UNIVERSAL LABOR STANDARDS AND NATIONAL CULTURES

Jean-Michel Servais†

Present-day[1] globalization has many facets. It comprises not only the transfer of capital, goods, and services, but also societal, artistic, even individual exchanges. The growing pace of globalization prompts us to reexamine a perennial dilemma in international law, namely the role of global considerations, on the one hand, and national and local dimensions on the other, in how social relations are arranged. Legal standards on labor, in particular those of the International Labour Organization (ILO), must constantly deal with this dilemma because their effectiveness depends to a large extent on how the two roles are combined in the protection of labor and in the regulation of worker behavior.

It seems clear that the heightened internationalization of human activity will have a lasting and profound impact on culture in every region and country. The difficulties encountered in Europe by several systems of industrial relations can be explained, at least in part, by the mismatch between institutions derived from national cultures and an economic process that is, for all intents and purposes, borderless.[2]

This being said, each culture's[3] defining characteristics continue to play a significant role in how human beings behave and work.[4]

† Honorary President of the International Society for Labor Law and Social Security, Former Director at the International Labour Organization, and Visiting Professor at the Law Faculties of the Universities of Girona (Spain) and Liège (Belgium). The present essay was presented at the International Seminar on Comparative Labour Law, Industrial Relations and Social Security (July 4–15, 2005, University of Bordeaux VI, France).

1. Why "present-day"? Because this is not the first. *See also* O. Mongin, *Les deux préalables d'un débat sur l'Europe: Le socialisme et la mondialisation*, ESPRIT, Nov. 2004, at 70–71.

2. *See*, *e.g.*, ILO, WORLD LABOUR REPORT 1997-98: INDUSTRIAL RELATIONS, DEMOCRACY AND SOCIAL STABILITY 69 (1997).

3. I refer here to national, not corporate, culture, which gives rise to a set of entirely different problems. *See*, *e.g.*, G. Apfelthaler, H.J. Muller & R.R. Rehder, *Corporate Global Culture as Competitive Advantage: Learning from Germany and Japan in Alabama and Austria*, 37 J. WORLD BUS. 108, 108–118 (2002).

4. Recent publications include SIOBHAN AUSTEN, CULTURE AND THE LABOUR MARKET (2003); S. ROCHE, POBREZA NO BRASIL: A FINAL DE QUE SE TRATA? 18 (2003); GEERT HOFSTEDE, CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS,

Students of comparative law know to what extent positive law can vary, in content, naturally, but also in wording and means of implementation. Psychologists and sociologists have long pointed to the extent to which interpersonal relationships, especially between men and women, are marked by national traditions.

I. ILO STANDARDS AND CULTURAL SPECIFICITY

A. A Universal Mandate

All ILO activities, in particular the production of labor standards, are universal in scope. This derives from the ILO Constitution, which in principle opens the Organization to all states worldwide. In the same way, the procedure by which international labor conventions are drafted involves all the Members and their industrial associations.

Some authors[5] have suggested that ILO adopts different rules depending on the regime, to take account of cultural diversity and of differing levels of economic development, but this is not the case. While it is true that many ILO standards have their roots in European history,[6] they have nevertheless been expressly adopted or accepted by the representatives of what is often a large majority of countries in many international institutions, including ILO.

What is more, is it wise, from the human point of view, to treat workers differently in areas that touch on their lives, health, and dignity? Convention No. 111, adopted by the Organization in 1958, covers discrimination against individuals in employment and occupation. It deplores "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin."[7] Should not the same policy of equality prevail in relations between States?

AND ORGANIZATIONS ACROSS NATIONS (2d ed. 2001); and the special issue of the *Journal of World Business* on the GLOBE Project (Global Leadership and Organizational Behavior Effectiveness), 37 J. WORLD BUS. 1–89 (2002). *See also* I. Harpaz, B. Honig & P. Coetsier, *A Cross-cultural Longitudinal Analysis of the Meaning of Work and the Socialization Process of Career Starters*, 37 J. WORLD BUS. 230, 230–44 (2002); C. Frege, *The Discourse of Industrial Democracy: Germany and the U.S. Revisited*, 26 ECON. & INDUS. DEMOCRACY 151, 151–175 (2005); ALFONS TROMPENAARS & CHARLES HAMPDEN-TURNER, RIDING THE WAVES OF CULTURE, UNDERSTANDING CULTURE DIVERSITY IN GLOBAL BUSINESS (2d ed. 1998); SUSAN C. SCHNEIDER & JEAN-LOUIS BARSOUX, MANAGING ACROSS CULTURES (2d ed. 2003).

5. CHRISTIAN PHILIP, NORMES INTERNATIONALES DU TRAVAIL: UNIVERSALISME OU RÉGIONALISME? (1978).

6. On this point, see Ryuichi Yamakowa, *Labour Law in an Era of Globalization: A Japanese Report*, *in* WORK IN THE GLOBAL ECONOMY 175 (J.P. Laviec, M. Horiuchi & K. Sugeno eds., 2004).

7. Article 1, ¶ 1(a).

There is another reason for applying ILO standards in general: to ensure that dissimilar conditions of employment do not distort competition between States and seriously handicap those offering the best terms.[8] Beyond this, ILO instruments are intended to facilitate the process of globalization in different socio-cultural contexts,[9] in particular during periods of transition.

