

THE FUTURE OF INTERNATIONAL LABOUR STANDARDS

The Standards Department and the Social Security Policy and Development Branch have decided to carry out a study on normative policy and decent work, with particular reference to the field of social security. The aim is to contribute to the debate on the impact of international labour standards, and on possible innovations in standard-related activities that might increase and improve their effectiveness. An interdisciplinary group of experts has been set up for this purpose and will work first on the general problems presented by the ILO's normative activities, and secondly on the new developments that these activities might have to undergo in the field of social protection. The present note is designed to outline possible common issues for the group of experts. The aim is to launch a debate, not to confine it to a predetermined framework, so the working theories put forward here are obviously open to criticism and discussion. A brief description of the historical background will be followed by five questions for the group to consider.

Back to the beginning

In spite of the various reforms it has undergone, the system of international labour standards still bears the stamp of the historical conditions in which it was first developed at the end of the First World War. In demonstrating the absolute and deadly power of technology, this War without precedent had marked a major sea-change in the history of the West. Troops on both sides referred to themselves as "cannon fodder", and in doing so had pinpointed better than anyone what was radically new about this conflict, which introduced the industrial management of massacre and reduced human beings to "human material". We tend to forget what a formative influence this experience had in legal and institutional terms. It was from

this traumatic event that the plan emerged to organise international relations not on balances of power between nation-states any more, but on cooperation between all States within global institutions. This led to the creation of the League of Nations, which was to establish the primacy of law over power on the international stage by transposing the rule-of-law values common to the major democracies to relations between States. The ILO was set up as part of this overall project to give normative force to the idea that human beings cannot be treated as a commodity.

Like the League of Nations, the ILO was initially made up of a small number of countries, mainly industrial countries belonging to the same western culture. At that time, international society was a society of nation-states enjoying full sovereignty over their own nationals (particularly employers) and those of their many colonies and protectorates. During and after the Second World War it underwent a number of profound changes, which the League of Nations did not survive. The ILO, on the other hand, was the only one of all the institutions set up between the two wars whose existence was confirmed as part of the new institutional framework created with the setting up of the United Nations Organisation. This is proof of the eternal nature of the values the ILO stands for, but it also explains why it still carries traces of a world that no longer exists.

The aim of setting up the ILO was to establish international social legislation that would be binding on all States and would prevent them from competing to undercut each other in the employment conditions they offered in order to give their businesses an advantage over foreign rivals. This international legislation was based, both in terms of its objectives and its sources, on experience gained in the domestic labour law of different countries. In all the industrial countries, the first “labour laws” had been introduced in the 19th century as a result of legislative intervention, but while the French approach had retained this political, interventionist model, the English approach tended towards an economic, “proactive” model, based on collective agreements which were not enforceable, and the German approach tended towards a social model based on organised occupation-based communities. These different national laws all dealt with the same subject, however: paid employment, largely manual work, carried out in a position of dependence on a

capitalist employer. The whole of the ILO's normative structure is based on these national experiences.

If we look first at how *standards are elaborated*, the Constitution of the ILO follows the parliamentary model found in the various democracies, but takes account of national models that used to be based on negotiation or partnership between employers and trade unions. Hence the unusual sort of "parliament" that we see in the International Labour Conference, which combines political representation (of the States as the subjects of international life) and corporate representation (of employers and trade unions, representing the interest groups involved in industrial relations). The Conference is thus a forum for both discussion and negotiation at the same time.

This hybridisation is also reflected in the *legal nature of the standards* it adopts: they are conventions, expressing a compromise between interest groups, and their binding force is dependent upon a voluntary undertaking from the countries ratifying them; however, they are also, as Georges Scelle clearly identified, international laws, expressing rules of general interest, and their normative force is not based on reciprocal undertakings between those bound by them. They may have been drafted by representatives of the employers' and workers' organisations, but they are not binding on those organisations directly, as a collective agreement would be, but only indirectly, through national legislation which is subordinate to them in the hierarchy of norms.

