

Working Paper 6

External Powers and the Role of the EU in Labour Matters: Work in Progress

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I am honoured to have the opportunity to contribute to the colloquium in honour of Sally Ball.

My role is to say something about the research project Sally and I were working on when she died. This ‘work in progress’ is a small example of Sally’s academic legacy. Her much broader impact has been on the many people – including me – who were inspired and empowered by her enthusiasm and confidence that anything is possible, with a little effort. We were very optimistic that our project would make a contribution to the field, even though we hadn’t worked out what! This brief overview is dedicated to Sally, but I am solely responsible for any errors of fact or logic.

Our research project was going to examine the external relations of the EU in the area of employment law and policy. The relevant sites of EU external action are many – development co-operation, trade policy, technical assistance, the external aspects of the regulation of multinational corporations, relations with international organisations including the ILO, the OECD and the World Trade Organisation. In this brief paper I want to look at a particular issue which arises from the way in which the Community has utilised its external competence, and suggest alternative approaches.

The Community’s external relations in the area of labour law are almost completely submerged within its external relations in the field of human rights.

The Community’s external human rights policies and practices have generated a strongly **normative** critique from commentators such as Philip Alston and Joseph Weiler, following Alston’s earlier critique of American trade policy. It is often argued

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that the external relations of states and entities like the EU should reflect three inter-related values :

(1) **reciprocity**: (i.e. don't make unilateral demands on other states)

(2) **consistency**: (i.e. don't demand standards you yourself don't adhere to; in the EU context, ensure there is consistency between the Pillars and between EU institutions and the Member States)

(3) **legitimacy**: (i.e. don't make demands in relations to matters which do not have the appropriate status)

The logic of this normative approach is very clear in the field of human rights. If we can identify a set of universal, indivisible rights which are internationally accepted, then it can be said that the duty to accept and consistently implement these rights falls equally on all states, and that arguments of national sovereignty do not trump this over-arching international requirement. For the Community, the use of human rights clauses in bilateral trade and co-operation agreements has the virtue of 'merely reaffirm(ing) existing commitments which, as general international law, already bind all states as well as the EC in its capacity as a subject of international law.'

What happens to this framework of values if we start, not from the basis of fundamental human rights, but from a labour law perspective, including in particular EC employment law and policy?

At first glance, the labour law perspective offers us a view identical to that through the human rights lens. This is because the focus of the Community's external relations in the labour field is inextricably linked to its broader human rights approach. This linkage between the human rights agenda and the core labour standards is made clear in the 2001 Commission Communication, *The EU's Role in Promoting Human Rights and*

*Democratisation in Third Countries.*¹ See, too, the Commission Communication, *Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*:² ‘The EU has a long-standing commitment to the promotion of core labour standards and social development generally. The EU itself rests on the respect of fundamental rights. The Charter of Fundamental Rights of the EU... confirms the EU’s aim to promote and fully integrate fundamental rights – including core labour standards – in all its policies and actions’ (at 10).

Whether or not the core labour standards of the ILO *are* properly seen as fundamental human rights instruments is far from clear. Close examination of the ILO core standards reveals elements which take a classical human rights form, and others which, for example, tell states how to create policy to ensure that certain standards are met. The ILO itself shies away from the human rights label: its 1998 Declaration refers to Fundamental Principles and Rights at Work. Long ago, former ILO Director-General Wilfred Jenks argued that the ILO Conventions in fact operationalised the Universal Declaration on Human Rights and its Covenants, and the contemporary language of the ILO Committee of Experts is that the ILO core standards give ‘practical application’ to the grand principles of the Universal Declaration.

The identity of the ILO core standards is potentially highly problematic for the Community. Is its competence to engage in external relations in fact the same for the ILO Conventions as it is for instruments expressing fundamental human rights? At a more practical level, how will the Community deal with the tensions between the ILO core standards and its own Charter of Fundamental Rights? For example, it is arguable that the ILO Convention on minimum age for employment (Convention 138) has the potential to conflict with the content of the Charter of Fundamental Rights’ provision on child labour. (The ILO Convention permits states to authorise employment for those below school age in certain specific circumstances, while the Charter seeks to prohibit any such employment.)

