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of Labour Regulation**

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The ILO – Experience with Tripartism in the Governance Field of Labour Regulation

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Preliminary deliberations on the conceptual framework of transnational normbuilding networks

The International Labour Organization (ILO) is *not* in itself a transnational norm-building *network*, because it is a state based international *organisation*, yet it is linked with transnational networks. The ILO is in *one* aspect a *typical international* organisation. It was founded at a time when there had been a tremendous increase of inter- and transnational associations, beginning with the end of the 19th century. World War I (and again World War II) induced a temporary break in this trend which, however, was overcome and gave way to a new growth later on.

At the beginning of the 20th century a Union of International Associations was founded which since that time has collected data on, and has interpreted, the phenomena of international associations, state based and not state based. The *non-state* international associations - called international nongovernmental organisations, abbreviated INGOs - did always in numbers outweigh the international *governmental* organisations, called IGOs¹:

	1909	1950	1960	2000
IGOs	37	118	163	241
INGOs	176	1000	1324	5963

These figures show a secular trend towards cooperation beyond state borders which exists much longer than the debate about transnational networks. But this picture has to be contextualized with respect to different regions in the world: Most of the inter- and transnational connections are situated in Europe, particularly in Western Europe. This means that the phenomenon of inter- and transnational connections via associations or organisations is firmly based in a specific *modern* societal structure.

The ILO is in another aspect an *atypical international* organisation. It is of hybrid character: Although an interstate organisation its constituent members

¹ E. Senghaas-Knobloch: Beiträge internationaler Organisationen zum Frieden in der Welt, in: Astrid Sahm et al. (Hg.): Die Zukunft des Friedens, Opladen 2002, S. 214.

are not only governments but also trade union and employer organisations *in* the member states, in addition ILO has also links in terms of a consultative status with selected international nongovernmental actors (INGOs), especially with the most important international confederations of unions (ICFTU and WFU) on the one hand and the International Organisation of Employers (IOE) on the other hand. These federations of national federations rely heavily on their constituencies with respect of knowledge and power. This entanglement might be understood in terms of networks contributing to normbuilding in the context of ILO.

Motives behind the foundation of the ILO

ILO was set up in the context of the peace treaty of Versailles. The lesson learned during World War I as a catastrophe for civilisation was that the material wellbeing of people in the world, e.g. social justice and social equity, matters when questions of peace and war are at stake. The foundation of ILO was at that time a result of a coalition between the then British labour government and the international democratic labour movement, particularly reform oriented unions. This coalition was directed against revolutionary bolshevism vision and the newly set up regime in Russia. The aspirations of the reforms labour movement were then rather high. They originally included an interest to set up a world labour parliament.

ILO's task is stated in the preamble to its constitution: It is dedicated to the worldwide improvement of *working* and *living conditions* since *world unity* and *world peace* are understood to be based on *justice* and *humanity* inside of the nations and on fair international exchange trade between the nations. So reference is made to basic values and interests. Lack of international regulation is understood as an "obstacle in the way of other nations which desire to improve the conditions in their own countries". The understanding that real interdependence and improving of living conditions matter in questions of world peace created a situation in which organised co-operation was regarded as inevitable. At the end of World War II and again at the end of the 20th century the ILO solemnly confirmed once again its mission and principles: *value related worldwide regulation* in face of international and transnational interdependence.

The scope of the membership was considered to be worldwide. Yet which world was meant? At the time of the ILO-foundation *world* meant foremost the *industrialised* countries, but also some countries in Latin America and Asia from which export was considered as a potential threat for the well-being of both industry and unions in industrialized Europe. After its foundation, the ILO had to cope with deep changes in the world: Europe lost its dominance in the world economy to the USA. Newly independent states emerged from the old empires with very different societal structures and administrative capacities. New

powerful non-state actors - the multinational corporations (MNCs) – have been emerging.

What does the ILO do? The ILO pursues its primary task with three forms of activity:

1. the establishment of international labour *standards*,
2. technical *assistance and cooperation*, and
3. *research and information*.

In all three activities the secretariat or staff of the international organisation – the International Labour Office, also abbreviated ILO - is of utmost importance. It is a collecting point for statistical information, an organiser of available knowledge on the condition for workers throughout the world, a supervisor of activities and functions as organizational memory.

