LABOUR LAW DRAFTING IN DEVELOPING COUNTRIES

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[*Dr Gamba, a man of much experience in this field, in this article discusses the difficulties experienced by labour law draftsmen in countries of the third world. The difficulties range mainly from the political and economic to the equally important cultural and lingual. In addition, Dr Gamba outlines the background to the making and the work of the International Labour Organization.*]

I FOUNDATIONS AND AREAS OF LABOUR LAW

> Law and action are not antithetical but complementary to each other. The antithesis of law is not action but the choice between anarchy and arbitrary power. The antithesis of action is not law but hesitant indecision. In world affairs and industrial life alike we need, and need imperiously, both more law and more action. We need law which is a basis for, not a barrier to, effective action, and action which fulfils, not action which destroys, the rule of law as the bulwark of personal freedom, civil liberties and social justice. We need of course a law attuned to the temper of the times, imaginatively responsive to the quickened pulse of change and the heightening of human expectation; law is neither a substitute for dialogue nor an alibi for action. It is an essential element in the rational alternative for violence and the orderly discipline of the relentlessness of change. The option is between law and lawless change.[1]

One of the earliest actions known in the history of labour directed against the evils of the factory system and towards protecting workers, appears to have been a resolution by the magistrates of Manchester in 1784 to refuse their sanction to the indentures of parish apprentices if it appeared that they were expected to work at night. Slowly, painfully, facing continuous challenges, rulings and legislation protecting labour or, more colloquially, labour law, continued to develop and found eventual form in the Factory Acts of the first quarter of the nineteenth century. Robert Owen and Richard Arkwright encouraged this trend by urging the imposition of definite restrictions in all factories in England, on the employment of children and

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[1] Jenks, *Reply by the Director-General to the General Debate at the 54th Session of the International Labour Conference* (1970).

women and their hours of work. By the second quarter of the century, Richard Oastler and Michael Sadler were also succeeding in arousing public opinion, and leaders of political parties and their supporters realized that the continued disregard of the law by factory owners could not be allowed to continue. These various efforts brought about the tabling in the House of Commons of a measure which may well be called the first effective labour law, Ashley and Althorp's Factory Act of 1833. The Act, although repeatedly amended, remained the basis of factory legislation until the early years of this century. More importantly, it became the model upon which other western countries based their earlier attempts to legislate in this particular field of law. Owen's effort did not come to an end. Believing that better conditions of work and shorter hours should become general standards in the world of his day, he wrote to the Council of the Five Powers of Europe, then meeting at Aix-la-Chapelle, suggesting international action to that effect. His effort remained unrewarded but his idea was followed in 1874 by two Frenchmen, Blanqui and Le Grand. Another sixteen years elapsed before the first attempt was made to prepare an internationally acceptable measure related to the protection of labour. It was the draft of the regulations concerning work in the mines, eventually agreed in 1890 at the Berlin Conference attended by the governments of twelve European industrial countries. The Conference considered a number of suggestions concerning the treatment of workers in factories. The suggestions reached the respective governments but without being followed by any action. Nevertheless, the Conference became an historical milestone representing the first meeting at which government spokesmen decided to give serious consideration to labour legislation. In 1897 another conference was held, in Brussels this time, which led, in 1900, to the establishment of the International Association for Labour Legislation. By then, with the development of the newly established workers associations and trade unions in most European countries, the United States and Australia and through their unceasing effort, labour legislation however narrow in its ambit became, as Higgins was to say a few years later, a 'new province of law and order' and a proper adjunct to other national laws. The International Association established a permanent secretariat in Basle, Switzerland. It then began to collect and publish the texts of every labour law enacted in Europe and overseas. The Association then succeeded in encouraging the organization of two international conferences at which two conventions were adopted: the first, prohibiting the use of phosphorous in the manufacture of matches and, the second, prohibiting night work for women in industry except in small establishments. Other conventions were encouraged and were considered in draft form, including one that would have had the effect of diminishing the number of hours to be worked by women and young persons. However, certain symptoms were

by then heralding the tragedy to follow, the First World War, thus precluding any further work of such a nature. In 1919 the Peace Conference created the League of Nations. Certain historians have commented that the League's most important act was not political but social, the establishment of the International Labour Organisation under Part XIII of the Treaty of Peace. The ILO, as it came to be known, was given the duties of considering and providing advice on labour questions as well as suggesting international standards of treatment in all fields of work. Its original constitution was based on the concept that universal peace could only be established on the foundations of justice. In 1944 the ILO adopted a declaration of the aims and purposes of the Organisation and of the principles which should inspire the policy of its members at the end of the Second World War, taking into account the likely socio-economic post-war conditions of many countries. Referred to as the Declaration of Philadelphia,[2] it revised and expanded the basic concepts on which the Organisation stood and asserted the overwhelming importance of social objectives in international policy.

Montesquieu said that: 'Laws, in their broadest sense, are the essential relationships arising from the nature of things; and, in this sense, all beings have their laws.'[3] The relationship of government, employer and labour in industrial relations is central to the work of the ILO. It is expressed by the International Labour Code, a collection of conventions and recommendations setting down minimum labour standards. The Code covers every possible aspect of labouring life; from freedom of association, social security and industrial health to invalid and old age benefits, labour inspection in agriculture, weight of packages to be transported in vessels and the welfare of indigenous and tribal populations. The conventions and recommendations are agreed by the annual ILO Conference composed of delegates from each member state on a tripartite basis—each country sends two government representatives and one each for the employers and labour.[4]

[2] General Conference of the International Labour Organisation, *Declaration Concerning the Aims and Purposes of the International Labour Organisation* (1944). The Declaration reaffirms a number of fundamental principles on which the Organisation is based and, in particular, that—(a) labour is not a commodity; (b) freedom of expression and of association are essential to sustained progress; (c) poverty anywhere constitutes a danger to prosperity everywhere; (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare.