If a State considers that its socio-economic situation precludes the immediate implementation of an international labor convention, there is nothing to prevent it from postponing ratification, which is a voluntary, sovereign act. It can also take advantage of the flexibility clauses and devices contained, as we shall see, in many of the conventions.

There is another point. One country can be home to several cultures: that of a majority of its citizens and that or those of others who are fewer in number and hail from different backgrounds. The United States is an oft-studied example. Western Europe today is also tending to form multiracial societies. Minorities inevitably influence the culture in the host country. In this article, national culture is considered as a diverse whole.

B. Situation-specific Arrangements

ILO incorporates cultural concerns—and economic constraints—in the wording of its conventions and recommendations. To start with, texts are prepared by a process comprising several stages during all of which the aim is to obtain the cooperation of most Member States. The secretariat produces an overall report on legislation and practice in respect of the topic at hand. The report is accompanied by a questionnaire for the governments and for employers' and workers' organizations. A summary document is submitted to the International Labour Conference and to one of its commissions especially constituted for the purpose. Their conclusions are the subject of further consultation conducted in the same manner. The ILO then prepares one or several draft instruments and submits them to another session of the Conference, for a second reading. The Conference and its *ad hoc* commission discuss them and usually adopt a convention and/or a recommendation.

8. JEAN-MICHEL SERVAIS, LES NORMES INTERNATIONALES DU TRAVAIL ¶ 6 (2004) (an English edition was published by Kluwer in 2005, JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR LAW (2005)).

9. International Labour Conference, *A Fair Globalization. The Role of ILO: Report of the Director-General on the World Commission on the Social Dimension of Globalization* 43 (92d Sess. 2004).

These texts seek to accommodate different situations. They contain only minimum rules, basic principles that can be incorporated into most, if not all, national legal frameworks.[10]

What is more, they contain flexibility clauses and devices designed to meet concerns not only about the weak economic development of some countries, but also about specific cultural characteristics. Let us explain the concept.

ILO has always refused to accept ratifications accompanied by reservations because of the involvement of employers' and workers' organizations in the process of adopting the international labor Conventions and in their implementations mechanisms. Such reservations are also deemed to be incompatible with the purpose of the Conventions, namely the establishment of standardized employment conditions.

The founders of the Organization, however, inscribed in its Constitution that its annual Conference had a duty to introduce flexibility into the legal texts it adopted:

> In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization *or other special circumstances* make the industrial conditions substancially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.[11]

Their successors therefore introduced into the instruments they adopted what are known as flexibility clauses.

Different means were used to do this depending on the objective: allowing countries to ratify only part of a convention, to choose between different levels of requirements, or to make exceptions for certain categories of workers or branches of activity, softening the wording by using expressions such as "where [or "if"] necessary,"[12] "where appropriate,"[13] "as appropriate,"[14] "as far as possible,"[15] "in accordance with national conditions [law] and practice,"[16] and other terms that give greater leeway to the authorities in charge of giving effect to the content of an instrument.

10. JEAN-MICHEL SERVAIS, DROITS EN SYNERGIE SUR LE TRAVAIL 28 (1997).

11. ILO Constitution, art. 19, ¶ 3 (emphasis added).

12. *See* ILO Convention No. 98, Right to Organize and Collective Bargaining, arts. 3, 4 (July 1, 1949); ILO Convention No. 149, Nursing Personnel, art. 7 (June 21, 1977).

13. *See* ILO Convention No. 175, Part-time Work, art. 10 (June 24, 1994).

14. *See* ILO Convention No. 169, Indigenous and Tribal Peoples, art. 4 (June 27, 1989).

15. *See* ILO Convention No. 177, Home Work, art. 4 (June 20, 1994).

16. *See* ILO Convention No. 161, Occupational Health Services, arts. 7, 9 (June 25, 1985); ILO Convention No. 181, Employment Agencies, art. 3 (June 19, 1997).

Some ILO conventions deal directly with problems of cultural differences and propose adjustments. They require, for example, that the weekly rest should coincide with the day of the week established as a day of rest by local tradition or custom.[17]

The instruments on migrant workers seek to strike a balance between two goals: the elimination of discrimination and respect for distinct traditions. Convention No. 143, 1975, on migrant workers (supplementary provisions) calls on the States to encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin; it specifically mentions the possibility for children to be given some knowledge of their mother tongue.[18] Recommendation No. 100, 1955, on the protection of migrant workers (underdeveloped countries) encourages the States to offer migrants facilities for the remittance of funds, the exchange of correspondence, and the performance of any customary obligations they wish to observe.[19] Recommendation No. 151, 1975, on migrant workers suggests that account be taken of the special needs of migrants until they have adapted to the society of the country of employment. The policy adopted for that purpose should be based, in particular, on an examination of conditions in both the migrants' host country and the countries of origin.[20]

Convention No. 169, 1989, is very specific on indigenous and tribal peoples: it requires the authorities to recognize and protect the social, cultural, religious, and spiritual values and practices of these people and to respect the integrity of their institutions and practices.[21] Convention No. 142, 1975, is more general, requiring human resources development programs and policies to take account of the stage and level of economic, social, and cultural development.[22]

17. *See* ILO Convention No. 14, Weekly Rest (Industry), art. 2, ¶ 3 (Nov. 17, 1921); ILO Convention No. 106, Weekly Rest (Commerce and Offices), art. 6 (June 26, 1957). The latter provision stipulates that the traditions and customs of religious minorities shall, as far as possible, be respected. *See also* ILO Convention No. 89, Night Work (Women) (Revised), art. 6 (July 7, 1948), and Recommendation No. 179, 1991, on Working Conditions in Hotels and Restaurants, ¶ 9.