Lastly, when it comes to the *application of its standards*, the ILO's supervision mainly consists of examining the regular reports which countries are required to submit on the measures they have taken to give effect to the conventions they have ratified (Article 22) and the comments made on those reports (or the absence of reports) by the social partners. The representations and complaints procedures also provided for in the ILO Constitution (Articles 24 and 26) have played only a relatively minor role, even though they have started to gain momentum in recent years. That the complaints procedures are effective is, however, clear from the success of the special procedure introduced in 1950 to ensure respect for freedom of association (Committee on Freedom of Association and Fact-Finding and Conciliation

Commission), although this is, admittedly, applied even without the ratification of the conventions on the subject.

This contrast between the fact that the ILO's founding principles are still enormously relevant today while its organisation and the means of action it uses are relatively out-of-date explains why there has been such intensive discussion about its standard-related activities over the last fifteen years or so, both among researchers and within the ILO itself. The more pressing the need becomes for social ground rules at global level, the greater the expectations are of the ILO, and the more obvious the limitations are of the system of standards inherited from 1919. So let us not deceive ourselves: the normative dimension has been, is and will remain at the heart of the ILO's activities, not just because it is its primary task under its constitution, but also because trade liberalisation (so-called "globalisation") is undermining national law and automatically increasing the need for transnational rules in all fields of human activity. So the question is not a quantitative one (should we have more or fewer standards?), but a qualitative one (what sort of labour standards do we need?). We can only tackle this question if we assess the deep-rooted transformations affecting the socio-economic and institutional context in which the ILO has to operate today. Discussions on this point could focus on five issues: the legitimacy of international labour standards, their binding force, their pluralism, their subject and their implementation.

1 – The legitimacy of international labour standards

The political context has changed profoundly since the end of the First World War. Then the ILO was made up of a small number of countries mainly from the same culture and covering most of the workers concerned by the ILO standards. Just as what was good for Ford was then considered to be good for America, so what was good for the industrial countries was considered to be good for the whole world. This idea is still around today, and many people still think that the only way forward for "under-developed" countries which have gained independence with decolonisation is for them to "develop" in line with the model adopted by the countries of the west and to espouse their system of values unreservedly. But the majority of the ILO Member States do not belong to the 'rich club', and workers in these countries are

demographically the most numerous and economically the most exposed to the effects of trade liberalisation. Furthermore, the development model represented by the countries of the west does not appear to be sustainable, particularly in terms of natural resources, so that these countries are themselves going to have to drastically change how they live and work together. This is why the universality of international labour standards can no longer be unilaterally dictated by the wealthy countries, as we saw during the debate on the social clause in international trade agreements. The legitimacy of international standards now presupposes that the values they express are genuinely shared by all cultures instead of being imposed by one of them. It was this attempt to establish legitimacy based on universal consensus which led the ILO to reiterate in its 1998 Declaration the fundamental principles and rights which lie at the heart of its standard-related activities.

However, the difficult thing about fundamental rights is knowing how to avoid the traps of absolutism and relativism, which are basically both just two different forms of fundamentalism¹: one messianic, the other identity-related. *Absolutism* treats fundamental rights as a new Decalogue, a text which the “developed” societies reveal to the “developing” societies, and it leaves the latter no alternative but to “catch up” and convert to the modern nature of human rights and the market economy combined. *Relativism*, on the other hand, considers that human rights are only suitable for the west, and would be incompatible with the values of other civilisations. This assumption that dogmatic corpora cannot be communicated tends to trap people in identity-based fundamentalism. What these two variants of fundamentalism have in common is that they give the “southern countries” the following alternatives: either to transform and abandon what they are, or to stay as they are and abandon the idea of transforming. Hence the success in some of these countries of political movements advocating a return to the roots of a pure identity that is actually entirely mythical, with all the psychological regression and social segregation that this produces.

¹ Protestant in origin, the idea of fundamentalism first referred to a doctrine which appeared at the end of the 19th century in traditionalist circles in America (adoption of the fundamentals in 1895). It advocates a literal interpretation of the Scriptures and is opposed to theological liberalism and the Social Gospel. This defence of a literal interpretation of the Scriptures is also seen in what we refer to today as Muslim fundamentalism, which rejects medieval legal thinking and the Doctors’ consensus technique as sources of law, adhering instead to the letter of the Koran and the Sunna.