[3] *L'Esprit des Lois* (1748).

[4] The foregoing was a brief account of the major events. For further information see, e.g., Bland, Brown and Tawney, *English Economic History, Selected Documents* (1914); Hamilton, *The History of the Homeland* (1947); Southgate, *English Economic History* (1934). For further details on the International Labour Organisation see, Johnston, *Social Progress* (1924); International Labour Organisation, *The International Labour Code* (1951); Morse, *The Origin and Evolution of the*

By 1947 the membership of the ILO included a number of developing territories or, as otherwise called, countries of the third world to which, over the past years, have been added former colonies and other former dependant territories which have gained full independence. All members of the ILO are entitled to the services of the Organisation including assistance under the United Nations development programme of technical co-operation. Labour administration and labour law[5] drafting projects are often established under this programme. ILO experts and advisers may be called upon to provide their services in territories that already have a system of laws and in others where labour laws and, for that matter, civil and criminal procedures, in the western sense, are still in a nascent stage. It is to be noted that at this moment such schemes of technical co-operation assistance benefit almost entirely the countries of the third world.

II THE WORK OF THE DRAFTSMAN

1 GENERALITIES

Under ordinary circumstances a draftsman[6] must know his government's wishes and what is to be achieved with the measure he is to draft. He must also fully understand the likely effects in law of the contemplated measure well before beginning the written work. This in itself is a delicate task even without forthcoming language and phraseological difficulties. The duties of an ILO draftsman are somewhat more onerous and intricate. The terms of the job description suggested by the ILO and accepted by the government to which the expert is attached, may require him to be both an adviser and an expert in labour administration and labour legislation; to advise and assist the government in establishing a system of labour administration backed by appropriate policies and legislation. In particular, the expert might be required to advise on the formulation of policies and on the contents of possible legislation in support of such policies and, eventually, in actually drafting the legislation. In some instances he may also be required to advise and assist in the organization of a labour department and take part in its structuring, staffing and, for that matter, in the preparation of the departmental budget.[7] Therefore, an expert of this type, if he is to be effective in his advisory functions, must

International Labour Organisation (1969). At its fiftieth anniversary, in 1969, the ILO had a membership of 120 nations.

[5] The areas properly covered by contemporary labour law are: the employment relationship, collective bargaining, statutory control of particular conditions of work, strikes and lockouts and trade unions.

[6] From this point the opinions expressed and actions suggested, unless otherwise stated, are entirely those of the writer. He is also solely responsible for any action inferred as having been taken by him as a United Nations functionary, unless it is indicated that he followed a specific directive from his authorities.

[7] These various duties were abstracted from the job description of an ILO expert who served in the Western Pacific until the end of 1972. A slightly amended set of

have a substantial theoretical and practical knowledge of labour law generally and of the intricacies of drafting in particular—the former obtained through a university degree and the latter, from experience in labour law drafting and labour administration over a relatively long period of time. He will be required to be fully conversant with the contents of all ILO conventions and recommendations and to be aware of the decisions made by the various specialized committees of the ILO and related bodies, such as the industrial committees covering some of the major industries.[8] Being required to assist in the running of a labour department, the expert will have to be conversant with matters of labour economics and, to some extent, with manpower policies. Personally, the expert will have to be a diplomat, a realist and, often enough, a pragmatist and improviser and a keen student of politics but, as a United Nations functionary, he will have to keep himself entirely aloof from local domestic politics and avoid expressing any personal political views.[9] Obviously, his distinctive characteristic will be his ability to draft labour legislation and related instruments in communities each differing greatly in beliefs, institutions, culture and *mores*. He may, for example, be required to draft legislation relevant to industrialization in an as yet completely traditional and entirely rural environment. As a human being, the expert must be extremely patient and forbearing and must not be surprised nor disappointed if, at the end of a mission of probably two to three years' duration, often under difficult physical circumstances, the bill or measure he drafted and made ready for tabling in the Council or Parliament lies forgotten gathering dust on the shelves of a ministerial office.

2 CONFLICT OF LAWS

On initiating his task the draftsman must immediately ask a question and, as speedily as possible, obtain its answer. The question is: if law is the order of social relationships in harmony with existential human ends,[10] how is such order envisaged here? This first question may be linked to another equally pertinent: if this country has laws, are they based on an original, local philosophy or, on models imported from a

duties but incorporating the giving of advice on policy matters and the drafting of relevant bills, was laid down in the job description of certain experts assisting African governments. Similar job descriptions apply to experts serving in Latin America and on the Asian continent.

[8] Such as coal mines, inland transport, iron and steel, metal trades, textiles, building and public works, petroleum and chemical industries.

[9] 'The technical assistance furnished shall—Not be a means of foreign economic and political interference in the internal affairs of the country concerned and not be accompanied by any consideration of a political nature . . . [The participating organisations should] avoid distinctions arising from the political structure of the country requesting assistance, or from the race or religion of its population'. Extracted from U.N. Economic and Social Council, *Resolution 222A(IX)* (1949).

[10] For a full development of this concept consult Messner, *DAS NATURRECHT: Handbuch der Gesellschaftethik, Staatsethik und Wirtschaftsethik* (3rd ed. 1958).

