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## Conference Report of the Symposium „Challenges to the ILO in the 21st Century: On the Future Role of a 100 Years Old Organisation”

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On the 25<sup>th</sup> May 2019 a Symposium was held at the Max Planck Institute for Social Law and Social Policy in Munich to bring together academics and practitioners to commemorate the centenary of the International Labour Organisation (ILO). The Symposium afforded the participants the opportunity to celebrate the unique role that the ILO has played in the formalisation and expansion of social security protection since its founding as part of the Treaty of Versailles in 1919 and to discuss which facets of the organisation have proved instructive and therefore worthy of reinforcement and/or imitation. Building on this understanding of its historical successes, the Symposium also explored how well-positioned the ILO currently is to meet those challenges that are mounting in a fast-changing world of labour where the setting up of universal standards is becoming increasingly difficult. Namely, how will it deal with shifts in industrial relations that are precipitated by digitisation, the rise of the platform economy and atypical employment and what can the ILO do to ease the tensions created by migration. Specifically, how will it support integration, ensure the recognition of migrants’ social rights and protect them from discrimination. In view of these aims and considering both the various challenges outlined above and the organisational structure of the ILO, the fundamental question that motivated the following contributions amounted to this: “Is the ILO well-positioned to meet future demands?”.

In his introduction to the Symposium, Professor Andreas Hänlein (University of Kassel) was the first participant to grapple with this underlying theme by discussing a number of contemporary examples from the field of the international regulation of labour. These served to introduce some of the key issues that have arisen at this stage of the ILO’s history, including the relationship between the ILO and other international organisations and between ILO Conventions and pertinent Human Rights instruments. In this respect, the cases of *Demir and Baykara v Turkey* and *Enerji Yapı-Yol Sen v Turkey* were taken as positive instances that demonstrated how several ILO Conventions had been fruitfully considered by the European Court of Human Rights in order to concretise the Court’s interpretation of the right of civil servants to organise and to strike. Similarly it was noted that it has now become customary for the Strasbourg Court to take into account the opinions of various committees of the ILO in its interpretation of Article 11 of the European Convention on Human Rights (ECHR). Another matter that Hänlein raised was the distinction between the legal and political dimensions of the ILO’s activities. Specifically, he emphasised how the legal character of the ECHR, combined with the invocation of ILO instruments, has enabled local players to play more prominent roles within their respective political systems. We will see that these significant issues – the relation between the ILO and other organisations and the distinction between the legal and the political dimensions of its work - resurface in a variety of forms below. However, the specific form in which Hänlein addressed them was able to demonstrate the existent positive influence of the ILO - and thus also how high the stakes are in ensuring its continued relevance - at the outset of the Symposium.

The remaining participants built on this foundation by exploring a number of different themes. Professor Christian Walter presented a historical perspective, focussing on the ILO’s development and particularly on its role in the institutionalisation of international law and on the parallels that could be drawn to the development of modern human rights protections. This was followed by the presentations of Professors Angelika Nußberger and Anuscheh Farahat, which considered how social security law could best be utilised to further the inclusion of migrants in our societies. The former provided a detailed analysis of the jurisprudence of the European Court of Human Rights as it pertained to this matter, while the latter reviewed the development of social protections for migrant workers in international law. The implicit juxtaposition of regionally specific issues and international resolutions

that these presentations had introduced was then picked up and considered explicitly by Professor Letlhokwa Mpedi, who reviewed and evaluated the ILO's influence on the development of South African labour and social security law. In the final section of the Symposium Professor Ulrich Becker and Dr. Francis Maupain both focussed on those future challenges that the ILO will have to face moving forward, but which may also provide crucial opportunities for the organisation to demonstrate its continued efficacy and legitimacy. The former was able to develop reform-proposals for the ILO on the basis of a substantive analysis of those issues emerging for social security systems across the globe. By contrast, the latter's proposals were primarily of an institutional nature and were based on a comprehensive understanding of the normative underpinnings of the ILO and how these must be effectuated in our changing world.

The convenors of the Symposium were Professors Ulrich Becker, Angelika Nußberger and Andreas Hänlein.

