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Recasting Labor Standards for the Contemporary: International versus Transnational Frameworks at the ILO

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The International Labour Organization (ILO) serves as a ready example of the corporatist, regulatory, and responsive juridical orientation that crystallized as part of a reaction against classical liberal law, what Duncan Kennedy labels “the legal consciousness of the social” (Kennedy 2006: 37–59). The organization’s founders approached international labor standard-setting through a functionalist legal modality, whereby the steady accumulation of enacted regulatory instruments was associated with modernity and progress. In scholarship on international law today, it is in historical treatments that one is more likely to find mention of the ILO, as a relic of an earlier age. However, it is important to keep in mind, first of all, that the ILO continues to operate and, second, that in the period since the end of the Cold War the ILO has experienced what some contemporaneous commentators identify as a new “constitutional moment” with which the organization continues to grapple today (Langille 1999: 232).

ILO jurists have been integrally involved with efforts to adapt international labor standards to contemporary circumstances and to defend their organization’s normative activities against external criticism. My discussion takes these practices as a window for examining how jurists situated within an organization constructed according to the specifications of a modernist modality of law attempt to navigate the contemporary moment. Their varied legal practices speak to a particular location of the legal contemporary, albeit one that is linked to broader patterns of transmission and change.

In exploring the contours of legal practice within the ILO, my analysis diverges to some degree from the understandings of “legal thought” and “legal consciousness” adopted by critical legal studies scholarship. CLS studies of legal consciousness have looked to the practices of appellate judges and doctrinal experts so as to identify legal thought’s underlying conceptual structure (Kennedy 1976; Klare 1981). In my view, this conceptualization of legal

consciousness does not supply a useful template for understanding the legal thought operative within the ILO. It is true that ILO jurists do at times express a desire to elaborate coherent principles to guide the organization's normative activities, and this aspiration certainly distinguishes their legal thinking from the everyday orientation toward law that has been the focus of legal consciousness studies undertaken by law and society scholars (Engel and Munger 2003; Ewick and Silbey 1998; Merry 1990). Yet, as my analysis shows, legal projects within the ILO are best understood as organizationally situated practical assemblages, rather than as manifestations of an internally coherent thought structure. ILO jurists are not legal mandarins, but in their experiments and setbacks we see contemporary legal thought in practice, as it enters into association with other sets of ideas and institutions.

My analysis differs from CLS scholarship in a second important way, insofar as I frame my inquiry around a particular organizational action setting in which multiple contemporary juridical projects have taken root. CLS scholarship, from its earliest formulation, has tended to frame its inquiry around developments within distinct doctrinal domains. Indeed, this doctrinally bounded framework of analysis has provided important insights into the ideology of labor relations jurisprudence (Klare 1982). However, as I show, contemporary juridical development in the domain of labor relations represents only one of the legal projects in which ILO jurists participate. Their contributions are also oriented toward ongoing efforts at reinventing international governance structures, an endeavor that builds on a tradition of international regulatory lawmaking with a substantially more positivist legal orientation than contemporaneous transnational judicial exchanges around labor rights. The advantage to my organizationally centered analysis is that it highlights how the relative authority of these differing forms of juridical expertise – international versus transnational – is itself an important aspect of the politics of contemporary legal thought. In other words, surveying an entire organizational action setting allows for claims to conceptual primacy, formulated by internationalists and transnationalists respectively, to be critically examined rather than taken as a starting point for analysis.

In what follows, I first provide a brief historical sketch of the development of the ILO's standards system in order to contextualize the contemporary practices of the organization's jurists. I then explore two distinct trajectories through which ILO jurists are contributing to reinventing our understanding of international labor standards, focusing first on creative efforts to reformulate the ILO's standard-setting machinery and second on equally creative efforts to reframe its processes of standards supervision. As I show, these juridical projects exhibit striking differences in how they understand the nature of the

ILO's normative authority, differences that have recently become a source of tension. Yet the overall picture, I would argue, is one of creative ferment, as jurists draft a wide range of legal theories into their efforts to recast ILO standards for the "contemporary."