different socio-economic environment? The two questions often blend into one. This is the situation that jurists have called 'conflict of laws'. Colonisation in every one of its forms—outright taking over, mandates or trusteeships under the League of Nations or United Nations—having brought into contact ruler and ruled, also brought about a confrontation of one set of legal rules and another, one set of institutions and another, an old system and a new system. There was bound to be a clash. The old law, the law of the ruled, was oral. The new law, the law of the ruler, was written. In this instance also there was bound to be a clash between tradition and innovation, the past and the present. Of greater seriousness was the impact of the new, the secular, law over the old, the religious, law. Traditional law was always based on the creed of the people. It might have been Islamic, animistic, pagan with a pantheon of gods, spirits, genies and devils, Coptic-Christian, Hinduist or Buddhist. The colonial powers, according to their own national principles, sought to bring about some accommodation between the two sets of laws. The conflict could, in some instances, be minimized. It was never fully resolved. Whenever this writer visited a developing country, he found traditional or customary law side by side with legal measures drafted on models originating from foreign sources. He also discovered, either open or veiled, a conflict of the two sets of laws as the underlying reason for many of the difficulties faced by the government especially where personal law, property and contract law were concerned. As one of the reasons behind such a conflict one must not discount the basic original reason for the introduction of the secular law: to favour settlers, traders and commercial interests of the ruling power. Thus, on the one hand there developed secular, profit-making organizations; the new companies and societal bodies based on commercial law. On the other hand were born, out of the same conflict and out of the introduction of the same secular laws, other associations which the ruled recognized as likely to be beneficial to themselves, based on civil law. It is not difficult to imagine the enormous change in ways of life when the family concern, hallowed by traditional law, began to give way to the commercial unit, the limited company or the shareholding firm. Nor is it difficult to imagine the traumatic experience brought about by the change from tribesman or member of an extended family[11] to labourer and, then, to industrial worker. Some of the secular laws were introduced by the former ruling powers almost ninety-five years ago. Since 1946 one colony, one mandate and one trusteeship after another has obtained independence. One would have expected, taking the conjunction of both historical facts into account, that such a conflict of laws should, for all practical purposes,

[11] Expanded or extended family is the immediate family together with other kinsmen. See, e.g., J. L. Gillin and J. P. Gillin, *An Introduction to Sociology* (1942); Maunier, *The Sociology of the Colonies* (1949) II, LIV; Clare, *A Review of Social, Labour and Economic Conditions in Western Samoa* (1962).

have greatly diminished. Such is not the case. This particular state of affairs makes the work of the international labour law draftsman still more laborious owing to one main reason: that, to the secular and traditional laws, he is now seeking to add a third set of rules, dealing this time with totally new concepts of social life and with an entirely new set of human relations between two groups that have only recently come into being. They are, the contemporary worker and the contemporary employer. In many instances, the one is new to the concepts of trade unionism while the other is new to, or is unwilling to accept, the presence of a new set of relations between himself and the worker—industrial relations. Government, in the centre, is expected to hold the balance but this is a function new to it and one that requires a great deal of expertise often totally unavailable even in the more developed of the developing countries.

3 BACKGROUND OF LAWS

The beginnings of Indian labour legislation can be traced to 1881 with the introduction of the first Factories Act. Such a measure and many of those that were to follow, were drafted by or under the direction of British colonial public servants who 'adapted' English statutes to Indian conditions. At the same time, each Indian state had its own traditional or customary laws. Both sets of laws, the British colonial measure and the unwritten, traditional rule operated side by side or so it seemed. Seldom did the one become superimposed upon the other. Even now, owing to religious[12] and other reasons, there are aspects of the 'operation' of written laws which only reflect the words of a statute as a shadow may reflect a shape. For example, the caste system of the past exercised an overwhelming influence on every aspect of Indian life. Although abolished on independence in 1947, its influence is still felt. Complex indeterminate forces are similarly at work, such as personal and social barriers, age-long aversions and deep-rooted prejudices of class, origin and sex, all making the operation of the written law extremely difficult. But, if a United Nations expert of Anglo-Saxon origin was asked to draft a bill, he could easily proceed on the well-founded assumption that, in general terms, the basic legal philosophy of the continuously expanding modern sector of the Indian economy, is English.[13] If the same expert were to move to a territory once a dependency of France, Italy, Portugal or Belgium, he would have to

[12] For example, the Koran, the sacred book of the Moslems, deals with a variety of subjects, including legal enactments, matters of state, matters of private import and social and economic practices. The degree of orthodoxy in the followers of the Koran varies from country to country, also according to the school of Muslim philosophical thought to which the religious leaders belong. For a brief commentary on Islam consult Champion, *The Eleven Religions and their Proverbial Lore* (1944).

[13] Some important branches of English law, such as contract law, company law, the law of trusts, criminal law and labour law have greatly influenced the development of the corresponding branches of law in modern India. It may be recalled that India has produced some eminent jurists as well as experts in the field of international law.

adjust his standpoint once again. He would now be dealing with an administration which, if only on the surface, follows the basic principles, say, of the *Code Napoléon*[14] or of *Roman Law*[15] as exemplified in measures modelled on the laws of the former metropolitan power and its system of administration of justice. In such territories too, parallel to the 'modern' legislation he would find involved traditional laws, involved because concerned with land tenure and the conditions of such tenure with their wide variations from territory to territory and, within each, with their numerous differences from one province to another and, probably, from one tribe to another. Land tenure is linked to ownership and usually related to chiefly rights recognized through certain formal attitudes of respect by commoner towards chief; such attitudes often influencing the running of a public administration and the operation of a public service. The relevance of this description in the context of this article may be clarified through the following example. In some countries under review the civil code may provide that landlords can demand two-thirds of the crop and corvée service from each one of their sharecroppers or tenants. Generally, in this case the local Council is composed almost exclusively of landlords and their supporters. Therefore, in advising on labour legislation, the draftsman will be confronted with a totally different mentality and outlook from his own about man and his rights and about the administration of justice. Yet, he may have before him printed copies of the local codes, based on modern western models. Such codes, however, will seldom be applied by the local courts, nor will much thought be given to the concepts inscribed in the newly acquired Constitution. This writer recalls how fruitlessly he worked for weeks on end, seeking to induce a minister for labour in an African territory, to introduce legislation allowing for the formation of peasant associations[16] (freedom of association having been incorporated in the local Constitution) only to discover at a later date that the same minister was a large landowner and the leader of one of the forty families in actual control of that region.