If there is to be an opportunity to move away from these mistaken ideas, we need to *open up the interpretation* of fundamental rights to all civilisations, in other words we need to regard them as a common resource to mankind. Classifying them as a common resource takes account of the widespread recognition of the State as a model and that given to fundamental rights in international society. This was the idea behind the 1998 Declaration, which recalled “that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organisation to the best of their resources and fully in line with their specific circumstances”. But since the vast majority of States have formally subscribed to these rights and principles, the latter should not be given the one, single interpretation of the countries of the west. If it is to be held in common, a resource cannot belong exclusively to anyone. Making it available to all is the only way to respect each civilisation’s own essential nature without turning it in on itself. It is also the only way for the countries of the north to enrich their perception of the world with experience and knowledge acquired in the south.

We therefore need to think about how the fundamental rights and principles enshrined by the ILO might be defined and interpreted in the light of the experiences of all countries. Take the issue of child labour, for example. The ban on child labour is based on a value which is obviously universal: the fact that children deserve special protection because they are weak and because they need an appropriate practical and emotional framework to make them into responsible adults. However, expressing this value presents a problem when it involves projecting the western concept of work onto traditional societies which have no industries or schools. When an African farmer takes his son with him to look after the animals and passes on to him all sorts of knowledge about man and nature, he may be making him work, but the work is actually similar to schoolwork, which the west has never classified as work and which it imposes on its children in sometimes extremely harsh conditions. Banning such work in the traditional family may break the transmission of knowledge and values, particularly in a society where this transmission is largely oral and is not written down. Acting with the best of intentions, we are then merely accelerating the disintegration of social bonds and the rejection of all knowledge that does not bear

the modern western stamp. So the idea is not to ban child labour (otherwise we would have to close all the schools in the world), but to ban the exploitation of child labour and to recognise the many different forms of educational work to which all the world's children are entitled, since it is this work that makes them grow up into adults.

The same sort of analysis could be applied to the ban on forced or compulsory labour, which strictly logically should mean condemning the workfare programmes, or the fight against poverty, where this is defined by purely quantitative, monetary criteria which take no account of quality of life. One of the great merits of the concept of Decent Work is that it has refocused the emphasis on this qualitative dimension of the worker's life and it looks beyond ways of thinking that are the product of industrialisation. What we still need are suitable ways of defining on a case-by-case basis what this new concept of work, open to the full range of human experience, actually involves.

2. The binding force of international labour standards

The system of conventions binding only States might have been effective in a world where economic activity took the form of large companies employing homogeneous working communities under the protection of a country's domestic law. But the large industrial company model is no longer the reference model for economic strategists nowadays. The new element in how major companies operate is not the importance of international trade, but the fact that they have been liberated from the institutional framework of the State. Their model now is that of a global network in which individual functions (research, development, design, engineering, manufacturing and marketing) are organised on a transnational level. Viewed in this way, firms can no longer be reduced to a mere binary relationship between employer and workers. They involve not just managers and workers, but also shareholders, suppliers, sub-contractors and clients, whether real or virtual. Hence the dual shift which firms have undergone – from institutions to networks and from the national to the transnational – with symptoms with which we are all familiar: concentration on the company's main trade, outsourcing and insecure jobs for some of the workforce, the use of sub-contracting, workers facing international competition. We are thus coming back to

the primary meaning of the word “undertaking” (the action of undertaking), to the detriment of its secondary meaning (the institution carrying out that action). Instead of major companies being subject to States, they tend today to make States subject to them, and to force their national legislations into competition with each other. This then undermines the ILO’s system of conventions, for whose implementation the States and their national legislation are pivotal.