1 THE LATE ARRIVAL OF THE CONTEMPORARY AT THE ILO

The ILO's organizational structures were forged in the aftermath of the First World War, when trade union leaders lobbied at the Paris Peace Conference to create a supranational legislative authority that could impose labor standards internationally and that would include labor representation. The goal was to institutionalize the nascent international processes that had emerged from Social Democratic reformist currents at the turn of the twentieth century, a moment when the growing power of the labor movement encouraged governments to engage in national and international labor legislation efforts (Van Daele 2005: 442; Follows 1951: 161). The structures developed for the ILO reflected these developments as well as the postwar balance of power. The European labor ministers who made up the majority of the Commission on International Labour Legislation at the Paris Peace Conference were willing to incorporate labor participation into the ILO's lawmaking apparatus, but they insisted that employers should also be given a seat at the table and that the Organization's Governing Body should include two government representatives for every one worker and employer representative (ILO 2009).

The ILO's first Director, the French socialist politician Albert Thomas, played a particularly important role in shaping the apparatus for international labor legislation. During his tenure from 1920 to 1932, Thomas encouraged the secretariat's production of technical information as a means by which the Organization could avoid being dragged into the morass of polarized international politics (Phelan 1949: 184). Thomas also asserted the authority of the secretariat to steer the convention-drafting process by providing initial draft texts for consideration by government, employer, and worker delegates at the annual International Labour Conference (ILC). Furthermore, in the ILO's first decade of operations, its tripartite constituency was persuaded to entrust the secretariat with the responsibility of assisting a specially assembled "Committee of Experts," whose observations on the application of enacted conventions and recommendations would inform discussions on this topic by the Conference.

Having allied itself with the Atlantic Alliance and decamped to Montreal during the Second World War, the ILO revised and expanded its constitution at the end of the Second World War and subsequently became the

first specialized agency of the new United Nations system. Whereas the first decade after the war was a period of intensive convention drafting marked by unprecedented consensus on a social-democratic agenda, Cold War rivalry emerged in the mid-1950s following the entry of Communist Bloc countries into the organization. This rivalry was heightened by the conservative turn in labor politics within the United States, which had joined the ILO in 1934. As historian Edward C. Lorenz writes, “In the face of hostility to the ILO from a rigidly free-market business constituency, U.S. foreign policy and business elites engineered a compromise: they would keep the U.S. in the ILO and increase funding for research but would not push for ratification of the substantive conventions” (Lorenz 2001: 179). The United States was not the only member state to lose interest in ILO standards. Government representatives from developing countries took the position that it was difficult to apply ILO conventions that were framed in light of conditions in industrialized capitalist countries and were inappropriate to their own (Maul 2011). ILO technical assistance programs, promoted in response to these changes at the international level, became the largest item in the organization’s budget.

Yet even as a large segment of the ILO came to function more or less as a development agency, the organization’s standard-setting activity proceeded apace. Workers from industrialized states continued throughout the 1960s and 1970s to focus the annual ILC meetings around the enactment of conventions. It was an open secret that these standards were destined to remain largely aspirational, since the conventions would not be ratified by major world powers and had little chance of implementation in the developing countries that might be persuaded to ratify them. However, the formal cachet of binding conventions, even if they held meager rates of ratification, made them more attractive than recommendations or declarations that were explicitly nonbinding (Maupain 2012: 46).

Moreover, the shortcomings of standard setting during this period did not prevent a formalization of standards-supervision processes from taking root within the ILO Standards Department, the segment of the Office charged with assisting the organization’s three main standards supervisory bodies (the Committee of Experts, the Conference Committee on the Application of Standards, and the Committee on Freedom of Association). Under the leadership of its charismatic director, Nicolas Valticos, the Standards Department mobilized both discreet on-the-spot diplomacy and public moral persuasion to induce governments who had ratified conventions to move toward fuller implementation. Adjustments to the processes of standards reporting and supervision made it possible to concentrate attention on select issues and thereby maximize the potency of the ILO’s soft-law enforcement

powers, at least with respect to countries that had ratified conventions. Writing at the end of his tenure, Valticos described the ILO processes of standards supervision as “a complex system” in which “there does not appear to be any more room for major modifications” (Valticos 1979: 695).