Far more difficult may be the position of the draftsman in a country inhabited by a variety of tribes, all having different customary laws and in which the penal code may originate from Swiss sources, the civil code

[14] Thirty-six different laws united in 1804 in one body of law under the official title of *Code Civil des Français*, designated as *Code Napoléon* because this monarch was personally concerned in it. The Code was greatly influenced by the tenets of political philosophy born of the French Revolution and epitomized in the motto: 'Liberté, Egalité, Fraternité'. See Olivier-Martin, *Précis d'histoire du droit Français* (3rd ed. 1938).

[15] The first scientific treatment of law which lays the bases of order in civil intercourse by systematic and practical reasoning. See Buckland, *A Text-Book of Roman Law From Augustus to Justinian* (2nd ed. 1932) and Jolowicz, *Historical Introduction to the Study of Roman Law* (1939).

[16] The country being discussed has a population of approximately twenty-six millions. About ninety-six per cent of the population is employed in subsistence agriculture under a system that might well be called of *debt peonage.*

from French sources and the criminal procedure code from English sources. This writer did in fact complete a two-year's mission under such circumstances. At the base of the system of administration of justice were magistrates' courts hearing cases along more or less traditional lines. Plaintiff and defendant, on entering the court-room placed a live chicken before the magistrate. The proceedings having been concluded and the magistrate having handed down his decision, a court usher conveyed the chickens to the magistrate's home. This writer never inquired whether the size of the birds influenced in any way the magistrate's decision. However, from long experience one would say that it did not. The presentation of a gift was originally made to propitiate a person of a higher status than oneself. It is now, in most cases, carried out as a mark of respect; the economic content of the gift being often minimal. The people, assembled in the court-room and squatting on the grounds surrounding the building with its wide open doors and windows, in some way recalling to this writer the cherished principle that justice must not only be done but be seen to be done, were as fully informed on traditional law as the magistrate himself. They would immediately have known whether or not the magistrate had followed the traditional procedure.[17] It was in courts of this type that this writer recognized some signs of an incipient rule of law with its classical meaning. However, in the same region, a High Court decision did not always depend on the facts of the case, on the value of the relevant evidence and on precedents. These three elements would decide the case if the two parties before the Court were of similar status or below that of the chiefly families. If one of the parties was of a higher traditional status than the other and if he did belong to a chiefly family, in particular, if the family was related by kinship ties to the paramount ruler, traditional considerations would in all likelihood bring about a decision by the Court favouring that party; a decision that if based solely on considerations of the facts of the case and on the weight of the evidence, would have been against him.[18] This writer, still new to the country, watching both proceedings, could not but wonder what kind of labour code he might be able to draft and whether he would ever be able to fathom the mentality of that people and its understanding of justice.

[17] One of the best contemporary examples of a court functioning entirely on the basis of unwritten traditional law is the Land and Titles Court of Western Samoa. It is presided over at this moment by the Chief Justice of Western Samoa, a New Zealander. See also Marsack, *Notes on the Practice of the Court and the Principles adopted in the hearing of Cases affecting: 1) Samoan Matai Titles, 2) Land according to Customs and Usage of Western Samoa* (1961).

[18] For obvious reasons this writer is unable in some instances to name the country discussed. However, in reference to some of the practices mentioned in the text, the reader may find the following titles of interest: Meek, *Land Law and Custom in the Colonies* (2nd ed. 1949); Roper, *Labour Problems in West Africa* (1958); International Labour Organisation, *African Labour Survey* (1958); Dumont, *L'Afrique Noire est Mal Partie* (1962); Redden, *The Law Making Process in Ethiopia* (1966).

The draftsman, having gradually collected a variety of experiences, must reach that degree of specialist knowledge enabling him to produce an instrument that, on the one hand, will follow the equitable principles laid down in ILO conventions and recommendations and, on the other hand, will not come into conflict with those views held locally which it would be politically and in other ways dangerous for the administration to violate. This danger may also arise from the fact that such views may be based on strongly held religious beliefs or might be jealously guarded by religious institutions intimately linked to the establishment. Extremely conservative and strict upholders of tradition, such institutions often share with the paramount ruler certain aspects of power. In one particular country to which this writer was adviser, all cultivable land was shared by the paramount ruler, the religious leaders and a small group of noble families (which included also representatives of the military caste).

III POLITICAL, ECONOMIC AND OTHER CONSIDERATIONS

(a) The draftsman will find it necessary to consider the political ideology of the government to which he is attached and of the establishment as a whole. As an ILO functionary, however, he will also have to take account of the views of employers and labour. In most developing countries the views of government and employers usually coincide. They will certainly coincide in the more developed of the developing territories—those following western economic models. Account must also be taken of the fact that although trade unions might be allowed to function, they will be weak and ineffective or be politically and otherwise under the control of government. In other instances the unions might be groups of individuals supporting a person already in or desirous of reaching Council or Parliament. The situation may also be that trade union leaders are supported by the government because they are expected to act on its behalf in controlling labour. And again, trade unions may not represent particular skills but might be organized along ethnic lines. During his stay in an African territory and, in another instance, while advising a government on the Asian continent, this writer met with trade union leaders, each a tribal chief or leader of a group of specific racial origin. Each of the organizations led by them was not, therefore, an association of industrial workers with a specific skill but a *sui generis* general union composed of individuals of the same ethnic origin, no matter what their particular skill. Under such circumstances it became extremely difficult to draft a labour code that would take account of the presence of labour organizations, when these, in fact, were undeveloped, immature and haphazard groupings of individuals, each violently resenting the other because of deep and virulent racial antipathies.

(b) The draftsman must also take into account that in many of the developing countries, trade unions, no matter how advanced, represent

minorities and, to that extent, represent privileged groups. Labour legislation may enhance their existing privileges thereby creating deep friction between the large number of land workers, unorganized and underprivileged and the relatively small number of urban, industrial workers. Furthermore, the privileges granted by law to the industrial group will eventually be reflected in an increase in the price of basic commodities. Such an increase will be felt more strongly by the peasantry—already an economically depressed majority—than by the wage-earning population in the urban centres.

