

A Very Personal View on the Role of the ILO

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Introduction

For several decades, I was closely connected to the International Labour Organization (ILO). My main objective as an expert advisor was to conduct and participate in missions of so-called technical assistance whereby the ILO helps member states resolve domestic problems related to international labour standards. These activities were a very rewarding experience in my professional life. They provided an insight into the domestic situation of the respective countries while shining a light on the functioning of the ILO, with all its strengths and weaknesses.

In a globalised world where the countries and the economic actors are closely interconnected – as the experiences in the COVID pandemic and the impacts of the war in Ukraine have shown – the role of the ILO as an international agency to develop and implement international labour and social security standards on a global scale has become more important than ever.

In this short essay, I first will briefly sketch the history and basic structure of the ILO. Then I will indicate the merits and deficiencies of standard setting as its main task and indicate the new soft law approach, before trying to describe the field of technical assistance based on my own experience.

The Development and Basic Structure of the ILO

The more competition in international trade became an issue, the more it became evident that social dumping might be an efficient tool to undermine fair trade between different countries. This coincided with the consequences of industrialisation, where the need to establish minimum standards to cope with the social question became evident. Therefore, it is no surprise that already in the 19th century, there were initiatives to push for international labour and social security standards guaranteeing a minimum level, which had to apply in each country. For example, in 1864, the International Working Men's Association was formed to protect, advance, and emancipate the working classes. In 1889, the first International Trade Secretariat was established. At the beginning of the new century, the International Secretariat of Trade Union Centres, renamed in 1913 International Federation of Trade Unions (IFTU), was founded in 1901. One year earlier, in 1900, the International Association for Labour Legislation (IALL), consisting of academics, politicians, administrators, and representatives of labour and of business, was formed.¹ In short: given the growing integration of the economy, the goal of developing

international minimum standards was supported not only by organised labour but also by representatives of business.

There were several international conferences at the end of the 19th and the beginning of the 20th century in which the idea of the establishment of an International Labour Organization (ILO) was promoted.² However, there seemed to be no chance for success. Dramatic events were required to realise this concept. »The two triggers for the creation of the ILO were war and revolution.«³ Specifically, the First World War and the Russian Revolution of 1917. The misery caused by the war led to the revolution and made it clear that international standards to prevent social catastrophes were of utmost importance. This explains why the founding text of the ILO was integrated in 1919 into the Peace Treaty of Versailles and its Part XIII became the Constitution of the ILO.⁴ It also explains why, in addition to fighting social dumping, the promotion of peace in the world by social justice and the prevention of revolutions by people living in miserable conditions have been the main goals of the ILO from the very beginning.

Given the Second World War, the Constitution of the ILO was restated in 1944 by the famous Declaration of Philadelphia. It was adapted »to the new realities and to the new aspirations aroused by the hopes for a better world«. This mainly meant to develop the ILO in two new directions, namely by stressing human rights as the basis for social policy and by better accounting for the need for international economic planning.⁵

Today, the ILO is based in Geneva and consists of 187 member states. Its most important characteristic feature is its tripartite structure. Different from all other international organisations, not only the governments of the member states are represented but also employers' associations and trade unions. Business and labour, together with the governments, are supposed to meet the ambitious task of this international institution. This is not only unique, but it also guarantees the involvement of those people who know social problems best.

It was not always easy to comply with this tripartism in practice. The precondition of this structure is the independence of trade unions and employers' associations. This, evidently, was not the case in communist countries in the era before the fall of the Iron Curtain, and it is still problematic in some countries

even nowadays. The question for the ILO in those cases was to either exclude those countries or to close both eyes and not insist on the independence of the actors representing business and labour. To be able to control the conditions in these countries, the latter alternative was chosen, even if it led to strong controversies. Nowadays, given the importance of climate change in the world of work, the question arises whether new actors – such as environmental organisations – should be integrated into the tripartite structure. So far, however, no steps in this direction have been taken.

The ILO is led by the Director General, who is residing in the International Labour Office in Geneva. This is an entity with a huge number of highly qualified experts in all areas that are relevant to the world of work. It is of utmost importance for the functioning of the ILO. The building of the International Labour Office also houses the best library for all fields related to the world of work. For me, it was, for many years, a sort of research paradise.

