THE POSITION OF SOCIAL SECURITY IN THE SYSTEM OF INTERNATIONAL LABOR STANDARDS

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Protecting workers against the risks of a loss of earning capacity was part of the International Labour Organization's (ILO) remit when it was created in 1919, and a first series of conventions and recommendations was adopted to that end before World War II. These *first-generation standards* were geared (as was prevalent at the time) toward social insurance protecting specific groups of workers against an initial list of risks (medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity, death).

This outlook changed at the end of World War II when the ILO adopted the *Declaration of Philadelphia* in 1944. Under this Declaration, which is annexed to its Constitution, the ILO must "further among the nations of the world programmes which will achieve . . . the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care" (section III(f)). The objective of establishing social security systems of a universal rather than categorical nature throughout the world was thus enshrined at an international level. This objective is linked in the Declaration with a broader perspective of social protection, in particular including the ILO's support for protection for the life and health of workers in all occupations, protection of child welfare and maternity, access to adequate nutrition and housing, and an assurance of equality of educational and vocational opportunity (section III(g)(h)(i)(j)).

This linkage is also to be found in the *Universal Declaration of Human Rights* adopted by the General Assembly of the United Nations in 1948, under which "everyone, as a member of society, has the right to social security, and is entitled to realization, through national effort and international cooperation and in accordance with

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the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality" (Article 22).

Any thinking about "standards-related activities" by the ILO has to start from these fundamental legal bases, of which *the conventions and recommendations subsequently adopted in the social security field* are no more than technical extensions. The most important of these conventions is No. 102 (1952), which is the basic convention on minimum social security standards. It has since been supplemented by a series of conventions and recommendations, adopted between 1962 and 2000, some of which are intended to ensure equality of treatment of nationals and non-nationals (Convention No 118 (1962)) or to establish an international system for the maintenance of rights (Convention No 157 (1982)) and others to provide greater protection against certain risks.[1] In order to take account of differing national situations, most of these standards contain flexibility clauses, enabling variable-geometric ratifications from the point of view of the risks covered as well as the degree of coverage and the persons protected. As a result, States can organize their social security systems with a great deal of freedom.

Despite these flexibility clauses, there has been a fairly *low rate of ratification* of the conventions on social security. Convention No. 102 has been ratified by only forty-one States, not including the United States, Russia, China, Brazil, or India. However, the rate of ratification is not really a satisfactory indicator of the actual penetration of ILO standards. Some States ratify conventions without too much concern for their actual implementation, while others introduce social security systems without being bound by ratification. More generally, ratifications tailed off after the fall of the communist regimes and not just in the field of social security. Since that time States have been more interested in committing themselves to the legal disciplines on international trade, about which the least that can be said is that they do not encourage a bold approach to economic and social rights. The very legitimacy of these "second-generation" human rights has been fiercely questioned by the advocates of a world legal order based entirely on the notions of rivalry and competition. The ILO tried to respond to this new situation by adopting in 1998 a *Declaration on Fundamental Principles and Rights at Work*, which changes the normative context for its action in the social security field

1. *See* M. HUMBLET & R. SILVA, STANDARDS FOR THE XXIST CENTURY—SOCIAL SECURITY (ILO 2002), for a clear and precise review of these standards.

(Section I). It subsequently succeeded in establishing a new consensus in this field, though its legal application has yet to be defined (Section II).

I. THE NEW NORMATIVE CONTEXT

The *Declaration on Fundamental Principles and Rights at Work*, adopted in 1998, reminds States "that in freely joining the ILO, as 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 . . ." (Article 1(a)). This general reminder therefore includes the social security rights affirmed in Philadelphia. This reminder is immediately followed, however, by a list of four "principles concerning the fundamental rights," which are the only ones to be "respect[ed], promot[ed] and . . . realize[d] in good faith" (Article 2) and subject to a follow-up procedure (Article 4). These are: a) freedom of association and the effective recognition of the right to collective bargaining; b) the elimination of all forms of forced or compulsory labor; c) the effective abolition of child labor; and, d) the elimination of discrimination in respect of employment and occupation.

This list does not include social security or even protection of health at work. Bearing in mind the founding role played by workers' physical protection in the history of labor law, it comes as no surprise that this Declaration was fiercely criticized.[2] By affirming the fundamental nature of some rights or principles, this formal text implicitly gives others a secondary status and has rather relegated them to the warehouse of normative accessories. It would nevertheless be simplistic to focus solely on the manifest inadequacy of its substantive content (and its possible perverse effects) and to disregard the novelty and potential of the method used. The merit of this Declaration is that it breaks away from the self-service approach to standards inherent in the ratification system. Bearing in mind the general nature of the "reminder" of the normative scope of the ILO's founding texts set out in Article 1(a), this Declaration can just as well be seen as a first step toward a genuine international social public order binding on all States as a step back from the ILO's normative

2. *See* P. Alston, *"Core Labour Standards" and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004).

ambitions. *Both of these interpretations are possible* and only history will show which one is correct.