Actors' constellations

The members of the ILO are nation states. These are represented by government as well as employers' and workers' organisations.

In final decision making processes the government representatives have the same amount of votes as workers' and employers' organisation together – that is in the plenary organ, the International Labour Conference, meeting annually; and they have the same amount of votes also in the executive organ, the Governing Board, in which in addition seats must be reserved for the 10 economically most important states. But in committees, where substantial issues are dealt with, the tripartite structure is founded on an equal basis. During the sessions separate meetings of all union members, employer representatives and of governments take place. That means that the 3 constituent groups build networks for deliberating and bargaining on specific positions in the decision processes.

Clearly the two societal actors involved (employer organisations and unions) are based upon the socio-economic pattern of industrialised and also of industrialising countries. This profile fits with the situation of most of the 45 member states (mainly from Europe) at the time of the foundation, as I said before. The intended universal membership by the organization has since risen to 178 nation states in 2005. This enlargement today results in problems:

1. The problem of societal representation of many actual member states with very different socio-economic structures than that of the founding states. The main feature of these different socio-economic structures of developing countries are characterized by

- structural heterogeneity of the economy
- and a still increasing informal economy with many self-employed workers lacking collective organisation and voice of their interests.

2. The problem of ability and political will. The ability of states is nowadays very diverse. A typology of Ulrich Schneckener differentiates between consolidated states (OECD-world), weak states, failing states and failed states.

In many of the states trade unions, being a constituent member group in the ILO, are repressed and threatened by state and parastate violence. So they hardly have a chance to fulfil their function in the ILO. It is then a matter of the international confederations of unions to bring forward the complaints of the repressed voices.

Type of Regulation

Since the foundation of ILO the most important form of regulation is the establishment of international labour standards either in the form of *Conventions* which need to be ratified or in the form of *Recommendations* to the member states. In addition the ILO adopted some solemn declarations, foremost the so-called *Declaration of Philadelphia* in 1944 when the classical principles as formulated at the time of foundation were reconfirmed, and the *Declaration on Fundamental Principles and Rights at Work and its Follow-up* in 1998 when ILO decided upon a priority among the many already established Conventions and Recommendations (e.g. 8 out of some 180) and an innovative follow-up procedure. Since the Declaration of 1998 a set of 4 principles worded in the 8 mentioned Conventions are considered to be *core norms* or fundamental rights that bind *every* member-state, whether having ratified the norm, respectively, or not. *Thus*, being bound by constitutional values in form of fundamental rights every member-state which has *not* ratified a respective Convention is obliged to report annually on the matters concerned and on obstacles against ratification.

The 4 principles are: freedom of association and right to bargaining, non-discrimination in employment, abolishment of forced labour and elimination of child labour. The Declaration of 1998 about the Principles and Rights at Work is of special interest because it obliges not only member-states but also the Organization, e.g. International Labour Office which must assist member-states in their efforts to attain the ILO-objectives

“ by offering technical co-operation and advisory services to promote the ratification and implementation of the fundamental Conventions;
by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles

concerning fundamental rights which are the subject of those Conventions; and by helping the Members in their efforts to create a climate for economic and social development.”

Thus we find here a reciprocal obligation between the Organization and its member states.

Legitimacy

The legitimacy of the ILO is based on its tripartite structure (involvement of societal groups) and its reference to international law. Many ILO Conventions are supported by UN Conventions which themselves are informed by ILO Conventions. Summing up one can state that the legitimacy of adopted norms is high.

Form of Regulations

Since the founding of the ILO there has been a lively debate with regard to the legal status of the Conventions that are decided upon by the International Labour Conference (the ILO's plenary body) with at least two thirds of delegates' votes. The question has been whether obligations are towards the international organisation or towards ratifying member-states of the ILO. Albert Thoms, the first Director General of the International Labour Office, viewed the ILO Conventions as a *compromise* between the two different camps of legal thought that comprehend international Conventions either as *agreements* or as *contracts*.

It is significant for this debate that the Conventions are deliberated in a tripartite conference in which – as I said - *governments are not in the majority*, and that it is *not necessary* for the adoption of Conventions that *government delegates vote unanimously*. In addition to this, ILO Conventions are *not subject to reservations* of member states, and there are *no procedures for signing*.