The International Labour Office has regional and sub-regional offices all over the world, which, despite the ILO's universal approach, are important to make sure that regional peculiarities are taken into account. There is close communication between the International Labour Office and the regional and subregional offices to make sure that the feedback from these offices flows into ILO politics.

The executive organ of the ILO is the Governing Body, which is composed of 28 representatives of governments of the member states and 14 representatives of employers' associations and trade unions. This shows that, despite the tripartism, the governments have a bigger weight than the representatives of business and labour. The term of office for the members of the Governing Body is three years with the possibility of re-election.

The heart of the ILO is the International Labour Conference, the so-called Parliament of Work, which annually takes place in Geneva during the whole month of June and gathers representatives of government, business, and labour of all member states. Its main task is to pass international labour standards (see below).

The member states are supposed to contribute to the ILO's budget according to their size and economic wealth. This implies the danger that powerful States may withhold the payment temporarily to push for certain

political strategies in the ILO or to resist strategies of the ILO. This, for example, was the case when the USA wanted to change the treatment of the communist countries within the ILO. This possibility of using the financial tool is definitely a latent danger for the ILO.

Standard setting

To understand what is so fascinating about the ILO, one must know its long-lasting history, whose origins date back to the 19th century. Due to this success story, I felt very privileged when allowed to work with this recognised prestigious institution. The key to understanding ILO's uncontested authority until today is its remarkable history.

The achievements of the ILO in standard setting are a success story that has lasted more than 100 years and cannot be overstated. Almost 200 conventions⁶ and even more recommendations covering all aspects of labour law and social security law are an impressive output.⁷ However, as impressive as the total number may be, it cannot be ignored that, in the last decades, the production of standards has been significantly reduced compared to the times until about the 1980s.

Conventions are categorised as international Treaties, even if they are not concluded merely by representatives of States but also by representatives of social partners. To become legally binding in the Member States, they must be ratified according to the rules of the individual States. Recommendations are legally non-binding instruments. They are passed to be a sort of guideline on how to apply a convention, which is often formulated rather vaguely. Another reason for passing a Recommendation is to indicate that there is a topic for which regulation is needed, but for which the majority of a Convention cannot yet be guaranteed.

A good example of the latter is Recommendation 204 of 2015 on the »Transition from the Informal to the Formal Economy«. Even if worldwide, mainly in Africa, Asia, and Latin America, more people work in the informal economy than in the formal economy, the ILO's focus was exclusively on the formal economy. Only a few decades ago, the ILO started to include the informal economy in its standard-setting agenda. This has already led to Convention 189 in 2011, together with

Recommendation 201 on »Decent Work for Domestic Workers«, thereby protecting at least one group of the informal economy. There is a big debate about whether formalisation of the informal economy can be the right approach or whether different concepts are to be developed for the informal economy. Since there is consensus that regulation is badly needed but there is not yet a majority reached on what exactly to do, it is too early for a Convention, but a Recommendation was passed to indicate, in a more general way, some possible modes of regulation in a future Convention.

The world of work has significantly changed during this long period in which the ILO has been occupied by standard setting. Therefore, it is no surprise that according to an assessment, which began in 2002, only 71 conventions and 73 recommendations are up to date. 54 conventions and 67 recommendations are totally outdated. For the rest, there are efforts made to update them.⁸ Sometimes, updating conventions cannot be achieved because one group of the tripartite system resists. This applies, for example, to Convention 158 on termination of employment whose up-dating is blocked by the employers' camp.

It would be too simple to merely look at the ILO's output of Conventions to assess the ILO's standard-setting activity. The question rather must be asked: what impact have these Conventions made in the Member States regarding working conditions? And here it turns out that things are getting very complicated, and many further questions must be asked: what about the ratification rate of the Conventions? What about the supervisory system of the ILO? And what about sanctions? Here, we shall see a whole lot of problems.

The ratification rate is not very promising. Overall, the member states' inclination to ratify is unfortunately rather low. This is particularly true for developing countries. The reason seems to be that they are afraid of competitive disadvantages in the case of ratification. Equally relevant is the governments' fear that with their insufficient infrastructure (administrative, judicial, etc.) they are not able to meet the requirements of the Convention. For this reason, 60 percent of ILO member states ratified less than a quarter of conventions and more than 20 percent of the member states less than one-tenth.⁹ This explains the contradictory behaviour of representatives of member states. They support a

Convention in the International Labour Conference for image reasons, but once they are at home, they think twice and do not ratify it. It should be added that this contradictory behaviour by Member States for image reasons might even apply to the act of ratifying itself. A very illustrative example in this respect is the very recent ratification of the Conventions C 29 and C 105 on the prohibition of forced labour by China. This leads to the next problem: implementation.

