According to UNICEF, the primary school net enrolment/ attendance in Vietnam in 2003-2008 is 93 %. See [http://www.unicef.org/infobycountry/vietnam\\_statistics.html](http://www.unicef.org/infobycountry/vietnam_statistics.html) (last visited 10 May 2010).

<sup>1530</sup> For intensive analysis on Vietnam population, see Chapter IV.

the advantage of Vietnam's labour force in attracting foreign investment and fostering economic development.

Moreover, freedom of association and collective bargaining as mentioned are a means to achieve industrial democracy, which is one of the bases for social democracy. Studies have also proved that industrial democracy is not in conflict with a country's economic efficiency.<sup>1531</sup> Therefore, Vietnam can receive economic benefits from ratification, incorporation and implementation of the CILS on freedom of association and collective bargaining.

In terms of trade, the United States is now Vietnam's third biggest trading partner, and has become Vietnam's biggest export market.<sup>1532</sup> Vietnam has been applying to the United States Government for the GSP since 2008. If Vietnam received the United States GSP benefits, a number of Vietnamese products would be eligible for duty-free entry and would sell at even more competitive prices in the United States markets. Eligible Vietnamese products would finally compete on a level playing field with duty-free products from all the other countries that currently receive the United States GSP benefits. There are over 3,400 tariff lines in the United States' tariff schedule under which Vietnamese products would be eligible for GSP benefits.<sup>1533</sup> Moreover, the United States GSP treatment would encourage Vietnamese industry to shift into producing goods that are eligible for preferential treatment, which would help it to expand and diversify trade performance.

One of the eligibility criteria for the grant of GSP is recognition of internationally accepted workers' rights including the right on freedom of association and collective bargaining.<sup>1534</sup> GSP benefits would provide an added boost to Vietnam's exports that would help to encourage further economic development and alleviate poverty. Therefore, Vietnam's ratification and implementation of Convention No. 87 and No. 98

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<sup>1531</sup> Franz Traxler and Bernd Brandl (2009) *The Economic Effects of Collective Bargaining Coverage: A Cross-National Analysis*, ILO, Geneva.

<sup>1532</sup> Vietnamese exports to the United States have been steadily increasing and came to a total of \$12.9 billion in 2008. Source: GSO 2008.

<sup>1533</sup> Source: USTR, *2009 Trade Policy Agenda and 2008 Annual Report*. Available at [http://www.ustr.gov/Document\\_Library/Reports\\_Publications/2009/2009\\_Trade\\_Policy\\_Agenda/Section\\_Index.html](http://www.ustr.gov/Document_Library/Reports_Publications/2009/2009_Trade_Policy_Agenda/Section_Index.html) (last visited 10 April 2010).

<sup>1534</sup> See U.S.-Vietnam Economic and Trade Relations: Issues for the 111th Congress. Available at [www.crs.gov](http://www.crs.gov) (last visited 26 April 2010).

of the ILO will contribute to the success of Vietnam's application for U.S. GSP, which, in turn, would render a lot of economic benefits for Vietnam.

Furthermore, studies in Chapter II show that the attempt to include a social clause within the WTO has temporarily failed,<sup>1535</sup> but no one can be sure that this issue will not be raised again and it is not impossible that one day the CILS including freedom of association and collective bargaining at work will be enforced by the WTO. In this scenario, incorporating ILO Conventions No. 87 and No. 98 into domestic legal system is a step forward, which will enable Vietnam to fulfil its obligation and continue benefiting from the status of a member of the WTO.

## **6.2. Peculiarities of Vietnam in Light of Regulations and Recommendations for Incorporation of the CILS on Freedom of Association**

### **6.2.1. The Right to Organise**

#### *The Coverage of the Right to Organise*

The CILS guarantee the right of workers and employers, without distinction whatsoever, to establish and to join organisations of their own choosing without previous authorisation.<sup>1536</sup> In Vietnam, the law recognises the right to organise of all categories of workers including the armed forces and the police. The Law on Trade Union provides:

Vietnamese workers employed in the business and production units of economic sectors, enterprises with foreign owned capital, other work units, State bodies and social organisations, (referred to as bodies, units, and organisations) are all entitled, within the framework of the trade union laws of Vietnam, to establish and join trade unions.<sup>1537</sup>

The Labour Code reconfirms the right of workers to form, join, or participate in union activities in accordance with the Law on Trade Unions in order to protect their legal

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<sup>1535</sup> For extensive analysis of the social clause, see Chapter II.

<sup>1536</sup> Article 2 of the Convention No. 87.

<sup>1537</sup> Sec.2 Article 1 of the Law on Trade Union.

rights and benefits.<sup>1538</sup> The law also prohibits an act, which obstructs the establishment and activities of the trade unions.<sup>1539</sup> However, in Vietnam, the right to organise is granted only to Vietnamese workers. The law does not provide this right to foreign workers who are employed or working in Vietnam. According to statistics, by December 2009, there are about 50,000 foreign workers working in Vietnam<sup>1540</sup> and these workers do not have the right to organise.

Workers in Vietnam can establish and join a trade union without previous authorisation but its establishment must be approved by the upper-level trade union.<sup>1541</sup> When a trade union is established it has to inform the Government body or organisation concerned in order that official relations may be established. Any union established by workers in accordance with the provisions of the law is entitled to join a trade union federation.<sup>1542</sup> The Vietnam General Federation of Labour (VGCL) and trade union associations are entitled to join international trade union organisations which have similar objectives.<sup>1543</sup> However, according to the Charter of Vietnamese Trade Unions, only VGCL has the right to join international trade unions associations,<sup>1544</sup> all other associations of trade unions cannot join international trade union associations.<sup>1545</sup> This regulation in Vietnam is not in conformity with the CILS since the CILS provide employers' and workers' organisations the right to establish and join federations and confederations and the right of such organisations, federations and confederations to affiliate with international organisations of workers.<sup>1546</sup>

Under Vietnam law there is no minimum number of workers required to establish a trade union, although, according to the Charter of Vietnamese Trade Unions, the

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<sup>1538</sup> Sec.2 Article 7 of the Labour Code.

<sup>1539</sup> Sec. 1 Article 153 of the Labour Code.

<sup>1540</sup> Source: MOLISA.

<sup>1541</sup> Sec. 2 Article 1 Decree No. 133/HDBT dated 20/4/1991 of the Minister Council.

<sup>1542</sup> Sec.2 Article 1 of the Law on Trade Union.

<sup>1543</sup> Sec.3 Article 1 of the Law on Trade Union.

<sup>1544</sup> Article 29 of the Charter of Vietnamese Trade Unions. Text available at [www.congdoanvn.org.vn](http://www.congdoanvn.org.vn) (last visited 20 May 2010).

<sup>1545</sup> However, in practice, there has been one sectoral trade unions have been members international trade unions, the Vietnam National Union of Post and Telecom workers joined the UNI (the Global Union for skills and services) on 28/8/2008. Source: <http://www.congdoanbdvn.org.vn/english/> (last visited 26 April 2010).

<sup>1546</sup> Article 5 of the Convention No. 87.

minimum number of workers required to establish a trade union is five.<sup>1547</sup> According to the CILS, a minimum number if fixed on a reasonable condition is not incompatible with Convention No. 87.<sup>1548</sup> Therefore, this requirement does not violate the CILS on freedom of association.

The CILS secure the right to organise by prohibiting national authorities from dissolving or suspending workers' and employers' unions.<sup>1549</sup> In Vietnam, the law is silent on these issues. However, the decision to dissolve organisations is freely and voluntarily taken by trade unions as required by the CILS.<sup>1550</sup> The right to suspend and dissolve trade unions is recognised in the Charter of Vietnamese Trade Unions, according to which, the higher level trade union has the right to dissolve the lower level trade union. In my personal experience, there has been no case where a trade union has been suspended or dissolved in Vietnam except for cases where the enterprise is dissolved.

The total number of trade union member in Vietnam by December 2009 was 6,619,069 members.<sup>1551</sup> As noted in Chapter IV, the population of working age in Vietnam is 44.9 million, of which employed workers are 16,716,760.<sup>1552</sup> These figures show that only 14.6% of the Vietnamese workforce exercises the right to organise, and only 39.5% of employed workers in Vietnam enjoys this right by being members of trade unions. In other words, 85.4 % of Vietnamese working population and 60.05 % of Vietnamese employed workers do not, in practice, exercise the right to organise.

### ***The Monopoly System of Trade Union***

The CILS require that workers have the right to establish organisations of their own choosing, which implies, in particular, effectively the possibility of creating, if the

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<sup>1547</sup> Sec.1(b) article 14 of the Charter of Vietnamese Trade Unions.

<sup>1548</sup> CFA: Case No. 2332, Report No. 336, para. 703.

<sup>1549</sup> Article 4 of the Convention No. 87.

<sup>1550</sup> ILO (2006), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* [Digest], 5th edn, ILO, Geneva, p. 137(para. 679).

<sup>1551</sup> Document No. 17/BC-TLĐ dated 9/3/2010 of VGCL.

<sup>1552</sup> Source: GSO 2007.



workers so choose, more than one workers' organisation per enterprise.<sup>1553</sup> Therefore, if domestic law does not authorise the establishment of a second union in an enterprise, it is not in conformity with the CILS.<sup>1554</sup> In the EU, the right to organise of workers consists of the right to freedom of choice. In *Young, James and Webster v. the United Kingdom*,<sup>1555</sup> the ECtHR stated freedom of choice is an indispensable element of the right to organise and is in reality non-existent where there is a trade union monopoly. The law in the United States and in South Africa also allows the existence of many trade unions in an enterprise.

In Vietnam, the monopoly of the trade union system is imposed by law. Workers do not enjoy the true right to organise because they cannot choose to establish or to join trade unions of their own choosing. Like the monopolistic system of trade union in China, there is only one legally recognised system of trade unions in Vietnam. Attempts to establish trade union independent from the Vietnam General Confederation of Labour (VGCL) or its affiliates is suppressed, illegal and sanctioned.<sup>1556</sup>

The Vietnamese trade union system is very complicated and difficult to understand not only for foreigners<sup>1557</sup> but also for the author, who has been working closely with VGCL since 2003 and who is a member of Vietnamese trade union system. Vietnamese trade unions system is divided into 4 levels:<sup>1558</sup> the central and highest level is the Vietnam General Confederation of Labour; the second level is the provincial level trade unions including provincial Confederations of Labour, national sectoral trade unions and corporate trade unions under VGCL; the third level is the upper level trade unions includes district Confederations of Labour, trade unions in Ministries of Government, local sectoral trade unions; trade unions in industrial zones; trade unions in SOEs under provinces' management; the lowest level is grass roots trade unions.

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<sup>1553</sup> Case No. 1840, Report No. 302, para. 351; Case No. 1581, Report No. 327, para. 109; Case No. 2327, Report No. 337, para. 198.

<sup>1554</sup> Case No. 2327, Report No. 337, para. 198.

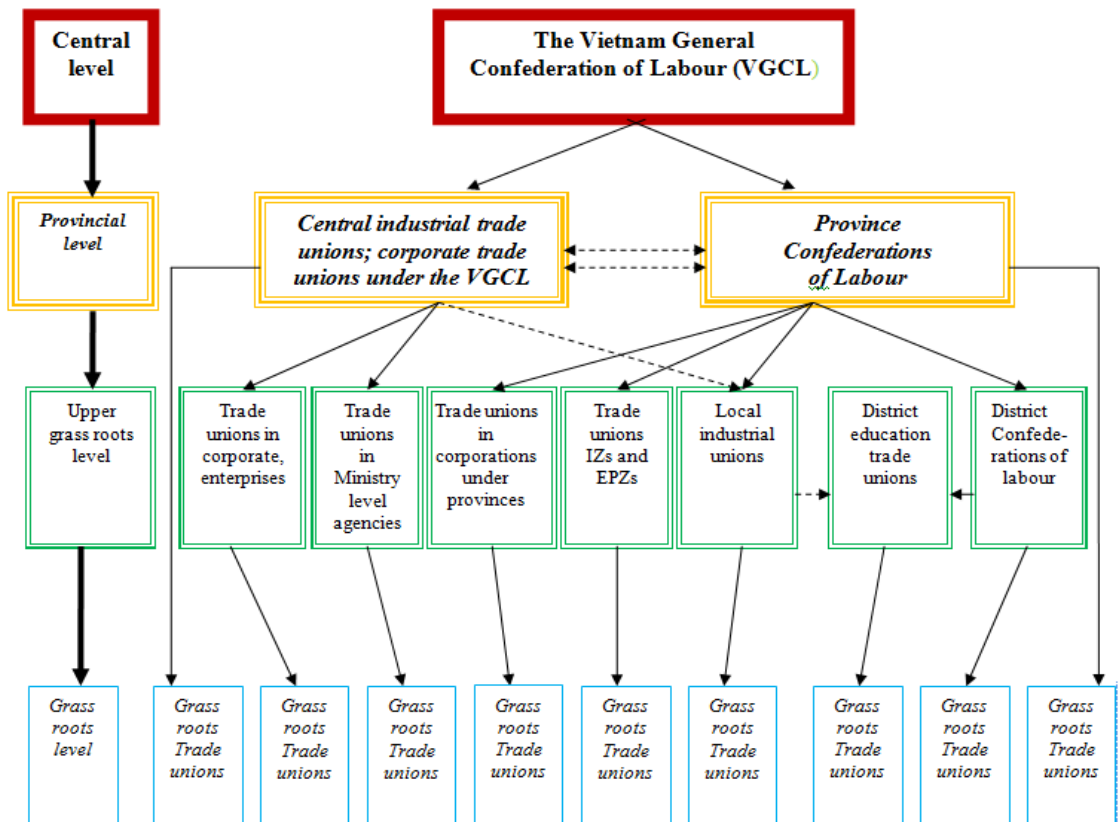
<sup>1555</sup> *Young, James and Webster v. the United Kingdom*. 4 EHRR 38 (1982).

<sup>1556</sup> See Human Rights Watch (2000) *Not Yet a Workers' paradise: Vietnam's Suppression of the Independent Workers' Movement*. Human Rights Watch Organisation, Washington, D.C.

<sup>1557</sup> Angie Ngoc Tran (2007) "The Third Sleeve: Emerging Labour Newspapers and the Response of the Labour Unions and the State to Workers' Resistance in Vietnam, *Labour Studies Journal*, vol 32, No. 3, pp. 257-279.

<sup>1558</sup> Article 6 of the Charter of Vietnamese Trade Unions.

**Chart 6.1: Structure of Vietnam's Trade Union System**



Note:

————▶	: Direct control
-----▶	: Indirect control
◀-----▶	: Cooperating in operation
IZs	: Industrial zones
EPZs	: Export processing zones

The VGCL is the supreme organisation of all trade unions. All trade unions fall under the umbrella of the VGCL. The monopoly role of the VGCL is recognised by the Constitution as the socio-political organisation of the working class and working people.<sup>1559</sup> Provincial Confederation of Labour is established in every province in Vietnam; by December 2009, there were 63 provincial level Confederations of Labour in Vietnam. National sectoral trade unions are not arranged in accordance with the administrative organisation of the State but they are under the line management of the

<sup>1559</sup> Article 10 of the 1992 Constitution.

relevant line Ministry.<sup>1560</sup> By December 2009, there were 20 national sectoral trade unions including the Confederation of trade unions of the armed forces, the Confederation of trade unions of the police and the Confederation of Government officials.<sup>1561</sup>

A district Confederation of Labour is established in every district, amounting to 686 by December 2009. Besides district Confederations of Labour, upper grass roots trade unions include 375 local sectoral trade unions and 35 industrial zone and export processing zone trade unions.<sup>1562</sup>

Grass roots trade unions, at the bottom, are established in enterprises, State agencies and other units. Grass roots trade unions are managed by trade union leaders who are elected by their members with a term of 2.5 years.<sup>1563</sup> By December 2009, there were 99,577 grass roots trade unions in Vietnam, of which 74,149 grass roots trade unions are operating in State agencies and SOEs which account for 3,792,309 trade union members and 25,248 grass roots trade unions operating in non-State enterprises which account for 2,826,760 trade unions member. The percentage of enterprises with trade unions is low at just about 30%.

**Table 6.1: Grass Roots Trade Unions and Members in Vietnam**

Sectors	Number of grass roots trade union	Number of members
State agencies and SOEs	74,149	3,792,309
Non-State sectors	25,248	2,826,760
Total	99,577	6,619,069

*Source: VGCL*

Trade union coverage varies in different types of enterprises. While 95% of SOEs have trade union, 80% of private enterprises and 60% of FDI enterprises do not have trade

<sup>1560</sup> For example: National Postal Trade Union is under the supervision of Ministry of Information and Telecommunication; National Education Trade Union is under the supervision of Ministry of Education and Training. Leaders of these organisations are staff of the relevant Ministries.

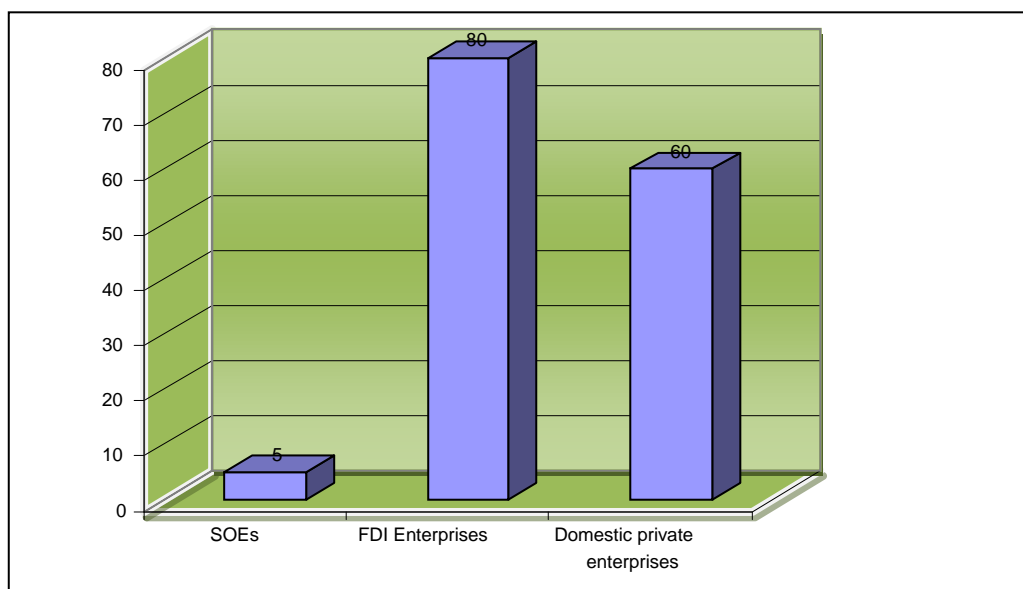
<sup>1561</sup> Document No. 17/BC-TLĐ dated 9/3/2010 of VGCL.