So the question arises: should we give these conventions a “horizontal” effect, making them directly binding on international economic operators irrespective of where they operate? A tentative step in this direction was taken with the adoption in 1977 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. But as we know, this was just an “invitation”, stripped of any binding force, addressed to governments, representative organisations and multinationals. A genuinely horizontal effect would mean that firms would have to answer for failure to comply with international labour standards before the courts of the States where those standards apply. At the moment the way in which the national courts refer to the ILO standards varies from country to country, and legal clarification on this point would be welcome. Giving the conventions a horizontal legal effect would mean that we could take a fresh approach to the whole issue of an international labour inspectorate, which could carry out investigations and publicise the most serious offences against the international social order, along the lines of what already happens with disarmament or nuclear safety, for example. The ILO already has considerable know-how in this sort of area, which it has acquired in the protection of freedom of association in particular. Its experience in the field of maritime labour would also be a great help, because this sector, with its flags of convenience, demonstrates very clearly the destabilising effects of using employment conditions as a competitive weapon, and the powerlessness of national legislations to ensure compliance with international labour standards.

We might also question the binding effect of the conventions in relations between States. At present the ILO conventions, unlike other international conventions, do not create a direct obligation between States which ratify them. Each State gives a unilateral undertaking to the ILO and is answerable only to the ILO for that undertaking, so that ratification by one single State is sufficient to ensure the

normative effect of a convention adopted by the International Labour Conference. Would it not be appropriate to give these conventions a proper synallagmatic effect, which would enable a State to object to the fact that another State had failed to comply with its undertakings in the social field, such as in the context of proceedings before the WTO, for example? Extending the conventions' binding force in this way would be likely to encourage States not to give in to pressure from businesses, such as when they urge States not to enforce effective respect for rights to representation and collective bargaining.

3. The pluralism of international labour standards

For a long time now the ILO has enjoyed a *monopoly* in international labour law, which has lent its standards considerable legitimacy. That monopoly has now disappeared, and we are seeing a huge expansion in the number of “international labour standards” competing with those of the ILO.

It would be useful to start by looking at the precise types of standards involved. First of all, there are those which *explicitly* describe themselves as such. They may emanate from the wealthiest nations, which make preferential economic treatment subject to their economic partners' (usually “less advanced” countries) compliance with minimum social rules which the wealthiest nations have fixed unilaterally (such as the *US Tariff Act* [Sect. 307] in the USA, or the *Generalised System of Preferences*). They may also go hand in hand with the creation of a single regional market among a number of countries. The European Union is the most advanced example here, with its “Community social law” overturning both internal legislation and ILO Conventions (as we saw when the Community judiciary declared that the aim of protection, which had been the justification for prohibiting night work for women, was outmoded). Lastly, they may be the result of a private initiative by NGOs, trade unions or businesses, which unilaterally adopt standards with which they intend to comply or enforce compliance using their own methods; this is the case with social labels, codes of conduct or some of the ISO quality standards.

Secondly, seen less often but much more binding, there are *implicit labour standards* which have developed alongside the liberalisation of the products and capital

markets. These too may be the result of national measures, regional economic unions or private initiatives. A few examples will give you some idea here. A State may forbid to take account of the working conditions applied by firms tendering for public contracts. Such a rule is not *prima facie* a labour standard, but it is *de facto* an incentive to reduce labour costs and thus to reduce job quality. The structural adjustment programmes that have to be complied with in order to obtain a loan from the International Monetary Fund are also not specifically intended to impose a certain level of labour law or social protection on an applicant country, but they nevertheless have greater weight in this field than concern about compliance with ILO conventions. As a final example, the international accounting rules to be observed by businesses offering an issue for public subscription heavily influence the employment policies of those firms, much more so than any ILO convention. The rules are drawn up by international authorities governed by private law and composed of experts who are, in principle, independent². They have been revised over the last twenty years or so to take more accurate account of firms' performance in terms of "value added", using indicators such as economic value added and the principle of "fair value", under which a share must be counted at the value in present terms of future revenue flows which it is expected to generate, in other words in practice at its market value on the day when the accounts are closed (known as instantaneous market value). The big problem for the head of the company, and the condition for him keeping his job, is to increase this value. Wages, on the other hand, are counted as outgoings, and drastically reducing them, particularly through job cuts, automatically creates "value" in this accountant's view of the firm. The volume and conditions of employment in the company are therefore dictated by these financial accounting rules. Can we devise a system of international accounting rules that would regard workers not merely as a cost, but also as a resource? Or that would take account of what economists call the firm's "negative externals", in other words the human costs which their management decisions impose on the community?