18. ILO Convention No. 143, Migrant Workers (Supplementary Provisions), art. 12, ¶ f (June 24, 1975). For further information, see SERVAIS, *supra* note 8, ¶ 772–81.

19. ILO Recommendation No. 100, Protection of Migrant Workers (Underdeveloped Countries), ¶ 48 (June 22, 1955).

20. ILO Recommendation No. 151, Migrant Workers, ¶¶ 9, 10 (June 24, 1975).

21. ILO Convention No. 169, *supra* note 14, at art. 5; *see also* ILO Convention No. 169, *supra* note 14, at arts. 8, 13, 17, 30, and ILO Recommendation No. 35, Forced Labour (Indirect Compulsion) (June 28, 1930).

22. ILO Convention No. 142, Human Resources Development, art. 1, ¶ 2b (June 23, 1975).

C. Lasting Problems

The universal character of international labor standards makes it more complex to give effect to the obligations they contain: the usual legal difficulties relating to content, wording, supervision, etc., are compounded by other factors.[23]

For example, the role of the law in the settlement of disputes varies from one society to another. American citizens turn more readily to the courts than those of East and South-East Asia, who see court action as a last resort when all efforts at conciliation have failed. Another factor is that disciplined conduct and respect for authority are more marked in some mentalities and periods than others, as evidenced by the well-known anecdote about German railway workers in the early 20th century who bought their platform tickets before joining a demonstration at a railway station platform. Times have certainly changed—where in today's world could one imagine workers acting like that?

Besides the level of economic development, the State's institutional capacities are another factor of paramount importance for the incorporation of international labor standards into the domestic legal order;[24] social security springs to mind. The same holds true of religious convictions; they encourage observation of measures to protect others. When faith gives way to superstition, on the other hand, the effect can be perverse, such as in the case of the Thai workers in a knife factory who thought there was no point in wearing the requisite safety equipment once the workshop had been blessed by a Buddhist monk.

The methods chosen to implement labor standards are also predicated on the historical context, the power of employers' and workers' associations, the experience of their leaders, and the respective place of the law and collective work agreements in the system of industrial relations. More fundamentally, how a rule is worded and given effect depends on the ideas, customs, skills, arts, etc., of a people or group, that are transferred, communicated, or passed along, as in or to succeeding generations; in other words, on its culture.[25]

23. JEAN-MICHEL SERVAIS, INTERNATIONAL LABOUR STANDARDS ¶¶ 1104–05 (2005).

24. *See* T.L. Caraway, *Protective Repression, International Pressure and Institutional Design: Explaining Labor Reform in Indonesia*, 39 STUDS. IN COMP. INT'L DEV. 28, 28–49 (2004).

25. This is how culture is defined in WEBSTER'S NEW WORLD DICTIONARY (3d College ed. 1994).

II. AN EXCEPTION FOR CULTURE?

A. The Impact of Culture

The standards drafted are universal for a reason, and a number of techniques are used to reflect the variety of civilizations and customs to which they apply, but cultural differences continue to strain the harmonious implementation of ILO instruments. Should we, then, make "an exception for culture" in international labor regulations?

Let me be more specific. The economy is no doubt the ideal meeting ground for the private and public spheres and a key field in the configuration of social relations.[26] The cultural dimension is nonetheless fundamental to explaining why even neighboring countries adopt different solutions to the same problems. The way in which labor and its role in society are viewed differs depending on whether the viewer is French or British, Brazilian or Australian, Japanese or Canadian. In one place the unemployed are considered to be down on their luck, in another as lazy good-for-nothings. The religious ideal in one country is to withdraw from working life, like a hermit or at least a missionary; in another, it takes the form of material success. The ancient Greeks showed clear disdain for paid work; present-day moralists insist that work brings personal fulfillment. This, in any case, was how Luther and above all Calvin saw work.

Max Weber has aptly described the effects of Lutheran and Calvinist doctrine on the formation of modern society and the spirit of capitalism.[27] The Reformation valued work and condemned idleness, which was deemed harmful; riches and success in earthly tasks were the harbingers of eternal salvation. Hence a considerable effort was made to rationalize living modes, organize activities, and, in time, to secularize those ideals.[28] Sergio Buarque de Holanda, on the other hand, has shown to what extent Brazilian civilization is underpinned by affective ties and *farniente.*[29]

---

26. Daniel Mercure, *Adam Smith: Les Assises de la Modernité*, *in* LE TRAVAIL DANS L'HISTOIRE DE LA PENSÉE OCCIDENTALE 120 (Daniel Mercure & Jan Spurk eds., 2003).

27. MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Stephen Kalberg trans., 2002), *alternatively available at* http://xroads.virginia.edu/~HYPER/WEBER/cover.html.