Whatever the ratification record may be, the bigger problem lies in the discrepancy between ratification and implementation in actual practice. Even if Conventions are ratified, it must be kept in mind that particularly in developing countries there is a lack of administrative and infrastructural preconditions to implement the stipulations of the convention. Monitoring mechanisms are only available to a limited extent. In many cases, trade unions are much too weak to function as monitoring actors. Governments quite often are not very much interested in implementation because they are afraid of losing out on foreign investments and short-term competitive advantages stemming from low labour costs and a low level of workers' rights.

This leads to the crucial question of the efficiency of the ILO's supervisory system. There are different committees for conducting the supervisory task. First, the Committee of Independent Experts on the Application of Conventions and Recommendations consists of 20 internationally renowned experts in labour law and social security law who are elected for three years with the possibility of re-election. Then, there is the Conference Committee on the Application of Conventions and Recommendations, which consists of 200 representatives appointed by the International Labour Conference and nominated by the governments and social partners of the Member States. Lastly, the Committee on the Freedom of Association specifically supervises the Conventions 87 and 98 on freedom of association and collective bargaining. It consists of nine members of the Governing Body, three of each group, and an independent chair. There are rather sophisticated procedures: the so-called reporting procedure, which is the typical case, and different complaint procedures, which play rather a minor role.¹⁰

The most important reporting procedure consists of reports by member states that have ratified the

respective Conventions to be delivered at regular intervals. These reports are subject to a purely technical, non-public examination by the Committee of Experts and can lead to requests if they are incomplete or unclear or to concerns or regrets when the committee discovers that the implementation may not be in line with the respective Convention. In the latter case, they may be passed to the Conference Committee,¹¹ which gives recommendations to the International Labour Conference. The International Labour Conference votes on the recommendations of the Conference Committee. However, it must be stressed that the Conference can only recommend action to the member states, not enforce it. There is no further legal effect. This pattern is called ›naming and shaming‹, based on the assumption that if a misbehaving member state is put in the limelight, it will quickly do everything to correct the situation just to improve its image. There are serious doubts about whether this is a realistic assumption.

There are further procedures that even involve special mechanisms of fact-finding.¹² Suffice it to say that in the very end, there are no consequences but again ›naming and shaming‹. Theoretically, claims could be brought to the International Court of Justice if both sides agree. This, however, has never happened.

Coming back to the reporting procedure, the lack of enforcement instruments is not the only problem. Problematic from the very beginning was the fact that the material for monitoring is provided by reports written by the member states themselves. They, of course, are not eager to put their countries in a bad light. Trade unions and employers' associations are entitled to cooperate in the production of these reports and to comment on them. This, however, does not mean the reports are any less problematic since these organisations are also often not eager to pinpoint domestic deficiencies. In addition, the workload is a problem. Every year, the Committee of Experts has to process around 2,000 reports within a few weeks, which does not allow for a profound examination.

Despite all my doubts on the efficiency of the supervisory system, it should not be underestimated. The Committee of Experts as well as the Committee on Freedom of Association have developed an impressive set of case law by way of interpreting the Conventions. Even if this case law struggles to have an external effect,

it cannot be denied that in many jurisdictions it serves as a point of reference and, thereby, may have an impact on shaping the legal structure in many countries. The European Court on Human Rights is an excellent example of such a practice. The reference to the case law of the committees also plays an important role in individual countries. In South Africa, the Constitution requires, for example, the courts to apply international law wherever it is appropriate. This opportunity is used very frequently.

In addition, the informal activities of the regional and subregional offices have to be taken into account. There is close communication with the respective member states, which often may result in a settlement implementing the International Labour Conference's recommendation despite the lack of enforcement instruments. This does not mean to give up the plea for a reform of the supervisory system;¹³ it only means that there are mechanisms at work that are not evident when only the formal system is considered.