² The Financial Accounting Standards Board (FASB), whose rules (known as US GAAP) are observed by US companies, and the International Accounting Standards Committee (IASC), whose Accounting Standards Board (IASB) draws up International Accounting Standards (IAS). The IASC is a private foundation based in London and is currently chaired by the former chairman of the US Federal Reserve.

Generally speaking, the new methods of governance, whether public or private, make great use of quantifiable indicators (see Section 5 below). Various research projects on employment and unemployment indicators in particular have shown just how far the construction of these indicators was normative in principle. But all too often the fact that they were intended to be normative is not obvious, making value choices appear technical and objective and thus beyond question. For example, gearing public policy towards maximising the employment rate tends to mean that any sort of work is regarded as a job, and it thus encourages the deregulation of the labour market. These new forms of social regulation conceal serious dangers for democracy, since they are not based on a minimum balance of power between employers and workers. The principles and conventions on freedom of association and collective bargaining are designed to achieve this balance of power. However, representation and collective bargaining are nothing if workers do not have a genuine possibility of taking collective action. Yet while the rights relating to collective action remain strictly within the grip of national legislation, trade liberalisation has largely released the economic activities of company-owners from such legislation. This has been the source of serious imbalance, and could lead to a radical challenge to the process of globalisation and a return to violent identity conflicts. Since the Seattle conference in 1999, every meeting to do with the organisation of international trade has been the scene of violent demonstrations, showing how the very aims of globalisation have lost their legitimacy. It would be dangerous to ignore this disaffection, and the ILO risks falling into disrepute and becoming marginalised if it leaves it to others to fulfil the role of international social forum. We need to consider what standards will genuinely enable workers, as part of Decent Work in the broader sense, to take action on an international scale. The debate here should focus on the legal frameworks for strikes, at national or international level, and alternative forms of action to strikes, such as boycotts or information campaigns about firms' social policies, which can be powerful weapons in achieving the aim of Decent Work provided that they are governed by standards which prevent abuse.

The proliferation of implicit or explicit international labour standards also presents the problem of how they should be coordinated in an institutional context where the fact that the ILO is generally recognised as having a monopoly on regulating the social effects of globalisation tends to mask the fact that it does not actually possess

the main legal instruments required to do so. There are two questions here that might usefully be considered in greater detail.

The first is how to regulate conflicts between international labour standards. There is currently no mechanism for ensuring the primacy of the ILO's principles and conventions over other sources of international labour law, whether explicit or implicit. Since the WTO has declined to have any jurisdiction in this field and has recognised the ILO as the only international organisation in charge of the social dimension of trade liberalisation, the full legal impact of this must be realised. What it means is that any institution involved (States, employers' or workers' organisations) has the right to dispute any standard which is at variance with the standards and fundamental principles of the ILO. This requires an *ad hoc* judicial mechanism which can settle such disputes on a case-by-case basis and thus develop universally binding international social case-law. A procedural framework of this type would, for example, mean that the international legality of the aid schemes which northern countries grant their farmers could be challenged, since the methods used (export subsidies leading to price dumping) tend to ruin the working conditions and pay of farmers in the south.

Secondly, we need to consider how the ILO could strengthen the standards issued by other organisations where these are likely to help to achieve its aims. This particularly applies to standards from private sources, such as labels or codes of conduct, whose legitimacy and effectiveness could very well be strengthened if they were in some way accredited by the ILO.