<sup>1562</sup> *Ibid.*

<sup>1563</sup> Article 7 of the Charter of Vietnamese Trade Unions.

unions. The coverage of trade union in non-State enterprise also varies in different provinces; for examples, there are 50% in Ho Chi Minh city, 20% in Da Nang city, 12% in Hanoi, 30% in Vung Tau province, and 12% in Vinh Phuc province.<sup>1564</sup>

**Figure 6.1: Enterprises without Trade Unions (%)**



*Source: VGCL*

Despite supports to establish trade union in law by the State, the low number of trade union membership and the low number of trade unions in non-State enterprises can be explained by the ignorance of workers on the role of trade unions. The reasons for this may be weakness and impotence of trade unions in protecting workers' rights and interests, which result from the monopoly of the trade union system and the dependence of trade unions. It can also be justified by the weakness of VGCL and its affiliates in communicating its role to workers and in promoting the establishment of trade unions in enterprises.

In addition to the single system of trade unions connected with the totally dominant role of the VGCL, in Vietnam only one grass roots trade union is recognised and set up in one unit. The establishment of this trade union must be approved by the upper level trade union, which is affiliated to and under the umbrella of the VGCL. In cases where there is no trade union at an enterprise, if the workers set up a trade union, this must be

<sup>1564</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

approved by and affiliated to the upper level trade union. If a trade union has been established in an enterprise, workers cannot set up another trade union and they can exercise their right to organise only by joining the single existing trade union.

The term “trade union” in English translates as *Cong doan* in Vietnamese. Nonetheless, there is only one *Cong doan* at one grass roots unit (enterprise, organisation, etc) which represents workers and no other *Cong doan* coexists with this only *Cong doan*. If another trade union is established when a *Cong doan* already exists, that trade union will not be called *Cong doan* and will not be recognised as a trade union. Furthermore, every *Cong doan* is affiliated to the upper level trade union, which is under the umbrella of the VGCL. Therefore, the right to establish and to join a trade union is interpreted as the right to form and to join the monopoly *Cong doan*.

According to the CILS, trade unions have the right to draw up their constitution and rules.<sup>1565</sup> However, in Vietnam, because of the monopoly trade unions system, all trade unions must comply with the Charter of Vietnamese Trade Unions promulgated by the VGCL. Their right to discuss and draft their own constitution and rules provided by the CILS is implemented, on their behalf, by the VGCL.

According to the CILS, the monopoly in the trade union system imposed by law is a violation of freedom of association and collective bargaining.<sup>1566</sup> Experience of China demonstrates that the monopoly in the trade union system might result from the monopoly in the political system; it is a violation of the CILS on freedom of association and collective bargaining, which leads to the impotence of trade unions in protecting and promoting workers’ rights and interests. Therefore, in order to be in compliance with the CILS, legislation imposing the monopoly of trade union system must be abolished and replaced by legislation that legalises and enables the establishment and existence of many trade unions at all levels. This legislation, in consequence, may require a reform in political democracy in Vietnam because if there is no democracy at

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<sup>1565</sup> Article 3 of Convention No. 87.

<sup>1566</sup> CFA: Case No. 1963, Report No. 320, para. 220.

the political level, there will not be any right for workers and employers to join freely the organisation of their own choosing and to exercise their legitimate activities.<sup>1567</sup>

The first draft of the new Labour Code set in place the first stepping stone for the creation of multi-trade unions in Vietnam by allowing for the establishment of representatives of workers in an enterprise where no trade union has been established; it also allows the creation and existence of organisations of workers' representative in parallel with the traditional trade union system.<sup>1568</sup> However, this progressive provision was rejected in the second draft, which clearly maintains the monopoly of the trade union system in Vietnam by providing the right to represent workers in enterprises where no trade union had been established to the upper-level trade union, which is affiliated to and under the umbrella of the VGCL.<sup>1569</sup>

### ***The Dependence of Trade Union***

Trade unions in Vietnam have two main functions: the function of protecting rights and interests of workers and the function of a socio-political organisation. The latter function creates strong reliance and dependence of trade unions on the CPV and the State.

Because it is a socio-political organisation, trade union is recognised in law as a large political and social organisation of the working class voluntarily established under the leadership of the Vietnamese Communist Party. It is a part of the political system of Vietnam and brings the benefits of socialism to workers. Trade union is, therefore, responsible to the leadership of the Party; their functions are a part of State administration.<sup>1570</sup> The function of trade union in Vietnam is provided by the Constitution as:

... together with State bodies and economic and social organisations cares for and protects the interests of workers, public employees and other working people; takes part in the inspection and

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<sup>1567</sup> Karen Curtis (2010) *Democracy, Freedom of Association and the ILO*. Available at [http://training.itcilo.org/ils/ils\\_freedom/training\\_materials/english/curtis.pdf](http://training.itcilo.org/ils/ils_freedom/training_materials/english/curtis.pdf) (last visited 15 April 2010).

<sup>1568</sup> Article 206 of the first draft of the new Labour Code.

<sup>1569</sup> Article 205 of the second draft of the new Labour Code.

<sup>1570</sup> Article 10 of the 1992 Constitution, Article 1 of the Law on Trade Union, Preamble of the Charter of Vietnamese Trade Unions.

supervision of the activities of State bodies and economic organisations; educates cadres, workers, public employees and other working people in the building and defence of their homeland.<sup>1571</sup>

The VGCL, as noted above, at the highest level of trade unions, is one of the socio political organisations that form the basis of Vietnam's political system.<sup>1572</sup> The President of VGCL is ranked as Minister and is a member of the CPV Central Committee. At provincial and district level, the provincial and district Confederations of Labour are organised in accordance with the State's administration. The presidents of the provincial and district Confederations are members of the provincial or district CPV Committees. Therefore, the trade union system in Vietnam is closely integrated with the Party State structures at all levels. Its own organisation is the same as the structure of the CPV and the State,<sup>1573</sup> its bodies at all levels collaborating closely with the local labour department under the supervision of the Party. In relation to the State, all officers of VGCL, provincial Confederation of Labour and district level Confederation of Labour are State officials, working for and receive salaries, benefits from the State.<sup>1574</sup>

The CILS provide that acts which are designed to promote the establishment of workers' organisations under the domination of employers' organisations or to support workers' or other organisations by financial or other means, with the object of placing such organisations under the control of employers' or employers' organisations shall be deemed to constitute acts of interference.<sup>1575</sup> In Vietnam, the trade union system is dependent on the State in terms of financial issues. State budget is the main source of funding for trade unions in Vietnam.<sup>1576</sup> As noted above, VGCL is a socio political organisation in Vietnam, thus its expenditure is covered by the State because according to the Law on State Budget, the State budget covers expenditures of the Communist Party and socio political organisations.<sup>1577</sup> On the contrary, the ILO states that the right to organise of workers can be protected only if it is based on financial independence of

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<sup>1571</sup> Article 10 of the 1992 Constitution.

<sup>1572</sup> See Chapter IV.

<sup>1573</sup> See Chart 4.1 and Chart 6.1.

<sup>1574</sup> Article 4 of the Law on State Officers 2008. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 22 April 2010).

<sup>1575</sup> Sec. 2 Article 2 of the Convention No. 98.

<sup>1576</sup> Sec. 2, Article 16 of the Trade Union Law 1990.

<sup>1577</sup> Article 10 of the Law on State Budget 2002. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 22 April 2010).

trade unions.<sup>1578</sup> Therefore, the regulation of Vietnam makes trade unions financially dependant on public body is not in conformity with the requirements of the CILS.

There is no clear dividing line between the responsibilities of the CPV, State agencies and trade unions in Vietnam.<sup>1579</sup> This argument is reinforced by the fact that no complaint by a trade union of Vietnam has been sent to the CFA since Vietnam rejoined the ILO in 1993 given the fact that State's actions, most importantly through legislation, is, in many aspects, not in conformity with the CILS on freedom of association and collective bargaining.

In an enterprise, the trade union is dependent on the employer in both establishment and operation. In Vietnam, the typical way of setting up a trade union is top-down not bottom-up, where the upper level trade union contacts the employer to collaborate in establishing a trade union. Thereafter, the employer often nominates and then the upper level trade union appoints a senior human resource director who becomes the trade union leader. Because of that, the trade union is still a tool of the employers. In practice, it has been established that the workers in Vietnam have tended to view trade unions as part of management rather than their representatives.<sup>1580</sup>

In addition, trade union leaders are also employees in the enterprise; they are dependent on the employer for salary, terms of contract and other interests. In this context, it is very difficult for their activities to be independent and separated from the interests of the employers. The law provides that a person who carries out trade union activities on a full-time basis and receives a wage from trade union funds.<sup>1581</sup> However, by the time of writing [March 2010], there was no regulation in Vietnam providing details of the conditions in which a full-time trade union leader must exist and operate at an enterprise. According to VGCL 95% of the trade union leaders in enterprises are not

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<sup>1578</sup> CFA: Case No, 1793, Report No. 3000, para 267; Case No. 1865, Report No. 304, para 248.

<sup>1579</sup> Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568.

<sup>1580</sup> Colin Fenwick and Thomas Kring (2007) *Rights At Work: An Assessment of the Declaration's Technical Cooperation in Select Countries*, p. 43 (para. 175). Available at [http://www.carnegieendowment.org/files/Declaration\\_report.pdf](http://www.carnegieendowment.org/files/Declaration_report.pdf) (last visited 15 January 2009).

<sup>1581</sup> Sec. 3 Article 155 of the Labour Code.



working full-time;<sup>1582</sup> and these leaders are not paid by the trade union fund as they do not meet the requirement of the above regulation. On the other hand, 95 % of trade union leaders in enterprises are employed and paid by their employers. Furthermore, according to the draft of the new Labour Code, full-time trade union leaders are compulsory only in enterprises employing more than 500 workers.<sup>1583</sup> This means that all trade union leaders in all enterprises employing fewer than 500 workers are part-time leaders and are paid by their employers.

The law requires both workers and employers to contribute to a trade union fund. At the enterprise where a grass roots trade union is established, the trade union fee of the workers is 1% of their wages, and trade union fee of the employer is 2% of the enterprise's wage fund. Foreign invested enterprises have to contribute 1% of the wage budget.<sup>1584</sup> This money is transferred to the district level Confederation of Labour.<sup>1585</sup> This requirement has two negative effects on the right to organise of workers: on the one hand, it encourages the employers to obstruct the right to organise of workers when it provides financial rewards to enterprises where no trade union exists; on the other hand, it increases the dependence of trade unions on the employers when it makes trade unions dependant on support from employers. In addition, by implying that all workers in an enterprise must be members of the only trade union once it is established, this regulation contributes to the monopoly of trade union in Vietnam. Regardless of whether they want to be members of trade unions or not their salaries are automatically deducted 1% to contribute to the trade union. Furthermore, the requirement that the employer has to contribute 2% of the wage fund to the trade union implies that the employer must recognise all workers as members of the only one trade union at his or her enterprise.

The draft of the new Trade Union Code imposes heavier financial obligations on employers when it requires every enterprise regardless of whether it has a trade union or

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<sup>1582</sup> Source: Speech of Mr. Nguyen Duc Chinh, Vice President of VGCL. Available at <http://www.tienphong.vn/Tianyon/Index.aspx?ArticleID=174974andChannelID=104> (last visited 22 April 2010).

<sup>1583</sup> Article 205 of the second draft of the new Labour Code.

<sup>1584</sup> Decision No. 133/2008/QĐ-TTg dated 1/10/2008 of the Prime Minister. Before the adoption of this Decision, FDI enterprises were exempted from trade union fee as a means to foster FDI in Vietnam provided by Decision No. 53/1999/QĐ-TTg dated 26/3/1999 of the Prime Minister.

<sup>1585</sup> Joint Circular No. 76/1999/TTLT/TC-TLĐ on 16/6/1999 of Ministry of Finance and VGCL.

not has to contribute 2% of its wage budget to the trade union fund.<sup>1586</sup> However, VGCL – the author of this draft – was not able to explain why it is 2% not 1% or 3% in its Proposal.<sup>1587</sup> If this regulation is passed it will have negative effects on Vietnamese enterprises, particularly their capacity for competitiveness. According to research and statistics, salaries account for 20% of production costs;<sup>1588</sup> if enterprises have to pay 2% for trade union fees, this will result in 0.4% increase in their products’ price, which consequently undermine the competitiveness of Vietnamese products.

Furthermore, as acknowledged in Chapter IV, because most of Vietnam’s export products are high labour intensity, in which labour costs (wages) account for 50% or 60% of the products’ price,<sup>1589</sup> therefore enterprises’ products’ cost will be increased by at least 1% if they have to pay the 2% salary fund for trade union fee, which once again reduce the competitive capacity of Vietnamese FDI attraction as well as export performance. The legal obligation of employers to pay a trade union fee is a unique characteristic of legislation on labour relations in Vietnam. Even the President of VGCL had to admit that it exists only in China and Vietnam.<sup>1590</sup> It has been seriously argued at the first hearing of the Standing Committee of the NA that this regulation should be repealed.

The dependence of trade unions in Vietnam results in both negative and active consequences. Firstly, it creates a conflict for trade unions between protecting the rights and interests of workers, on the one hand, and fulfilling trade unions’ duties as organs of the States, on the other hand. Conflicts occur in cases of trade unions in State agencies and SOEs. To protect the rights and interests of their members, trade unions in State agencies cannot fight against the directors; on the contrary, their role is mainly foster implementation of the law.<sup>1591</sup>

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<sup>1586</sup> Article 27 of the draft of the new Trade Union Law.

<sup>1587</sup> Document No. 317/TTr-TLD dated 9/3/2010 of VGCL.

<sup>1588</sup> Document No. 2172/UBPL12 dated 5/4/2010, of the Committee of Law under the National Assembly 12<sup>th</sup> Legislature.

<sup>1589</sup> *Ibid.*

<sup>1590</sup> Source: <http://www.baomoi.com/Info/Kien-nghi-bo-phi-cong-doan/47/4122328.epi> (last visited 23 April 2010).

<sup>1591</sup> According to the Charter of Vietnamese Trade Unions, the main functions of grass roots trade unions in State agencies, public service units, and headquarters of political, socio-political and socio professional organisations are:

Secondly, it provides trade unions with the right to participate and raise their voices to Government authorities at all levels. The President of the General Federation of Labour of Vietnam is entitled to attend meetings of the Government. Presidents of unions at all levels are entitled to attend meetings of parallel State bodies, units, and organisations concerned when the matters being discussed at those meetings relate to the rights, obligations, and interests of workers.<sup>1592</sup> According to the Labour Code, the Government must consult VGCL when promulgating regulations relating to minimum wages,<sup>1593</sup> wage scales,<sup>1594</sup> overtime working hours,<sup>1595</sup> national labour protection,<sup>1596</sup> occupational diseases,<sup>1597</sup> and social insurance.<sup>1598</sup> Moreover, VGCL can propose drafts of law to the NA,<sup>1599</sup> since 1992, VGCL has participated in drafting more than 250 laws and Ordinances of the National Assembly and its standing committee.<sup>1600</sup> Trade unions can use this chance to raise their voice, power and influence in the process of law and policy making in Vietnam.

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(i). Monitor and oversee the implementation of stipulations, policies and laws, ensure the exercise of the rights and interests of trade unions' members, cadres, public and office employees, and other working people. Combat negative practices, corruption and social vices. Identify and help settle complaints, denunciations and labour disputes, and exercise the rights of grass roots trade unions as stipulated by laws.

(ii). Coordinate with the chiefs or heads of the agencies or units for the implementation of the Regulations on democracy and holding of employees' meetings in the agencies or units; assign representatives to join councils for examining and settling issues related to the rights and interests of trade union members, cadres, public and office employees, and other working people. Guide and help workers in labour contracting. Join with the chiefs or heads of the agencies or units in improving the working conditions and catering for the life of workers.

(iii). Organise and motivate workers in the agencies or units for patriotic emulation campaigns to execute their obligation to help administer their respective agencies or units, improve work style and administrative procedures with a view to raising work quality and efficiency.

(iv). Disseminate information on Party guidelines and decisions, State policies and laws, and tasks of the trade union organisation. Conduct information, education and communication work among workers and help raise their political, education, legal, scientific-technical, professional and occupational levels; sponsor social and charity activities among workers.

(v). Increase trade union membership and build grass roots trade unions strong.

<sup>1592</sup> Article 4 of the Law on Trade Unions 1990. Article 156 of the Labour Code.

<sup>1593</sup> Article 56 of the Labour Code.

<sup>1594</sup> Article 57 of the Labour Code.

<sup>1595</sup> Article 69 of the Labour Code.

<sup>1596</sup> Article 95 of the Labour Code.

<sup>1597</sup> Article 106 of the Labour Code.

<sup>1598</sup> Article 150 of the Labour Code.

<sup>1599</sup> Article 87 of the Constitution 1992, Article 5 of the Law on Trade Unions 1990.

<sup>1600</sup> Document No. 317/TTr-TLD dated 9/3/2010 of VGCL.

In Vietnam trade unions are not independent from the CPV, from the State and from employers. The dependence of the trade unions on the State and the employers in terms of organisational structure and finance is not in conformity with the CILS on the right to organise. Studies on the experiences of China have proved that, once trade unions are not independent, they are impotent in protecting rights and interests of their members. Because of their dependence, trade unions' interests do not coincide with workers' interests. When workers' contributory fee is not the main income of the trade union, it is very difficult for the trade union to act totally to protect rights and interests of workers. The impotence of trade unions in Vietnam is also revealed in their roles in organising, leading strikes and collective bargaining, which will be examined later.

Experiences in China also showed the impotence of trade unions and suggest that trade unions just exist and play the role as the longer-hand of the Party States. This is because trade unions are neither dependant from the State nor properly established by the workers, consequently, trade unions are more in favour of the State over the fights for rights and interests of workers. This experience of China, once again, confirmed the importance of trade unions independence provided by the CILS discussed in Chapter II, which is also confirmed by the law in the United Kingdom, the United States and South Africa. Trade unions can only function properly when they are independent from both the State and the employers. Therefore, in order to make domestic law in conformity with the CILS on this issue, the law must abolish the interference of the State and the employers in establishment, organisation and operation of trade unions at all levels. Trade union funds must be independent from the Party, the State as well as from employers.