By the 1980s, the ILO’s activities around standard setting and supervision were largely divorced from the organization’s expanded development and technical assistance operations, and both sides of the “House” remained for the most part untouched by the increasing prominence of the Washington Consensus and its criticism of the regulatory state. Employers’ representatives who attended the ILC and who participated in the ILO’s Governing Body preferred to make common cause with workers’ delegates rather than with employers in the Communist Bloc, and they saw the ILO standards system as useful for embarrassing states such as Poland and Czechoslovakia. The Governing Body did create a working group to review standards policy in the late 1970s, but the impasse of Cold War politics prevented the organization’s constituents from reaching any consensus concerning the appropriate pace of standard setting, the priority given to revising existing standards, or the type of ILO instrument (convention versus recommendation) that would make international standards most effective (Gheballi 1989: 217–20).

With the end of the Cold War, however, organizational dynamics at the ILO began to look much more fluid. One major source of fluidity derived from the evolving position of the Employers Group, which was no longer divided and whose members became increasingly insistent on the need for the ILO’s normative activities to reflect changing political realities inside and outside the organization. In other words, having been isolated from neoliberal globalization by Cold War concerns, the ILO in the 1990s abruptly emerged from its sheltered yet stultifying organizational existence into a world in which global production was dominated by multinational corporations willing to accept voluntary codes of conduct but resistant to state-driven social regulation, and in which new governance approaches emphasizing the limited capacity of state-led regulatory processes and espoused by powerful international financial institutions were ascendant.

Yet, with the benefit of hindsight, it becomes clear that this apparently inhospitable environment for traditional standard setting nevertheless offered opportunities for legal innovation. The post-Cold War reconfiguration of international politics provided ILO jurists with a significantly expanded set of normative tools for engineering regulatory reforms, as well as an expanded network of judicial and quasi-judicial institutions with which to engage. The next two sections articulate the distinct projects that have coalesced, as ILO legal thinkers interpret the possibilities and constraints for law in

the contemporary moment, and experiment with its expanded repertoire of conceptual tools.

2 REVITALIZING INTERNATIONAL REGULATION OF SOCIAL POLICY

As the end of the Cold War exposed the ILO to a new international environment, one in which states were ever more unwilling to commit to binding social policy instruments, ILO leadership came to view reform of the standards system as intimately linked with the organization's struggle to assert its relevance. Not only was there a fear that governments were shifting their attention to a rival organization, the World Trade Organization (WTO), but there was also concern that the campaign to insert a social clause within trade agreements was sapping the attention of the labor movement away from ILO standards. Somewhat unexpectedly, it was a statement of ministers at the 1996 WTO Ministerial Meeting – declaring that the WTO was not the competent body to handle labor standards – that provided the ILO with an opportunity to assert its relevance. The ILO's *Declaration on Fundamental Principles and Rights at Work*, submitted for adoption at the June 1998 International Labour Conference, represents the Organization's response to this opening. The Declaration commits all ILO members, regardless of whether they have ratified specific conventions, to respect four fundamental principles: effective recognition of the right to collective bargaining, prohibition of forced labor, abolition of child labor, and elimination of discrimination in employment and occupation. Moreover, member states that had not yet done so were called on to ratify the existing ILO conventions deemed to most directly express these fundamental principles.

The enactment of the 1998 Declaration was a major achievement for Director-General Michel Hansenne, who viewed this as an indication that the ILO had negotiated a difficult transition and had placed itself on solid footing in a post-Cold War world. Ten years later, Hansenne's successor as Director-General, Chilean diplomat Juan Somavia, would in turn seek to leave his mark on the ILO by pushing through the enactment of an organizationally recalibrating *Declaration for Social Justice in an Age of Globalization*, which identifies a set of "inseparable strategic objectives" for the ILO: promoting employment, developing measures of social protection, promoting social dialogue, and realizing fundamental rights at work. The 2008 Declaration thus builds on and extends the 1998 Declaration by presenting fundamental principles and rights at work as one of four ILO "core strategies."