28. H.P. Müller, *Travail, Profession et Vocation: Le Concept de Travail Chez Max Weber*, *in* LE TRAVAIL DANS L'HISTOIRE DE LA PENSÉE OCCIDENTALE 261–66 (Daniel Mercure & Jan Spurk eds., 2003).

29. SÉRGIO BUARQUE DE HOLANDA, RAÍZES DO BRASIL (26th ed. 1995).

In *The Spirit of Laws,*[30] Montesquieu also underscored the relationship between laws and religion. He analyzed the effects on laws of climate, topography, demographics, and customs and manners. One of the human soul's vital needs is undeniably to have roots, and individuals have roots when they are active and spontaneous participants in the existence of a community that is a living reflection of treasures from the past and presentiments of the future. Man could attain no higher position in the universe than a civilization based on spirituality at work.[31]

B. Culture, Labor, and Industrial Relations

Our view of labor is shaped by where we live. The American view allows enormous scope for individual initiative.[32] It prefers enterprise- (or establishment-) level collective bargaining on employment conditions to legislation, to the point that the United States has no labor code or equivalent statute, even at state level. The collective agreements concluded with trade unions (or other forms of worker representation), usually within production units, constitute the essential form of labor protection and provide most social security. Where there is no such agreement, guarantees depend on the company's personnel policy. In short, American legislation focuses on civil liberties rather than on labor law, on equality of opportunity and treatment rather than on solidarity in the distribution of income. Hence the recent tendency among Anglo-Saxon scholars wishing to strengthen solidarity to make the defense of workers' rights part of human rights.[33]

When an American employer decides to recognize a trade union within the enterprise or the establishment and to sign a collective agreement with it, the effect on costs is not negligible since most costs relating to the financing of labor protection and social security are

30. MONTESQUIEU, 14–24 THE SPIRIT OF LAWS (J.V. Prichard trans., J. Bell & Sons Ltd. 1914).

31. SIMONE WEIL, L'ENRACINEMENT: PRÉLUDE À UNE DECLARATION DES DEVOIRS ENVERS L'ÊTRE HUMAIN 61, 128 (1949).

32. See ILO, *supra* note 2, at 224; Sanford Jacoby, *American Exceptionalism Revisited: The Importance of Management*, *in* MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS 173 (Sanford Jacoby ed., 1991); S.M. Lipset & N.M. Meltz, *Canadian and American Attitudes Towards Work and Institutions*, 1 PERSPECTIVES ON WORK (The IRRA's 50th Anniversary Magazine) 14–19 (1997). For an earlier take on this issue, see S. McCane Lindsey, *The Problem of American Cooperation*, *in* THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION 331–67 (J.T. Shotwell ed., 1934).

33. *See*, *e.g.*, COMMITTEE ON MONITORING INTERNATIONAL LABOR STANDARDS, MONITORING INTERNATIONAL LABOR STANDARDS: TECHNIQUES AND SOURCES OF INFORMATION 224 (2004).

borne by the enterprise. The situation is very different in Western Europe, where social legislation applies to all units of production; sector collective agreements still have primacy and are often made obligatory, even in unrepresented companies, by extension. Wages and social costs are therefore not a factor of competition and the risks of social dumping more remote.

The price of social dialogue and its repercussions in terms of competition undoubtedly explain the highly conflictual nature of industrial relations in the United States and the amount of labor litigation. The antagonism is further fuelled by the fact that American collective agreements contain clauses enabling workers' organizations to oversee posts and performance. The original aim was to safeguard jobs in the company, and even to reserve them for union members. The employers' reluctance understandably stems from more than financial concern: such clauses limit their customary prerogatives and oblige them to engage in protracted discussion whenever they want to reorganize.[34]

The way in which American unions see their role highlights the contrast with the European social scene. Focused on the enterprise (or the establishment), their main aim until recently has been to defend the direct interests of those of the enterprise's workers who have joined the union and of other wage-earners in the unit of negotiation concerned.[35] If they seek to have a political influence, they use networks, especially at that level, and make election deals with friendly politicians.

In continental Europe, on the other hand, the notion of labor is reflected in institutions that foster State intervention in economic and social policies. The public authorities meet with the social partners to discuss social policies in particular. Detailed social legislation is supplemented by social dialogue whose structure is essentially national and sectoral. The trade unions speak for all employed, unemployed, and underemployed workers. They fiercely defend a sophisticated system of State social protection. The European social model, an expression of solidarity in the face of unemployment and poverty, may well be open to debate but it continues to set the continent apart from other parts of the world. Europeans are unwilling to accept, no matter what political power they vote into power, the phenomena of exclusion and extreme inequality. They

34. On this, see Jean-Michel Servais, *Syndicats: Nouveaux Membres, Nouvelles Alliances?*, *in* DROIT SYNDICAL ET DROITS DE L'HOMME À L'AUBE DU XXIE SIÈCLE. MÉLANGES EN L'HONNEUR DE JEAN-MAURICE VERDIER 162–63 (2001).