### ***The Right to Organise of the Employers***

The right to organise is granted by the CILS to both workers and employers. In discussion of the draft of Convention No. 87, a proposal was made to limit the scope of this Convention only to workers. However, this proposal was rejected by most of ILO's members for three main reasons: firstly, the fully effective regulation of conditions of employment must be based on strong and free workers' and employers' organisations enjoying equal rights; secondly, freedom of association could not be effective if such an important segment as employers were excluded; finally, the exclusion of employers

from the scope of Convention No. 87 might endanger the tripartite structure of the ILO.<sup>1601</sup>

In Vietnam, the law is silent on the right to organise of employers but employers can join their associations as a business entity. In practice, two of the biggest business associations are officially recognised employers' associations: the Vietnam Chamber of Commerce and Industry (VCCI) and the Vietnam Cooperatives Alliance (VCA).<sup>1602</sup> While VCCI's members are formal private and foreign enterprises, VCA's members are small household enterprises and cooperatives. Both of these organisations were traditionally tasked with trade and business promotion. The Bureau for Employers' Activities was established under VCCI in 1997.<sup>1603</sup> However, the role of VCCI in representing employers was not recognised until 2003.<sup>1604</sup> These two employers' organisations in turn represent employers in the Delegation of Vietnam at the International Labour Conference annually.

In order to foster collective bargaining towards achieving effective regulation of conditions of employment and to improve social dialogue in Vietnam, it is a prerequisite to have proper regulation on the right to organise of employers. As provided by the CILS, the law needs to provide a balanced protection of the right to organise between workers and employers. The law needs to ensure that employers, as workers, should be able, without distinction whatsoever, to establish and to join organisations of their own choosing without previous authorisation.<sup>1605</sup>

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<sup>1601</sup> ILO (1948) "The ILO and the Problem of Freedom of Association and Industrial Relations", *International Labour Review*, vol. 58, No. 5, pp. 575-600.

<sup>1602</sup> Decree No. 145/2004/NĐ-CP dated 14/7/2004 of the Government.

<sup>1603</sup> Main functions of the Bureau for Employers' Activities are:

- (i). Promoting and strengthening the role of representation for Employers in Vietnam of Vietnam Chamber of Commerce and Industry.
- (ii). Participating in the tripartism in Vietnam together with Vietnam General Confederation of Labour (representing Employees) and Ministry of Labour, Invalids and Social Affairs (representing Government).
- (iii). Creating a favourable policy environment for Employers and business community; reflecting suggestions of Employers in Government policies; protecting legitimate rights of Employers in Vietnam.

<sup>1604</sup> Decision No. 123/2003/QĐ-TTg dated 12/6/2003 of the Prime Minister.

<sup>1605</sup> Article 2 of the Convention No. 87.

## 6.2.2. The Right not to Organise

Although the right not to join a trade union is not mentioned in the CILS, experiences of the United Kingdom and the United States are very good models for Vietnam's legislation on these issues. In these legislations, the right to organise have two aspects: the active aspect is the right to join or to from trade unions and the negative aspect is the right to refrain from joining trade unions.<sup>1606</sup>

In Vietnam, the law is silent on the right not to organise of employers. However, the law clearly denies the right not to organise of workers. According to Vietnam law, establishing trade unions is indirectly compulsory in enterprises in Vietnam since the adoption of the Labour Code 1994. This code requires establishment of trade unions in the case of newly established enterprises, after six months from the date of commencement of the operation. For enterprises which are operating without trade unions, trade unions must be set up within six months since this Code came into effect (1 January 1995).<sup>1607</sup> This means that, since 1 July 1995, a trade union must be set up in all enterprises in Vietnam and this regulation is still in effect after several amendments of the Labour Code 1994.

The duty to set up trade unions in enterprises is imposed on the upper grass roots trade unions, most importantly the district level Confederations of Labour. The law provides that the upper grass roots trade unions shall be responsible for establishing trade union organisations at enterprises to represent and protect the lawful rights and interests of the employees and the labour collective. In cases where no trade union is established after a period of six months, the upper grass roots trade union will appoint an interim/temporary trade union to represent workers in the enterprises. This interim trade union has all the rights of a trade union. Leaders of the interim trade union are workers in the enterprise or officials of the upper grass roots trade union.<sup>1608</sup> This trade union represents all workers in the enterprise and is under the control and supervision of the upper grass roots trade union.

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<sup>1606</sup> For intensive analysis on the right not to organise in the United Kingdom and the United States, see Chapter III.

<sup>1607</sup> Article 153 of the Labour Code 1994.

<sup>1608</sup> Decree No. 96/2006/ND-CP dated 14/9/2006 of the Government.

Compulsory establishment of trade unions is supported by some regulations of the Labour Code where it imposes some obligations on the employer relating to disciplinary and wages that can be implemented only with the establishment and existence of a trade union. One of the most important powers of the employers is to fire or to discipline workers who violate the labour disciplinary rules. According to the Labour Code, an employer can fire a worker only once the employer has internal labour rules in writing. In order to do so, the employer must consult the trade union of the enterprise prior to implementing the internal labour rules. Therefore, if there is no trade union in the enterprise, the employer is unable to establish internal labour regulation and thus the employer cannot fire any worker. A fine of between VND 500,000 and 1 million is imposed on employers who commit acts of failing to consult with the Executive Boards of the grass roots Trade Unions or the Interim Executive Boards of Trade Unions (if any) when setting out internal labour rules.<sup>1609</sup>

In addition, the Labour Code requires that, when examining and dealing with a breach of labour rules, a representative of the trade union of the enterprise must be present and participate. If there is no trade union in the enterprise, this procedure cannot be implemented, and the employer cannot fire workers who had violated labour disciplinary rules. A fine of between VND 5 million and 10 million is imposed on employers who have failed to obey this requirement.<sup>1610</sup>

Furthermore, according to the Labour Code, an employer has to make a salary scale in his/her enterprise after consulting trade union in the enterprise.<sup>1611</sup> If the employer fails to do so, he or she may be fined of between VND 2 million and 10 million.<sup>1612</sup> Thus, if there is no trade union in the enterprise, the employer cannot fulfil his legal obligation and can be fined.

The compulsory establishment of trade unions clearly shows the top-down pressure in establishing trade unions in Vietnam. Forcing workers to join a trade union and to be

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<sup>1609</sup> Sec. 1 Article 14 of the Decree 113/2004/ND-CP dated 16/4/2004 of the Government. From 25/6/2010, the fine is reduced to between VND 200,000 and 500,000 according to Sec. 1 Article 12 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1610</sup> Sec. 3 Article 14 of the Decree 113/2004/ND-CP dated 16/4/2004 of the Government. Sec. 3 Article 12 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1611</sup> Article 57 of the Labour Code.

<sup>1612</sup> Sec. 5 Article 10 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

represented by a trade union that is not of their own choosing is not in conformity with the CILS on freedom of association and collective bargaining. A compulsory trade union may be good when it originates from legal obligation and desires of the workers, with the conditions that the established trade union is independent and the trade union can function appropriately in protecting rights and interests of workers. On the contrary, requiring workers to join and to be represented by a monopoly and dependant trade unions is a violation of their freedom of association and right to organise.

The CILS state that workers are free to form and join trade unions of their own choosing. The law in the United Kingdom, the United States and South Africa also provides that workers are free to join or to form trade unions. The compulsory establishment of a monopoly trade union is a violation of the right to organise provided by the CILS particularly when the established trade union is the only one allowed to exist and forced to be affiliated to the only monopoly system of trade unions. Therefore, to be compatible with the CILS on freedom of association and collective bargaining, this regulation must be abolished.

### **6.2.3. Protection from Anti-Union Discrimination**

Previous studies reveal that trade unions in Vietnam have a dual function: to represent workers and to act as a socio-political organisation which is likely to be an extension of the State. Because of the latter function, trade unions are rigorously protected and promoted by the State. According to the law, obstruction and violation of the principles of voluntary recruitment to the organisation and operation of a trade union are prohibited.<sup>1613</sup> Employers must not interfere with or limit the right to organise of workers. The law imposes a fine of between VND 5 million and 10 million on employers for obstructing the establishment of trade union organisations.<sup>1614</sup>

Protection and promotion of trade unions leads to the protection of workers in exercising the right to organise. Discrimination against workers in exercising their right to organise is strictly prohibited. The employer must not prejudice an employee because he has formed, joined, or participated in the activities of a trade union organisation.

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<sup>1613</sup> Article 1 of the Trade Union Law 1999.

<sup>1614</sup> Sec. 2 Article 20 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Sec. 2 Article 16 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.



Furthermore, the employer must not apply economic pressure or other measures to interfere with the organisation and activities of trade unions. Violation of these requirements will incur a fine of between VND 1 million and 5 million.<sup>1615</sup>

#### **6.2.4. Protection and Facilities to Be Afforded to Workers' Representatives**

Most of Vietnam law is in conformity with the requirement of the CILS on protection of workers and trade union leaders and facilities afforded to workers' representatives. In Vietnam, when a trade union organisation is established in accordance with the law and the charter of the trade union, the employer must acknowledge such organisation. The law also requires the employer to afford facilities for trade union leaders. It provides that "The employer shall be responsible for provision of the necessary working conditions and facilities to enable the trade union to carry out its activities."<sup>1616</sup> The law imposes a fine of between VND 5 million and 10 million on employers for obstructing the activities of trade union organisations.<sup>1617</sup>

Vietnam law provides protection for trade union leaders from being discriminated against and obstructed by employers when implementing their trade union activities. When a trade union is set up in an enterprise, the employer must give part-time trade union leaders at least three working days in one month to carry out trade union activities.<sup>1618</sup> Failing to ensure necessary working means for trade unions and to arrange time for trade union leaders to participate in activities may result in a fine between VND 1 million and 5 million.<sup>1619</sup>

Furthermore, the law requires a special procedure in disciplining trade union leaders. The approval of the trade union of the enterprise must be achieved before an employer decides to dismiss, retrench or to terminate unilaterally the labour contract of trade union leaders or to transfer trade union leaders to another position. In cases where the employee involved is the chairman of the trade union of the enterprise, the approval of

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<sup>1615</sup> Sec. 1(a) Article 20 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Sec. 1 Article 16 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1616</sup> Sec. 1 Article 155 of the Labour Code, Article 14 of the Trade Union Law 1999.

<sup>1617</sup> Sec. 2 Article 20 of the Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Sec. 2 Article 16 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1618</sup> Sec. 2 Article 155 of the Labour Code. Sec. 2 Article 15 of the Trade Union Law 1999.

<sup>1619</sup> Sec. 1(b) Article 20 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government. Sec. 1 Article 16 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

the upper level trade union must be obtained.<sup>1620</sup> According to Vietnam law, the burden of proof is laid on the employer when disciplining workers, the law provides that “when dealing with breaches of labour rules, the employer must be able to prove the employee’s fault”.<sup>1621</sup> The law also imposes an administrative fine of between VND 1 million and 3 million on employers sacking or unilaterally terminating labour contracts with trade union leader without the agreement of the grass roots trade union, or with presidents of the grass roots trade unions without the agreement of the upper level trade union.<sup>1622</sup>

More protection is provided to trade union leaders in the draft of the new Trade Union Law. This draft devotes one Chapter (Chapter IV) to regulate protection of trade union leaders and facilities afforded to trade union. According to this draft, part-time trade union leaders are given from one to three days in a month, trade union leaders are given from three to six days in a month to carry out trade union activities.<sup>1623</sup> In cases where the employment contract of trade union leaders ends before his term of office, this employment contract will automatically be extended until the end of his/her office term. If the concerned trade union leader is re-elected, his employment contract will be transferred to a indefinite employment contract or the duration of the employment contract will be extend to the same period of his/her office term.<sup>1624</sup> The draft also requires employers to provide sufficient accommodation for the trade union to carry out its activities.<sup>1625</sup>

### **6.2.5. The Right to Strike**

#### ***The Scope of the Right to Strike***

China’s labour relations experiences show that where a trade union has a monopoly the right to strike is denied. Thus, the strong influence of the Party State is maintained and

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<sup>1620</sup> Sec. 4 Article 155 of the Labour Code; Sec. 4 Article 15 of the Trade Union Law 1999.

<sup>1621</sup> Sec. 1 Article 87 of the Labour Code.

<sup>1622</sup> Sec. 1(c) Article 20 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1623</sup> Sec. 2 Article 25 of the draft of the new Trade Union Law.

<sup>1624</sup> Sec. 1 Article 26 of the draft of the new Trade Union Law.

<sup>1625</sup> Sec. 1 Article 25 of the draft of the new Trade Union Law.

the unions are made to depend upon it.<sup>1626</sup> In Vietnam not all categories of workers have the right to strike. There are two types of workers in Vietnam, namely, workers who are State officials and, workers who are employed by enterprises. Although all categories of workers are entitled to the right to organise, according to the law, only the latter have the right to strike. The Labour Code provides that an employee shall have the right to strike in accordance with the provisions of the law.<sup>1627</sup> Nonetheless, the Law on State Officers provides that all State officials are prohibited from taking part in strikes.<sup>1628</sup>

According to the CFA, prohibition of State officials from participating in strikes is not a violation of the CILS on freedom of association and collective bargaining.<sup>1629</sup> Vietnam law provides that a fine of between VND 10 million and 15 million shall be imposed on persons who commit acts of obstructing the exercise of the right to strike.<sup>1630</sup> More severe penalties for breaches of this law have been introduced starting from 25 June 2010, increasing the fine to between VND 15 million and 20 million.<sup>1631</sup>

Under Vietnam law, a strike is defined as “temporary, voluntary and organised work stoppage by the workers in an attempt to settle collective labour disputes”.<sup>1632</sup> Collective disputes are divided into collective disputes over rights, i.e. disputes arising from the implementation of labour law or binding collective agreements; and collective disputes over interests, i.e. disputes arising from the demand for new terms and conditions of labour relations.<sup>1633</sup> Although each type of collective labour dispute has its own settlement procedure,<sup>1634</sup> workers can go on strike in both types of collective labour disputes.

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<sup>1626</sup> For intensive analysis on the right to strike in China, see Chapter III (section 3.4).

<sup>1627</sup> Sec.4 Article 7 of the Labour Code.

<sup>1628</sup> Sec. 1 Article 18 of the Law on State Officers 2008. Text available at [www.chinhphu.vn](http://www.chinhphu.vn) (last visited 23 April 2010).

<sup>1629</sup> CFA: Case No. 1719, Report No. 304, para. 345; Case No. 2363, Report No. 338, para. 731; Case No. 2020, Report No.318, para.318.

<sup>1630</sup> Sec. 2 Article 19 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1631</sup> Sec. 2 Article 15 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1632</sup> Article 172 of the Labour Code.

<sup>1633</sup> *Ibid.*

<sup>1634</sup> Intensive analysis in part 6.3.

Many discussions on granting the right to strike in collective disputes over rights were carried out when the amendment of the Labour Code 2006 was drafted. In principle, collective disputes over rights are settled when the law or the collective agreement is enforced. It is the obligation and the function of State authorities and the court to enforce these provisions; therefore instead of going on strike, workers can ask the State authorities (particularly labour inspectors) or the courts to enforce the law and the collective agreements. This saves time and money for workers (because workers participating in strikes are not paid). However, the VGCL has tried its best to secure this provision; it has lobbied all Members of Parliament who are trade union officials voted for this regulation, which grant the right to strike for workers even in cases of collective disputes over rights.<sup>1635</sup>

### ***Procedural Requirements for Legitimate Strike Action***

A strike is considered the last weapon of workers when all other methods of dispute settlement have been exhausted. However, because Vietnam law sets out an over long procedure for dealing with collective disputes, it imposes strict and cumbersome conditions for a strike.<sup>1636</sup> It is an illegal strike if it occurs when the collective dispute is being dealt with by another settlement agency, such as the grass roots conciliation council or the People's Committee or the Court (in collective disputes over rights), or the Labour Arbitration Council (in collective disputes over interests).<sup>1637</sup> Furthermore, the law provides that strike must arise from collective labour disputes within the enterprise; therefore, sympathy strike is illegal in Vietnam.<sup>1638</sup>

According to the CILS, regulations that require compulsory arbitration and the permission of labour authorities to resolve labour disputes as preconditions to strikes are a violation of the right of trade unions to organise their activities freely.<sup>1639</sup> In contradiction of this, regulation on procedure of collective labour disputes settlements

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<sup>1635</sup> Personal experience of the author as a member of the drafting committee.

<sup>1636</sup> Intensive analysis in part 6.3.

<sup>1637</sup> Sec. 3 Article 173 of the Labour Code.

<sup>1638</sup> Sec. 1 Article 173 of the Labour Code.

<sup>1639</sup> CFA: Case No. 1845, Report No. 302, para. 512; Case No. 1830, Report No. 303, para. 62; Case No. 1839, Report No. 300, para. 86; Case No. 1890, Report No. 307, para. 372; Case No. 1930, Report NO. 310, para. 348; Case No. 1931, Report No. 310, para. 506; Case No. 2281, Report No. 333, para. 631; Case No. 2303, Report No. 335, para. 1376; Case No. 2329, Report No. 338, para. 1275.

and strikes in Vietnam provides that strike can be carried legally after only the involvement of the presidents of district level People's Committees (in cases of collective disputes over rights)<sup>1640</sup> and labour arbitration councils (in cases of collective disputes over interests).<sup>1641</sup> Therefore, this regulation is not in conformity and should be revised in accordance with the CILS on freedom of association and collective bargaining.

Before amendment of the Labour Code in 2006, only unionised workers could go on strike because the law provided that only grass roots trade unions had the right to organise strikes.<sup>1642</sup> This monopoly role of trade unions in organising strikes was removed by the amendment in 2006, which provides that in cases where there is no trade union at the enterprise, workers can appoint representatives to organise and lead the strike. The appointment must be communicated to the upper level trade union.<sup>1643</sup>

According to the law, the grass roots trade union or representatives of workers must consult the worker on the decision to strike. A decision to strike is made if 50% of the workers (if the enterprise has more than 300 workers) and 75% of the workers (if the enterprise has fewer than 300 workers) votes for it. After the decision to strike is made, the grass roots trade union or representatives of workers must send a written petition to the employer clearly stating the demand of the workers, outcomes of the consultation on strike, starting time of strike, name and address of contact persons. This petition must be sent to the employer and the provincial Department of Labour, Invalids and Social Affairs (DOLISA) at least five days before the start of the strike. Failure to follow this procedure will make the strike illegal.<sup>1644</sup>

Workers who cannot work due to a strike but who do not participate in the strike are paid work stoppage wage.<sup>1645</sup> Workers participating in strikes are not paid<sup>1646</sup> but they are protected from being terminated their labour contracts, being imposed labour

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<sup>1640</sup> Sec. 2 Article 170a of the Labour Code.