The Soft Law Approach

Frustrated by the low ratification record at the end of last century, the ILO passed the well-known Declaration on Core Labour Rights in 1998. It contains the essence of eight conventions: Nr. 29 on forced labour of 1930; Nr. 87 on freedom of association of 1948; Nr. 98 on the application of the principles of freedom of association of 1949; Nr. 100 on equal pay for men and women for equal work of 1951; Nr. 105 on abolishment of forced labour of 1957; Nr. 111 on the prohibition of discrimination of 1958; and Nr. 138 on the minimum age for employment of 1973. They were transferred into the declaration focusing on freedom of association, prohibition of forced work, abolition of child work, and prohibition of discrimination, while Nr. 182, on the worst forms of child labour, was added in 1999. In its 110th session (2022), the International Labour Conference amended the Declaration by adding Health and Safety as a core labour right, thereby including the essence of Convention Nr. 155 of 1981 on Occupational Safety and Health and Convention Nr. 187 of 2006 on the Promotional Framework for Occupational Health and Safety.

At first glance, this declaration looks like a very positive innovation. All member states of the ILO are supposed to abide by these core labour standards no matter whether they have ratified the underlying conventions or not. The declaration has also greatly increased public attention towards these important rights. The media coverage is higher than ever before. The declaration even led to a significant increase of ratification of the eight core conventions to which the original version refers. The ILO as an international organisation has become better known, in the public eye it has climbed up into the league of global players like the World Bank, the International Monetary Fund, or the World Trade Organisation. It sounds like a great success story.

However, at second glance, some of the glamour might disappear. Above all, the declaration contains only a minimum level of human rights in the labour context, as even the ILO's Director General of that time, Michel Hansenne, has admitted. This impression is not significantly changed by the inclusion of health and safety. One wonders why the Conventions on social protection (Nr. 102 from 1952), on minimum wage, (Nr. 26 and 131 from 1928 and 1970) or protection against unfair dismissals (Nr. 158 from 1982), are amongst several of the missing provisions. This shows the ambiguity of the declaration: the selection of the core rights is arbitrary and establishes a hierarchy between important core labour rights and less important normal labour rights. The declaration as a mere mini-charter of fundamental labour rights is not sufficient to provide the necessary protection workers need, and it leads to a devaluation of all the other topics not contained therein.

There is a second impact of the declaration, which is perhaps even more problematic. If a member state ignores the declaration, no sanctions – not even naming and shaming – are incurred. The follow-up procedure contained in the declaration focusses on the reason why a member state is not living up to these core labour rights and offers financial and technical assistance to enable the respective member state to do better in the future. I am not saying that this is a bad idea. I simply want to highlight that this is a change of paradigm in the ILO's strategic concept. The basic task of the ILO from the very beginning was standard setting, elaborating binding rules combined with sanctions in

case of violation, even if there is a big question mark concerning the ILO's supervisory and sanctioning system as sketched above. The problem here, however, is not the quality of the sanctioning system but the fact that the hard law approach is given up in favour of a soft law approach.

The declaration was only the beginning of this paradigm shift in the ILO's strategic concept. It has been significantly extended under the leadership of Director General Juan Somavia, who invented the ILO's decent work agenda. The decent work agenda¹⁴ defines a coherent and comprehensive framework for the activities of the ILO. The same is true for the follow-up declarations. In particular, the declaration on social justice and fair globalization of 2008, a declaration on recovering from the crisis, a global jobs pact of 2009 up to the centenary declaration for the future of work of 2019.

All this is meant to be a highly sophisticated strategy not focusing on short-term effects but on a change of infrastructure of the member states as well as on the actors' involvement in the long run to pave the ground for decent conditions in the labour market. This whole agenda is primarily meant to build up consciousness all over the world for the necessity of reforms. Just to clarify, I am not suggesting this is a bad thing. I simply want to draw the readers' attention to the fact that the decent work agenda is not primarily focusing on binding rules being sanctioned in case of violation but that it is a political agenda stimulating important discussions all over the world. There is no doubt that the decent work agenda in the public perception has significantly increased the ILO's image as an important global player. But at the same time – and here lies the problem – it has also strongly promoted the soft law approach. Of course, the setting of legally binding standards is still playing an important role. But in the public perception, it is no longer as dominant and strong as it was.