There can be no doubt that both of these undertakings were shaped by a desire on the part of ILO leadership to engineer compromise among various

organizational constituencies. Legal content was the product of a “negotiated drafting” that bent purity of vision to political reality (Maupain 2005: 451) and reflected administrative considerations as well as substantive ones (Maupain 2009: 835). Yet, taken together, the two declarations represent a call for transformative reform, one that might be compared to a new constitutional moment, even though no formal amendment of the ILO’s Constitution took place.

The legal thinking most closely associated with the formulation of both of these major undertakings in the area of ILO standard setting was articulated, beginning in the mid-1990s, by former ILO Legal Advisor Francis Maupain, a French-trained specialist in public international law who had served for many years as the organization’s equivalent of a general counsel. Maupain’s commentaries on these two declarations offer a useful elucidation of the legal thinking set forth in their enactment. They elaborate a law reform project aiming to “revitalize” the ILO, and thus affirm its institutional positioning at the center of social policy formation, by reengineering both its mandate and its organizational processes.

In terms of the ILO’s mandate, this reinvention is achieved juridically through a novel reading of the organization’s existing constitution, whereby certain core competencies and principles are extracted from the somewhat rambling list of organizational aims set forth by the ILO in its 1944 Declaration of Philadelphia (which in 1946 had been annexed to the ILO Constitution and incorporated via its Article 1). In the case of the 1998 Declaration, the interpretive claim is that the ILO Constitution contains a coherent set of core principles, even if it also lists many other principles that lie outside the “core” of fundamental principles and rights at work, and that this constitutional core then makes it possible to set organizational priorities such that the numerous conventions that have been enacted but poorly ratified may be effectively sidelined, either through formal abrogation or simply through de facto de-prioritized treatment. The 2008 Declaration similarly discovers a set of core organizational competencies through a broad reinterpretation of the ILO’s existing constitutional text. The overall effect, according to Francis Maupain, is to reconfigure the ILO’s normative repertoire from an agglomeration of standards from which states can make their own selections into a more integrated program, which is argued to be better attuned to the “realities of globalization” (Maupain 2009: 837).

The two declarations aim to ensure the implementation of this reconfigured program through a parallel – and arguably more important – reinvention of the ILO’s organizational processes. “Follow-up mechanisms,” included as annexes to both declarations, play a crucial role in this respect. In the case of the 1998 Declaration, follow-up mechanisms require states that have not

ratified all eight “fundamental” conventions to report to the ILO’s Governing Body on national practice related to the relevant fundamental principles. The legal hook for this expanded reporting system is found in the ILO Constitution’s Article 19 procedure, which allows the Governing Body to request reports from all member states on one or more selected conventions and recommendations, whether or not the Conventions have been ratified. The 2008 Declaration employs a similar carrot-and-stick approach that combines the naming of non-compliers with focused constructive dialogue and targeted technical cooperation so as to marshal international authority around core ILO competencies. This “action-oriented” and “problem-solving” approach is viewed by its designers as potentially more effective in revitalizing the ILO’s normative apparatus than a complaints-based procedure, which they view as tending toward blame at the expense of encouragement (Maupain 2005: 456).

This latter point is important because critics who saw the ILO’s reform program as a move toward soft law had suggested that a more effective way to protect universal rights would be to extend the reach of the existing ILO standards supervision system, thereby bringing a larger number of states and a wider array of labor issues under its more juridicized processes. Clearly, one reason ILO leadership did not take this route was that it was politically infeasible, as Director-General Hansenne had discovered when he attempted to form a committee on forced labor in the early 1990s, along the lines of the existing Committee on Freedom of Association, and found his efforts rebuffed (cited in Maupain 2005: 445).