<sup>1641</sup> Sec. 3 Article 171 of the Labour Code.

<sup>1642</sup> Article 172 of the Labour Code 1994.

<sup>1643</sup> Article 172a, Sec. 5 Article 173 of the Labour Code.

<sup>1644</sup> Sec. 4 Article 173 of the Labour Code.

<sup>1645</sup> Sec. 1 Article 174d of the Labour Code.

<sup>1646</sup> Sec. 1 Article 174d of the Labour Code. Before the amendment in 2006, all workers participated in strike were entitled to be paid as normal.

disciplinary procedures or being transferred to other positions.<sup>1647</sup> The law prohibits revenge workers for participating in strikes or leading strikes<sup>1648</sup> before, during and after the strike. A fine of between VND 15 million and 20 million is imposed on persons who commit acts of persecuting or retaliating against strike participants or strike leaders.<sup>1649</sup>

### ***Limitations on the Right to Strike***

Vietnam law limits strike action by enterprise classification. Enterprises that provide essential services and enterprises involved in national security and defence may not invoke the guarantees of strike action.<sup>1650</sup> While the CILS require that the definition of essential services must be in a strict sense,<sup>1651</sup> in Vietnam, there is no definition of the essential service but the Government has issued a list of enterprises where workers are prohibited from going on strike.<sup>1652</sup> According to this list, workers employed in 138 enterprises involving power supply, transportation, telecommunication, water supply and in refuse collection are prohibited from strike.

The broad definition of “essential services” has resulted in the exclusion of many workers from the guarantee to strike action. For example, some enterprises in housing management and development or a company on newspapers distribution and postal companies are also regarded as providing essential services. On the other hand, unlike the CILS,<sup>1653</sup> hospital sector is not considered an essential service in Vietnam. The lack of a clear definition of essential services has led to restriction of many workers’ the right to strike. Therefore, Vietnam should build a clear and strict definition on essential service and limit the list of enterprises where workers cannot strike. Experiences in defining essential services in South Africa, particularly the working mechanism of the Essential Services Committee could be a good lesson for Vietnam.

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<sup>1647</sup> Sec. 4 Article 174đ of the Labour Code.

<sup>1648</sup> Sec. 5 Article 174đ of the Labour Code.

<sup>1649</sup> Sec. 3 Article 19 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1650</sup> Article 175 of the Labour Code.

<sup>1651</sup> Case No. 1963, Report No. 320, para. 229; Case No. 2066, Report No. 321, para. 340.

<sup>1652</sup> The list of enterprises is promulgated by Decree No. 122/2007/ND-CP dated 27/7/2007 of the Government.

<sup>1653</sup> CFA: Case No. 1818, Report N0. 300, para. 54; Case No. 1882, Report No. 306, para. 366.

In an enterprise where strike action is prohibited, the law requires regular talks every six months between the trade union, employer and representatives of the State authority in charge of that enterprise to listen to and settle demands of workers and the trade union.<sup>1654</sup> Collective labour disputes in this enterprise will be resolved by the arbitration council or the courts.<sup>1655</sup> However, like the case in China, because legal document is the only source of law in Vietnam, the courts are unable to deal with collective labour disputes over interests. Anyone who coerces or incites others to go on strike in enterprises that are prohibited is fined between VND 10 million and 15 million<sup>1656</sup> and from 26 May 2010, this fine is increased to between VND 15 million and 20 million.

According to the CILS, strikes may be suspended in times of national crisis including economic crisis. However, the responsibility for suspending a strike should not lie with the Government but with an independent body which has the confidence of all parties concerned.<sup>1657</sup> In Vietnam, the Prime Minister can postpone or suspend a strike in cases where the strike may seriously endanger the national economy and public interests and assigns a competent State agency or organisation to settle the disputes.<sup>1658</sup>

This regulation took effect in 1995. However, there has been only one occasion, in 2003, when the Prime Minister suspended strike action arising from disagreement with the law.<sup>1659</sup> Workers who participate in a strike after the Prime Minister has issued a decision to postpone or stop the strike can be punished by caution or a fine of between VND 200,000 and 500,000,<sup>1660</sup> or between VND 300,000 and 2 million if violate after

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<sup>1654</sup> Sec. 2 Article 4 of the Decree No. 122/2007/ND-CP dated 27/7/2007 of the Government.

<sup>1655</sup> Sec. 2 Article 4 of the Decree No. 122/2007/ND-CP dated 27/7/2007 of the Government.

<sup>1656</sup> Sec. 2 Article 19 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1657</sup> CFA: Case No. 2303, Report No. 335, para. 1377; Case No. 2366, Report No. 338, para. 1279.

<sup>1658</sup> Article 176 of the Labour Code.

<sup>1659</sup> On 9/1/2003 the Government issued Decree No 01/2003/ND-CP providing that a worker who left an enterprise before retirement age would no longer receive one-off payment from their insurance scheme. On 13/1/2003, workers at Sam Yang (a Korean owned company) went on strike, then workers at Carimax went on strike to express their disagreement with the new regulation and demand the employers to implement the old regulation that allow worker receive one-off payment if they leave the enterprise before the retirement age. After the strikes were suspended, the regulation had been revised in the guiding Circular No. 07/2003/TT-LDTBXH dated 12/3/2003 that provide that “workers those leave the enterprise before retirement age shall entitled to one-off payment if they cannot find a job after 6 months”.

<sup>1660</sup> Sec. 1 Article 19 Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

25 June 2010.<sup>1661</sup> Experience of South Africa on the eligible criteria and procedure for suspending strikes could provide a very good model for Vietnam.

### ***The Right to Strike in Practice***

The number of strikes has been increasing quickly. Between January 1995 and December 2009, there have been 2,862 strikes in Vietnam. The wave of strikes, started in 2005 due to the demand to increase minimum wages in FDI enterprises,<sup>1662</sup> rose rapidly in 2006, 2007, 2008 and fell down in 2009. Most of these strikes are not led by trade unions<sup>1663</sup> nor did they not follow the procedure required by law.

The provincial level People's Court is the only institution which has the right to decide on the legality of any strike action. However, according to statistics of the People's Supreme Court, from 1995 to 2008, only two applications were submitted to the provincial level People's Courts (one in Hanoi and the other in Ho Chi Minh) for deciding the legality of strike action but both were suspended by the Courts.<sup>1664</sup> Therefore, in Vietnam, most strike actions stop before its legality is determined mainly because strikes tend to arise from collective disputes over rights, which are caused by the violations of the employers in implementing labour law and collective agreements.<sup>1665</sup>

The fact that most strike action arises from collective disputes over rights shows that labour law enforcement should be improved in Vietnam. More efficient enforcement of the labour laws would ensure a greater enjoyment of protected rights. Incorporation of CILS into Vietnam law could facilitate this because it would buttress the national standards already in place and probably result in greater scope for the protection of workers' interests. In the absence of effective law enforcement, a strike is the fastest way for the workers to redress their grievances, to attract attention of local authorities,

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<sup>1661</sup> Sec. 1 Article 15 of the Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

<sup>1662</sup> Angie Ngoc Tran (2007) "Alternatives to the "Race to the Bottom" in Vietnam: Minimum Wage Strikes and Their Aftermath", *Labour Studies Journal*, vol. 33, No. 4, pp. 430-451.

<sup>1663</sup> Before the amendment of the Labour Code in 2006, only trade union can organise and lead a strike.

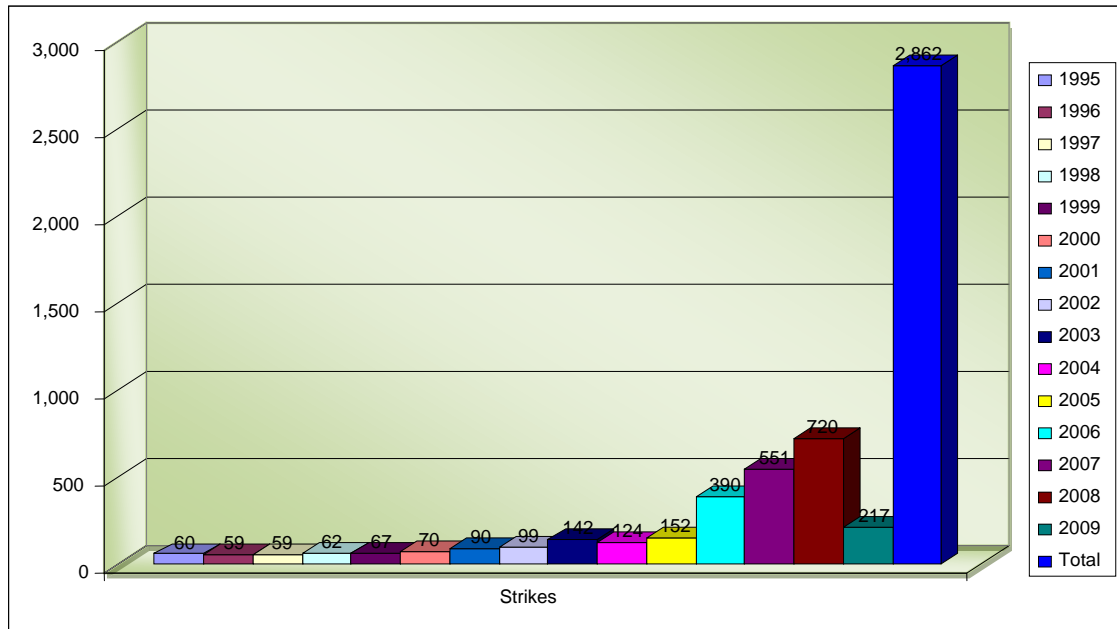
<sup>1664</sup> Document No. 52/TANDTC-LD/BC dated 22/10/2008 of the People Supreme Court.

<sup>1665</sup> According to unofficial source 95% of strikes in Vietnam emerged from collective disputes over rights.



put pressure on local authorities to investigate issues and force employers to meet their legal obligations, which would finally settle the disputes.

**Figure 6.2: Number of Strikes in Vietnam**



*Source: MOLISA*

Although there have been more than 2,800 strikes in Vietnam recently, the majority of them had either not followed the processes required by the law, or had ended before the question of their legality could be determined. To date, no strike has been declared a legal in Vietnam perhaps because the strike procedure is too complicated and difficult to follow and because of grass roots trade unions' weak membership in enterprises. Workers do not seem to trust trade unions in leading strike action and, in practice trade union leaders rarely have any advance knowledge of the strike until it takes place. This may be the result of top-down pressure in the establishment of trade unions where trade unions do not emerge from the need of workers and, it is also the result of the dependence of the trade union on the employer. Both of these contribute to the impotence of trade unions in protecting rights and interests of their members.

To a certain extent, strike action is still being viewed as a threat to social stability and harmful to economic development in Vietnam. Therefore, once strike action begins State authorities and trade unions cooperate closely with the employer to resolve the

dispute, to get workers back to work. This has two areas of impact. Firstly, it helps to stop strikes quickly. Secondly, it encourages wildcat strikes.

Although the law provides that workers who take part in illegal strikes have to pay compensation to the employer if the illegal strikes causes damage,<sup>1666</sup> there has been no claim made by employers for compensation since this regulation came into effect on 1 July 2007. It has also been argued that implementation of this regulation is impossible.<sup>1667</sup>

The number of strikes in SOEs is very low in comparison with those in foreign invested enterprises and private domestic enterprises. There has no strike in SOEs since 2008. This may be explained by the decrease in the number of SOEs and the increase in the number of FDI enterprises and domestic private enterprises. However, more importantly, it can be justified by the role of the group of four in SOEs; in every State owned enterprise, the group of four<sup>1668</sup> is the most important mechanism to deal with labour issues and consists of the communist party cell, the management, the trade union and the Ho Chi Minh Youth Association.<sup>1669</sup> The low number of strikes in SOEs can also be justified by the high percentage of trade unions in SOEs, which suggests the role of trade unions in SOEs is more on monitoring compliance with the law than fighting for improved rights and interests of workers.

While the number of strikes has been declining in SOEs, it has been rising steadily in FDI enterprises and private domestic enterprises. Except for in 1995 and in 1997, FDI

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<sup>1666</sup> Article 176 of the Labour Code. Decree No. 11/2008/ND-CP dated 30/1/2008 imposes compensation of maximum 3 monthly salary of workers participated in illegal strike. The ideas for regulation of this Decree [the author drafted this Degree] are: (i) Balancing the right and obligation between workers and employers on the principle of compensation when causing damage. (ii) Forcing grass roots trade union and workers to take strike more seriously and to follow the process prior to strike which encourage negotiation between parties. According to this Decree, if trade union leads illegal strike, trade union has to use its fund to pay for the compensation. If representatives of workers lead illegal strike, all workers participated in strike have to contribute to pay the compensation.

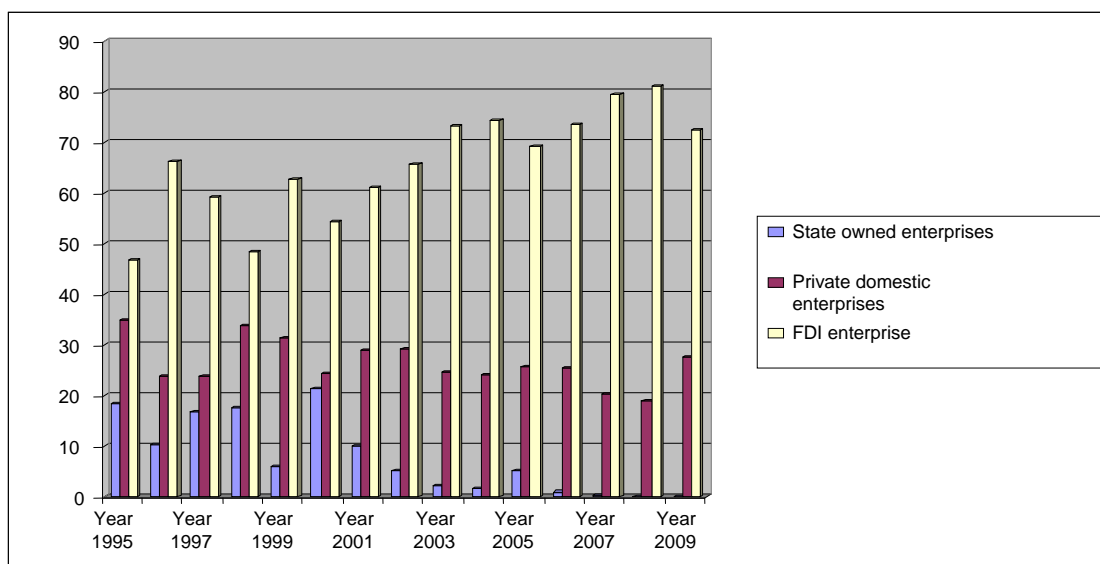
<sup>1667</sup> Source: Dr. Luu Binh Nhuong in interview by BBC. Available at [http://www.bbc.co.uk/vietnamese/vietnam/story/2008/02/080202\\_luubinhnhuong\\_iv.shtml](http://www.bbc.co.uk/vietnamese/vietnam/story/2008/02/080202_luubinhnhuong_iv.shtml) (last visited 25 April 2010).

<sup>1668</sup> The group of four is the main institution that approves every important decision in the enterprises. See also Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568.

<sup>1669</sup> Ho Chi Minh Youth Association is one of the socio political organisations in Vietnam. Their structure is similar to the structure of the trade union system.

enterprises have always accounted for more than 50% of strikes in Vietnam, particularly in 2007 and 2008, where this sector accounted for around 80 % of strikes in Vietnam.

**Figure 6.3: Strikes in Vietnam by Type of Enterprises (%)**



*Source: MOLISA*

From 1 January 2010 to 30 March 2010, 129 strikes occurred in Vietnam, of which 112 strikes took place in FDI enterprises and 17 strikes in private domestic enterprises. As noted above, 80% of private enterprises and 60% of FDI enterprises do not have trade unions.<sup>1670</sup> This trend, in the absence of trade unions in these types of enterprises, demonstrates that, even where trade unions are even weak in defending rights and interest of workers, they can contribute to the process of dispute resolution that helps to obviate wildcat strikes in enterprises. This suggests the need for the establishment of trade unions in FDI and private enterprises.

### **6.3. Peculiarities of Vietnam in Light of Regulations and Recommendations for the Incorporation of the CILS on Collective Bargaining**

#### **6.3.1. The Right to Collective Bargaining**

<sup>1670</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

According to the ILO, freedoms of association and collective bargaining have a special relationship. Association without the chance to use it in the collective bargaining process would be completely pointless.<sup>1671</sup> The right to collective bargaining is a fundamental human right<sup>1672</sup> in the workplace. Experiences from the four studied legislation also show the important role of collective bargaining in industrial relations.

According to the CILS, workers in all sectors are entitled to collective bargaining, except for the armed forces and the police, which are determined by national laws or regulations.<sup>1673</sup> In addition, public servants engaged in the administration of the State might not be covered by collective bargaining.<sup>1674</sup> In Vietnam workers who are State officials, including the armed forces and the police, are not given the right to collective bargaining.<sup>1675</sup> However, in term of workers in enterprises, the law indirectly recognises the right to collective bargaining of the both parties, the workers and the employers by allowing the right to negotiate a collective agreement. The Labour Code devotes Chapter V to collective agreements and regulating all aspects of collective bargaining that are mentioned by the CILS.

The CILS require collective bargaining to be recognised as a right of employers and their organisations, on the one hand, and organisations of workers at all level (first-level trade unions, federations and confederations), on the other hand.<sup>1676</sup> In Vietnam, the right to collective bargaining is not granted to workers explicitly but this right is granted to trade unions. The Labour Code contains no specific provision providing the right to

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<sup>1671</sup> Royal Commission on Trade Unions and Employers' Associations (1968) *Three Studies in Collective Bargaining*, HMSO, London, p. 55.