Technical Cooperation and Assistance

The General Pattern

While not as well-known as legal standard setting, technical cooperation and assistance is an equally

important function of the ILO.¹⁵ The idea is to help member states optimize their factual conditions, their infrastructure, in particular the judicial system and the administration, to be able to live up to international labour standards. ›Capacity Building‹ is the catchword which in my view best describes what is supposed to be achieved in such missions.

The International Labour Office together with the regional and sub-regional offices has established a huge network of experts all over the world. They are drawn from different fields (law, sociology, economy etc.) and are potential actors to participate in missions. Such missions are conducted only at the request of the countries in question. The experts for such missions are chosen by the ILO based on proposals by and in close communication with these countries.

Missions may be conducted by a single expert or by a team. Such teams often are multi-disciplinary. It is important to stress that all such missions are integrated into the tripartite context: This means that the actors of such missions, be it a single person or a team, must cooperate with the government, trade unions, and employers' associations, trying to find an adequate balance. This can be very difficult, in particular when either the relationship between employers' associations and trade unions is rather hostile and not at all based on the spirit of social partnership or when this hostility applies to the relationship between government and trade unions.

The terms and conditions of each mission are defined by the ILO in cooperation with the receiving country. It is very important for those who conduct such missions to be able to refer to these terms and conditions as point of reference in case of conflict either with the actors of the country or with the ILO. Sometimes these missions last only a few weeks, sometimes they extend to several months. It just depends on the specific task.

Technical cooperation requires a profound knowledge of all aspects of the country in question, of its history and culture, the political system, the economic and social situation, the mentality of people, the institutional structure, the relevant actors, of bad and good experiences in the past, etc. It is almost impossible to be adequately prepared for such a task. Shortcomings in this respect, however, easily lead to errors and mistakes.

In this context, the excellent briefing by the staff of the International Labour Office in Geneva, which takes place before each mission, is of utmost importance. The specialists for the destination in the Office share all their knowledge with those who go on missions. Thereby, people chosen for a mission not only get a comprehensive and profound insight into the particularities of the respective country but also get to know everything about the persons, the politicians, the trade unionists, and the employers that they will meet and to negotiate with. This briefing is an important precondition for conducting a mission successfully.

On the missions, the government of the receiving country provides all technical assistance (office, car, driver, etc.) one needs to perform the task. The ILO provides people on missions with a ›laissez-passer‹, which guarantees that one can leave the country if it becomes dangerous. I have to admit that this has significantly helped me feel significantly safer and once to ignore a curfew in the capital of Sudan.

Examples of My Own Experience

To illustrate such missions in a bit more detail, I will briefly sketch some of those I conducted. Of course, I cannot go into any details. My intention rather is to describe some characteristic elements. For this purpose, I chose the missions I conducted in Zambia (1983 and 1985); in Sudan (1987); in Trinidad (1988); in South Africa (1994); and finally the missions in Bulgaria (1992 / 2006) and Romania (2004).

After liberation from the colonial power, the former North Rhodesia became Zambia. As far as labour law and industrial relations were concerned, the new state started with a problematic strategy. It established a workers' participation system of a German type to initiate economic success without changing the traditional British collective bargaining system. The driving idea of this move was to bring about an economic success story, similar to the one experienced by Germany after the war. For anybody familiar with the mechanisms of comparative labour law, it was evident that the Zambian solution could not work. After a while, the Zambian government also became aware of the problems arising from this marriage of two patterns

which are incompatible if they are not carefully adapted to each other. Therefore, Zambia asked the ILO for an expert mission. I was chosen by the ILO. But I was not alone. Because Zambia had strong ties to communist countries in the early eighties, the country's president Kenneth Kaunda insisted that there should be a second expert from Yugoslavia, where they had a model of socialist self-government of companies. I was joined by Prof. Grozdanic from Belgrade, a colleague with whom I had a very friendly relationship, even if we worked separately.

My task was to analyse failures, investigate the practical functioning of different companies, discuss my analysis with representatives from the government, trade unions, and employers' associations, and finally write a comprehensive report with suggestions for reform to be given to the ILO. I discovered many reasons for the problems with the works council system. There were many deficiencies (among them a huge amount of illiteracy among the members of these bodies) that turned these bodies of workers' participation more or less into alibi institutions, weakening the collective representation of employees as a whole. My report was turned into an official ILO report to be submitted to the actors in Zambia. This was a so-called long-term mission lasting several months.