4. The subject of international labour standards

When the ILO was set up, its standards largely dealt with industrial work in the countries of the north. The list of issues in the preamble to the ILO Constitution (hours of work, employment, unemployment, pay, freedom of association, etc.) and the over-representation on its Governing Body of "members of chief industrial importance" (Article 7) still show ILO's original orientation towards paid employment in the industrial sector. This economic target was also a geographical one, since this type of work was then mainly found in the northern countries. Of

course, it was very quickly accepted that this was not its only focus, and that the ILO's responsibilities extended to all forms of work, particularly agricultural and maritime work, which gave rise to a number of specific conventions. The development of standards in the field of social security very quickly expanded beyond the world of work to cover the whole of the population. However, until recently it was paid employment as it has developed in the industrial world that served as a reference for the standards adopted, and self-employment was taken into account only in the features it had in common with paid employment (particularly physical exposure to occupational risks).

The refocusing of the ILO's activities on the concept of Decent Work, which the ILO adopted as a target in 1999, marked a new departure whose full consequences in terms of standards have yet to be drawn. In taking a comprehensive view of work, the objective of Decent Work for all considerably extends its normative scope. The main subject of its standards is now no longer the international regulation of paid employment, but the establishment of international rules for productive work regardless of the legal form in which it is carried out. It is all about enabling "women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity"³, which means that productive work should give the worker certain rights and enable him to obtain "an adequate income, with adequate social protection"⁴.

This development is primarily a response to the *transformation in the ways in which businesses are organised*. In the "Fordist" model of centralised, hierarchical undertakings encompassing all aspects of the creation of a product, a clear distinction could be drawn between paid employment and self-employment. This distinction becomes blurred in the reticular model of economic activity that is most common today. In labour law the idea of legal subordination, of strict submission to a superior's orders, is gradually giving way to the idea of defined targets which are left largely up to the worker to achieve and which constitute impersonal evaluation

³ *Decent work*, Report by the Director-General to the 87th session (1999) of the International Labour Conference, Geneva, ILO, 1999, p. 3

⁴ *Decent work*, op. cit., p. 13.

standards to be applied both to the worker himself and to his boss. In commercial law, on the other hand, legal independence is in decline and company-owners are becoming subject to the collective disciplines of integrated production or distribution networks. In both cases, however, it is the same target-led management approach that is taking root. Instead of stable and extremely hierarchical collective forms of organisation, what we are increasingly dealing with are procedures for coordinating mobile individuals. New forms of man-government are thus being invented in firms, designed to subjugate individuals without depriving them of the freedom and responsibility that make them conscientious, inventive or productive. Hybrids of servitude and freedom, equality and hierarchy are being cultivated for which the structures of labour law are unprepared.

These developments are neither good nor bad in themselves. They could bring the best or the worst, all depending on how we control them. On the one hand they offer enormous scope for new forms of individual alienation. The traditional employee could at least just do as he was told and otherwise keep himself to himself. He was not expected to give his heart, his trust, his intelligence and his creativity to the company. All this is now being demanded of him, and he risks losing his sense of self to a degree that is unprecedented in the industrial world. On the other hand, however, forms of organisation which support individual freedom and autonomy are also a chance to emancipate workers, and may thus help to achieve the work liberation goals which the trade union movement has always had in its sights. After the liberal period characterised by the *liberation of work*, then the era of the welfare state characterised by the *protection of workers*, the time is perhaps right for labour law which targets *the emancipation of workers*.

If this is to come about, workers still need to be given ways of influencing the developments that are taking place, and the economic activities of undertakings need to be brought under appropriate rules for this purpose. The aim of Decent Work could help here, precisely because it transcends the diverse nature of labour relations. But the question is knowing how the aim of Decent Work could be translated into standards which encompass all forms of work. The failure of the draft convention on sub-contracting shows that this is not an easy question to answer in an Organisation founded on a binary vision of labour relations, opposing employers and workers. The changes will necessarily involve a review of the procedures for drafting the ILO's

principles and conventions, together with their content. It is not enough to ensure compliance with existing standards. We also have to consider the need for new standards adapted to the new international economic order. And we need to ask how we can ensure, when standards are being drawn up, that the interests of the new figures of the employed employer and the self-employed worker, integrated in a production or distribution network, are represented.