<sup>1672</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 28, 29. See also Guy Davidov (2004) "Collective Bargaining Laws: Purpose and Scope", *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 20, No. 1, pp. 81-106; Hoyt Wheeler (2000) "Viewpoint: Collective Bargaining Is a Fundamental Human Right", *Journal of Industrial Relations*, vol. 39, No. 3, pp. 535-539.

<sup>1673</sup> Article 5 of the Convention No. 98.

<sup>1674</sup> Article 6 of the Convention No. 98.

<sup>1675</sup> The Law on State Officers does not contain any provision providing the right to collective bargaining to State officials. According to Decree No. 196/CP dated 31/12/1994 of the Government, collective agreements are not applied to: State officials, the armed forces and the police.

<sup>1676</sup> ILO (2003) *Fundamental Rights at Work and International Labour Standards*, ILO, Geneva, p. 28-29.

collective bargaining to workers on the contrary the Trade Union Law provides that trade unions be entitled to represent workers in signing collective labour agreement.<sup>1677</sup>

In terms of the right to collective bargaining of employers, the law provides that:

An employer shall have the right to appoint a representative to negotiate and sign a collective labour agreement of the enterprise or a collective labour agreement of an industry and shall have the responsibility to cooperate with trade unions in discussing issues relating to labour relations and to improve the material and spiritual lives of employees.<sup>1678</sup>

The CILS require Member States of the ILO to respond appropriately to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>1679</sup> Vietnam has created a national level mechanism to foster collective bargaining not only between the two parties in employment relations but also with the presence of the Government. The Labour Code requires the Government to consult VGCL and employers' organisations prior to promulgating regulations relating to issues such as minimum wages,<sup>1680</sup> wages scales,<sup>1681</sup> additional working hours,<sup>1682</sup> and occupational diseases.<sup>1683</sup> The Government also lists some issues that must have consultation of VGCL and VCCI and VCA, including drafting policies, legal documents on labour issues, measures to deal with strikes, reforming administrative procedures in labour, reporting to the ILO.<sup>1684</sup>

The Government Tripartite Committee was set up on 17 May 2007 acting as a Prime Minister's consultant agency on labour issues.<sup>1685</sup> Members of this Committee are from

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<sup>1677</sup> Sec. 1 Article 11 of the Trade Union Law.

<sup>1678</sup> Sec.2 Article 8 of the Labour Code.

<sup>1679</sup> Article 4 of the Convention No. 98.

<sup>1680</sup> Article 56 of the Labour Code.

<sup>1681</sup> Article 57 of the Labour Code.

<sup>1682</sup> Article 69 of the Labour Code.

<sup>1683</sup> Article 106 of the Labour Code.

<sup>1684</sup> Decree No. 145/2004/NĐ-CP dated 14/7/2004 of the Government.

<sup>1685</sup> Decision No. 68/2007/ND-CP dated 17/5/2007 of the Prime Minister.

MOLISA, the VGCL, the VCCI and other related State agencies.<sup>1686</sup> Immediately after the establishment of this Committee, Vietnam ratified Convention No. 144 of the ILO Convention on Tripartite Consultation. This once again shows that suitability and compliance of domestic law is the most important pre-condition for ratification of ILO's Conventions.

According to the CILS, trade unions at all levels (first-level trade unions, federations and confederations) have the right to bargain collectively with the employers or the employers' organisations. Vietnam law allows collective bargaining at industrial and sectoral level and applies the same provisions of collective bargaining used at enterprise to collective bargaining at industrial or sectoral level.<sup>1687</sup> However, the Charter of Vietnamese Trade Unions while clearly stating the duty to bargain collectively with employers of grass roots trade union, does not provide the duty to bargain collectively for the upper level trade unions,<sup>1688</sup> the provincial level trade unions<sup>1689</sup> and the VGCL.<sup>1690</sup> Instead, it provides a general duty to represent and protect the lawful and legitimate interests of members and workers to these trade unions.

Collective bargaining at industrial and sectoral level has been recognised since the Labour Code came into effect in 1995. MOLISA has started making efforts to foster sectoral collective bargaining since 2008 by the adoption of the Program on Promoting Sectoral Collective Agreements.<sup>1691</sup> However, the inconsistent regulation shown above led to the fact that, by May 2010, there had been only one sectoral collective agreement signed.<sup>1692</sup> In practice, according to the recent survey, 57% of employers and trade unions leaders found it unnecessary to sign industrial/sectoral collective agreements.

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<sup>1686</sup> Chairman of this Committee is Minister of MOLISA, three vice chair persons are Deputy Minister of MOLISA, Vice president of VGCL, Vice President of VCCI; five other members are three officials of the above agencies, one from of VCA, and one from Vietnam Association of Small and Medium Enterprises.

<sup>1687</sup> Article 54 of the Labour Code provides that "The provisions of this Chapter shall govern the negotiation and signing of a collective agreement for an entire industry".

<sup>1688</sup> Article 21, 22, 23, 24 of the Charter of Vietnamese Trade Union 2003.

<sup>1689</sup> Article 28 of the Charter of Vietnamese Trade Union 2003.

<sup>1690</sup> Article 29 of the Charter of Vietnamese Trade Union 2003.

<sup>1691</sup> Decision No. 681/QĐ-LĐTĐ dated 19/5/2008 of Minister of MOLISA.

<sup>1692</sup> The collective agreement in garment industry was signed on 26/4/2010. This agreement contains some better standards than the law, for example higher minimum salary for worker working in hazardous conditions, shorter period for wage increase, providing lunch for workers. Source [www.laodong.com.vn](http://www.laodong.com.vn) (last visited 21 May 2010).

This may result from the fact that trade union leaders did not find any interest in signing sectoral collective agreements, on the one hand, and, employers were afraid of heavier obligations incurred by the sectoral collective agreements, on the other hand.

In order to promote collective bargaining, the law needs to create “places” for it to take place, the more “places” the better. These “places” are created by South African law by provisions on some types of institutions such as: bargaining councils, status councils and, workplace forums. Legislation on these institutions should be a good example for Vietnam.

### **6.3.2. Parties, Subject and Content of Collective Bargaining**

#### ***The Monopoly Role of the Trade Union in Collective Bargaining***

Vietnam law defines a collective labour agreement as “a written agreement between a labour collective and the employer in respect of working conditions and utilisation of labour, and the rights and obligations of both parties in respect of labour relations”.<sup>1693</sup> According to the law, the negotiating representatives for the workers in collective bargaining is the trade union or the interim trade union; for the employer, the representative of the employer is the director of the enterprise, or a person authorised in accordance with the charter of the enterprise or authorised in writing by the director of the enterprise.<sup>1694</sup>

Vietnam law also requires that the representative who signs the collective agreement for the workers is the Chairperson of the trade union of the enterprise, or a person authorised in writing by the executive committee of trade union. The representative who signs for the employer is the Director of the enterprise, or a person authorised in writing by him.<sup>1695</sup> Violation of this requirement will result in a void collective agreement.<sup>1696</sup>

The above regulations show that only the Trade Union has the right to represent workers in collective bargaining. Workers are not allowed to select their own representatives to negotiate collectively with the employer. Furthermore, this regulation

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<sup>1693</sup> Sec. 1 Article 44 of the Labour Code.

<sup>1694</sup> Sec. 1 Article 45 of the Labour Code.

<sup>1695</sup> Sec. 2 Article 45 of the Labour Code.

<sup>1696</sup> Sec. 2(b) Article 28 of the Labour Code.

shows that a trade union is the exclusive representative of workers in collective bargaining. Once established, a trade union will represent all workers in the enterprise to negotiate collectively with the employer. Thus the absence of a trade union in an enterprises means that workers in that enterprise do not have the right to collective bargaining with the employer. In the context of the monopoly system of trade union in Vietnam, the requirement that only trade unions have the right to collective bargaining deprives many workers in enterprises without trade unions of the right to collective bargaining, which will be explained later in this section. It explains why most of SOEs, where trade unions exist, have collective agreements while the percentage of collective agreement in non SOEs is very low.

In practice, there is no official statistics on collective bargaining in Vietnam even the law requires that collective agreements must be sent to DOLISA for registration. Furthermore, the of Department of Labour and Wages under MOLISA, which is in charge of labour relations matters including statistic on strike, is not tasked with collecting data on collective bargaining.<sup>1697</sup> Therefore, the number of collective bargaining in Vietnam is not consistent. Nonetheless, the number of enterprises which have collective agreement must be equal or lower than the number of enterprises which have trade unions because only trade unions can represent workers to carry out collective bargaining.

According to a MOLISA survey in 2009 at 1,500 enterprises, 75.19 % of enterprises with trade unions have collective agreements.<sup>1698</sup> However, the VGCL reported that the percentage of SOEs which have collective agreements is 95%, while this figure for FDI enterprises is 40% and for domestic private enterprises is 25%.<sup>1699</sup> But curiously, VGCL had also reported that 20% of private enterprises and 40% of FDI enterprises have trade unions.<sup>1700</sup>

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<sup>1697</sup> Decision No. 202/QD-LDTBXH dated 31/1/2008 of Minister of MOLISA on Organisational Structure and Function of the Department of Labour and Wages.

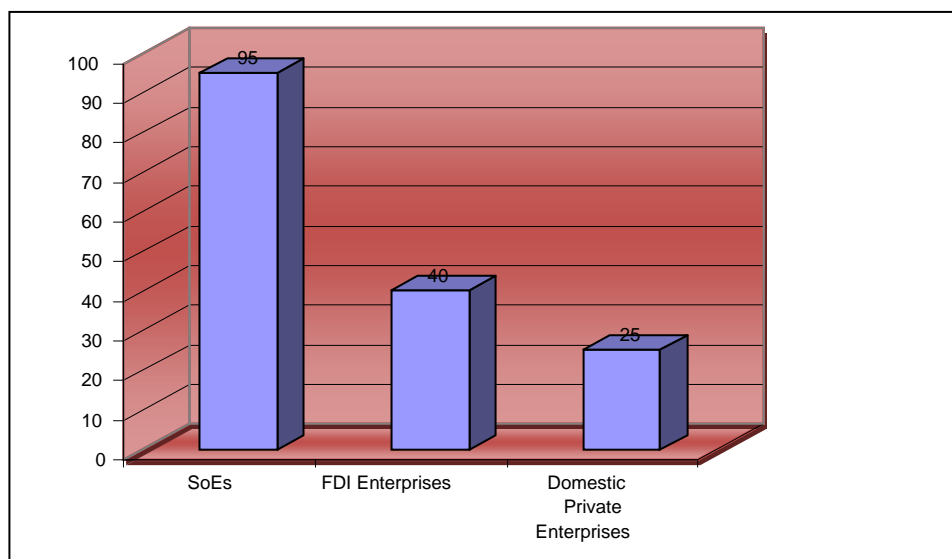
<sup>1698</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

<sup>1699</sup> Source: [http://baokinhteht.com.vn/home/2010011811244883\\_p0\\_c131/thoa-uoc-lao-dong-tap-thenhung-bat-cap-trong-thuc-tien.htm](http://baokinhteht.com.vn/home/2010011811244883_p0_c131/thoa-uoc-lao-dong-tap-thenhung-bat-cap-trong-thuc-tien.htm) (last visited 12 May 2010).

<sup>1700</sup> Document No. 17/C-TLD dated 9/3/2010 of the VGCL.



**Figure 6.4: Enterprises with Collective Agreements in 2009 (%)**



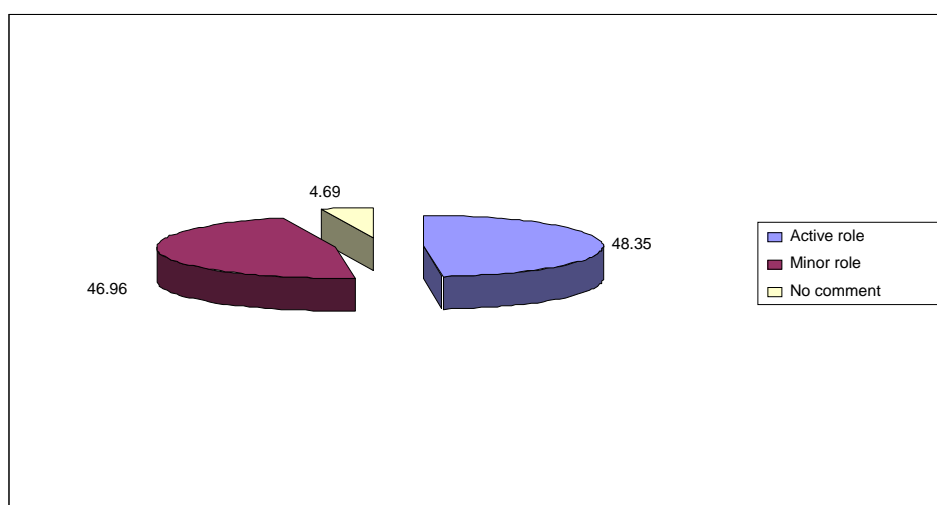
*Source: VGCL*

The absence of collective agreements in non-State enterprises can be explained by a number of factors. Firstly, it is the result of regulation that maintains the monopoly right of trade unions in collective bargaining; without a trade union, workers cannot exercise their right to collective bargaining. Secondly, it is the weakness of trade unions to demand rights and interests of workers in collective bargaining. Thirdly, it is the reluctance of the employer to undertake obligations that he could not be confident of fulfilling. Fourthly, it is ineffective to sign collective agreement on workers' rights and interests because the content of the collective agreement contains no provisions higher than minimum standards provided by law.

The impotence of trade unions analysed in the previous part is further proved by their role in the process of collective bargaining in order to protect rights and interests of workers. According to survey by MOLISA on the role of trade unions in collective bargaining, 48.35% of respondents thought trade unions play an active role, while 46.96% replied that trade unions do not take an active or normal role and, 4.69% said they did not care about the role of trade union in collective bargaining.<sup>1701</sup>

<sup>1701</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

**Figure 6.5: Workers' Opinions on the role of Trade Unions in Collective Bargaining (%)**



According to the CILS, collective bargaining can be negotiated between representatives of workers and the employer in enterprises where no trade union exists.<sup>1702</sup> According to MOLISA's survey, more than 70% of respondents agreed that the right to collective bargaining must be provided for workers in enterprises without trade unions. In this case, 76.51% suggested that workers could elect representatives to negotiate with the employer, while 23.49% suggested that the upper level trade union would represent workers in negotiation with the employer.<sup>1703</sup> The role of the representatives of workers in collective bargaining was recognised in the first draft of the New Labour Code, but due to many reasons, in the in the second draft, this regulation was taken out and replaced by the role of the upper level trade union.

#### *Subjects and Content of Collective Bargaining*

According to the CILS, the focus of matters which might be subject to collective bargaining is very wide: terms and conditions of work and employment and regulation of the relations between employers and workers and their organisations.<sup>1704</sup> The concept of working conditions is not limited to traditional working conditions, such as working

<sup>1702</sup> Recommendation No. 91 paragraph 2. See also CFA: Case No. 1512, Report No. 229, para. 424; Case No. 1781, Report No. 302, para. 253; Case No. 1926, Report No. 308, para. 628; Case No. 1926, Report No. 321, para. 65; Case No. 2138, Report No. 327, para. 545; Case No. 2243, Report No. 331, para. 618; Case No. 2216, Report No. 332, para. 909; and Case No. 2251, Report No. 333, para. 977.

<sup>1703</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

<sup>1704</sup> Article 2 of the Conventions No. 154.

time, wage, occupational safety at work, holiday, etc, but also covers certain matters which normally emerge in employment relations, such as promotion, transfers, dismissals, redundancy, etc. Collective bargaining may also include coverage of the collective agreement, the granting of trade union facilities, including access to the workplace beyond what is provided for in legislation, etc. The CILS require that these matters should not be excluded from the scope of collective bargaining by law.<sup>1705</sup>

Vietnam law limits the content of collective bargaining to working conditions, utilisation of labour, and the rights and obligations of both parties in respect of labour relations.<sup>1706</sup> It requires the principal provisions of the collective agreement to include commitments in respect of employment and guarantee of employment; working hours and rest breaks; salaries, bonuses, and allowances; work limits; occupational safety and hygiene; and social insurance for employees.<sup>1707</sup> The standards provided by law are minimum standards. Therefore, the law provides that the terms and conditions of the collective agreement must be consistent with provisions of the law. A collective agreement is void if it contains provisions that are not in conformity with the law.<sup>1708</sup>

Although not clearly required in matters which normally emerge in employment relations such as promotion, transfers, dismissals, redundancy, etc to be negotiated, Vietnam law encourages the parties to sign a collective agreement which provides employees with more favourable conditions than those stipulated in labour laws.<sup>1709</sup> However, in practice, the content of collective agreements is just a duplicate of the law; they rarely include anything above than the minimum standards provided by law<sup>1710</sup> for two main reasons. Firstly, in collective bargaining, trade unions are weak in their

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<sup>1705</sup> ILO (2006), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* [Digest], 5th edn, ILO, Geneva, p. 182 (para. 913). See also CFA: Case No. 2326, Report No. 338, para. 450. Bernard Gernigon, Alberto Odero and Horacio Guido (2000) "ILO Principles Concerning Collective Bargaining", *International Labour Review*, vol. 139, No. 1, pp. 33-55.

<sup>1706</sup> Sec.1 Article 44 of the Labour Code.

<sup>1707</sup> Sec. 2 Article 46 of the Labour Code. See also Article 2 of Decree No. 196/CP dated 31/12/1994 of the Government.

<sup>1708</sup> Se.1, 2(a) Article 48 of the Labour Code.

<sup>1709</sup> Sec. 2 Article 44 of the Labour Code.

<sup>1710</sup> Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568. See also Colin Fenwick and Thomas Kring (2007) *Rights At Work: An Assessment of the Declaration's Technical Cooperation in Select Countries*, p. 42, para. 173. Available at [http://www.carnegieendowment.org/files/Declaration\\_report.pdf](http://www.carnegieendowment.org/files/Declaration_report.pdf) (last visited 15 January 2009).

demands for improved rights and interests for workers, which have been discussed in the previous section. Secondly, the collective bargaining process does not start from the need of the workers. While asking employers to obey the law is the most important issues for workers, they do not think of demanding further rights and interests for the workers. This also shows the top-down process in collective bargaining in Vietnam.

The presence of collective agreements is a tool used to evaluate the efficiency of upper level trade unions. Therefore, upper level trade unions organise campaign to foster collective agreements in their areas; thus, the need to sign collective agreements does not come from the workers or the employers and the content of collective agreements is just a duplicate of the law.