There are 4 fundamental distinctions between ILO Conventions and traditional diplomatic treaties: a) the participation of social (or societal) groups, b) the obligation of all member states to put forward adopted texts of international standards to their respective national public bodies for deliberation, c) the fact that Conventions formulate a detailed policy, the general line of which is laid down in the Constitution (later confirmed in the Philadelphia Declaration of 1944), and d) the system of supervision with regard to the Conventions' implementation. It is this elaborate system of supervision which gave rise to some similar attempts in other organisations of the UN-family.

Depending on the specific field for regulation (basic human rights, for instance, freedom of association, employment, general working conditions, labour

administration, labour relations, labour protection and health promotion, special groups of workers like seafarers etc.) the wording of Conventions and recommendations is either more general (promotional) or very specific and technical.

The effect of the adoption of the Declaration in 1998 is strongly contested. International lawyers, i.e. Alston, interpret the Declaration as trend towards soft law or even informal regulations. Yet, ILO-staff for the promotion of the Declaration of 1998 could demonstrate that the assistance (given to states who apply for such help) is always linked with the promotion of the specific basic or core standards, be it child labour, forced labour, etc. and that the number of ratification of the Conventions raised considerably.²

Procedures

86 years after its foundation ILO's policy is based upon an elaborated set of procedures.

There are procedures for the Conference, the Governing Body and most important for supervising the performance of Member-states with respect of their obligations.

In the framework of Zürn's and Zangl's index of legalisation one has to examine procedures in the realm of *norm-setting*, *jurisdiction*, *norm-enforcement* and *constitutionalization*.³

Asking about *norm-setting* we clearly find a situation of transparency and participation in the Conference.

Asking about *jurisdiction* we have a) the regular reporting system. Under this reporting system states are obliged to submit regular reports to the International Labour Office concerning the status within their country with regard to the Conventions they have ratified. And, governments have to consult the most representative employees and employers associations to obtain their comments on the contents of the state-report. This is the bite of the supervision system. These regular reports are examined by an elected International Committee of Experts, the result of which will be brought before the responsible Standing Conference Committee on the Applications of Norms which takes up every year around 20 cases of observations from the report of the Committee of Experts for

² See L. Thomann: Tendenz zur Unverbindlichkeit der ILO-Normen? Eine Auseinandersetzung mit Kritik am Beispiel Zwangsarbeit, in: E. Senghaas-Knobloch (Hg.): Weltweit geltende Arbeitsstandards trotz Globalisierung, Münster 2005, forthcoming.

³ Bernhard Zangl/Michael Zürn (Hg.): Verrechtlichung – Baustein für Global Governance? Bonn 2004 (bes. S. 12-45).

public discussion. In the end the Conference itself adopts a report of all these results.

Apart from this regular reporting system there are b) specific procedures for so-called *reservations* (article 24 of the Constitution) that are reserved for the social constituents and for *complaints* that every Conference delegate and government which have ratified a Conventions in question can file during the Conference. Whereas the complaint procedure until now is rarely used (Germany had been involved in some cases), the procedure of so called reservations is heavily used since the 1990s (after the Cold War).

c) Related to freedom of association and effective recognition of the right to collective bargaining the UN Economic and Social Council of the UN in 1951 decided to set up a special committee in the ILO. By the end of the 20th century some 2000 cases have been dealt with in the tripartite Freedom of Association Committee of the Governing Body. There is some dispute as to the authoritative character of these interpretations.

With respect to *enforcement* one has to state that in the case of stubborn refusal on the part of member states to deal constructively with accusations of abusing norms, Article 33 of the Constitution provides that the Governing Body can recommend to the International Labour Conference “such action as it may deem wise and expedient to secure compliance therewith”. Assuming that a state does feel mistreated it can bring this case before the International Court of Justice. Yet until now not one single case has been brought there.

With respect to *constitutionalization* one can state that the ILO-Conventions are always derived from values, enshrined in the Constitution. Summarizing, the procedures mentioned above demonstrate a medium *degree of legalization*, whereby enforcement, which is more or less missing, being the exception.