Yet the two declarations also appear to favor a more consultative and dialogic approach for reasons that go beyond political expediency. As Maupain sees it, the ILO’s contemporary normative authority derives from its capacity to set certain “rules of the game,” where the game is one of building policy consensus through tripartite discussion. To this effect, the various follow-up mechanisms in the two recent declarations are designed to orchestrate international consensus among ILO member states through a combination of structured discussion and detailed reporting. The hope is that annual targeted dialogues will propel ILO constituents to collaboratively establish “clear – even if modest – priorities,” thereby setting in motion a self-imposed “ratcheting” system for social policy making (Maupain 2005: 457). Importantly, in this line of thought, there is little emphasis on getting the substantive content of standards right; rather, it is the process itself of universal and recurrent tripartite review, albeit in the form of general reports on progress in achieving goals, that provides the momentum for a dynamic of progress. Indeed, the premise that fulsome tripartite dialogue – even in the absence of any substantive bounding for the discussions – will lead to “the sustainable implementation of social justice

requirements” is asserted to be a basic ILO founding principle (Maupain 2009: 837).

Institutionally, the ILO has a dual role in this dialogue-based vision of international lawmaking. First, through its involvement in the annual International Labour Conference, the secretariat serves as facilitator and convenor of the structured discussions through which frameworks for balancing the core decent work objectives are elaborated. The hope is that the process of recurrent annual dialogue – informed by the secretariat’s rigorous empirical analysis and preparations – will “persuade [ILO] members that it is in their own best interests from the viewpoint of both social progress and economic efficiency” to rigorously promote the decent work objectives as part of an overall policy (Maupain 2009: 846). To participate in this constructive dialogue, states must come to Geneva and must adhere to the ILO’s particular organizational procedures. A second form of dialogue, likewise benefiting from the guiding supervision of the ILO, unfolds in the ministerial offices of member states. National officials benefit from ILO technical assistance programs and social dialogue protocols as they develop their capacity to engage social partners in the continuous updating and revising of their policies in the core domains of “decent work,” in a manner that responds to national needs and priorities. To this effect, the 2008 Declaration singles out conventions governing labor inspections, employment policy, and tripartite consultation, i.e., instruments deemed “most significant from the viewpoint of governance,” and gives them priority for promotion.

This preference for dialogic process appears to draw inspiration from multiple trajectories of contemporary legal thought in the domain of regulation and governance. These influences are seldom named explicitly. Reading between the lines, we might identify the strong influence of practices that recently have found favor within the European Commission, where the implementation of framework directives combines a wide margin of national appreciation with built-in processes of peer monitoring and review. Yet, as we have seen, the project of standards reform continues to be shaped by shifting practical considerations, confounding any attempt to pin down a single intellectual genealogy or fully coherent underlying structure, at least not in the sense in which this term is used by structuralist legal philosophy.

Nevertheless, it is safe to say that the various ideas set forth in the 1998 and 2008 Declarations give priority to a highly centralized model of international lawmaking, one that rests on a belief that social policy objectives are most effectively instantiated through legislative-type processes rather than through the more diffuse lawmaking of judicial case law. Indeed, Maupain’s writings in support of the two declarations at times go so far as to suggest that turning

to judges for lawmaking purposes is not only suboptimal but also dangerous. In particular, he worries that the ILO standards-supervision system's current practice of considering workers' comments responding to their government's official report has led, de facto, to the "withering" of alternative processes in which the tripartite membership of the International Labour Conference takes more active ownership of supervising international standards (Maupain 2013: 135). Moreover, he finds the hardening of ILO jurisprudence and the tendency toward case-based lawmaking in standards supervision to be deeply problematic. On the one hand, he views the traditional standards-supervision system as devoting "disproportionate" attention to "detailed or trivial inconsistencies at the expense of more fundamental issues" (Maupain 2013: 153). On the other hand, he perceives the Committee of Experts' preference for leaving "a certain vagueness and flexibility in its appreciation" as a weakness, because this sort of judge-made case law is likely to create "juridical uncertainty" (Maupain 2010: 489). For the small set of cases in which the meaning of a particular provision in an ILO convention is truly unclear, ILO constituents should bring the issue to an international tribunal, but Maupain cautions that its judges should carefully avoid any temptation to introduce new interpretive frameworks into the ILO normative corpus (Maupain 2010: 489). And yet, as the next section details, using adjudication to develop innovative interpretive frameworks was at the center of developments within the ILO's Standards Department, where jurist technicians were also attempting to reinvigorate social policy making through a different set of interventions.