¹ COM (2001) 252 final

² COM (2001) 416 final

To the extent that the core labour rights are subsumed in the Community's general human rights approach to external relations, some of the same criticisms made by Alston and Weiler and others apply. There are problems of **consistency**:

As Silvana Sciarra has noted, 'two core social rights (are) explicitly ousted from the Community competence – namely the right to organise and the right to strike...'³, so there is a gap between internal and external here.

Example 1: Imperfect integration of labour rights into the general human rights approach. For example, Council Regulation 1658/98 on co-financing operations with European non-governmental development organisations (NGOs) in fields of interest to the developing countries

Example 2: The Community's General System of Preferences, established by Council Regulation (1256/96 of 20 June 1996 and 3281/94 of 19 December 1994) provides market access on a preferential basis to developing countries. The Regulation creates a positive incentive scheme whereby additional trade preferences are granted when states adhere to several of the core labour Conventions (87 and 98 on freedom of association and the right to collectively bargain, and Convention 138 on child labour). There is also a negative scheme, which threatens the withdrawal of preferences where a country permits slavery or forced labour (as defined in the Geneva Conventions and ILO Conventions). While the Community avoids the problems of legitimacy of the US GSP as analysed by Alston (it sources its standards back to a legitimate international source by naming the instruments), it is not a complete system. The Community has created its own hierarchy within the core labour standards – the worst offence, attracting negative action is forced labour, and, by implication, the least problematic are breaches of the core labour conventions on discrimination, which are excluded from the GSP schema altogether. Given the importance of general Community principles and secondary legislation in the field of discrimination, this represents a severe imbalance between internal and external rule-making. The Commission has proposed the extension to all four core standards.

³ at p 481??

But what is the role of the Community in external relations in labour matters **other than the core**?

We are not used to seeking reciprocity and consistency in states' external relations in the field of labour law. (Of course, the ILO was created in an attempt to harmonise national labour laws, but that is another story.) For example, Philip Alston does not upbraid the USA for not seeking to apply its minimum wage laws through its GSP programme. As Kahn-Freund noted in his famous discussion of comparative law, national labour laws are the product of local forces and power relations – the 'habitat of industrial relations' – and transplants across borders will in some cases be difficult. It is also common to think that the differences in levels of economic and social development preclude the transnational transmission of labour laws. Finally, national sovereignty and citizenship models suggest that labour law is a matter for each political unit and its citizens to determine, provided the bedrock of fundamental rights approved by international law is adhered to.

By moving from a human rights perspective to a labour law one, however, we are not limited to the normative approach which seeks the equitable application of international standards between states. We are able to ask a different set of questions. **For example, we might ask, what is the purpose of the Community's involvement in a particular external process, and how best can this purpose be met?** There is no good reason why the Community should begin and end all its answers to such questions with the core labour standards. There are many possible sources of labour rules and policies which might usefully be applied through external means, including all the non-core standards of the ILO (but are there questions here for Community competence?). For the rest of this paper, I will discuss the case for the **external deployment of the internal employment law and policy of the Community** in certain circumstances.

One such reason for the external deployment of internal Community labour law is where the internal goals of Community legislation coincide with the goals of a particular external relationship.

For example, although there are differences in language and emphasis, there is a marked convergence between the objectives of the Cotonou Agreement and recent Social Action Programmes of the Community. The Cotonou Agreement, for example, aims at ‘rapid and sustainable job-creating economic growth’ (Article 20(a)), the need to develop entrepreneurship (Article 21 (1)(b)), the need to develop labour market reform (Article 22 (1)(b)(ii)), the need to use training to improve productivity (Article 23 (a)), and to encourage ‘the promotion of participatory methods of social dialogue as well as respect for basic social rights’ (Article 25 (1)(g)).

Catherine Barnard has suggested another rationale: the potential threat to labour standards within the EU derives from non-EU states. It is therefore in the Union’s interest to seek to promulgate high labour standards globally. However, the Commission disavows this protectionist motivation, and like the ILO states that ‘the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.’⁴

Another reason for considering the external application of internal Community labour law is that Community laws may provide useful models of regulatory action. The Community’s employment law directives are very interesting regulatory instruments, particularly for states where law-making is multi-layered (such as China) and for regional associations engaged in their own processes of economic integration. Paradoxically, the limited Treaty basis for social law making within the Community, the principle of subsidiarity, the mixture of social and economic Community goals, the requirement that at least most of 15 states agree with any measure have combined to make the Community rules very open-textured, flexible instruments, some of which have a useful framework character. Further, the Community – partly because of its interest in both generating employment and extending social protection – has pushed further into the field of the regulation of so-called non-standard work than many other jurisdictions, and for many developing countries, this is the very site of economic activity most likely to develop. (Of course, another paradox is that these very aspects of the Community’s legal order are likely to threaten the integrity of the Community’s

⁴ Above n 2, at 11.

fundamental human rights order, as Sally pointed out in her article on the European Employment Strategy.)