This legal context is obviously the first area that needs to be examined before any normative proposal can be put forward in a field such as social security that is excluded from the list of "fundamental principles and rights" in the 1998 Declaration. This is why we felt that it would be a good *method* for our group to look first at the changes that have taken place in the universe of international labor standards and then to try to pinpoint the opportunities and risks of a normative initiative by the ILO in the social security field.

During this first, purely preparatory, stage we took stock of the *proliferation of standards* covering social issues in the context of globalization. Public and private initiatives in the name of "enterprises' social responsibility" and the implicit social standards imposed by the international trade and financial institutions (in particular, incentives to dismantle the social protection systems inherent in structural adjustment plans) mean that the ILO no longer has a monopoly, assuming that it ever did. The questions that the ILO leaves to one side will undoubtedly be tackled by others, from philosophical and legal standpoints differing from those of its Constitution. This is particularly true of the social security field, where there are such colossal economic and financial issues.

This general thinking about international labor standards also made it possible to pinpoint the strengths and weaknesses of the new legal practices flourishing with the ideals of "*governance*." While the notion of subjection to general and abstract mandatory rules, which is a feature of hard law, has lost none of its force in the area of international trade, it is disputed, however, in the social field. Countries' differing social models and unequal wealth have led to the development of various forms of soft law, often as a result of private initiatives (labels, codes of conduct, etc.), which have also been implemented by public institutions. Initially used by enterprises as a management technique, management by objectives has become common in public policy. The 1998 ILO Declaration took this path, moreover, as regards the so-called "fundamental rights" by introducing a "promotional follow-up mechanism" intended both to measure and encourage States' commitment to pursuing the objectives that it assigns them. The key reference in this case is nevertheless the "open method of coordination" adopted by the European Union in the employment field and extended since then to

various fields including social security.[3] Up to now this has been the most advanced attempt to introduce international social governance transcending the conventional legal techniques of government. As laid down by the Lisbon European Council in 2000, it consists in a) formulating guidelines for achieving *objectives* set by the Member States; b) drawing up quantitative and qualitative *indicators* and criteria for assessing best performance; c) translating the guidelines into *national and regional policies*; d) drawing lessons from the evaluation of concrete *cases*, i.e., providing this normative system with feedback from actual cases of its implementation. This method is formally included in various provisions of the draft Constitutional Treaty of the European Union.[4]

These new approaches to normative issues in the social sphere should not be immediately ruled out. However, if they are not to undermine the force or the scope of the principles enshrined in the Declaration of Philadelphia and the Universal Declaration of Human Rights, and are, on the contrary, to pave the way for their actual implementation, their use has to be subject to various precautions that the first phase of our group's work helped to pinpoint.

The first of these precautions is not to see soft law as an alternative but rather as a supplement to hard law. If a free market is to be introduced in a sustainable way, it requires a legal framework that takes account of its economic (the need to trade the wealth produced by workers) as well as its social (the needs of the workers producing that wealth) dimensions. As history shows, neglecting either of these dimensions can lead only to disaster. That would be true of a world legal order where trade in goods was subject to a "hard" law and the fate of men to a "soft" law. Economic and social questions are not independent from one another, and account needs to be taken of the unity and diversity of human societies in both fields. It is therefore necessary, as regards both economic and social

3. The European Commission has thus set four objectives in the field of social protection: a) creating more incentives to work and provide a secure income; b) safeguarding pensions with sustainable pension schemes; c) promoting social inclusion; d) ensuring the high quality and sustainability of health protection. *A Concerted Strategy for Modernising Social Protection*, (1999) 347 (July 14, 1999), http://ec.europa.eu/employment_social/social_protection/docs/comm99-347_en.pdf. Experience gained over a number of years led the Commission to publish a further Communication on "*Streamlining open coordination in the field of social protection*" *Strengthening the social dimension of the Lisbon strategy: streamlining open coordination in the field of social protection*, COM (2003) 261 final (Oct. 10, 2004), http://eur-lex.europa.edu/LexUriServ/site/en/com/2003/com2003_0261en01.pdf.

4. *See* Articles III-100 (European employment strategy), III-107 and III-111 (labor law and social protection), http://www.fco.gov.uk/Files/kfile/5897.pdf.

standards, to *combine rules applicable to all with rules taking account of differing situations*.

Taking genuine account of these differences and in particular not projecting the ways of thinking of the countries of the north onto the countries of the south is a second key precaution. This is essential from a number of points of view. First, any use of incentive standards must be subject to the existence of *reliable methods of representation of the populations covered by these standards*. If soft law is not to be an instrument conditioning men and women, but a way of ensuring that they participate in formulating a fair order, it has to be rooted in the principle of participation. This is particularly true of workers in the informal economy who are the best experts on this economy. They must therefore have the collective ability to influence the content of standards that cover them if these standards are to be legitimate and in keeping with their actual lives. Second, ways of *gaining a genuine knowledge of the working practices and systems of solidarity* on which action is to be taken need to be found. Failing this—and this is one of the unpalatable lessons of forty years of "development" policies in many regions of the world—neither the objectives set nor the methods used to achieve them reflect actual local problems. Management by objectives that does not proceed from local knowledge is at best ineffective; at worst, it merely exacerbates the problems that it is supposed to resolve.