Gearing standard-related activities to the aim of Decent Work is also a response to the considerable development in the poorer countries of what is known today as the *informal economy*. In these countries much of the productive work, and sometimes even the majority of it, is carried out outside the legal and institutional framework officially in force. There is a subsistence economy, where poverty and insecurity reign. The very term informal economy is very woolly, since it can cover so many different situations, particularly in the links it may have with the formal economy. It does not necessarily always have to be seen as an area where rights are not respected, unless we identify lawfulness absolutely with the States' normative legal system. However, it nevertheless poses a major headache for the ILO. On the one hand, the work carried out in this economy is most often far from "decent", and it can cannibalise employment in the formal sector. The aim should therefore be to reduce the amount of work in the informal economy. But on the other hand, this work is the only means of support for a large number of men and women who, even if they are not earning a proper living from it, are at least surviving. If its eradication is not accompanied by an increase in employment in the formal economy, they risk being thrown into even greater destitution. The question is therefore how international standards might help to ensure decent work in the informal economy without jeopardising the survival of those for whom it is the only means of support.

5. The implementation of international labour standards

The final question mark today is against the *mechanisms used to apply* international labour standards. The procedure for examining the Member States' reports on the application of standards is suffering as a result of the increase in the number of

reports and the relatively formal way in which they are examined, which makes it difficult to prioritise the resulting observations. The changes made to deal with this (particularly the longer periods between reports on matters deemed to be less vital) have kept the system going without really asking whether it is relevant and whether the considerable resources which the ILO dedicates to it could be put to better use.

This method of supervision was very much in line with the “Kelsenian” concept of a normative system founded on the legislative sovereignty of the States and on a clear distinction between the content of the standard and its application. But this concept no longer corresponds to the new forms of normative activity which we can see developing at national and international levels around the notions of “governance” and “regulation”. The replacement of “rules” and “government” by “regulation” and “governance” is very much in line with the post-war ideas developed by cybernetics theorists, who combined *governance* (cybernetics comes from the Greek *kubernetes*: the pilot, the man at the helm) and regulation (inherent in any homeostatic system) in a global information and communication science that was supposed to warn us of entropic disorder. From a legal point of view, regulation appears to be an attempt to bring together the two opposing faces of the Standard which have existed in the west since modern science first took off. First there is the legal standard, which derives its force from a shared trust in the values which it is meant to express (order, justice, freedom, equality, private property, etc.); then there is the technical standard, which derives its force from the factual scientific knowledge which it is meant to represent.

Instead of subjecting labour relations to rules imposed from outside or else leaving them to the free play of power relationships between employers and workers, attempts are now being made to involve both sides in defining and implementing the rules needed to keep the labour market operating smoothly. This development forms part of a broader trend towards transforming sources of law, of which Community social law offers many examples (legislative agreements in Articles 138-139 of the EU Treaty; employment guidelines in Article 128; open coordination method in Articles 130 and 140) and which all combine the following to varying degrees: a statement of general principles or common objectives; the periodic evaluation of results on the basis of common indicators or criteria (benchmarking); and the use of new forms of collective bargaining. People no longer claim that rules for the common good can be

imposed from outside, but in contrast to the standard economic ideology, that does not mean that they accept that the general interest can automatically be served by allowing each person to pursue his own interest. In order to resolve this apparent dilemma, a normative framework is being introduced which forces those involved in the system not just to play an active role in defining and implementing rules for the common good, but also to contribute to their ongoing revision as lessons are learnt from their implementation. Alongside this development we are also seeing a transformation in our basic legal concepts: laws are becoming a relative standard, the purpose of which is determined by conventions preparing for them or implementing them; contracts, on the other hand, are becoming an instrument for subjecting the will of the parties to overriding imperatives.