## **The Historical Perspective**

### **Implementing Rights at Work and Human Rights: A Comparative Perspective on the Role of the ILO Committee of Experts and Human Rights Treaty Bodies**

Prof. Dr. Christian Walter, Ludwig Maximilian University Munich

Walter's contribution emphasised the early role of the ILO in institutionalising international law and the parallels that could be drawn between the implementation of rights at work through the ILO and the development of modern human rights. Regarding the former, it was emphasised how the formation of the ILO in the Treaty of Versailles had been an important step in the institutionalisation of rights at work and that the subsequent characterisation of these founding articles as a 'constitution' provided an important stimulus for the recognition of international law as a distinct discipline and for its further formalisation. Regarding the latter, Walter examined the institutional character of the ILO and the way in which it provided a framework for the protection of rights at work. More particularly, in the ILO's case such protection was promoted through its ability to impose obligations, albeit limited ones, on member states and through the use of a variety of surveillance and enforcement mechanisms. Modern international human rights institutions have adopted some of these features. For instance, parallels can be drawn between the role afforded to state reporting in the United Nations Human Rights Council's Universal Periodic Review Mechanism and the ILO Committee of Experts' periodic monitoring of government reports. Indeed, these comparisons even extended to the way in which these institutional mechanisms had been realised, in that in both cases a thin legal basis was identified in the founding documents of the respective institutions to justify their creation. However, Walter also critically evaluated the transposition of these mechanisms and came to the conclusion that there were significant remaining deviations that in fact limited the effectiveness of the transposed institutions in the human rights context and their potential to play a legitimating role. Thus, while it was especially the ILO's tripartite structure that encouraged substantive negotiations between different stakeholders and ensured the practical effectiveness of its review mechanism, this was not adopted in the sphere of human rights. In the latter case the favoured composition remains one based solely on state delegates. Similarly, the fragmented nature of human rights reporting under the United Nations' system, stemming from a proliferation of treaties and reporting committees, also still contrasted unfavourably with the more unitary approach of the ILO.

## **Managing Inclusion**

### **International Social Standards and the Protection of Migrants**

Prof. Dr. Dr. h.c. Angelika Nußberger, European Court of Human Rights and Prof. Dr. Anuscheh Farahat, Friedrich Alexander University Erlangen-Nuremberg

Nußberger examined how the European Court of Human Rights has begun to assume a more prominent role on issues of migration and especially how it has now authoritatively guaranteed migrants, including asylum seekers, certain social protections. This included an elaboration of how, since *Budina v Russia*, Article 3 ECHR was recognised by the Court to guarantee, at least in principle, a right to have state support meet a minimum subsistence level for those wholly dependent on it. This right was then later invoked in the consideration of the living conditions of asylum seekers in Greece in *M.S.S. v Belgium and Greece*; leading the court to reiterate that a failure to provide those vulnerable and reliant on state support with sufficient resources to avoid destitution and extreme poverty constitutes a violation of Article 3 ECHR. Thus such protections were upheld when the applicant was an asylum seeker and even when they had potentially profound implications for the ‘Dublin System’ underlying European asylum policy. Moreover, a further substantiation of the social rights of migrants and asylum seekers under the Convention had followed very recently in the case of *France v Khan* where the Court found that French authorities had breached Article 3 ECHR through their failure to take sufficient steps to ensure that an unaccompanied minor had sufficient care and protection. These protections flowed from Article 3 ECHR even though it was the minor’s intention to travel and seek asylum in another European country, the United Kingdom.

In the ensuing discussion several further points were considered. The first aspect that the participants explored was the extent to which the European Court of Human Rights’ protection of social rights was complicated by the institutional fragmentation of protections at the transnational level. In this regard, Nußberger acknowledged that this state of affairs did entail certain limitations and recounted the case of *Lambert and Others v France*. Here the decisions of authorities and courts had already been divergent at the national level and had then involved further appeals to a range of international bodies, including the European Court of Human Rights. In spite of a national decision subsequently being taken in line with the Strasbourg Courts’ pronouncement, the most recent development involved the Court of Appeal of Paris again reversing this decision, pending a review of the case by the United Nation’s Committee on the Rights of Persons with Disabilities. Another point that arose in discussion was that the Court had to be cognisant that the areas of social protection and of migration are widely perceived as matters of policy to primarily be dealt with autonomously by the different signatory states and that there may be significant push back to attempts by the Court to establish protections that could be perceived as too intrusive into the states’ discretion in these matters.