### **6.3.3. Principles of Collective Bargaining**

The CILS require that collective bargaining must be established through free and voluntary negotiation, free choice, good-faith and follow voluntary procedures. Vietnam law requires a collective agreement shall be negotiated and signed by the representative of the labour collective and the employer based on the principles of voluntary commitment, fairness, and shall be made public.<sup>1711</sup>

Vietnam law requires collective bargaining to be conducted voluntarily. Either party (trade union or employer) has the right to request collective bargaining. However, if one party requests collective bargaining the other party is obliged to negotiate. According to the law “upon receiving the request, the receiving party must accept to negotiate and must agree on a commencement date for the negotiation no later than twenty days after receiving the request.”<sup>1712</sup> Violation of this obligation can lead to an administrative fine between VND 5 million and VND 10 million;<sup>1713</sup> from 25 June 2010, this fine is reduced to between VND 2 million and 5 million.<sup>1714</sup> However, in Chapter III, studies on experiences of other countries in show that imposition of this obligation should be based on the capacity of trade unions and legality of strikes. If the trade unions are strong and they can strike, they will be able to force the employers to the table to

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<sup>1711</sup> Sec. 1 Article 44 of the Labour Code.

<sup>1712</sup> Sec. 1 Article 46 of the Labour Code.

<sup>1713</sup> Sec. 2(a) Article 11 of Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1714</sup> Sec. 2 Article 9 Decree No. 47/2010/ND-CP dated 6/5/2010 of the Government.

negotiate without support from the law like in the United Kingdom and in South Africa. On the other hand, if trade unions are weak and they are not granted the most important weapon (the right to strike), it is necessary to impose a legal obligation to negotiate in regulation of collective bargaining like in the United States and China. Vietnam law reveals that it does sufficiently protect and promote collective bargaining: on the one hand, it imposes the obligation of each party to negotiate when requested; on the other hand, it grants the right to strike to the workers. The recent survey shows that 74.55% of employers and 89.68% of trade union leaders found it necessary to impose an obligation to negotiate when requested in collective bargaining.<sup>1715</sup>

According to the CILS, collective bargaining must be carried out on the principle of free choice. Free choice means collective bargaining is possible at any level, including that of the establishment, the undertaking, the branch of activity, the industry, or the regional or national levels. Vietnam law is silent at regional and national level of collective bargaining. However, the law provides the same mechanism for collective bargaining at industrial and enterprise level.<sup>1716</sup> Because the CILS requires that the level of negotiation should not be imposed by law, by decision of the administrative authority or by the case-law of the administrative labour authority;<sup>1717</sup> therefore, this regulation of Vietnam is not a violation of the CILS on freedom of association and collective bargaining.

Vietnam law grants a trade union in an enterprise the right to represent workers in collective bargaining but workers have the right to approve the collective agreement. The draft of the collective agreement must be sent for the approval of workers in the enterprise. A collective agreement shall be signed only if the negotiated content of such agreement is approved by more than 50% of the members of the workers in the enterprise.<sup>1718</sup> Violation of this requirement makes the collective agreement void.<sup>1719</sup>

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<sup>1715</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

<sup>1716</sup> Article 54 of the Labour Code.

<sup>1717</sup> ILO (2006), *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* [Digest], 5th edn, ILO, Geneva, p. 197 (para. 988). See also CFA: Case No. 1845, Report No. 302, para. 514; Case No. 1906, Report No. 306, para. 553; Case No. 1926, Report No. 308, para. 629; Case No. 1975, Report No. 321, para. 117; Case No. 2099, Report No. 325, para. 193 and Case No. 2326, Report No. 338, para. 448.

<sup>1718</sup> Sec. 31 Article 45 of the Labour Code.

<sup>1719</sup> Sec. 2(c) Article 48 of the Labour Code.

According to the CILS, domestic law that requires collective agreements signed by the two parties subject to approval by State authorities is contrary to the principle of collective bargaining.<sup>1720</sup> Vietnam law requires the collective agreement be sent to DOLISA not for approval but for registration within ten days of signing. Violation of this requirement can result in an administrative fine of between VND 1 million and VND 3 million.<sup>1721</sup> In addition, DOLISA has the right to declare a collective agreement is void or null. However, the registration obligation does not undermine the legal effect of the signed collective agreement as the law provides:

The collective agreement shall become effective as from the date agreed by both parties and recorded in the agreement; in the absence of such agreement, the collective agreement shall become effective from the date of signing.<sup>1722</sup>

In the collective bargaining, Vietnam law imposes a heavy obligation on employers. It requires the employer to notify all workers in the enterprise of the content of the binding collective agreement.<sup>1723</sup> This regulation results in the fact that the awareness of workers about the content of collective agreement is very high. According to MOLISA's survey, 90.36% of workers know about the content of collective agreement.<sup>1724</sup> In addition, the employer is responsible for all expenses of the negotiation, signing, registration, amendment of, and announcement of the collective agreement. Workers who are trade union leaders are entitled to payment of wages during the time of negotiation and signing of the collective agreement.<sup>1725</sup> This financial obligation on employers does not encourage employers to negotiate collectively and, is also one reasons explaining why most collective agreements are initiated by trade unions in Vietnam.

#### **6.3.4. Legal Effect of Collective Agreement**

Vietnam law provides that a collective agreement becomes effective as from the date agreed by both parties and recorded in the agreement; in the absence of such agreement,

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<sup>1720</sup> CFA: Case No. 2030, Report No. 320, para. 596.

<sup>1721</sup> Sec. 1 Article 11 of Decree No. 113/2004/ND-CP dated 16/4/2004 of the Government.

<sup>1722</sup> Sec. 2 Article 47 of the Labour Code.

<sup>1723</sup> Sec. 1 Article 49 of the Labour Code.

<sup>1724</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

<sup>1725</sup> Article 53 of the Labour Code.

it becomes effective from the date of signing.<sup>1726</sup> However, the law limits the duration of collective agreements. According to the law, a collective agreement is signed for duration of one to three years. When an enterprise signs a collective agreement for the first time, the duration of the collective agreement may be less than one year.<sup>1727</sup> A collective agreement's effect is extended by no more than three months when it expires during the period when two parties are negotiating its extension.<sup>1728</sup> Regulation on the term of collective bargaining is implemented properly in practice. Recent survey shows that 47.25% of collective agreements have the period of three years, while 27.52% of collective agreements have the period of two year and 20.64% of collective agreements have the duration of one year.<sup>1729</sup>

The right to amend collective agreements is granted to both parties. Amendment of a binding collective agreement is allowed only after three months of implementation from the effective date in respect of a collective agreement with a period of less than one year, or six months in respect of an agreement with duration of one to three years. The procedure for amendment of or addition to a collective agreement is in accordance with the signing procedure.<sup>1730</sup>

Under Vietnam law, once it has effect, a collective agreement is binding on all workers in the enterprise including workers who started working after the collective agreement had been signed.<sup>1731</sup> Furthermore, the law provides that all labour regulations within the enterprise must be amended so that they are consistent with provisions of the collective agreement.<sup>1732</sup>

This regulation shows the exclusive right of the monopoly trade union in an enterprise. Even workers, who do not want to be members of the trade union, are represented and bound by the collective agreement signed by the trade union. The trade union monopoly has led to the monopoly of collective agreement in an enterprise where only one

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<sup>1726</sup> Sec. 2 Article 47 of the Labour Code.

<sup>1727</sup> Article 50 of the Labour Code.

<sup>1728</sup> Article 51 of the Labour Code.

<sup>1729</sup> Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

<sup>1730</sup> Article 50 of the Labour Code.

<sup>1731</sup> Sec. 1 Article 49 of the Labour Code.

<sup>1732</sup> Sec. 2 Article 49 of the Labour Code.

collective agreement can exist as it is negotiated and signed by the only single trade union.

In regulating the legal effect of collective agreements, Vietnam law gives more protection to workers. As in South Africa, where no provision of an individual employment contract may permit a worker to be paid less remuneration, to be treated less favourably than the applicable collective agreement,<sup>1733</sup> so too in Vietnam. If terms and conditions of the individual labour contract are more favourable for the worker than the collective agreement, the worker is still entitled to those terms and conditions. On the contrary, if the terms and conditions stipulated in the labour contract are less favourable than those provided for in the collective agreement, the respective terms of the collective agreement must be implemented.<sup>1734</sup>

Legal effect of a collective agreement is protected where there is a merger. If an enterprise is merged, the collective agreement will still have effect in the new enterprise if the total number of workers in the old enterprise, who are still working in the new enterprise account for more than 50% of the total workers in the new enterprises.<sup>1735</sup> However, if implemented, this regulation will sometimes deprive a group of workers of favourable terms and conditions; this occurs where the collective agreement binding a minority of workers contains better conditions than that binding the majority. The law also impose an obligation to negotiate in order to sign a new collective agreement within six months in case of enterprises consolidation, separation, transfer of ownership of enterprises.<sup>1736</sup>

### **6.3.5. Settlement of Disputes**

The CILS establish that disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations as may be appropriate

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<sup>1733</sup> Sec. 199(1,2) of the Labour Relations Act.

<sup>1734</sup> Article 49 of the Labour Code.

<sup>1735</sup> Article 6 of Decree No. 196/CP revised by Decree No. 93/2002/ND-CP dated 11/11/2002 of the Government.

<sup>1736</sup> Article 52 of the Labour Code. See also Article 6 of Decree No. 196/CP revised by Decree No. 93/2002/ND-CP dated 11/11/2002 of the Government.



under national conditions.<sup>1737</sup> Vietnam law provides a sufficient mechanism to settle disputes arising from employment relations including collective bargaining through conciliation, arbitration and the court. However, up to now, there is no channel for collecting data and statistics on labour disputes and solutions at the national level.

Vietnam law sets out clearly the principles for dealing with labour disputes are:<sup>1738</sup>

- (i) direct negotiation and conciliation between the disputing parties at the place where the dispute arises.
- (ii) conciliation and arbitration on the basis of mutual respect of rights and benefits, respect of general social benefits, and compliance with the law.
- (iii) a labour dispute must be resolved publicly, objectively, in a timely manner, quickly, and in compliance with the law.
- (iv) participation of the workers and employers' representative in the resolution process of the labour dispute.

Vietnam law requires the employer of an enterprise with trade union to establish a grass roots conciliation council, which consists of at least four members and equal representatives from the trade union and from the employer; it has the tenure of two years and representatives of each party take the post of chair person in turn; it has the right to solve both individual labour disputes and collective labour disputes.

In practice, the efficiency of grass roots conciliation councils in individual labour disputes is limited. Because it consists of trade union representatives and employer' representatives, who are unlikely to rule against the employer,<sup>1739</sup> it is suggested that workers do not have confidence in grass roots conciliation councils so very few cases of individual labour disputes are referred to grass roots conciliation councils. Nonetheless, the grass roots conciliation council plays more active role in dealing with collective labour disputes. If there is no grass roots conciliation council, both parties will decide to choose one labour conciliator<sup>1740</sup> to solve the dispute. Even where a grass roots

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<sup>1737</sup> Para. 6 of the Recommendation No. 91.

<sup>1738</sup> Article 158 of the Labour Code.

<sup>1739</sup> Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568.

<sup>1740</sup> Article 163 of the Labour Code. See also Decree No. 113/2007/ND-CP dated 8/8/2007 of the Government. Requirements for a labour conciliator:

- (i) full civil responsibility, good characters;
- (ii) has knowledge of labour law;

conciliation council is already established in enterprise, both parties can still chose either this council or an independent conciliator to deal with the dispute.<sup>1741</sup>

A labour arbitration council is established by the provincial People's Committee. It consists of full-time members and part-time members who are representatives of DOLISA, provincial level Confederation of Labour, employers' association, lawyers' association or person with experiences in local labour relation. The number of a labour arbitration council must be an odd number and not exceed seven. The tenure of a labour arbitration council is three years.<sup>1742</sup>

According to the law, when a party considers that the other party fails to perform fully the provisions of the collective agreement or breaches the provisions of the collective agreement, the first party has the right to request full compliance with the agreement. Both parties must consider and resolve issues, failing which; each party shall have the right to request resolution of the collective labour dispute in accordance with the procedure stipulated by law.<sup>1743</sup>

As mentioned previously, under Vietnam law, collective labour disputes are divided into collective disputes over rights and collective labour disputes over interests; each type of collective disputes has its own settlement procedure. Institutions to deal with collective dispute over rights are grass roots conciliation councils or labour conciliators, the presidents of district level People's Committees and the Court.<sup>1744</sup> If the conciliation councils or labour conciliators have failed to resolve the dispute, either party can request the president of district level People's Committee to settle.<sup>1745</sup> The role of president of district level People's Committees in settling labour disputes was first promulgated in 2006. At that time the idea was that because collective disputes over rights arise from violation of the law and collective agreements and, therefore, the presidents of district level People's Committees can punish the violator and finally settle the disputes.

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(iii) has conciliation skills or experiences;

(iv) voluntarily involves in labour disputes.

<sup>1741</sup> Sec. 1 Article 170 of the Labour Code.

<sup>1742</sup> Article 164 of the Labour Code.

<sup>1743</sup> Sec. 3 Article 49 of the Labour Code.

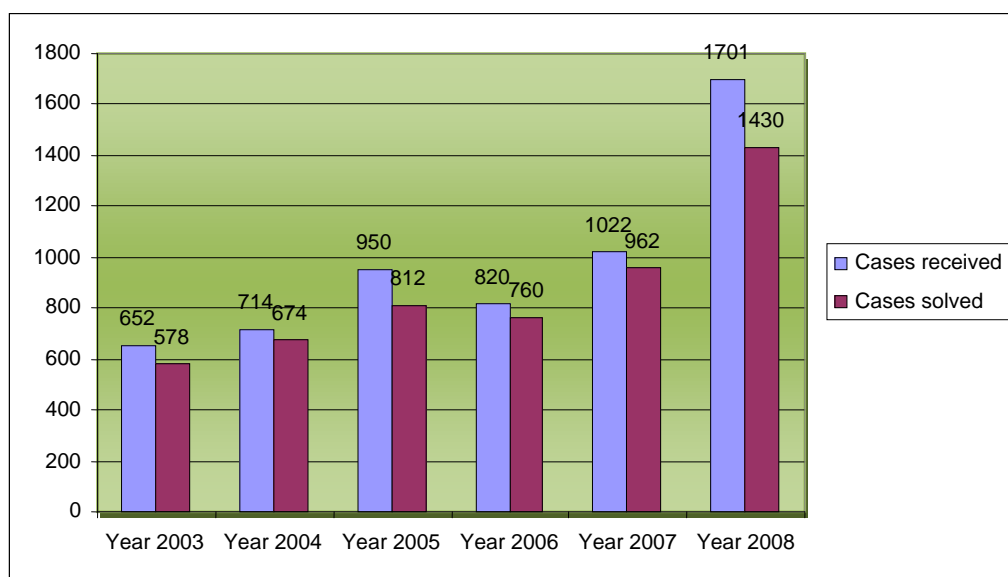
<sup>1744</sup> Article 168 of the Labour Code.

<sup>1745</sup> Article 170a of the Labour Code.

However, the interference of president of district level People’s Committee to settle the dispute raises some legal issues. Firstly, whether the decision to settle labour disputes is an administrative decision or not. Secondly, if it is an administrative decision, can either party appeal it in accordance with the law on administrative litigation<sup>1746</sup> or not? The law requires the President of the district level People’s Committee to settle the dispute within five working days from the date of receiving a written request.<sup>1747</sup> If after this period the president fails to settle the dispute, either party can request the provincial level People’s Courts to decide the case or carry out a strike.<sup>1748</sup> At this stage workers have to choose between bring the case to the court or taking strike action because Vietnam law is still silent on the issue of whether workers have the right to strike after the decision of the court or not.

The number of labour disputes brought to the court has been rising in the last five years. However, most cases involve individual labour disputes. From 1 July 1996 to 31 September 2008, there were only two collective dispute cases, four strike cases, brought to the court.<sup>1749</sup>

**Figure 6.6: Labour Cases at Courts in Vietnam**



<sup>1746</sup> According to the law, there is a different procedure for appeal against an administrative decision or an administrative activity.

<sup>1747</sup> Article 170a of the Labour Code.

<sup>1748</sup> Article 170b of the Labour Code.

<sup>1749</sup> Document No. 52/TANDTC-LD/BC dated 22/10/2008 of the People’s Supreme Court.

In terms of collective disputes over interests, grass roots conciliation councils or labour conciliators and provincial level arbitration councils entitled to take part in the resolve process.<sup>1750</sup> If grass roots conciliation councils or labour conciliators fail to solve the dispute, either party can request the provincial level arbitration council to settle. The conciliation period at the provincial level arbitration council is seven working days. Within this period, the provincial level arbitration council suggests solutions for the two parties to consider. If the two parties agree to the solutions, they are bound to obey the solution. According to the law, where provincial level arbitration council fails to reach a solution, workers can strike.<sup>1751</sup> However, the law is silent where the conciliation is successful but one of the parties does not implement its obligations provided by the solution. In this case, what the other party do to enforce the successful agreement is still silent in Vietnam law.

## **Conclusion**

In order to foster economic development and international integration, conformity between domestic law and international labour standards is urgently required in Vietnam. In the domestic context, the emergence and development of non-State sectors has invigorated a new type of labour relations that requires the Government to reshape the role of trade unions. Under the previous political, economic and social paradigm, only the SOEs were allowed to exist. In that context, all workers and employers were staff of the State and, trade unions played the role of the lengthened hands of the Party State.

However, under the emergent order, other types of ownership of enterprise, including private enterprises and foreign investment enterprises have taken root in Vietnam. Consequently, more attention is required to ensure the role of trade unions in promoting and protecting the rights and interests of workers.

The preceding Chapters and their deductions showed that the CILS on freedom of association and collective bargaining, which derive from Convention No. 87 and

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<sup>1750</sup> Article 169 of the Labour Code.

<sup>1751</sup> Article 170 of the Labour Code.

Convention No. 98 of the ILO, have very clear purposes and play important roles in creating strong employment relationship, building developed and democratic society as well as in enhancing economic development. Freedom of association and collective bargaining are fundamental human rights that must be recognised, protected and promoted by every Member of the ILO. In practice, these rights have been recognised in both developed and developing countries, such as the United Kingdom, the United States and South Africa.