Though I eventually succeeded in cooperating with all actors, this was not a foregone conclusion. Upon my arrival, president Kaunda, who dominated the country, wanted to prevent me from meeting Frederick Chiluba, the powerful leader of the trade unions (and later president of Zambia) who was just coming out of prison. I was successful in staving off this interference from the president because experts of the ILO have high authority as international agents, not promoting the interests of an individual country. And I felt safe due to my ›laissez-passer‹.

It took two years until a high-level meeting on the report took place in Lusaka, composed of all relevant actors of Zambia, top officials of the ILO, and me. Even if I could put aside all obstacles for my investigation and even though my report was highly appraised by the whole group, it did not lead to the changes I suggested. The same happened to my Serbian colleague Grozdanic. We both had to learn that it is extremely difficult to overcome vested interests in an established system. Too

many important actors in the country were profiting from the dysfunction.

To give an impression of the political climate in Zambia during my mission: I accepted an invitation from the University of Lusaka to give a lecture on a labour law topic. Then, Kaunda asked me into his office, telling me that either I cancel the lecture or leave the country. He was afraid that the event could be used to attack the government, so I had no choice but to retract from holding the lecture, giving fake reasons to the university for which I was ashamed, even though my colleagues at the university understood quite well.

In the eighties, I had to conduct two different short-term missions of several weeks in Sudan and in Trinidad. In Sudan, there were ongoing conflicts in the railway system between the workforce and management as well as within the workforce. Therefore, the government of Sudan asked the ILO for an expert to find out whether it might be possible to overcome such conflicts by introducing a system of workers' participation. My investigation quickly found out that no such system had any chance, and that the reasons for these conflicts were elsewhere. It became clear that these were ethnic and religious conflicts that could not be resolved by any system of industrial relations. At least I succeeded in convincing the actors in Sudan as well as the ILO of this result.

The mission in Trinidad was of a very similar type. This time the idea of Trinidad's government was to eliminate the increasing ethnic conflicts between Black employees and Indian supervisors, again by a system of workers' participation. It quickly turned out to be a futile hope. But at least I had many discussions with the employees and supervisors and, thereby, I could act as a mediator in ongoing conflicts, using the authority of the ILO. So, the mission was not totally useless.

My missions in Bulgaria and Romania in the early nineties and shortly after the turn of the century were of a very different kind. They were embedded in the restructuring programs of these countries, being transformed from a communist system with a planned economy into a democratic society with a market economy. So, my first mission in the early nineties was based on advice on how to restructure industrial relations, how to define the role of trade unions, and how to build up employers' associations. The

new system was then still in a very embryonic stage. Therefore, only possible options could be discussed. The main purpose of the mission was the establishment of trust and confidence in the ILO as a partner for ongoing communication on these matters.

The missions to Bulgaria and Romania in the first decade of the new century were conducted directly with the regional office in Budapest, not with the central office in Geneva. This shows that the regional offices have far-reaching power on their own, including an independent budget. In both cases, I had to investigate whether a specialized labour court system would make sense and might be recommendable for these countries. Both countries faced the same problem: the judicial system still lacked full independence. In both countries, the social partners were very eager to establish such a system, in particular given participation of lay judges coming from their ranks. However, it turned out that in both countries this plan had no chance. In Romania, the main obstacle was the strong resistance by the professional judges of the existing court system. And in Bulgaria, the idea had no chance because of the lack of necessary finances.

I would like to end the snapshots of my activities by describing my by far most important mission in the mid-nineties: the participation in the elaboration of the Labour Relations Act in South Africa. In the course of transforming the country from the dark era of Apartheid into a modern democracy, the reconstruction of labour law was an important topic on the agenda. A drafting team, composed of representatives of the South African government, social partners, and scholars was appointed by Tito Mbowweni, Minister of Labour in the cabinet of Nelson Mandela. The ILO was asked to assist by three experts. These were Bob Hepple from the UK, Anthony Adigun from Nigeria, and myself. I had already attended seminars and symposia in South Africa after the end of Apartheid. For this reason, I had some experience in the country and was well-known by the scholarly community of labour law. We closely cooperated for several months with the drafting team, partly in South Africa and partly on the premises of the International Labour Office in Geneva, where we also could use the excellent library and consult the highly skilled staff.