35. ILO, *supra* note 2, at 23.

want the State to remedy the negative human consequences of an excessively mechanical market economy and an overly painful process of globalization. Fear may be expressed about the threat this policy poses to European competitivity, but European electors, as recent history as shown, continue to prefer it, albeit with minor adaptations.[36] Some artist even has added that the modern world is structured as a factory and that its basic rules are production and advertisement, both generating uniformity and fatal tediousness.[37]

C. Should the Law Differentiate?

Those who counter the contention that the same standards must apply with the right to be different can provoke even greater misunderstandings in that everyone clings to their vision of social relations and the powerful tend to prevail.[38] Those who speak for some cultures often feel those cultures have been overlooked and invoke their specificity to distance themselves from a common rule.

Their position is not unfounded,[39] but it also has limits: cultural identity encompasses the individual's belonging and bars him, by the risk of being seen as a traitor, from doubt, irony, reason—anything that could detach him from the collective matrix.[40] This ambivalence is characteristic of international labor law.[41] It exhorts us to strike the best possible balance.

It is therefore important, as we have seen, for international labor standards to be worded flexibly, so as to take account of the socio-economic specificities of States. ILO conventions also require, often

36. *Compare* Jean-Michel Servais, *Quelques réflexions sur un modèle social européen*, 56 RELATIONS INDUSTRIELLES/INDUSTRIAL RELATIONS 701, 701–19 (2001) *with* J. RIFKIN, THE EUROPEAN DREAM: HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004).

37. Francis Picabia mentioned by Phllippe Dagen, *Les Dadaistes Bougent Toujours*, LE MONDE, May 8, 2005, at VII.

38. *See*, *e.g.*, RONALD DORE, ILO, NEW FORMS AND MEANINGS AT WORK IN AN INCREASINGLY GLOBALIZED WORLD 66–67 (ILO 2004); Alain Supiot, *The Labyrinth of Human Rights*, NEW LEFT REVIEW 118–36 (May–June 2003). *See also* ALAIN SUPIOT, HOMO JURIDICUS: ESSAI SUR LA FUNCTION ANTHROPOLOGIQUE DU DROIT 312 (Seuil, 2005); Sanford M. Jacoby, *Economics Ideas and the Labor Market: Origins of the Anglo-American Model and Prospects for Global Diffusion*, 25 COMP. LAB. L. & POL'Y J. 43–78 (2003).

39. *See* CHAFIK CHEBATA, DROIT MUSULMAN 2 (Dalloz 1970); *see also* Mahdi Zahraa, *Characteristic Features of Islamic Law: Perceptions and Misconceptions*, ARAB L.Q. 168 (2000) *and* S. Jahel, *Les droits fondamentaux en pays arabo-musulmans*, REVUE INTERNATIONALE DE DROIT COMPARÉ 795 (Oct.–Dec. 2004).

40. ALAIN FINKELKRAUT, LA DÉFAITE DE LA PENSÉE 168 (1987).

41. J.C. Javillier, *Libre Propos sur la "Part" du Droit dans l'Action de l'Organisation Internationale du Travail*, *in* LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR. MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 669 (J.C. Javillier & B. Gernigon eds., 2004).

explicitly, that account be taken of those specificities in the choice of means of giving effect to the instruments. There can be no flexibility, however, when an infraction is observed. *Dura lex sed lex*: a legal system is only credible if it guarantees the same methods of evaluation for all.

The question was particularly acute for the Communist countries of Europe before the fall of the Berlin Wall. The ILO's Committee of Experts on the Application of Conventions and Recommendations examined the conformity of Soviet legislation, and that of several neighboring States, with the international conventions on freedom of work, trade union rights, and equality in employment. The governments concerned defended restrictions of these fundamental freedoms on socio-economic grounds. More specifically, although their constitutions and other laws protected those freedoms, they also made enjoyment thereof conditional on respect for the established socialist order. Hence the refusal, for example, of the competent government bodies to authorize trade unions that did not share the political vision of the party in power. What is more, the Ministry of the Interior usually had complete discretion to appraise what views and objectives agreed with that vision. The delegates of such States justified infringements of the above freedoms by the need to incorporate them into a specific political and economic system.

ILO's supervisory bodies rejected that point of view. Their mission is clearly to assess the degree to which international labor conventions are given effect in the States that have ratified them, irrespective of the political system or market structure. The conventions can accommodate different social realties. Conclusions as to whether or not national situations are compatible are based solely on the text of the conventions, with no derogations except those expressly authorized. This is a basic principle of legal interpretation: a rule must be construed as it stands, without introducing distinctions where it makes none.

When the system in those countries changed, the new governments accepted that point of view. Several developing countries, notably in Asia, have since raised the same objection. They insist that the assessment of their application of the conventions take account of their socio-economic difficulties. ILO's supervisory bodies have refused to follow their reasoning, on the same grounds: although those who drafted the international labor standards had sought to make them sufficiently flexible that they could be adapted to different socio-economic contexts, the same flexibility does not apply when it came to monitoring application of a standard in a given country.

When adopting an instrument, the delegations have to consider disparities in conditions at the outset and grant countries facing particular difficulties possible exemptions. There can be no double standard when it comes to monitoring compliance with international legal instruments. Were they to apply one, ILO's supervisory bodies would risk validating attacks on the dignity of protected persons, violations camouflaged as respect for cultural difference.

D. Implementation in Light of Cultural Specificity

Once any discrepancies between national legislation and practice, on the one hand, and ILO's standards on the other, have been picked up, the standards and the values they enshrine must be incorporated into the domestic legal order in light of the socio-cultural environment. It falls to an institution like ILO to deploy all its technical assistance resources in order to help the countries overcome any obstacles they encounter.