3 TRANSNATIONAL DIFFUSION OF ILO JURISPRUDENCE

At the same time that the ILO Governing Body sought to identify creative devices to strengthen the ILO's position within an international institutional hierarchy, jurists working within the ILO's Standards Department were engaged in a substantially less programmatic project of normative innovation grounded on emergent legal paradigms of transnationalism and judicialization. For most of the twentieth century, consensus among international law specialists had viewed the provisions of international instruments as too general to be used by domestic courts. However, in the post-Cold War period, this traditional view was brought into question as legislators and constitutional courts, most notably in Latin America, South Africa, and India, signaled that international instruments might have an interpretive function in the application of domestic law, either through direct judicial application of ratified international instruments or, more innovatively, through recourse to unrati-fied international instruments as supporting authority for identifying generally

accepted legal principles. For the ILO's specialists in international labor law, this increased judicial willingness to approach the provisions of international legal instruments as applicable legal authority seemed to offer a means for enhancing the relevance of enacted labor conventions, even at a moment when national governments and employers' organizations were losing interest in the ILO's standard-setting processes.

Jurists within the ILO's Standards Department found themselves well situated to take up the project of supplying national judges with juridical resources to further develop labor rights. The annual reports of the Committee of Experts, although officially confined to monitoring the application of conventions, had long been understood by those in the Standards Department who assisted in their preparation as allowing for de facto jurisprudential development. In addition, the decisions of the tripartite Committee on Freedom of Association, in whose work the staff of the Standards Department likewise assisted, were tacitly understood to have established a kind of customary rule in common law in the area of freedom of association.

In the early 1990s, this understanding within the Standards Department moved closer to official acknowledgment. Language in the Committee of Experts' 1990 General Survey asserted that as long as its views on the meaning of the provisions of an ILO convention are not contradicted by the International Court of Justice (the only institution explicitly endowed with interpretive authority over standards by the ILO Constitution), then "these views are deemed valid and generally recognized" (ILO 1990: para 7). This interpretive dimension became particularly evident in the Committee's supervision of ILO conventions – such as those dealing with forced labor, freedom of association, and discrimination in employment – whose open-ended provisions facilitated jurisprudential development and where the Committee of Experts saw itself as elaborating "universal principles [that] cannot be applied selectively" (ILO 1994: para 20).

Perhaps most significant in this respect was the development of an ILO jurisprudence around the right to strike. This principle, not expressly addressed in the 1948 Freedom of Association and Protection of the Right to Organize Convention (No. 87), was nevertheless allocated its own independent section in the Committee of Experts' 1994 survey of the application of the ILO's freedom of association conventions, having been extracted juridically through a synthetic reading of multiple provisions in Convention 87 and further bolstered by reference to international human rights instruments. In light of this extensive jurisprudential analysis, which identified both situations in which the right to strike could be acceptably restricted and adequate supplemental guarantees for the interests of workers in these situations, officials

in the Standards Department could convincingly claim that the right to strike was a matter in which the Committee of Experts – following the lead of the Committee on Freedom of Association but also making its own contribution by tethering the right to strike to a specific convention – had progressively developed a mature “case law” (Valticos and von Potobsky 1995: 98).