The ILO's standards on freedom of association and collective bargaining appear to be the best confluence on which the opening up of Vietnam markets under the WTO paradigm and the socialist ethos of ensuring that everyone's welfare is taken into account best meet. Additionally, the ratification of Convention No. 87 and No. 98, incorporating standards of the CILS on freedom of association and collective bargaining into the domestic legal system and, implementing them in practice is an essential means of harmonising domestic law with international standards in the process of globalisation. The utility test proves that it is necessary to incorporate the CILS on freedom of association and collective bargaining into Vietnam because it increases happiness for workers, employers and the society. The benefit test demonstrates that Vietnamese Government can receive legal benefits, political benefits and economic benefits from incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system.

Vietnam Constitution recognises freedom of association with the same guarantees that workers in the United Kingdom, the United States, South Africa and China are accustomed to. In terms of freedom of association in employment, the right to organise is recognised in the Labour Code and the Trade Unions Law but it is not recognised in the Constitution. However, this right is not a true right as provided by the CILS and recognised in the United Kingdom, the United States and South Africa. The right to organise in Vietnam is very similar to that right in China in which all workers including the armed forces and the police have the right to join, to form trade unions but they are not able to join or form trade union of their own choosing. Instead, all trade unions must be affiliated to a monopoly system and work under the umbrella of the VGCL. As in China, the monopoly system of trade union in Vietnam is imposed by law, which is not in conformity with the CILS.

The CILS require equal recognition, promotion and protection of the right to freedom of association and the right to organise of both workers and employers, while Vietnam law regulates only the right to organise of workers and is silent on the right to organise of employers. However, employers' organisations at national level have been set up to represent employers in issues relating to domestic labour relations and international obligations incurred by the ILO's membership.

While the CILS require the independence of trade unions, the trade union system in Vietnam is not independent of the Party State system in both organisational structure and financial terms. At enterprise level, grass roots trade unions are dependent on the employers in both establishment and operation. The dependence of trade union in Vietnam is created by the law and is not in conformity with the CILS. The independence of trade unions has led trade unions becoming impotent in protecting rights and interests of their members.

Like China, the monopoly system of trade union in Vietnam is rigorously protected by law. Workers in Vietnam are protected from anti union discrimination. Trade union leaders are protected from being punished by the employer for implementing trade union activities. Once established the employer must recognise the trade union and afford suitable facilities for trade union as well as provide sufficient time for trade union leaders to carry out union activities. Regulation on protection of workers, trade union leaders and facilities afford to trade unions in Vietnam is in conformity with the requirement of the CILS.

While the right to strike in China is prohibited, it is recognised in Vietnam law as it is in the United Kingdom, the United States and South Africa. However, this right is recognised only for workers in enterprises; officials of State including the armed forces and the police are prohibited from strike actions and collective bargaining but they are still entitled to join and form trade unions.

Up to March 2010, there have been 2,991 work stoppages in Vietnam. Prior to 2006, most work stoppages arose from collective disputes over rights. That suggests a weakness in the enforcement mechanisms that the ILO monitoring systems could help weed out. Since 2006, there have been changes in the nature of strike action. Most stoppages now arise from collective disputes over interests. This development has

resulted in trade unions adopting more and more aggressive positions at the negotiation tables. This has the effect of prolonging workers' anxiety and management concern for elongated strike action. Additionally, most stoppages have not followed the procedure provided by law. This suggests that the current requirements for formalising strike action may be too onerous. Furthermore, most strikes are not being led by trade unions especially at grass roots level where people treat trade unions and employers with similar suspicions.

The view that a strike is the most efficient way to solve disputes and the fact that workers are given immunity in illegal strikes may have contributed to the strengthening of the phenomenon of wildcat strikes in Vietnam. While CILS do not specifically regulate strike action, because of the importance of strike action to workers, and the experience of the right to strike in Vietnam and other countries analysed, it is suggested that the ILO take the issue of strike action as a matter of regulation by a specific Convention or Recommendation.

Under Vietnam law, the right to collective bargaining is granted to trade unions and employers. Collective bargaining is recognised at enterprise level, sectoral level and promoted at national level by the establishment of a tripartite consultation mechanism. In the context of the monopoly system of trade union in Vietnam, the requirement that only trade unions have the right to collective bargaining deprives many workers in enterprises without trade unions of the right to collective bargaining. From the point of view of workers, in enterprises with trade union, the role of trade unions in collective bargaining is limited. To a certain extent, it is reasonable for a senior official of VGCL to state that collective bargaining in Vietnam does not guarantee true partners, true content, true negotiation and true implementation.<sup>1752</sup>

Workers in the armed forces and the police as well as State officials are prohibited from collective bargaining. Because of the monopoly system of trade unions, the recognition of trade union for the purpose of collective bargaining and the issues of closed-shop agreements which create big legal challenges in the United Kingdom, the United States and South Africa, do not occur in Vietnam.

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<sup>1752</sup> Source: <http://www.congdoandanang.org.vn> (last visited 16 May 2010).

The Labour Code allows collective bargaining at both enterprise and sectoral level. However, the Charter of Vietnamese Trade Unions while clearly states the duty to bargain collectively with the employers of grass roots trade unions, it does not provide the duty to bargain collectively to the higher level trade unions. In practice, there has been only one national industry level collective agreement signed. Legislation action is needed to make it possible for collective bargaining to be carried out at all levels.

The subject matters of collective bargaining in Vietnam law is restricted to the following: commitments in respects of employment and guarantee of employment, working hours and rest breaks, salaries, bonuses, and allowances, work limits, occupational safety and hygiene, and social insurance for the employees.<sup>1753</sup> The scope of subject matters of collective bargaining should be broadened in order to be in conformity with the CILS.

In conformity with the requirements of the CILS, collective bargaining, under Vietnam law, is based on the principles of voluntary commitment, fairness, and publicity. In Vietnam, once it has taken effect, a collective agreement is binding on all workers in the enterprise including workers who started working after the collective agreement had been signed.<sup>1754</sup> Furthermore, the law provides that all labour regulations within the enterprise must be amended so that they are consistent with the provisions of the collective agreement.<sup>1755</sup>

Collective labour disputes are divided into collective disputes over rights and collective disputes over interests; each type of dispute has its own settlement procedure. Vietnam law creates adequate mechanisms to deal with labour disputes through conciliation, arbitration councils and the courts. These mechanisms are in conformity with the CILS approaches to collective bargaining.

Most regulation of Vietnam law is not in conformity with Convention No. 87 but Vietnam law is mostly in compliance with the substantive provisions of Convention No. 98. Member States that ratify Convention No. 98 have to establish machinery appropriate to national conditions for the purpose of ensuring respect for the right to

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<sup>1753</sup> Sec. 2 Article 46 of the Labour Code. See also Article 2 of Decree No. 196/CP.

<sup>1754</sup> Sec. 1 Article 49 of the Labour Code.

<sup>1755</sup> Sec. 2 Article 49 of the Labour Code.



organise,<sup>1756</sup> to take appropriate measures to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.<sup>1757</sup>

Vietnam law provides sufficient protection to the workers against anti union discrimination. The law has established appropriate mechanism to ensure respect for collective bargaining. It seeks to promote collective bargaining at national level by creating national dialogue mechanism, at industrial level and enterprise level by imposing the obligation to negotiate on both workers' and employers' organisations. The law clearly provides the principles, process and subject matters of collective bargaining that mostly meet the requirement of the Convention No. 98. Furthermore, the law creates a sufficient mechanism to deal with labour disputes through conciliation, arbitration, and the courts required by the Convention No. 98. As seen in Chapter V, Vietnam often ratified a ILO's core Convention once domestic law is mostly consistent with the substantive provisions of the Convention; it is suggested that Vietnam law is probably now in an appropriate state for Convention No. 98 to be ratified. However, in-depth studies must be carried out to examine the true effects of collective bargaining in the absence of an independent trade union system in Vietnam.

For the Convention No. 87 to be ratified many regulations must be repealed, abolished or revised to ensure that workers and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. In order to do so, firstly, the monopoly of trade union system imposed by law must be repealed or abolished. Practice experience in China shows the reliance of recognition, protection and promotion of freedom of association in general and the right to organise in particular rely on the political idea and principle of the ruling party. It also shows that monopoly of trade union system might be a result of monopoly in political system. This is a violation of the CILS on freedom of association, which has led to the impotence of trade unions in protecting and promoting workers' rights and interests. Furthermore, there are certain legal and structural pre-conditions for freedom of association and

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<sup>1756</sup> Article 3 of the Convention No. 98.

<sup>1757</sup> Article 4 of the Convention No. 98.

collective bargaining to function properly. Democratic foundations and an appropriate legal framework with which to ensure independence and the effective participation of social partners are essential. Therefore, pluralisation of trade union system may require pluralisation in the political regime that is not, at the moment, a priority of Vietnam.

Secondly, the dependence of trade union on the Party State in terms of personnel and financial issues must be reduced. The reliance of trade union system and the grass roots trade unions on employers must be limited and removed.

Besides the need for incorporation into the domestic legal system, which may require changes and revision in many legal documents, implementation and enforcement mechanisms must be enhanced and improved. In addition, at national level, there must be a channel for collecting data on collective bargaining. Furthermore, efforts must be made to communicate and disseminate legal regulations on freedom of association and collective bargaining to workers, trade unions leaders as well as employers and State officials.

## **Submissions**

This Dissertation attempted a thorough evaluation of the opportunities and challenges attendant upon Vietnam's aspiration to incorporate the International Labour Organisation's (ILO) Core International Labour Standards (CILS) into Vietnam law. It made specific recommendations that both the ILO and the Vietnam Legislature must have due regard to in light of both the quality of the relevant ILO standards, and the nature or character of those standards in light of Vietnam's peculiar history and current constitutional arrangements and legal structures.

The first two Chapters examined the nature of International Labour Standards (ILS) in general and the CILS on freedom of association and collective bargaining in particular. The latter standards are examined because of their status among ILO standards as benchmark standards that all States parties to the ILO by joining the organisation, must have esteemed. That exercises served also to facilitate examination in the third Chapter of experiences of the United Kingdom, the United States, South Africa and China with incorporation or ratification of the same standards. Chapters IV and V interrogated Vietnam's legal system and its structure in order to determine any possible challenges for the intended incorporation of the ILO CILS into Vietnam law. This background set the scene for examination in Chapter VI of the possibility of incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system.

The main findings of the research are summarised, recommendations are offered, and further studies are suggested on how to enhance the recognition, protection and promotion of the CILS not only for Vietnam but also for the four other countries examined in Chapter III, and also for the ILO in its effort to ensure social justice for people everywhere.

### **Brief Summary**

ILS emerged as recently as the nineteenth century from the demands and efforts of many stakeholders, including social reformers, revolutionaries, the Governments, the Pope and various private associations that marked by the birth of the ILO. By May

2010, the ILO had adopted 188 Conventions and 199 Recommendations, which are the main sources of ILS.

The working mechanism of the ILO has provided some distinctive characteristics to ILS that make ILS different from other types of international legal standards. These characteristics are derived from the ILO's tripartite mechanism, its procedure to adopt ILS and its supervisory system. At present the resilience of ILS is being exercised especially by the emergent processes of deeper economic integration, habitually referred to in the literature as globalisation.

State practice shows that wherever they have been received into domestic law, ILS have played an important role in ensuring decent work for workers, enhancing economic development and in protecting workers and society from social hardship and poverty. This is probably why Vietnam policy makers have now decided to look into the possibility of incorporating ILO standards into Vietnam law. ILS cover a very wide range of subjects relating to the world of work, of which some are considered the CILS.

The CILS consist of four subjects, relating to freedom of association and collective bargaining, forced labour, child labour and equality at work. These are enumerated in the respective ILO Conventions and Recommendations. By signing up to the ILO, it is presumed that every Member State accepts them as binding upon them and undertakes to promote and to realise them, in good faith even before they have ratified the relevant Conventions. This is consistent with the doctrine of implied competence that was enumerated by the International Court of Justice (ICJ) in the *Reparations for Injuries Case*.<sup>1758</sup>

The Dissertation has shown that the CILS could positively influence the fostering of social and economic development. This study has found no evidence of any negative effects on States' development following their participation in core ILO Conventions. Incorporation of the CILS into domestic legal systems does not undermine a country's economic performance at all. On the contrary participation in the relevant Conventions appears to strengthen labour relations law and practice, resulting in optimisation of

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<sup>1758</sup> See ICJ (1949) *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion: I.C.J Report 1949, p.174*. Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=41&case=4&code=isun&p3=4> (last visited 24 June 2010).

welfare for workers and employers alike. The Dissertation does not support the call for the adoption of a social clause to ensure against the worst possible unintended effects of deeper economic integration among States. It is my submission that that objective, if it is desirable, could be achieved through recognition, promotion and protection of the values enshrined in the CILS.

Freedom of association and the right to bargain collectively are fundamental rights in the workplace, entitled to workers and employers. The most important instruments containing the CILS on freedom of association and collective bargaining are Convention No. 87 and Convention No. 98 of the ILO.

According to the CILS, all workers and all employers have the right to freely form and join organisations of their own choosing without distinction, and without previous authorisation. Workers and employers are protected from anti-union discrimination. Facilities must be afforded to trade unions, representatives of workers to carry out their business. The right to organise of workers in the armed forces and the police is decided by Member States in domestic law.

The CILS allow workers and employers to choose between more than organisations for the protection of their rights and interests. Furthermore, the CILS require that trade unions must be independent from authorities in both organisational operation and financial issues; trade unions must also be independent from employers in carrying out their activities.

The CILS provide that workers and employers have the right to bargain collectively on all matters concerning the employment relationship. The right to collective bargaining of the armed forces, the police and State officials is decided by domestic law. Collective bargaining must be carried out in good faith, free choice and voluntary process. The CILS require mechanisms to settle disputes arising from collective bargaining, such as such as mediation, conciliation and arbitration.

The ratification of the core Conventions on freedom of association and collective bargaining has been rising rapidly but implementation of the CILS on freedom of association and collective bargaining is still challenging. Various violations were found in both developed and developing countries all over the world in every aspect of

freedom of association and collective bargaining, which included violations relating to the right to organise, the right to strike, the right to collective bargaining, etc.

There are differences in the recognition, promotion and protection of the right to organise and collective bargaining provided by the ILO in the United Kingdom, the United States, South Africa and China. The United Kingdom and South Africa have ratified both Conventions No. 87 and No. 98 of the ILO while neither the United States nor China has ratified these Conventions. Countries which have ratified the core Conventions have better protection and promotion of the right to organise and collective bargaining than countries that have not ratified.

Although all four studied legislation recognise the right to organise, there are still differences in many aspects. The right to organise of the armed forces and the police is allowed in China and South Africa but not in the United Kingdom. The right not to organise is recognised in the United Kingdom and in the United States but not in South Africa and China. The right to strike is not granted in China but recognised and protected in the other three countries; while the replacement of strikers is prohibited in the United Kingdom, it is legal in the United States. In the United States, the right to private property of employers prevails over the right to organise of workers and trade unions.

The right to organise of employers is regulated in the United States and South Africa but it is silent in China. Although the basic principles of freedom of association apply to workers and employers alike, in practice they usually arise in connection with trade unions than with employers' organisations. The main reason for this is probably that many Governments are more concerned about the potential influence of trade unions on national life and have therefore attempted to control them closely.

The plurality and independence of trade unions are the vital bases for strong trade unions in protecting their members. Plurality in the trade union system seems to depend on the plurality in the political system. Of the countries, where the political system is plural, the trade union system is plural, workers can join or form more than one trade union at an enterprise and trade unions are independent from the states and the employers. In such cases, trade unions are always stronger and function better in protecting rights and interest of workers. On the contrary, in countries where the political system is a

monopoly, like China, the trade union system is also monopoly and strongly dependent on the Party State. They operate like an extension of the State. They are weak and impotent in protecting rights and interests of workers.

In terms of collective bargaining, the right to collective bargaining is also different from country to country. The duty to bargain collectively is obligatory in China and in the United States but not in the United Kingdom and in South Africa. The closed-shop agreement is prohibited in the United Kingdom but post-entry closed shop is allowed in South Africa and it is not regulated by law in China, etc.

Where there is more than one trade union in a bargaining unit, recognition of the most representative trade union should be regulated by law. Recognition of an exclusive trade union by a majority vote of workers should be avoided because it may lead to situation where no trade union in a bargaining unit receives a majority vote to be the recognised representative of the workers. In this case, workers would not have representatives to exercise their right to collective bargaining. Recognition of trade union for the purpose of collective bargaining does not exist in a monopoly system of trade unions where there is only one trade union in one bargaining unit and this only trade union would represent workers in the bargaining process.

The content of collective bargaining is very wide. It is not bound by conditions of work but should be open to any other matters of mutual interest between workers and employers. Legal effects of collective agreements should be provided by law. The law should provide detailed conditions about and the scope of collective agreements that are binding. The content of collective bargaining depends hardly on the capacity of trade unions. If trade unions are strong they could get better working conditions, rights and interests for workers noted in the collective agreement. On the contrary, if they are weak, the content of the collective agreement is just a duplicate of the law.

Collective bargaining can be enhanced and fostered through the creation of institutions for the two parties to cooperate and negotiate with each other like work councils, bargaining councils, work-place forums, etc. Experiences of these countries also demonstrate that they provide sufficient mechanisms to protect workers from anti-union discrimination and sufficient facilities must be afforded to trade unions and worker representatives. The mechanism to resolve disputes arising from collective bargaining

must be set out by law through mediation, conciliation and arbitration and finally the courts.

Vietnam's legal system has shown the influences of feudal and French legal systems and ideas borrowed from socialist legal theory. The Vietnam's present legal system is still a communist legal system. In Vietnam, law has not only the function of regulating social relations but also has the function of transforming policies of the ruling Communist Party. Only legal documents are sources of law in Vietnam, case law is not used as a source of law. Legal documents are promulgated by different state agencies with different names and legal values, of which the Constitution and Acts passed by the National Assembly (NA) have the highest value.

In relation to international law, Vietnam ratified the Vienna Convention on the Law of Treaties 1969 in 2001. Thus, Vietnam has a monist legal system, in which, ratified international treaties are a direct source of domestic law, and ratified international treaties prevail over domestic law. In cases, where provisions of ratified international treaties are not possible for direct application, the law requires incorporation of these standards into the domestic legal system so that they could be implemented.

Being a communist country, the first and the most important role of the state is protecting and serving the working classes – the workers by means of legislation. However, regulation of labour relations has just taken place in a real sense in Vietnam only since the start of *Doi Moi* in 1986. Vietnam has promulgated many important legal documents to regulate employment relations, which covers almost all aspects of labour relations in the work place, such as labour contracts, trade unions, collective bargaining, salaries, occupational safety and health at work, etc.