This brings us to another potential pitfall, unrelated to legal assistance: technical cooperation activities must not themselves neglect the cultural dimension. Failure to acknowledge the cultural dimension has frustrated more than one project, in standard-setting as in other fields.

The issue is not a simple one. It is discussed in the 2004 report of the United Nations Development Programme (UNDP) on human development.[42] It is not merely political or economic. It calls for concrete answers to the old question of how to ease the tensions brought about by the existence of different languages, races, religions, and social conduct. There is no one-size-fits-all answer.

As evidence, witness the heated debate that broke out when the United Nations discussed the definition of cultural rights and especially the recognition of minority rights.[43] That debate mirrored another, on whether the individual or the community took precedence in the process of human fulfillment. When the Universal Declaration of Human Rights[44] was being drafted, Canada, the United States, and many Latin American countries upheld the right of people to participate in the cultural life of the community; India and the countries of Eastern Europe preferred to speak of minority rights.

42. U.N. DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY'S DIVERSE WORLD V, 37 (2004). *See also* G. HOFSTEDE, CULTURE'S CONSEQUENCES 437–40 (2d ed. 2001).

43. UNDP, *supra* note 42, at 28.

44. Adopted in 1948 by the United Nations General Assembly.

More than ideological conflicts, the controversy reflected diffuse fears: of being obliged clearly to delineate the meaning of culture, of upsetting longstanding practices that were harmful to certain groups, above all of accepting a cultural relativism that could be used to justify violations of fundamental human rights—a fear, as we have seen, that was well-founded. It was added that the safeguard of civil and political rights (freedom of religious worship, expression, and association, for example) sufficed to allow everyone to live by their convictions and to respect their cultural traditions.

Agreement was finally reached in 1966: the International Covenant on Civil and Political Rights gives people belonging to ethnic, religious, or linguistic minorities the right, "in community with the other members of their group," to enjoy their own culture, to profess and practice their own religion, or to use their own language.[45] More generally, the second Covenant of 1966, on economic, social, and cultural rights, proclaims the right of everyone to take part in cultural life.[46]

The above-mentioned UNDP report nevertheless denounces several tenacious preconceived notions:[47] that some cultures are more open to progress than others, that cultural diversity will inevitably lead to opposition on questions of values and even constitutes an obstacle to development. Anyone with experience of international work knows how inane such assertions are. They also know, however, that being too respectful of national considerations can lead to failure. It is a difficult balance to strike.

III. STRIKING A BALANCE

A. A Shared Ethical Framework

The opening of borders has telescoped cultures and been a learning experience for some, a source of instability for many. The quest for universal values, while more necessary, has stumbled on local traditions. Work ethics are once again in serious crisis: "Our societies underwent sweeping and rapid change; they shed their segmentary nature with unprecedented swiftness and to an extent never before seen. The corresponding morals later regressed, but without other morals developing quickly enough to cover the ground

45. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 27.

46. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 15.

47. UNDP, *supra* note 42, at 38.

the former left empty in our consciences." The new life has not been fully organized. "There must be a stop to this rootlessness, we have to find the means of making the bodies that continue to flay about in discordant movement work together harmoniously, of introducing greater justice in their relations by increasingly attenuating the external inequalities that are the source of the evil."[48]

"We" has always[49] been used in self-protection. Withdrawing back into the community, or, in other words, renewed insistence on the community, reflects the desire of the weakest to unite in self-defense, even if that means placing their fate in the hands of a more autocratic power.

The answer, initially, is to build a common ethical framework, one of ILO's goals since its inception.[50] The ILO seeks to overcome the insecurity that remains at the core of work: labor market and job insecurity, income and occupational insecurity, employment insecurity arising from risks to life and health or discriminatory practices, insecurity in the defense of one's interests, and collective representation.[51]

Workers feel threatened by all these dangers largely because of their dependent situation: the legal subordination of wage-earners and economic dependency of many self-employed[52] is compounded by fear of cultural subjugation. Foreign investment and other forms of globalization have promoted a third kind of subordination: the obligation to accept another culture. A Tunisian sub-contractor confided at a recent meeting[53] how difficult he found it to reconcile the code of conduct imposed by an Anglo-Saxon company with the rules of behavior of a population steeped in tradition.

B. Effective Regulation

The first step is to prepare international rules that garner broad support among countries and their citizens. The second is effective execution of those rules, or support in more than words.

48. ÉMILE DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL 405–06 (4th ed. 1996) (French original).

49. *See* RICHARD SENNETT, THE CORROSION OF CHARACTER: THE PERSONNEL CONSEQUENCES OF WORK IN THE NEW CAPITALISM 138 (1998).

50. F. Daghistani, *In Search of a Common Ethical Framework*, *in* PHILOSOPHICAL AND SPIRITUAL PERSPECTIVES ON DECENT WORK 150 (Dominique Peccoud ed., ILO 2004).