This was the sort of step which the ILO took in 1998 when it adopted its *Declaration on Fundamental Principles and Rights at Work*, which requires all Member States to respect, promote and implement these principles in good faith. According to the Declaration, “in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organisation to the best of their resources and fully in line with their specific circumstances”. Hence the obligation for them to respect, promote and apply in good faith principles relating to the fundamental rights set out in the Declaration (freedom of association and right to collective bargaining; elimination of forced labour; abolition of child labour; elimination of discrimination in respect of employment and occupation). The Declaration has a “follow-up reporting” (rather than control) mechanism, whose strictly promotional role is to “focus technical cooperation efforts on helping countries achieve these principles and rights”. Provision is made for this follow-up reporting mechanism itself to be reviewed in the light of experience gained in its implementation.

We can see here all the ingredients of the sort of ideals of governance expressed in the political or economic field: the recruitment of individuals in the pursuit of freely undertaken goals, the establishment of an Authority responsible for ensuring that those goals are achieved, and a feed-back procedure allowing the goals to be adjusted to the agents’ capabilities as revealed in the light of experience. In this sort of model

standards are regarded as simple tools, as a means to an end, and compliance with the standards is not an end in itself. Laws are no longer a common sense reference for human action, but one of many instruments used for the rational management of the human condition. The theory of politics is thus reduced to a theory of power and how it is exercised, cleansed of all questions of legitimacy. However, reducing politics to power and the legal to the technical in this way is to misunderstand the normative factors involved in the new methods of governance. Far from becoming marginalised, normative activity lies at the very heart of the new systems of regulation: in the definition of objectives, the establishment of indicators to measure their achievement, and in the procedures used to monitor their achievement. The new and worrying aspect is that this is de facto normative activity which does not guarantee the sort of exchange of arguments involved in the drafting and application of legislation in a democratic system. It may therefore be the ideal vector for values which are no longer genuinely discussed. The structural adjustment programmes which the IMF has imposed on a number of poorer countries, often with disastrous results, as we have all seen⁵, are a good illustration of this type of drift. The problem for the ILO is not that it needs to avoid these modern forms of normative activity by confining itself to its current legal system. On the contrary, it needs to promote, in accordance with the principles which informed its constitution, a “governance” which genuinely respects democratic values and brings practical improvements to the lot of men and women at work.

This means in particular considering the “criteriology” which lies at the heart of governance. What procedures should be used to ensure that indicators and statistical categories are constructed on the basis of a genuine debate, taking account of all the interests involved? How can we ensure respect for the principle of democracy in the composition and operation of the regulatory authorities monitoring the targets established by those criteria ? Under what conditions might the ILO be looked on as the social regulatory authority on the international markets?

⁵ Cf. the report by J. Stiglitz *Globalization and its Discontents*, WW Norton, 2002, French translation *La grande désillusion*, Paris, Fayard, 2002

Finally, consideration would have to be given to the representations and complaints procedures. As I said in the introduction, although these procedures had been hardly used for some time, they have seen a remarkable increase over the last thirty years or so. This is a sign that they meet the needs of the new global economic order, and also of the moral and legal authority which the ILO has acquired. We need to ask how they can be improved and made more efficient, particularly if international labour standards are to be given a “horizontal effect”.

Conclusion

Far from undermining the ILO’s standard-related activities, the “globalisation” phenomenon is making it more necessary than ever. But while it increases the need for documents which can act as a common reference for labour relations throughout the world, at the same time it is also bringing about deep-seated changes in the context surrounding those relations. Labour relations are no longer about confronting two homogeneous and clearly identified social groups organised in a purely national framework under the aegis of the State. The diversification of work situations, the accentuation of the north/south divide and the erosion of national legal frameworks are all generating legal uncertainty, as the multinational companies have not been slow to notice. The voluntary standards developed by some major companies or private organisations are a symptom of rather than a response to this need for a reliable and universally recognised legal framework. The ILO is the only international body that can legitimately tackle this need, assess the current changes accurately and develop its normative system accordingly. This move is the responsibility of its constituents, which have already been given some important reports on the subject undertaken within the ILO. The modest but specific contribution of our group of experts should be to shed light on the evolution that has already started from a viewpoint outside the Organisation. It is not our intention to repeat, summarise or interfere in the debate within the ILO, or to look at its procedures in detail, but to help to place its standard-related activities in the wider context of the institutional changes affecting today’s world.

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