The terms of reference for our task were far-reaching and ambitious: to eliminate racial heritage,

to adapt labour law to fundamental rights in the new constitution and international standards, to develop a structure which balances social protection and economic efficiency, to improve the conditions for foreign investment, to settle conflicts of distribution no longer on company level but on centralised level (branch), to create instruments to absorb conflicts, to establish cooperation between actors, and to establish quickly working mechanisms of conflict resolution.

Just to indicate the chances as well as the difficulties of this exercise, I would like to select some topics from the comprehensive draft that was developed. It was very easy to adapt everything to international standards. All groups represented in the drafting team wanted to get rid of the Apartheid image. It was much more difficult to promote the new pattern of collective bargaining, changing the bargaining levels from company to branch. And it only succeeded to a certain extent, company bargaining is too deeply rooted in the country and, therefore, still plays a role in actual reality.

Problematic was the topic of conflict resolution, simply because there were not many possible judges who had nothing to do with the system of Apartheid. Therefore, the important innovation in our drafting was not so much the introduction of specialised labour courts but a Commission for Conciliation, Mediation and Arbitration (CCMA), which is supposed to be a filter before judicial control and for which the necessary personnel can be trained quickly. This CCMA has become a real success story until today.

Since, due to the terms of reference, we were asked to »establish cooperation between the actors«, we introduced a body of worker participation, which we named »workplace forum.« The notion of a »works council« was no option because it was abused in the Apartheid period. The »workplace forum« is a body representing all employees and supposed – without going into any detail – to participate in management's decision-making.

The »workplace forum« has remained unfortunately law in the books but not in action. We underestimated the resistance by trade unions who were afraid of a competitor at the workplace where they defend their monopoly and their privileges. We also underestimated the resistance of the employers who wanted to maintain their prerogatives in decision-making. Despite our

good intentions, no spirit of cooperation between business and labour has been created. The situation is as conflictual as it ever was. However, given the present desperate economic situation, the voices to finally vitalise the »workplace forums« are becoming louder.¹⁶

Evaluation

Technical cooperation and assistance only have a chance to be successful if the experts of the ILO have a clear picture of the situation of the respective country before the mission. Such knowledge is acquired by the International Labour Office in Geneva in close and permanent communication with the regional and sub-regional offices. The experts profit from this knowledge by a comprehensive briefing in the International Labour Office before starting a mission. Of course, this does not replace the experts' studies but excellently complements them. On this basis, technical cooperation and assistance can be conducted. Since it helps to improve the infrastructure of respective countries, it shapes the conditions for the implementation of labour standards and, thereby, is closely linked to standard setting.

Of course, missions in this context are not always a success story. As the Zambian example demonstrates, vested interests may in the end be stronger than reform perspectives. And as the Bulgarian and Romanian cases show, there might be serious obstacles to establishing innovations. And sometimes, the countries' assumptions and expectations of what can be achieved by labour law and industrial relations are utterly naive and unrealistic, as the examples of Sudan and Trinidad indicate. Nevertheless, all these missions have value. They help to maintain and improve the link between the nations and the ILO, thereby paving the ground for further cooperation. This personal exchange of views cannot be overestimated.

The South African example shows that even on a generally very successful mission, failures and misperceptions cannot be eliminated, as the »workplace forums« demonstrate. This has important implications: innovations created in such missions in all modesty are to be understood as experiments to be corrected if necessary. And the possibilities of legal reforms should

not be overestimated. As the example of the »workplace forums« shows, long-lasting hostility cannot simply be tuned into a spirit of cooperation and partnership by legal patterns. Such a turn would require further changes in the cultural, economic, and political environment.

Conclusion

The ILO's predominant task has always been and still is standards setting. Legally binding international rules are needed more than ever. The trend to escape into soft law patterns certainly does have its merits. The agenda on decent work has been and still is stimulating discussions worldwide on what labour law, social security, and industrial relations should look like. However, this strategy should not replace the elaboration of legally binding standards as the main activity of the ILO.

As has been indicated in this short essay, technical cooperation and assistance are closely related to standard setting. The main problem for implementing international standards into actual practice is the deficiencies of infrastructure in many countries. Technical cooperation and assistance are appropriate ways to detect such deficiencies and help the countries overcome them. The ILO only has a chance to implement the international standards efficiently if it stays in close cooperation with the member states. And the member states know where to go when in need of assistance. In this respect, cooperation and informal patterns may often be more important than the formal structure of the ILO.