51. ILO, ECONOMIC SECURITY FOR A BETTER WORLD (2004).

52. ALAIN SUPIOT & PAMELA MEADOWS, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (Alain Supiot ed., 2001).

53. VIE UNIVERSITÉ DE PRINTEMPS DE L'AUDIT SOCIAL (Hammamet, May 21–22, 2004).

The vaster—geographically speaking—the authority of the bodies tasked with adopting the rules, the more numerous the obstacles to their tangible implementation. Indeed, the effectiveness of a rule is measured at the local level, at the level of the service giver and service taker. Hence the complexity of giving effect to labor regulations voted by an international organization: their implementation depends on the conviction and quality of the national authorities concerned. The degree to which they are imperative basically hinges on the determination and capacity of a majority of States to dictate, under threat of sanction, specific rules of social conduct.

Any manner of approach can be used to that end, from the mildest, which relies chiefly on persuasion and reason, to the harshest, which involves severe penalties for failure to discharge an obligation.[54] The former comprises the conclusion of political undertakings, the adoption of economic measures, the launch of training and information initiatives, and the preparation of "technical" (as opposed to "legal") standards and practical guidelines. The latter relates to international treaties and agreements which, like ILO conventions, the States undertake to respect by the voluntary and sovereign act of ratification. Between these two extremes lie instruments that are less binding in nature: recommendations, solemn declarations such as the Declaration on Fundamental Principles and Rights at Work adopted by the International Labour Conference in 1998, resolutions adopted by the managing bodies of international organizations, model regulations, and collections of practical guidelines. The open method of coordination used by the European Union to stimulate job creation[55] falls into this category. In some quarters this is referred to, somewhat ambiguously,[56] as "soft law." All the States have to do, in the best of cases, is explain to what extent they have taken account of the relevant provisions, which large corporations also turn to when they adopt codes of conduct unilaterally or in agreement with workers' associations.

If one takes it that governments seek to provide their citizens with the best possible protection at work, the improvement of employment conditions implies building the capacity of States to

54. Jean-Michel Servais, *Globalization and Decent Work: Reflections Upon a New Legal Approach*, 143 INT'L LAB. REV. 187–89 (2004).

55. *See*, *e.g.*, Silvana Sciarra, *Integration Through Coordination: The Employment Title in the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 209–29 (2000); S. Velluti, *Towards the Constitutionalization of New Forms of Governance: A Revised Institutional Framework for the European Employment Strategy*, 22 Y.B. EUR. L. 353–406 (2003).

56. Servais, *supra* note 54, at 187–88.

make progress toward that goal. This is the aim, for example, of the work of Amartya Sen.[57]

C. Choice in the Means of Legislating

Let us return to the law itself, i.e., the rules that make it possible to require a type of conduct under threat of sanction. A distinction is usually made between rules of conduct—which make it obligatory to act a certain way—and rules of organization, which attribute power; both are mandatory and legal in nature.[58] Reflections on doctrine have taken this classification a step further and currently set rules of procedure, which give some institutions a mandate to deliberate and find the best possible solution to a social problem, apart from rules of substance.[59] Rules of procedure reflect the reluctance of the national or international legislative authorities to rule on a matter of substance, because of its complexity or because they wish to remain neutral in the face of the range of interests involved: the decision is left to other players who are closer to the issue.

This distinction also occurs in international labor law, where standards are either "technical" or "programmatic" depending on the nature of the obligations they contain. The former have a specific technical content; they concern employment conditions broadly speaking and social services. They give rise to debate about the future of the legal protection of work and its adaptation to the economic imperatives of the day.

The programmatic standards are less controversial. Drawing on modern techniques of human resources management, they are content to set relatively general objectives for employment, vocational training, harmonious industrial relations, etc. The only obligations they contain are of means: the subject of the standard is obliged to do everything in its power to succeed (conduct certain activities, take certain initiatives, prepare and implement a project or program) but can usually choose the method; there is no obligation to succeed, as in

57. *See also* his statement to the 87th session of the International Labour Conference, 87th Session, *Provisional Record 21*, 21-33 to 21–36 (ILO, 1999); *cf.* K. Sankaran, *Labour Standards and the Informal Economy: Need for a Rights-centred Approach*, 24 DELHI L. REV. 90–99 (2002).

58. LUCIEN FRANÇOIS, LE CAP DES TEMPÊTES: ESSAI DE MICROSCOPIE DU DROIT 283 (2001).

59. *See* A. Lyon-Caen, *Droit du Travail et Procéduralisation*, *in* II L'AVENIR DE LA CONCERTATION SOCIALE EN EUROPE 176 (Jean de Munck, J. Lenoble & M. Molitor eds., 1995); SIMON F. DEAKIN, ILO, RENEWING LABOUR MARKET INSTITUTIONS 52–55 (ILO 2004); M. de Nanteuil-Miribel & M. Nachi, *Flexibility and Security: What Forms of Political Regulation?*, 10 TRANSFER 300, 309–11, 313–14 (2004).

the case of an obligation of result. It must be emphasized that legislating in this way does not amount to "deregulating," or to adopting a purely voluntarist approach that leaves the social players total freedom to define their relations. Quite the contrary, contacts between the parties are part of a framework and strategy determined by binding rules, i.e., with threats of penalties in case of infringement. This category comprises standards facilitating collective relations between the social players that, through their discussions and negotiations, help solve labor problems.