A complementary presentation was given by Farahat in the form of a critical historical review of the international development of social protections for migrant workers and the influence that the ILO has had on these since the Second World War. In this respect, she utilised a historical appraisal to suggest that we need to move away from an approach that merely aims for the transformation of immigration societies and focuses on “legal” migration and towards one that prioritises the concrete realisation of effective minimum standards for all migrant workers. Elements of the former defective approach could be found in ILO Convention 143 on Migrant Workers and the United Nation’s Migrant Worker’s Convention (UNMWC). Convention 143 mostly focussed only on regular migration and while the UNMWC contrasted favourably with this by including all migrants, it nevertheless failed to afford them many “hard rights” and importantly also suffered from a total lack of ratification by the destination countries. Another recommendation of Farahat turned on the need to change and diversify the ways in which migrant workers can participate in organisations such as the ILO in order to prevent marginalisation and to address specific vulnerabilities. This was illustrated through an examination of the situation of domestic workers. In this group the often informal nature of the work meant that, historically, opportunities for organised representation had been lacking, including representation in

the tripartite system of the ILO. This kind of work requires a more flexible form of representation, calling for instance for the inclusion of more stakeholders and NGOs. Lastly, in addition to outlining a range of specific steps to address some of the outlined difficulties – including the regulation of private recruitment agencies or the requirement that there are written offers and conditions of work – Farahat also proposed a more foundational solution. Namely to institute a comprehensive human rights-based approach that would be broad enough to address these marginalised groups. For instance, the right to a representation in a union would lay the groundwork for a more inclusive and effective representation of informal workers through the tripartite system. Such an approach would importantly also move us beyond seeing the relevant individuals as merely migrants or workers, but rather as fellow humans.

## **The Regional Impact of a Global Organisation**

### **The Influence of the ILO on the Development of Social Security and Labour Law in South Africa: A Critical Review**

Prof. Dr. Letlhokwa Mpedi, University of Johannesburg

In his presentation Mpedi covered both the historical association between the ILO and the South African development of labour and social security laws and the kinds of reform that will be necessary as we proceed through the fourth industrial revolution. Mpedi began by exploring the former, indicating the different kinds of influence the ILO has had on South African law in different historical periods. In this respect it was notable that South Africa had been a founding member of the ILO and that this gave rise to a close relationship that enabled the organisation to play an influential role in the development of South African social security law. For instance, the relatively early introduction of an unemployment insurance scheme in South Africa could be associated with the early ratification of the ILO Unemployment Convention (No 2, 1919). A more informal connection to the ILO - in the form of relevant committees and commissions working with the ILO to report on questions of social protection - was initially fostered and then even maintained in the era of apartheid, when the regime had officially withdrawn from the ILO (1964). This went as far as the Wiehahn Commission, which investigated the reform of labour regulation, making direct references to ILO Conventions to recommend the introduction of an industrial tribunal. This paved the way for a post-apartheid South Africa to re-join the organisation in 1994 and to ratify its fundamental labour conventions, alongside internal reforms of labour and social security laws that gave effect to new constitutional rights and international obligations.

Looking forward Mpedi explained the need to reform social security systems proactively with regard to such matters as prevention, compensation and re-integration and in response to an ever-increasing degree of connectivity that constitutes the driving feature of the current industrial revolution. He emphasised that while these reforms would likely have to be on the scale of those initiated by Bismarck and Beveridge, precautions are necessary to ensure that they are sustainable, reliable and relevant. Particularly, they should be designed to suit the local context, rather than imposed in a one-size-fits-all fashion. Lastly, Mpedi also recommended that there should be a greater coordination in the interactions between the ILO and other international organisations so as to maximise the efficiency and impact of their responses to joint concerns, such as how to accommodate changes in the nature of work.

## **The Future Role of the ILO**

### **Social Protection in the 21st Century: Potential Contribution of the ILO?**

Prof. Dr. Ulrich Becker, Max Planck Institute for Social Law and Social Policy

In his presentation Becker proposed a package of solutions that addressed the emerging challenges facing modern social security systems and he elaborated on the role that the ILO could play in this

endeavour. In this regard, the most prominent difficulties to be tackled encompassed: ageing populations (i.e. the relative increase of older age groups in a given population), the changing nature of industrial relations and labour, the ways in which household patterns and therefore also associated needs are changing and the difficulties associated with migration; whether this be the integration of immigrants or the brain drain associated with emigration. These challenges further triggered a variety of substantial issues for social security systems, including issues of financing and coverage, of integration and inclusion - whereby it became one of the aims of social security to integrate certain groups - and of the emergence of novel social risks, including: care dependence, vulnerability to natural catastrophes and the secondary risk of not being adequately covered in these eventualities. This also necessitated the coordination of tasks across different systems and over different areas, an exercise that gave rise to risks of its own.