(c) In all developing countries government is the largest employer and any new labour legislation will be of benefit, on the whole, to government employees who, in comparison with the rest of the local workforce, will also enjoy a privileged position. However small the legislated privileges might be, they will appear of major magnitude from the standpoint of the usually underpaid personnel in private enterprise. There will then be encouraged a shift of manpower from the private to the public sector of the economy.

How can the foregoing conflicts be minimized and labour legislation introduced that will provide the necessary improvements without being, although unintentionally, discriminatory to any one group of labour? It could be answered that attention should be given to laying down a scale of priorities. This suggestion has merit, but not in all instances. In all developing countries the peasantry is a depressed majority. In all developing countries government is the largest employer and it alone can attend fully to the process of development, generally through planning policies involving a high public works content. The long-term problem, that of the peasantry, will, therefore, be left practically unresolved. It will fester and may eventually become a major cause of political dissent, if not of violence and bloodshed. Such has already been the unhappy experience of a number of African and Asian countries (and of certain Latin American territories). The draftsman, faced with such potential for disorder might then have to revert to his duties as adviser. He may suggest a different order of priorities fully aware, however, that his advice will not be accepted by government owing to particular short-term considerations. In a developing country priorities are often decided by the kind of assistance the government has obtained or expects to obtain from the developed world. A government may feel that it will have to 'streamline' its laws or introduce new laws, to meet the requirements demanded by foreign investors. It is an unfortunate reality that most regions of the third world suffer with conditions of political instability inhibiting local and foreign investments.[19] An effort will therefore be made by the governments con-

[19] For a learned treatment of this subject see Horowitz, *The Abolition of Poverty* (1969).

cerned to counteract such unwillingness to invest through legislation exempting investors, for example, from paying company tax, allowing them freely to remit their profits to the home country, charging them only nominal factory rentals and extremely low water and other rates, if not granting them total exemption.[20] The other wing of this policy will take the form of a number of controls placed upon labour by industrial relations legislation specifically favouring the employer.[21] Such measures may provide for long-term industrial agreements, sometimes lasting over a period of five years during which there must be no wage increases or alterations in conditions of work. This type of legislation may also prohibit srikes, deny to workers the right to organize or to join trade unions or might allow for the formation of company or, in American idiom, yellow, employer-controlled unions. The draftsman, if requested to prepare a bill along such lines, will immediately find himself in difficulties. As an ILO expert he must do his best to work along the principles enunciated in the International Labour Code where free collective bargaining and freedom of association are the central beams of the ILO's entire socio-philosophical structure.[22] At the same time, as already explained, the draftsman must remain aloof from the politics of the country to which he is assigned. But if 'lasting peace can be established only if it is based on social justice',[23] the draftsman must also remember that:

> all national policies . . . in particular those of an economic and financial character should be judged in [that] light and accepted in so far as they may be held to promote and not to hinder the achievement of [that] fundamental objective.[24]

Much perseverance and much diplomacy will then be demanded of the draftsman to discover a compromise that will not disturb his conscience, that will meet the overall needs of the country and yet will answer to the harsh demands of contemporary economic and industrial life and to the requirements of cold, profit-controlled international finance.

(d) In preparing himself to provide advice to be followed by legislation, the draftsman may have to take into account the presence of certain elements of compulsion. These have been called by some writers 'forces of stagnation'.[25] Without accepting the concept of predestination and of the

[20] This is often called 'pioneer industries' legislation.

[21] But note that some of the more developed and already heavily industrialized countries of the third world have similar legislation, e.g., the Republic of Singapore's *Industrial Relations Ordinance 1960 as amended 1962 and by the Industrial Relations (Amendment) Bill 1968* and *The Employment Act 1963 as amended 1968.*

[22] See in International Labour Organisation, *Conventions and Recommendations 1919-1966* (1966), 'Freedom of Association and Protection of the right to Organise Convention, No. 87 of 1948' and 'Right to Organise and Collective Bargaining Convention, No. 98 of 1949'. Also, International Labour Office, *Freedom of Association* (1959).

[23] Declaration Concerning the Aims *op. cit.* II.

[24] *Ibid* II(c).

[25] See, e.g., Guernier, *La Derniére Chance du Tiers Monde* (1968).

supremacy of one race over another, and without agreeing with the view that each race has a natural disposition of its own that will never alter, the presence can nevertheless be admitted of certain forces in operation in the third world that, for the time being, will retard or impede its process of development. There are socio-religious views which, given the distance between one territory and another and one continent and another, difficulties of communication, language barriers, analphabetism, illiteracy, retarded education and backward cultural ways, have remained for centuries unaltered and ever more deeply are coming into conflict with and are an impediment to the process of speedier modernization. There is the factor of climate. There are health hazards and deeply ingrained attitudes of mind. Obstacles of this kind may also retard or may totally prevent the unimpeded progress of individual self-determination or, in other words, may adversely affect the freedom of the individual.

(e) As indicated earlier on, many developing countries are areas where privilege of family or of caste has still much importance. Therefore, the concept of justice, that is, justice handed down equally to all without fear or favour, although likely to have been inscribed in the constitutional instruments of governments modelled on western systems, must often be understood, both in the less and the more developed countries of the third world, as justice considered from the viewpoint of the privileged or through eyes biased by a tradition that sets out well-defined rungs of social importance with their attendant socio-economic implications. Such an attitude to justice will be reflected in the administration of justice by the local courts. An example to this effect was given in section II of this article. It may be reflected also in the performance of their duties by public servants. This situation may be exemplified by the warning given by this writer to a public servant who had been promoted to the position of factories inspector. The location was an island in the Pacific Ocean where this writer had completed a two-year's mission during which he had drafted a labour bill, now an Act of Parliament. On being farewelled at the airport, this writer said to the inspector:

> Remember that in visiting shops and factories you will meet near and distant members of your expanded family to whom, as demanded by tradition, you owe allegiance, respect and, if they are of chiefly rank, obedience. Your chief has the right to direct your actions. It would be a sign of disrespect, however, if you did not agree with the views of a chief who was not a member of your expanded family. So . . . you will discover that often enough your duties under the Act might clash with your duties as a member of your expanded family.