The means used to implement them are not all legal: definition of political projects, economic measures, training and information campaigns, recourse to "technical" (i.e., "non-legal") regulations. When it comes to employment and vocational training, for example, these standards seek to make the activities of the public authorities more coherent and systematic;[60] they contain specific measures on the labor market and how to evaluate its effectiveness. In terms of employment conditions, the 1990 Protocol to Convention No. 89, 1948, on night work (women, revised) authorizes[61] the social partners to conclude agreements derogating from the principle stipulated in the convention and to set the terms and conditions of such derogations.

Supervising implementation of these standards gives rise to specific problems because the evaluation examines the methods employed more than the results obtained. Qualitative and even quantitative indicators would seem to be called for. This being said, when these standards confer an important role on the social partners, much depends on the balance of power between them. For the method to be effective, all the parties to the labor relations must have a reasonable possibility to act on a more or less equal footing. Were this not to be the case, the result could be greater inequality between them.

Clearly, programmatic standards are helpful for embracing a cultural dimension in international regulations. They provide the ideal means of applying universal principles in a specific context. They delegate to the national authorities or the social partners at different levels the task of giving effect to grand objectives established and agreed at the global level.

For example, Convention No. 151 of 1978 aims to regulate labor relations in the public service. In its preamble, however, it points not

60. See ILO Convention No. 122, Employment Policy, arts. 1, 2 (July 7, 1964), and ILO Convention No. 142, Human Resources Development, arts. 1–5 (June 23, 1975).

61. Article 1 of the Protocol.

only to the diversity of political, social, and economic systems among member States, but also to the differences in practice among them as to the respective functions of the institutions concerned (central, local, and, as the case may be, federal authorities, state-owned undertakings, and autonomous or semi-autonomous public bodies) and as to the nature of employment relationships. Indeed, the status of the public service reflects how each State views the role of the public authorities. This is why article 8 of the Convention leaves the choice to the States when it comes to the settlement of disputes arising in connection with the determination of terms and conditions of employment; it gives an overview of the most common practices in that regard (negotiations, independent and impartial machinery such as mediation, conciliation, and arbitration), but imposes none of the mechanisms suggested.

Likewise, Convention No. 111 of 1958 requires the ratifying countries to make a commitment of principle: to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof. It leaves them free to choose methods "appropriate to national conditions and practice,"[62] but specifies the general direction to be taken: enact or repeal legislation; modify any administrative instructions or practices which are inconsistent with the policy; promote educational programs to encourage it; ensure observance of the policy in the activities of vocational guidance, vocational training, and placement services under their direction; scrupulously pursue the principles of non-discrimination in respect of employment under the direct control of a national authority. The Convention also stresses that the national authorities must seek the cooperation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of the policy. That concern to involve employers' and workers' organizations in the preparation and implementation of labor policy or its arrangements is to be found in many ILO conventions, among them those dealing with occupational health, including the prevention of major industrial accidents,[63] the worst forms of child labor,[64] working hours (night work,[65] part-time work[66]), home work,[67] and employment (coordination of protection

62. ILO Convention No. 111, Discrimination (Employment and Occupation), arts. 2 & 3 (June 25, 1958).

63. ILO Convention No. 161, *supra* note 16, at arts. 3 & 4, and ILO Convention No. 174, Prevention of Major Industrial Accidents, art. 4 (June 22, 1993).

64. ILO Convention No. 182, Worst Forms of Child Labour, art. 6 (June 17, 1999).

65. ILO Convention No. 171, Night Work, art. 10 (June 26, 1990).

66. ILO Convention No. 175, *supra* note 13, at art. 11.

against unemployment and employment promotion,[68] status of private employment agencies[69]).

An exercise in globalization of the spirit, the international regulation of labor relations is a necessary but perilous undertaking: it is indispensable because the elimination of borders leads to internationalization of the law, and risky because the path to international regulation is rife with cultural and economic pitfalls, and mistrust waiting round every corner. It is easy for the skeptics to sneer about the shortcomings of acculturation. They must not overdo it if the aim is globality on a human scale. The system invented by ILO has its defects and they are well known. It is nevertheless the most elaborate, and best accepted, response to the equally globalized social question.

The preceding pages have highlighted the legal procedures by which international labor law can take better account of economic and cultural variables. ILO standards are designed to be incorporated into the domestic order of the member States by the process of ratification, or at least to influence that order if the States are not ready to make such a commitment.[70] They serve as a basis for regional groups of States drafting social charters or other instruments, and for countries wishing to insert social provisions in their bilateral treaties.

Looking beyond inter-State relations, the standards can serve as models for large corporations—mainly multinationals—drafting codes of conduct, for employers' and workers' organizations engaged in a process of national or supranational collective bargaining, and for the campaigns waged by activists from other social organizations. This is why it is so important to have legal instruments that are truly applicable in all cultures.

67. ILO Convention No. 177, *supra* note 15, at art. 3.

68. ILO Convention No. 168, Employment Promotion and Protection Against Unemployment, art. 3 (June 21, 1988).

69. ILO Convention No. 181, *supra* note 16, at arts. 3, 7 & 8.

70. A. Bronstein, *En Aval des Normes Internationales du Travail: le Rôle du ILO dans l'Elaboration et la Révision de la Législation du Travail*, *in* LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR: MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS 219–47 (J.C. Javillier & B. Gernigon eds., ILO 2004).