Having identified these problematic developments, Becker then went on to put forward a four-pronged approach for reforming social protection institutions to overcome them. The first element in this approach was 'Universality'. It should be ensured that the systems offered universal protection. Drawing inter alia on the foundational concept of human dignity, they should cover all areas of economic activity and a state of affairs should be avoided where special privileges were afforded to certain groups or individuals. Furthermore, it was necessary for modern systems to engage in the 'Diversification' of the ways in which they afforded protections. This entailed varying the sources of financing of the relevant institutions, establishing different layers of social security protection and establishing new schemes that were tailored to the newly emerging risks. The third aspect of Becker's approach relied on 'Integrity', which encompassed the need to match social security contributions, such as pensions, to the personal requirements of the contributor. Lastly, the importance of ensuring continuous opportunities for training and education was also emphasised by Becker and constituted the final element in his package of recommended solutions.

The part to be played by the ILO within this reform was to build on its existing human-rights-based approach of establishing transnational floors of social protection. Specifically, the impact of such floors could be enhanced by developing the general ideas evident in documents such as Convention 102 (1952) and the Social Protection Floors Recommendation (2012) into a more concrete normative architecture. In order to secure the legitimacy of the ILO throughout this process it is still important to root it firmly within the structure of member state societies. Yet, its traditional tripartite system might run into difficulties given the necessary restructuring of social security systems, which will, to a certain extent, move security further away from the employment relationship. Even if this was not seen as a problem for the democratic legitimacy of the ILO in a strict sense, it can make its role as a leading institution that lays the necessary legal foundations much more difficult.

## **A Second Century for What? The ILO at a Regulatory Crossroad**

Francis Maupain, PhD, former Special Adviser to the ILO Director-General

Maupain closed the Symposium with a prospective appraisal that focussed on the ways in which the ILO could be reinvented to enable it to flourish in the twenty-first century. In particular, he argued that the future of the ILO turned on its relevance to, as well as its capacity and willingness for, addressing the challenges posed by the ever-increasing economic and environmental interdependence and the ongoing transformation of work. Before addressing these three questions however, Maupain drew a distinction between the regulatory and magisterial functions of the ILO: the magisterial function embodies the responsibility of the ILO for concretising its goals of progress and social justice, while the regulatory function demands that the organisation strives to ensure a sufficiently equitable distribution of social benefits and constraints. Maupain emphasised that the organisation had to establish a sufficient relevance, capacity and motivation with regard to each of these twin normative dimensions.

Taking first the matter of relevance, this was found straightforwardly with regard to each of the outlined dimensions. For there is evidently a need to substantiate the ILO's goals in light of the changing nature, forms and modalities of work (material role) and, relatedly, the growing global economic and environmental interdependence and the demonstrated sustainability of the multilateral system called for a reassertion of the ILO's regulatory role. So, given this relevance of the ILO, it then becomes crucial that it also has the capacity to discharge its two functions. Two proposals were put forward by Maupain in this regard. First, to ensure that the ILO's instruments had a universal and undistorted impact, the gap between ratifying and non-ratifying members should be bridged by re-establishing a balance between the 'review of compliance' under Article 22 and the 'review of effect' under Article 19 of the ILO constitution. Second, there should be an integration of standards into a global "social policy framework" and thus a rejection of the silo approach under which standards are set with a narrow focus on specific kinds of objectives (social, economic, environmental etc.). Such a framework should also aim to create an 'enabling environment' that assists members in developing a "Globalisation" Social Policy with a view to optimising national capacity to take advantage of global interdependence for the purpose of employment creation.

In his final analysis, concerning motivation, Maupain indicated that, although he remained optimistic, a will to enact these reforms was not yet in sight and that they had notably not been included in the ILO's draft centenary declaration. He also explained that strong external pressure for reform would be necessary in order to overcome existing pressures that were partially shaped by corporate interests. It thus seems probable that the centennial celebration will not yield the desired regulatory reforms and this may well lead to the ILO being further integrated into the United Nations Sustainable Development Group, regrettably leaving the organisation's unique regulatory potential largely untapped.

## **Conclusion**

The Symposium brought together a wide range of perspectives that addressed distinct aspects of the ILO's ongoing development and also introduced unique frameworks, methods and substantive recommendations that can be drawn upon to answer the question posed at the outset: "Is the ILO well-placed to answer future demands?". Through these different approaches we have now seen how successful the organisation has historically been in achieving its normative goals and the great potential it has for continuing to do so. However, and perhaps most significantly, it is hoped that it has also been demonstrated that the ILO's future success is not just a function of its past achievements, but rather that such success must be ensured through a willingness to adapt and reform in light of a new and fast-changing world.

*Christian Günther*