It should be pointed out that local chiefs and expatriate interests formed most of the business and trading community in that area. They were also the managers of the newly-erected factories. Of interest is also the fact that, until a few months before the arrival of this writer, the promotion of

a public servant to the position of departmental head had depended on whether or not he was a traditional chief. This practice was eventually abandoned. However, under the circumstances it would obviously take several years before the public service would function independently of the pressure of tradition. As the aircraft rose higher in the skies this writer thought about the various sections of the Act providing for the duties of a factories inspector. Probably for the hundredth time, he also wondered how much of that Act would be implemented and how much of it would remain inoperative under the pressure of traditional forces.

IV DRAFTING—LOCAL PROBLEMS

1 SOCIO-ECONOMIC AND POLITICAL

In contemplating giving advice on new legislation or on amendments to existing measures, the adviser must be ready, after having fully studied the local circumstances, to indicate to government that, in his opinion, new legislation or amendments to existing laws are not necessary. On the other hand, he might have to advise that, due to the needs of economic growth a revision and, sometimes, even the radical reform of existing procedures is imperative. The International Commission of Jurists said:

> It is often not sufficient to revise or rescind existing laws or to introduce new laws as the mere consequence of social and economic change. It is necessary to go even further and introduce laws designed to promote social and economic change, so that these changes would be the consequence or the result of the laws themselves.[26]

Governments today attend an ever increasing number of international conferences and meetings. Misplaced national pride often rises very much to the surface. If country A states that it has a code of laws of a certain type, country B, probably its neighbour, feels impelled to say that it is contemplating similar legislation, although in fact local circumstances do not require it. Repeatedly international organizations receive requests of this kind and, repeatedly, they must call upon their diplomatic resources to suggest that assistance may be necessary but not in that particular form. There may be in country B far more serious problems—for example, deep hunger and endemic diseases—than the alleged absence of a labour code. However, on the assumption that a request for assistance has been made and is considered worthwhile if accompanied by a United Nations technical co-operation project, the adviser may on arrival discover one or more of the following situations. The list is by no means inclusive. It merely exemplifies some of the more glaring anomalies, problems or situations with which a labour law draftsman might have to deal:

(a) given the extremely retarded stage of economic growth and

[26] International Commission of Jurists, *The Dynamic Aspects of the Rule of Law in the Modern Age* (1965) 75.

development of the country, the legislation envisaged by the government is, for the time being, totally unnecessary;

(b) the suggested legislation is unnecessarily elaborate;

(c) a totally different measure from the one suggested by government would be better suited in the socio-economic context of the country;

(d) the legislation, in the form suggested by government would come into conflict with other existing statutes;

(e) the suggested legislation is a copy of a measure in operation in a western country with a totally different economy and social organization. If introduced locally it would hamper rather than encourage socio-economic development;

(f) the measure is wanted as a political *gimmick*. The draft would be prepared, a great deal of pre-elections publicity would be given to it but, once the elections were over, the measure would not find its way to Council or the House;

(g) the measure, if implemented, would have none of the effects desired by government. It might, on the other hand, bring about a great deal of unrest in various sectors of the economy;

(h) if the legislation wanted by the government were enacted, it might not properly be administered because:

  (i) the local public service is inexperienced and it lacks an adequate infrastructure;

  (ii) funds are insufficient or are not available for the establishment of an adequate labour department, the authority that would have to administer the legislation;

  (iii) the punitive clauses of the legislation could not properly be enforced in the absence of an inspectorate and of adequately staffed magistrates courts;

  (iv) it would not be possible to establish an inspectorate in the absence of properly trained personnel. Personnel already possessing a higher school certificate or an equivalent degree of education (neither available locally) would have to be trained overseas over a period of many months;

(i) the new legislation is desired only as an instrument to castigate alleged refractory workers or trade unions;

(j) the legislation is wanted by some Cabinet members. It is opposed however by elements in the public service expressing the views of expatriate merchants and other interests to which they are linked by social ties. Such interests are desirous of maintaining the *status quo*;

(k) Cabinet might want the legislation but the tradition-minded Council

might be against it on the ground that it would affect adversely the powers of traditional leaders through the independence that labour would obtain, for example, on becoming wage-earning and, therefore, ceasing to work under the local traditional system.[27]

2 CONSTITUTIONS

In the developing countries constitutional instruments have been copied in some instances from models submitted by the former metropolitan power. Or, they might have been based on modified copies of foreign, that is, western Constitutions. But even when the Constitution has been drafted by a constitutional convention composed of autochthonous inhabitants, western advisers, either officially or unofficially, might have been called upon to assist in the drafting process. Their influence can clearly be noted in the final instrument. During the period of initial discussions and the actual drafting, pressure groups and lobbies will be at work making their influence felt in more or less obvious ways. One such group, found in smaller territories, is composed of offspring of mixed European and local parentage. Their interests are generally linked to those of the former metropolitan power. Their ways of thinking and spiritual loyalties will similarly lean more towards their western rather than their local ancestry. Such a group, sometimes out of fear of the future, sometimes for ethnic reasons, is apprehensive of any change from the *status quo*; apprehensive, for example, of a change from colonial territory to self-governing nation. Feeling that their social and economic position will better be safeguarded at the level of the 'native' leadership, they will temporarily ally themselves with the local traditionalists who, in the past, were singled out by the metropolitan power for special consideration. United, these two groups will have almost identical constitutional views. Out of it all, the actual self-government situation might be as follows. Parliament will, for all purposes, be a House of Chiefs; its members will all be chiefs, not elected on a general suffrage but only by chiefs or by chiefs and individual voters from a roll granting the voting right to westerners holding local citizenship and to those of mixed parentage holding a chiefly title. The people will be without voting rights. The Constitution will be a relatively brief instrument. Its principal feature being the translation into western legal terminology of what otherwise was a traditional situation. The introduction of labour laws in such a region, self-governing in name only, will be extremely difficult. The draftsman, although visiting that country at the government's request, might eventually find himself ostracized by the very people from