All this should not deny the need for structural reform in the ILO to make its supervisory system more efficient. Of course, there is not only the need for structural reform, but the ILO also must find answers for the enormous challenges which affect working life in the 21st century, from technological innovations such as digitalisation to the fight against climate change.¹⁷

- 1 For the development in the 19th century and the early 20th century, see Gerry Rodgers et al.: *The ILO and the Quest for Social Justice 1919–2009*, Geneva ILO 2009 pp. 3–6.
- 2 For details, see Jean-Michel Servais: *International Labour Law*, 5th ed., Wolters Kluwer 2017, pp. 22–24.
- 3 G. Rodgers et al.: *The ILO*, p. 2
- 4 For details, see Servais: *International Labour Law*, pp. 24–26.
- 5 For today's relevance of this Declaration, see Alain Supiot: *The Spirit of Philadelphia. Social Justice vs. The Total Market*, London 2010.
- 6 See on the impact of these conventions Antonio Ojeda-Avilés: *Transnational Labour Law*, New York 2015, pp. 103–107.
- 7 See for a comprehensive overview of the ILO's standard setting activities Neville Rubin (ed.): *Code of International Law*, 2 vol., Cambridge 2005.
- 8 Bob Hepple: *Labour Laws and Global Trade*, Oxford/Portland 2005, p. 63.
- 9 Hepple: *Labour Laws and Global Trade*, p. 35.
- 10 For all these procedures, see Hepple: *Labour Laws and Global Trade*, Oxford/Portland 2005, pp. 304–313.
- 11 In so called »double footnoted« cases.
- 12 The procedure for »representations« under Art. 24 and 25 of the Constitution, the »complaints« procedure, which is only open to delegates of the International Labour Conference (Art. 26 ff Constitution) and the Fact-Finding Investigation.
- 13 See already Manfred Weiss: *Some Reflections on the Future of the ILO*, in: *International Labour Office, Visions of the Future of Social Justice. Essays on the Occasion of the ILO's 75th Anniversary*, Geneva 1994, pp. 313–316.
- 14 See Rodgers et al.: *The ILO*, pp. 222–235.
- 15 For a comprehensive assessment of the technical cooperation, see *International Labour Office: Report VI on the Role of the ILO in Technical Cooperation: Promoting Decent Work through Field and Country Programmes*, Geneva 2006.
- 16 See Clive Thomson: *Co-operation in the Workplace. The South African Flag Never Unfurled*, in: Marius Olivier / Nicola Smit / Evance Kalula (eds.): *Liber Amicorum Manfred Weiss*, Cape Town 2021, pp.168–182. Also Johann Marée, in: Olivier et al. (eds.): *Liber Amicorum Manfred Weiss*, Cape Town 2021, pp.183–197.
- 17 For the challenges the ILO is confronted with in the future, see in particular *ILO Global Commission on the Future of Work: Work for a brighter Future*, Geneva 2019. And Alain Supiot: *The Tasks Ahead of the ILO and its Centenary*, in: *International Labour Review* (2020), pp. 117–136.

Abstract

The article sketches the history, the structure and the function of the International Labour Organization (ILO). In the first part the focus is on trans-national standard setting. There not only the merits and specific problems, concerning in particular the implementation of trans-national labour standards, are described but also the implications of the shift from hard law to soft law are discussed. The second part is devoted to technical cooperation. Here the author's own experiences serve as illustration of the big variety of such cooperation. It can be shown that successful technical cooperation is a precondition for successful standard setting.

About the Author

Manfred Weiss born 1940. Full Professor for labour law and civil law since 1974 in Hamburg, then at the Goethe University Frankfurt. Professor emeritus since 2008. Visiting Professor in many universities all over the world. President of ILERA (2000–2003) Deputy President of German Lawyers' Association (DJT) (1998 – 2002). For many years consultant to the ILO since 1980 and to the Commission of the EU. Bob Hepple Award of the Labour Law Research Network (LLRN) for lifetime achievement. Fellow of the World Academy of Art and Science (WAAS). Several honorary doctorates and Order of Merit of the Federal Republic of Germany.