Effectiveness

The ILO's self-evaluation in the 1990s had produced an awareness of shrinking numbers of ratification and a lack of effective implementation. It was in this context that the Declaration on Fundamental Principles and Rights at Work has been adopted with a special mechanism of Follow-up. It represents a new policy. The department DECLARATION in the International Labour Office has since then strengthened new promotional activities to sensitize and activate diverse groups within member states to the most basic rights at work, e.g. against forced labour and child labour.

Problems

The very strength of the ILO, the tripartite representation of interests, foreseen in the ILO ever since its foundation, faces serious problems where many - or sometimes even most - working people in the world are not to be found in the formal economy (where associations of workers and employers really exist) but rather in the informal economy.

In addition to this ILO has the problem to face heterogeneous state structures, even of failed states, and of governments with a very low administrative capacity in the area of labour policy, and ILO has to cope with dictatorships.

ILO has also to cope with the world economic and world political trends:

- denationalisation and transnationalisation; some labour related issues are being dealt with outside the territory of the states, for instance by private actors like multinational enterprises.
- structural heterogeneity and fragmentation of social situations in the world of work but also inside the states.

In this situation ILO chose the strategy of revision and *prioritization* of norms. It decided to rely on 71 Conventions (out of the bulk of more than 180 adopted Conventions) and to find new ways and means to further compliance. In that context a new emphasis is put on *capacity-building*. Therefore, the ILO is in search of partners – national and international, local and regional, among unions as well as among newly emerging groups of actors among NGO's and in the world of business.

I may give two examples.

1. Child labour has been one of the first issues dealt with since foundation. When child labour seemed to be overcome in the industrialized countries, a new comprehensive age-group based Convention was adopted in 1973, which however got over time only a small amount of ratification. In this situation some factors came together to produce a learning process in and of the Organization. There have been moral entrepreneurs in the staff, who knew that the situation of the children in the world worsened and who sought ways to convince enough membergroups that something had to be done. They started research programs. They could coalize with single governments (like Norbert Blüm) who donated money to set up a global research program IPEC that focussed on eliminating the worst forms of child labour. Other governments donated too: Special time bound programs have been set up which are attractive for developing countries since they get money. It became also necessary and possible to involve local civil actors. National unions and employers then demonstrated their interest. A dynamic has been set in motion. Thus, a new integrated strategy was developed to combine normrelated and assistance related activities.

With respect to the problem and policy field of child labour it becomes apparent that socio-cultural and social-economic factors play an important role in giving life to the basic norms of abolishing child labour. To work with social groups at the grass root level seems inevitable, particularly in the informal economy. Yet, on the other hand without state control and state assistance all efforts may fail.⁴

2. Already in the 1970s the ILO started an attempt to bind multinational enterprises in its activities. In 1976 the ILO adopted “A Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” with a specific mode of reporting. Since the effect of this non binding instrument was rather meagre, new activities for codes of conduct then have been set in motion by private actors (MNCs and NGOs) on their own terms. The problems of these activities are those of lacking consistency, control etc. After having adopted the Declaration on Fundamental Rights in 1998 the Tripartite Declaration on Multinational Enterprises and Social Policy has been amended in 2000: The fundamental labour rights are now emphasized. These rights were also included in the amendment of the OECD Guidelines for Multinational Enterprises. By implication, the 8 Core Conventions are now recognized reference points for multinational enterprises and their codes of conduct. Thus, the ILO norms do inform other actors activities.

Summing up I come to the conclusion that transnational normgenerating networks are not of much interest in the policy field of the ILO. Interesting are the transnational norm*implementation* networks that help, assist and push employers and governments to comply with existing most fundamental right at work. The ILO uses all three ideal typical strategies defined in the current global governance debate: the strategy of administrative dialogue or management, the strategy of quasi-judicial arbitration and, at least potentially, the strategy of enforcement. Clearly, the ILO is in need of governmental *and* of social activities, even of activities beyond its constitutive members, to reach the goals and aims enshrined in the Constitution.

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⁴ See A. Liese: „Capacity Building“ als Strategie zur Förderung der Regeleinhaltung. Erfahrungen der ILO bei der Abschaffung von Kinderarbeit, in: E. Senghaas-Knobloch 2005 (FN²) forthcoming.