[27] Fifteen years ago it was stated: 'The growth of wage-earning challenges [the] position of the chief. New obligations arise, not envisaged under the older arrangements. Grievances and arbitration arise, which the older principles of native arbitration cannot properly solve. The growth of trade unions is often a challenge to traditional institutions', Roper, *op. cit.* 23. Such a situation has by no means totally disappeared and can still be found, however weakened, in Africa and in certain territories of the Pacific Ocean.

whom he hoped to obtain information relevant to his work. Attempts might be made to persuade him into viewing labour matters in a slanted manner at variance with the facts. If such attempts are unsuccessful, means will be sought to gather a strong parliamentary opposition. In one of such territories this writer found most Cabinet members, including the Prime Minister, in favour of an employment act. Their desire to introduce the measure was genuine. After several months of work this writer produced a draft bill. It was thoroughly discussed and eventually tabled in the Council. However, because the country was still heavily dependent economically on the former colonial power and due to the pressure of the traditionalists and of the part-European group in a Council where, constitutionally, only chiefs elected by chiefs could sit, the third reading of the bill was indefinitely postponed.

In preparing draft legislation, the adviser will also have to bear in mind the 'principles' embodied in national Constitutions. He may have to adapt certain industrial measures acceptable in a western country without any religious qualms, to meet the demands of theocratic Constitutions of either the Christian or Islamic type.[28] One recalls a discussion lasting over several days, between a Bills Committee of Parliament and this writer and his collaborators, on the matter of whether the expression 'rest-day' should have been used in a draft labour Act or the word 'sabbath'. The Committee eventually decided to use the word 'sabbath' although its members agreed with the draftsman that difficulties of interpretation and of application to industry would arise because of the presence in that territory (in the eastern Pacific Ocean) of a large number of non-conformist religious groups, all recognised at law, each having its own particular rest-day (not a Sunday) together with two major denominations recognizing Sunday as their rest-day. But, the Committee members argued, the Constitution expressly stated that their country was a state based on Christian principles. The Bible, the draftsman was reminded, used the word 'sabbath'.[29] 'Rest-day' was cancelled and replaced by 'sabbath'. The Bill, thus amended but as otherwise drafted by this writer, went through all stages and is now contained in the Statute Book of that country.

In the presence of a Constitution of the Islamic type, the draftsman might have to give particular attention to the position of women and young persons, viewed in local orthodox circles from a very restricted standpoint hardly meeting the liberal requirements of ILO conventions or the principles embodied in the United Nations' Charter of Human Rights.[30]

[28] E.g., the 1960 Constitution of Western Samoa (Christian) and the 1962 Constitution of the Republic of Pakistan (Islamic).

[29] Exodus 20, 8-10.

[30] United Nations Organisation, *The Universal Declaration of Human Rights* (1948). See also Jenks, *Human Rights and International Labour Standards* (1960).

3 PRACTICAL DIFFICULTIES

(a) A description however brief of labour law drafting problems cannot be complete without the inclusion of certain practical considerations. The draftsman, as was the experience of this writer, might find himself in a territory the language of which, the vernacular, is not English, German, French, Spanish or Italian nor any of the other internationally spoken languages. Furthermore, the vernacular might only be a spoken and not also, a written language.[31] The draftsman might also find that there are two western languages used for purposes of administration with a third used socially; for example, English and Italian used for administrative purposes and French used by certain minorities. The draftsman will then have to draft every measure in the two administrative languages, each with a different set of idioms and legal terminology and phraseology from the other. In discussing the measure in draft form with Cabinet, the draftsman will have to be trilingual, while the ministers might argue among themselves in the vernacular. This situation will become more complicated if it is added that one group of public servants might have been trained within, say, an English system of law and administration (and, therefore, like this best) and another group will have been trained, say, within an Italian system of law and administration (and, therefore, like that best). The whole of the population, public service and politicians alike, might then be of Islamic creed and, under the veneer of westernization, still follow the social and economic rules laid down in the Koran. Can adequate labour legislation be drafted under such circumstances—legislation capable of being easily administered? It can be done by restricting for the time being the ambit of the bill, confining it to very limited rules of a practical nature clearly translatable in the two official languages without fear of misinterpretation. Such rules would also be easily explainable, owing to their practicality, in the vernacular. They could, finally, be implemented without transgressing upon socio-religious tenets and traditional practices.

(b) In drafting legislation in certain bilingual countries, where two official languages are used, such as English and the local vernacular, the draftsman may face another set of difficulties. The vernacular might possess a very narrow vocabulary in which most of the words refer to material things, food and eating in particular. There might be an almost complete absence of words relating to abstract concepts and, certainly, an absence of legal terminology. Having drafted the measure in the English language, it will have to be translated in the vernacular. In a particular instance this writer observed that his draft, of ten typed pages was, in the vernacular translation, of twenty-six pages. He asked that the vernacular draft be translated back into English, and discovered that the original had been completely paraphrased with the introduction of a large number of roundabout phrases replacing the legal terms missing in the vernacular. The

[31] E.g., Somali which, until 1969, was not a written language.

final effect was that the clarity of the English draft had been completely destroyed and much uncertainty had been introduced as to the meaning, purpose and impact of each section or clause of the bill. This experience also indicated to the writer that although English was one of the official languages, was spoken by large sections of the population, and was taught in the schools and although many senior public servants had been trained in it, often for a number of years, in the capital of the former metropolitan power, words would be understood but not their particular connotation. It was not surprising, therefore, that in the same region, members of the Council, owing in some instances to misunderstanding of the meaning of words or their connotation, owing also to the paucity of technical terms in the vernacular, to a general ignorance of legal practice and, finally, to faulty translation from the English, introduced amendments to bills which had little bearing on the purpose and impact of such measures. The bills, having gone through all stages in the House and having now reached the head of state for his assent would, on the advice of the Attorney-General of British origin, 'be considered' and, later, 'referred' to government.