Finally, an employment law approach enables the Community to develop individualised strategies for particular countries in addition to the blanket requirement that other states adhere to the core labour standards. For example, if I knew that there was not going to be any change in the political system in China for the next ten years, the one rule I would like to see expressed and enforced would be the Community's directive on proof of the employment contract. This would remedy an important area of labour abuse and, like the Truck Acts in the history of British labour regulation, may provide a basis upon which other rights and entitlements, including collective action, could eventually be built. Further, China provides an example of another limitation with the focus on the core labour standards. Freedom of association is impossible in China: the only legally recognised union is an arm of the State, and empirical work shows that the All China Federation of Labour often acts in the interests of management to oppress its members. This reality appears to be accepted by other states and entities, unlike other instances where strong Community responses occurred (e.g. South African under apartheid or the Community's response to the use of forced labour in Myanmar). The European Works Council Directive provides a model of company level information and consultation which gestures towards freedom of association, and which could fit within the current Chinese power structures as a step towards work organisation and empowerment at the enterprise level, without requiring the complete overthrow of the communist system.

What would be the **legitimacy** of the Community's actions if it sought to introduce elements of its internal labour policies in its external relations? Any attempt to impose internal Community laws through binding external measures, such as positive or negative conditionality in trade agreements, would be inappropriate. The Community would be opening itself to charges of imperialism, of imposing inappropriate Western laws on the developing world. I am thinking rather of the kind of processes discussed by John Braithwaite and Peter Drahos in their recent book, *Global Business Regulation*: Community internal laws might take their place in external relations through processes of discussion and consideration, leading to modelling and prioritisation and dissemination through, for example, the creation of epistemic communities.

In fact, labour law reform in the Community's external realm is just as closely aligned to the 'rule of law' aspect of its agenda as it is to the human rights provisions per se. (One of the four 'thematic priorities' for the European Initiative for Democracy and Human Rights for 2002 is 'support to strengthen democratisation, good governance and the rule of law'.⁵) Many developing states have highly sophisticated labour law which simply does not connect with the economic and social systems in any way. Absence of appropriate rules is not always the problem.

This proposal for a targeted 'soft law' mirroring of the Community's internal labour laws may sound nebulous, but the fact is that the informal circulation of EC employment law and policy is occurring globally. I have been in meetings in Australia where the future of Australian labour law and social policy is being discussed, and participants have mentioned in detail the 'employment quality' policies of the Commission, as well as various labour law directives. Seminars on worker participation focus on the European Works Council Directive (EWD). When the Australian Council of Trade Unions (ACTU) sought a new ruling on limitations to working time, it used the Working Time Directive as an example. The major amendments to the OECD's Guidelines on Multinational Enterprises appear in part to reflect the need for consistency with the EWD, and so on.

In conclusion, I would say that the subsuming of labour law into the category of human rights for the purposes of external relations is less than satisfactory, for the reasons noted in this discussion. The ILO core standards are more than human rights instruments, and failure to recognise this tends to underplay their satisfactory utilisation. At the moment, the core standards appear to be only imperfectly and inconsistently reflected in the external human rights regime, to the possible detriment of the key standards on freedom of association and the right to collectively bargain.

Moving away from the human rights frame of reference to one of labour law takes us away from the normative analysis of external relations which has been applied to the human rights area which is essentially interested only in the consistent application of

⁵ See http://europa.eu.int/comm/external_relations/human_rights/doc/eidhr02_04.htm.

international law. A broader labour law approach permits us to consider not just the external transmission of rules, but the circulation of ideas about rules, experience in the application of rules in complex multi-regional and multi-state circumstances, and the targeted, strategic intervention to meet particular labour issues where the blanket human rights approach is not gaining ground.