Unless these two imperatives are respected—participation by the populations concerned and mobilization of local knowledge—there can be no hope of reliable indicators through which problems and progress toward the achievement of objectives can be genuinely measured. When they are imposed from outside and designed with scant regard for actual situations, the indicators inherent in management by objectives are no longer measurement instruments, but hidden and arbitrary standards that elude any democratic debate and any negotiation and are imposed in place of the objectives that they are supposed to serve.

II. THE NEW CONSENSUS ON SOCIAL SECURITY

These considerations provided a starting point for the second phase of our group's work, focusing on the standards-related dimension of the extension of social security in the world. This thinking took up the prospects sketched out in the *Resolution and Conclusions Concerning Social Security* adopted by the International Labour Conference at its 89th session in 2001. The task of our group

was to examine the possible legal ramifications of the "new consensus" on social security reached by the representatives of States, employers and workers.[5]

This new consensus moves toward a *free interpretation of the Declaration on Fundamental Principles and Rights at Work of 1998*. The International Labour Conference starts by affirming that social security is "a *basic* human right" (section 2). As it comes from the same authority as the 1998 Declaration, this provision makes it clear that the list of fundamental rights is not limited to the four "principles concerning the fundamental rights" set out in Article 2 of the 1998 Declaration, and that the action priority decided for these four principles can be extended to other issues. This interpretation is borne out by the fact that, according to the Conclusions adopted in 2001 (section 5): "*Of highest priority* are policies and initiatives which can bring social security to those who are not covered by existing systems." By addressing rights to social protection in this way, and going beyond the sphere of labor relations alone, the International Labour Conference supplements the 1998 Declaration, which dealt only with fundamental rights *at work*.

Faithful to the Declaration of Philadelphia, whose validity is re-affirmed (section 1), the 2001 Conclusions adopt a *broad conception of social protection* that, as it incorporates the new risks of exclusion from competences (in particular initial education and lifelong learning), envisages social protection from the point of view of maintaining people's skills in the long term (sections 3 and 7). There is also a broad conception of the scope of application of social security, which is enhanced by the reference to decent work (section 17) whose considerable potential is to be tapped. Linking the need for security with the performance of a *task* and not just with work in employment means that positive account can be taken, over and above employment, of self-employment, work in the informal economy (section 5) and unpaid personal care work chiefly by women as a result of family solidarity (sections 8, 9, and 10). The reference to *decent* work helps to anchor social security in the principles of dignity (section 2) and solidarity (section 13) and thus to rule out any return to risk management on a purely individual basis or a purely charitable approach to poverty.

5. *See* Int'l Labour Conference, Geneva, Switz., June 2001, *Social Security: A New Consensus*, *available at* http://www-ilo-mirror.cornell.edu/public/english/protection/socsec/download/aconsens.pdf.

While affirming a common vision of social security, the new consensus that has emerged in the International Labour Conference also sets great store by the *diversity of national situations*. By stating that "there is no single right model" and that "each society must determine how best to ensure income security and access to health care" (section 4), the Conference draws useful lessons from the failure of attempts to export a specific model into societies whose cultural and social values, history, institutions, and degree of material wealth differ from those of the "exporting" society. While this note of caution obviously applies to north/south exports, it also applies to north/north and south/south exports. In particular, social security must not be a way of imposing social choices that are a matter for national sovereignty and individual freedom. If, for instance, equality between men and women is a principle whose validity has been recognized by all the ILO's member countries, this *equality* is not to be seen as an *identity* of conditions. This means, for instance, that social security systems must respect the rights of women who have devoted all or part of their lives to work in the family rather than in the commercial sector (sections 8, 9, and 10). Diversity also has to be taken into account when defining priority risks and needs. Old-age pensions are a key issue in aging societies (section 11) but are fairly irrelevant in countries where life expectancy remains very low, especially those having to cope with major pandemics (*e.g.*, AIDS: section 12, as well as malaria) without having a satisfactory system of prevention and care or access to appropriate drugs. Hence the importance of the principle, discussed above, of representation of the populations concerned, since it is only they who can assess what their most pressing needs are (section 15).

Neither the Resolution nor the Conclusions adopted by the International Labour Conference comment on the normative dimension of the extension of social security. They call on the ILO to run a promotion campaign (section 17), to organize technical cooperation in the social security field (section 19), and to research ways and means of achieving its extension (section 18). The aim is to encourage member countries to draw up a "national strategy for working towards social security for all" (section 16). The work of our group was part of this remit. Following on from the intellectual approach taken by the Conference, we tried to design a legal mechanism likely to encourage member countries to draw up a national social security strategy. This strategy has to be rooted not only in the guiding principles of social security as set out in existing

standards, but it also has to start from each country's particular situation.