(c) To the major problems exemplified in this article, may then be added the much smaller yet heavily time-consuming everyday inconveniences which, in continuous temperatures of between thirty-seven and thirty-nine degrees centigrade and eighty-five to eighty-nine per cent humidity, try one's patience to the utmost. There are the typed drafts being returned to one's desk filled with typing errors because the typist uses her eyes but does not know the language she is copying in. There are the many hours spent in trying to explain the meaning of a single term. One recalls a three-hour discussion with a minister of labour to explain to him and his permanent secretary the meaning of 'truck'. Both men were fluent in English. What they could not understand was the concept and why legislation might have to be introduced to abolish such type of payment, at least in the capital, once the new, highly mechanized factory was in operation. A few hundred yards from the minister's own office, in the local general market, much business was done on the barter system and in the provinces and the villages cash was seldom seen. All transactions, including the payment for work performed, were settled in kind. Why, the draftsman was asked, change a system which had been quite satisfactory until then merely because a factory was now being opened; what did it matter if others were to follow? There were the long discussions over the independence of the judicature and of the public service. In a country visited by this writer, with a public service originally established according to the British system and with senior public servants mostly trained in the former metropolitan country, nothing objectionable could be found in the fact that the chairman of the public service commission was at the same time one of the five most important traders in the territory, a member of the judicial committee of review, an official of the local chamber of commerce which

functioned also as an employers association and, finally, was a senior official sitting on the board of an inter-regional commission. Elsewhere lengthy discussions took place on why, once a law was enacted, it could not be stretched like a sheet of India rubber according to circumstances. During one of such discussions a senior public servant interjected: 'but he is the nephew of . . . a chief. That law cannot apply to him!' And there were the innumerable revisions of drafts because a certain clause, for example, that women should not work between ten o'clock in the evening and six o'clock in the morning (unless members of the nursing service) was not acceptable to public servants, ministers and certain members of the community, on the grounds that the local Sports Club, the only club in the town, employed girls to serve drinks from nine o'clock in the morning till well after midnight. The patrons were accustomed to be served by women and be entertained by them. They would have been unhappy otherwise. The particular clause was altered to read 'midnight'. Overtime was not even mentioned nor shift duties. Lastly, in many instances there was the impossibility of maintaining one's work confidential either in one's office or in the relationship with other departments. One can well imagine the draftsman's dismay, in a particular instance, in discovering that the first draft of a bill marked for the 'Prime Minister's eyes only', before having been sighted by him had been circulated among minor public servants, had been read by leaders of the business community and had been discussed over a few beers at the local club.

In the foregoing pages this writer attempted to summarise his experiences as an international public servant with the duties of labour law draftsman in non-western societies. The conclusion to all he had to say recalls the functions of the rule of law. Defined and interpreted by the International Commission of Jurists,[32] the rule of law undergoes an evolutionary and expanding process to meet new and challenging circumstances. The applicability of the rule of law is not limited to a specific legal system, form of government, economic order or cultural tradition. Many of the examples provided in this article, although peculiar in their own way, all gave an indication of the presence more or less clear, depending upon circumstances, of *a* rule of law that in its own way approximated the *universal* rule of law. The labour law draftsman must then be both the maker and the instrument. He must seek to apply the rule of law to the varying circumstances. If at all times his instrument must be well honed, his hand must also be capable of extreme gentleness in the incision he might consider necessary to make. If ultimately the duty of the draftsman is to encourage an ever increasing awareness of the universal rule of law, he must also visualise this rule in developing countries, not as a clearly

[32] The Dynamic Aspects *op. cit.* I, 14.

discernible shape with sharply recognisable edges but, rather, as a combination of shapes, some more and some less clear than others, revolving around a similarly multi-shaped hazy core that may be called justice. It is in this sense that the rule of law can be a visible sign of our humanity regardless of our race or creed, while we hope that ultimately it may become the basis for the establishment of the juridical and political organization of a world community.[33]

Maritain[34] asserted that no declaration of human rights can be complete and definitive but must always be historically dependent upon the particular stage of moral consciousness reached and on the particular degree of civilization achieved. Years later his words echoed in the statement that:

> social life in the modern world is so varied and dynamic that even a juridical structure which has been prudently and thoughtfully established is always inadequate for the needs of society.[35]

If such a viewpoint is accepted, the draftsman would clearly have to differentiate between legal principles of universal validity and legal rules of particular application. Looking back over his years of labour law drafting in the third world, this writer can now clearly see that what he attempted to do, often without realizing it, was to direct his effort towards narrowing the distance between rule and principle, hoping to reach ever nearer to the core of the rule of law. From such a lengthy period of work this writer learned an important lesson that may be of some value to whomever may decide to enter this field of endeavour: that the solution to any problem confronting the international public servant as law draftsman in developing countries, cannot be found by him through the expedient of merely copying from methods with which he is quite conversant through his own upbringing, educational or personal experiences. Such methods, admittedly, have their own relevance. The lesson of overwhelming importance is that, whatever he might intend to do, he cannot and must not anticipate solutions.

[33] See also De La Chapelle, *La Déclaration Universelle Des Droits De L'Homme Et Le Catholicisme* (1967) Introduction.
[34] In U.N.E.S.C.O., *Human Rights—A Symposium* (2nd ed. 1950) 74.
[35] Pope John XXIII, "Pacem in Terris" (1963) in Fremantle, *The Papal Encyclicals In Their Historical Context* (5th printing, expanded, 1963) 407.