Vietnam has been actively integrating into the world's economy since *Doi Moi* started. In this process, Vietnam has been receiving benefits as well as suffering negative impact of globalisation particularly in the field of labour and labour legislation that demand for the adoption of a new Labour Code. Labour regulation in Vietnam has to balance between the obligation from membership of the ILO on the one hand and membership of the WTO on the other hand – a balance between protecting workers, promoting decent work and attracting FDI, enhancing economic performance and promoting free trade.



Vietnam has ratified eighteen Conventions of the ILO. Vietnam has ratified five core Conventions of the ILO relating to three fundamental principles and rights at work: elimination of forced labour (Convention No. 29), abolition of child labour (Convention Nos. 138 and 182), and elimination of discrimination in employment (Conventions Nos. 100 and 111).

The experiences of Vietnam in the ratification of core ILO Conventions reveal that conformity with domestic law must be taken into consideration before ratification, and ratification usually happens after domestic law is mostly compatible with the substantive provisions of the CILS. After ratification, active efforts have been made to incorporate into legislation and to implement in practice the ratified core Conventions in Vietnam. However, the incorporation of the CILS into domestic legal system is not balanced in all three areas. Of which, the CILS on child labour have been incorporated properly but some provisions of the CILS on forced labour and discrimination at work have not been incorporated into Vietnam's legal system.

In terms of implementation, ratification plays the role of momentum for the Government has carried out activities and programmes to implement the CILS that have been recognised and incorporated into domestic law. However, their implementation is still facing challenges, such as the weakness of law enforcement, lack of statistics, low awareness of workers, employers and Government officials, limited communication and dissemination of legal information.

Freedom of association is recognised in Vietnam's 1992 Constitution. In terms of freedom of association in employment, the right to organise is recognised in the Labour Code and the Trade Unions Law but it is not recognised in the Constitution. However, this right is not a true right as provided by the CILS and recognised in the European Union, the United States and South Africa.

The right to organise in Vietnam is very similar to that right in China and not in conformity with the CILS. All workers including the armed forces and the police have the right to join, to form trade unions but they are not able to join or form trade union of their own choosing. On the contrary, the establishment of trade union in an enterprise is obligatory duty of the upper level trade union provided by the Labour Code. All trade

unions must be affiliated to a monopoly system and work under the umbrella of the VGCL.

The trade union system in Vietnam is not independent of the Party State system in organisational structure, personnel and financial terms. At enterprise level, grass roots trade unions are dependent on the employers in both establishment and operation. The dependence of trade unions in Vietnam is created by the law and is not in conformity with the CILS. The dependence of trade unions brings back more power for trade unions in policies and law making process, which results in rigorous legal protection for workers, trade unions in exercising their right to organise.

Workers in Vietnam are protected from anti-union discrimination. Trade union leaders are protected from being punished by the employer for implementing trade union activities. Once established, the employer must recognise the trade union and afford suitable facilities for the trade union as well as provide sufficient time for trade union leaders to carry out union activities.

The right to strike is recognised in Vietnam law. However, this right is granted only to workers in enterprises; officials of State including the armed forces and the police are prohibited from striking while they are still entitled to join and form trade unions. Most strikes have not followed the procedure provided by law and are not led by trade unions.

In Vietnam, the right to collective bargaining is granted to trade unions and employers. Collective bargaining is recognised at enterprise level, sectoral level and promoted at national level by the establishment of a tripartite consultation mechanism. Workers in the armed forces and the police as well as State officials are prohibited from collective bargaining.

Collective bargaining in Vietnam is based on the principles of voluntary commitment, fairness, and publicity. The subject matters of collective bargaining in Vietnam are restricted to conditions of the labour relationship. Collective labour disputes are divided into collective disputes over rights and collective disputes over interests; each type of dispute has its own settlement procedure through: conciliation, the local authorities, arbitration councils and the courts.

## **Recommendations**

Vietnam has ratified five of the eight core Conventions of the ILO. To ensure successful implementation of these Conventions in Vietnam, the following recommendations should be put into consideration:

1. Vietnam law should have a clear definition of forced labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.
2. Vietnam law should impose a penal sanction on all activities which fall under the umbrella of the definition of force labour.
3. Vietnam should have regulation on indirect discrimination. Any apparently neutral situations, regulations, or practices, which in fact result in unequal treatment of persons with certain characteristics, should be prohibited.
4. Discrimination based on political opinions, national extraction in employment should be regulated by Vietnam law. Action which may be directed against persons who are nationals of the country in question, who have acquired their citizenship by naturalisation or who are descendants of foreign immigrants, or persons belonging to groups of different national extraction or origin living in the same State, should be prohibited by law.
5. Sanction on sexual harassment or unsolicited sexual activities should be regulated by Vietnam law.
6. Vietnam law should require the equal pay for work of equal value between male and female worker instead of equal pay for same work.
7. More attention should be paid at the implementation of regulations on elimination of forced labour, abolition of child labour and elimination of discrimination at work.
8. Mechanisms to collect data of cases of forced labour, child labour and discrimination at work should be created.

In order to ratify Conventions No. 87 and No. 98 of the ILO and to successfully incorporate the CILS on freedom of association and collective bargaining into Vietnam’s legal system, the Dissertation recommends:

1. The right to organise and collective bargaining of both workers and employers should be promulgated in the highest legal document - the Constitution of Vietnam.

2. The monopoly of the trade union system imposed by law should be repealed or abolished. Workers should be free to choose to join or form trade unions of their own choosing. The law should allow the establishment of more than one trade union at a unit.
3. The plurality of trade union system should be legalised. Once established a trade union can affiliate with other trade unions voluntarily without restriction of the law and not forced to be affiliated with the VGCL.
4. The compulsory obligation in establishing trade unions of the upper level trade unions provided by Article 153 of the Labour Code should be removed.
5. The right not to organise of workers should be recognised by law. Workers should be free to decide to join, to form trade union or not to not.
6. The right to organise of foreign workers working in Vietnam should be recognised by law. Foreign workers working in Vietnam should have the right to join, to form trade unions of their own choosing without previous authorisation.
7. The balance between the right to organise of workers and employers and the interests of their organisations should be created by the law. When workers and employers have the right to join, to form organisations of their own choosing; trade unions and employers' organisation should be able to decide whether to accept a member or not.
8. The reliance of the trade union system on the Party State in terms of organisational structure should be removed. Workers' organisations should be able to organise their organisations freely and not be bound by the structure of the Party State.
9. The reliance of the trade union system on the Party State in terms of personnel issues should be removed, trade union leaders should not be State officials and their salaries should not be paid by the Government.
10. The financial support of state budget to trade unions should be removed. Trade unions should get main incomes from their members and from other sources without financial support from the state.
11. The obligation of employers to contribute to trade union funds should be repealed. The main funding of trade unions should come from the fees of their members.
12. The procedure for carrying out strikes should be revised to ensure that workers and trade unions can organise a legal strike easily, e.g. the compulsory arbitration procedure before a strike should be removed.

13. The term “essential services” should be defined by law or by a tripartite committee in a strict sense in order not to deprive workers of the right to strike. The Government Tripartite Committee should be tasked to decide the list of essential services enterprises where workers are not allowed to strike.
14. The conditions in which the right of workers to organise is exercised should be provided by law in order not to undermine the right to property of their employers, such as the law should regulate in which conditions, trade union officials can communicate with workers in an enterprise to recruit trade union members.
15. The mechanism to enhance collective bargaining to take place, such as bargaining councils, status councils and, workplace forums should be created by the law.
16. Bargaining councils may be established in a particular sector by one or more registered trade unions and one or more registered employers’ organisations. The establishment of a bargaining council is voluntary and must be registered. Some of the main functions of bargaining councils are to conclude collective agreements; to enforce those collective agreements; and to prevent and resolve labour disputes.
17. The establishment of status councils should be regulated by law. The function of status councils include: to perform the dispute resolution functions; to promote and establish training and education schemes; and to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to the statutory council or their members; and to conclude collective agreements to give effect to these matters.
18. A work-place forum should be established at any workplace in which an employer employs more than 100 workers. The main functions of workplace forum are to promote the interests of all workers in the workplace, whether or not they are trade union members; to enhance efficiency in the workplace; to be consulted by the employer, with a view to reaching consensus, about the matters related to many aspects of employment relation; to participate in joint decision-making.
19. The content of collective bargaining should not be bound by conditions of work; it should be open to any other matters of mutual interest between workers and employers.
20. The obligation of the employer to consult trade unions in making salary scale should be removed or revised to allow the employer of enterprise without a trade union to

create salary scale. Alternatively, the law should only provide this obligation in enterprises with trade unions.

21. The obligation of the employer to consult a trade union in making enterprise labour rules should be removed or revised to enable the employer in enterprise without a trade union promulgate labour rules and discipline violators. Alternatively, the law should only provide this obligation in enterprises with trade unions.
22. The law should provide clearly whether the decision to solve collective disputes over rights of the President of district level People's Committee is an administrative decision or not.
23. The mechanism to enforced successful agreements of the labour arbitration councils should be regulated by Vietnam law.
24. The VGCL should pay more attention to not only increasing the number of grass roots trade unions and members but also to improving the capacity, skill and knowledge of trade union leaders at grass roots level.
25. Besides the need for incorporation into the domestic legal system, which may require changes and revision in many legal documents, implementation and enforcement mechanism should be enhanced and improved. There should be a channel to collect data on collective bargaining at the national level. Furthermore, efforts should be made to communicate and disseminate legal information to workers, trade union leaders as well as employers and State officials to raise their awareness on labour law in general and on freedom of association and collective bargaining in particular.

### **Further Studies**

The findings of this study show lacuna in discourse on labour relations on the following issues:

1. The possibility of using financial sanctions or trade sanctions by the ILO to enforce the CILS.
2. The protection of the rights of workers (particularly the right to organise and collective bargaining) who are excluded from the scope of the NLRA in the United States.

3. The linkage between violating the CILS on freedom of association and collective bargaining and economic development in the case of China.
4. The impact of incorporating ratified core ILO Convention in terms of socio-economic development in Vietnam.
5. The effects of collective bargaining in the absence of an independent trade union system in Vietnam.

## **Epilogue**

Ratification and incorporation of the CILS on freedom of association and collective bargaining into Vietnam's legal system meets the demands arising from both international integration and national development. The utility test proves that it is necessary to incorporate the CILS on freedom of association and collective bargaining into Vietnam because it increases happiness for workers, employers and the society. The benefit test demonstrates that Vietnam can receive legal benefits, political benefits and economic benefits from incorporating the CILS on freedom of association and collective bargaining into Vietnam's legal system. The legal investigation shows that it is possible to ratify and incorporate international treaties into Vietnam's legal system and, in fact, Vietnam has ratified and incorporated five core Conventions of the ILO into its legal system.

In terms of the CILS on freedom of association and collective bargaining, most regulation in Vietnam is not in conformity with Convention No. 87 but Vietnam law is mostly in compliance with the substantive provisions of Convention No. 98. It is suggested that Vietnam law is probably now in an appropriate state for Convention No. 98 to be ratified.

It is unlikely that Vietnam law is ready for the ratification of Convention No. 87 of the ILO. For Convention No. 87 to be ratified many regulations should be repealed, abolished or revised to ensure that workers and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. For this purpose, in the context of the demands of ratification and incorporation are urgent and the benefits of ratification and incorporation are clear, the most important precondition for Vietnam, at present, is the political will of the Party State.

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## Appendix

### Appendix 1: Status of ILO Conventions by December 2009

Convention No.	Ratified	Conditional ratification	Declared applicable	Denounced
1.	47	4	0	1
2.	53	0	0	3
3.	31	0	0	3
4.	53	0	0	3
5.	5	0	0	67
6.	50	0	0	9
7.	5	0	0	48
8.	60	0	0	0
9.	34	0	0	7
10.	5	0	0	50
11.	122	0	0	0
12.	76	0	0	1
13.	63	0	0	0
14.	119	0	0	0
15.	10	0	0	59
16.	82	0	0	0
17.	71	0	0	3
18.	61	0	0	7
19.	121	0	0	0
20.	9	0	0	8
21.	27	2	0	4
22.	60	0	0	0
23.	46	0	0	1
24.	28	0	0	1
25.	20	0	0	1
26.	103	0	0	1
27.	65	1	0	0
28.	1	0	0	3
29.	173	0	0	0
30.	27	1	0	2
31.	0	0	0	0
32.	33	0	0	13
33.	3	0	0	22
34.	1	0	0	10
35.	10	0	0	1
36.	10	0	0	0
37.	10	0	0	1
38.	10	0	0	0
39.	7	0	0	1
40.	6	0	0	1
41.	15	0	0	23
42.	41	0	0	12

43.	12	0	0	1
44.	12	0	0	2
45.	0	0	0	0
46.	3	0	0	0
47.	14	0	0	0
48.	8	0	0	4
49.	9	0	0	1
50.	30	0	0	3
51.	0	0	0	0
52.	40	0	0	14
53.	37	0	0	0
54.	4	0	0	2
55.	18	0	0	0
56.	19	0	0	1
57.	1	0	0	2
58.	17	0	0	34
59.	11	0	0	25
60.	0	0	0	11
61.	0	0	0	0
62.	21	0	0	9
63.	14	0	0	20
64.	28	0	0	3
65.	32	0	0	1
66.	0	0	0	0
67.	3	0	0	1
68.	25	0	0	0
69.	38	0	0	0
70.	6	0	0	1
71.	13	0	0	0
72.	1	0	0	4
73.	46	0	0	0
74.	29	0	0	0
75.	1	0	0	4
76.	0	0	0	0
77.	43	0	0	0
78.	39	0	0	0
79.	20	0	0	0
80.	57	0	0	0
81.	138	0	0	0
82.	4	0	0	0
83.	1	0	0	1
84.	4	0	0	0
85.	4	0	0	1
86.	22	0	0	1
87.	149	0	0	0
88.	86	0	0	3
89.	46	0	0	21
90.	51	0	0	0
91.	18	0	0	7
92.	47	0	0	0
93.	5	0	0	0

94.	59	0	0	1
95.	95	0	0	1
96.	25	0	0	17
97.	48	0	0	0
98.	159	0	0	0
99.	52	0	0	1
100.	0	0	0	0
101.	34	0	0	12
102.	44	0	0	0
103.	31	0	0	10
104.	26	0	0	0
105.	169	0	0	2
106.	63	0	0	0
107.	18	0	0	9
108.	61	0	0	3
109.	11	0	0	4
110.	10	0	0	2
111.	168	0	0	0
112.	8	0	0	21
113.	30	0	0	0
114.	23	0	0	0
115.	48	0	0	0
116.	77	0	0	0
117.	32	0	0	0
118.	37	0	0	1
119.	52	0	0	0
120.	51	0	0	0
121.	24	0	0	0
122.	99	0	0	0
123.	22	0	0	19
124.	41	0	0	0
125.	10	0	0	0
126.	23	0	0	0
127.	27	0	0	0
128.	16	0	0	0
129.	46	0	0	0
130.	15	0	0	0
131.	51	0	0	0
132.	35	0	0	0
133.	32	0	0	0
134.	29	0	0	0
135.	82	0	0	0
136.	38	0	0	0
137.	24	0	0	1
138.	151	0	0	0
139.	37	0	0	0
140.	34	0	0	0
141.	40	0	0	0
142.	65	0	0	0
143.	23	0	0	0
144.	123	0	0	0

145.	17	0	0	0
146.	17	0	0	0
147.	55	0	0	0
148.	45	0	0	0
149.	40	0	0	0
150.	69	0	0	0
151.	44	0	0	0
152.	26	0	0	0
153.	9	0	0	0
154.	38	0	0	0
155.	53	0	0	0
156.	40	0	0	0
157.	4	0	0	0
158.	34	0	0	1
159.	80	0	0	0
160.	46	0	0	0
161.	28	0	0	0
162.	32	0	0	0
163.	17	0	0	0
164.	14	0	0	0
165.	3	0	0	0
166.	13	0	0	0
167.	23	0	0	0
168.	7	0	0	0
169.	20	0	0	0
170.	17	0	0	0
171.	11	0	0	0
172.	15	0	0	0
173.	19	0	0	0
174.	13	0	0	0
175.	11	0	0	0
176.	23	0	0	0
177.	5	0	0	0
178.	15	0	0	0
179.	10	0	0	0
180.	21	0	0	0
181.	21	0	0	0
182.	169	0	0	0
183.	17	0	0	0
184.	10	0	0	0
185.	14	0	1	0
186.	5	0	0	0
187.	9	0	0	0
188.	0	0	0	0
<b>Total</b>	<b>6696</b>	<b>8</b>	<b>1</b>	<b>648</b>

## Appendix 2: ILO Conventions Ratified by Vietnam by June 2010

Conventions	Ratification date	Status
Minimum Age (Industry) Convention, 1919 (No. 5)	03:10:1994	denounced on 24:06:2003
Night Work of Young Persons (Industry) Convention, 1919 (No. 6)	03:10:1994	ratified
Weekly Rest (Industry) Convention, 1921 (No. 14)	03:10:1994	ratified
Marking of Weight (Packages Transported by Vessels) Convention, 1929 (No. 27)	03:10:1994	ratified
Forced Labour Convention, 1930 (No. 29)	05:03:2007	ratified
Underground Work (Women) Convention, 1935 (No. 45)	03:10:1994	ratified
Final Articles Revision Convention, 1946 (No. 80)	03:10:1994	ratified
Labour Inspection Convention, 1947 (No. 81)	03:10:1994	ratified
C100 Equal Remuneration Convention, 1951 (No. 100)	07:10:1997	ratified
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	07:10:1997	ratified
Final Articles Revision Convention, 1961 (No. 116)	03:10:1994	ratified
Hygiene (Commerce and Offices) Convention, 1964 (No. 120)	03:10:1994	ratified
Minimum Age (Underground Work) Convention, 1965 (No. 123)	20:02:1995	ratified
Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124)	03:10:1994	ratified
Minimum Age Convention, 1973 (No. 138)	24:06:2003	ratified
Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	09:06:2008	ratified
Occupational Safety and Health Convention, 1981 (No. 155)	03:10:1994	ratified
Worst Forms of Child Labour Convention, 1999 (No. 182)	19:12:2000	ratified

Total Conventions ratified: 18 Conventions.

Total Conventions denounced: 1.

*Source: www.ilo.org (last visited 24 June 2010)*