Though certainly not intended to have this effect, the Governing Body’s various moves to identify core ILO organizational competencies contributed to further accelerating jurisprudential development. In what might be seen as a precursor to the 1998 Declaration’s focus on fundamental rights, a “standards policy reform” enacted by the Governing Body in 1991 freed states from reporting annually on their observance of “low-priority” conventions. Intended in part to make standards supervision less cumbersome, this change had the effect of focusing more concentrated attention on the reporting that governments did still have a requirement to undertake. All the more so as the revised review system now offered expanded opportunities for workers and employers from the relevant country to append their own commentaries taking issue with the submissions of their government. Once this change went into effect in 1993, observations of workers’ organizations became “a crucial element” of the supervisory process, providing the Committee of Experts with a wider range of fact patterns on which to base its conclusions (Tapiola 2007: 35). The Governing Body’s moves to synchronize ILO activity around the broad strategic objectives identified in the 2008 Declaration likewise facilitated jurisprudential development, as it had the effect of enabling standards supervision to take a broader and more synthetic approach (Bellace 2011: 26–27).

Not only was the standards supervision system generating new normative content, but enterprising jurists in the Standards Department also took the initiative to disseminate these norms to a transnational interpretive community of like-minded jurists. The project of “selling” ILO standards to the judiciary took off, almost by accident, in the late 1990s, when Standards Department staff members were approached by national judges requesting information on international labor law and the Office organized a set of workshops in response. Starting in 1999, training sessions for lawyers and legal educators, and subsequently for judges, were institutionalized through the ILO’s International Training Center in Turin. These workshops presented ILO standards as relevant legal instruments that national labor lawyers and judges should have in their toolbox. In addition to the training sessions, Standards Department staff assembled a database of national court decisions that they considered to have correctly interpreted ILO standards, with an accompanying reference manual aiming to document a trend at the national level to incorporate ILO

standards into the formulation of labor legislation and into the application of labor law by the judiciary (Beaudonnet 2010).

Promoting standards in this decentralized manner was a move away from international institutional hierarchies. Traditionally, the primary contact for the Standards Department had been national ministries of labor. By cultivating direct contacts with domestic jurists and training them to transpose ILO standards into national law, the Standards Department sought to “oil the wheels of the supervisory machinery at the national level” (Doumbia-Henry 2007: 280). In this view, transnational norm diffusion is “a way to enrich and improve domestic judicial decision-making in developing and developed countries, in accordance with the prevailing legal environment” (Thomas, Oelz and Beaudonnet 2004: 284). Moreover, the increasing references by regional human rights courts to ILO standards represents a particularly exciting development, resulting in a proliferation and “mainstreaming” of ILO standards into other legal systems and “potentially leading to a broader application and wider awareness of the ILO body of law” (Ebert and Oelz 2012: 14). The success of this system is defined in terms of its ability not simply to articulate human rights at the international level, but also to diffuse workers’ rights to receptive audiences who do not directly participate in the negotiations and discussions sponsored by international organizations.

In 2007, the ILO Committee of Experts marked its eightieth anniversary with a conference at which eminent lawyers and legal scholars celebrated its success. The Committee had grown to twenty seats, a significant number of which were held by women, and its jurisprudence enjoyed a strong international reputation (Politakis 2007: xviii). At the same time, as officials in the Standards Department noted, the Committee was also at a crossroads. It needed to have access to resources adequate to its task of examining some 2,500 reports each year and a concurrent explosion of commentaries from workers’ groups (Simpson 2004: 73). Yet there was hope that technology might offer a solution. “We need to harness the tremendous potential of information technology to bring reporting into the twenty-first century,” according to the Department’s director, “so that our supervisory system can continue to function efficiently and produce high quality results” (Doumbia-Henry 2007: 281). There was a sense that the system had become a victim of its own success, but also pride that the ILO’s standards supervision system could now be recognized as “the beacon in the lighthouse” of human rights protection (Doumbia-Henry 2007: 280). As discussed in the next section, however, it was precisely while officials within the Standards Department celebrated what appeared to them to be universally positive normative development and diffusion that a forceful challenge to this transnational modality of lawmaking was in the process of being organized by

a set of ILO constituents holding a very different understanding of how the ILO should operate.

4 INTERNATIONAL AND TRANSNATIONAL APPROACHES IN CONFLICT

As the discussion in the previous sections has indicated, the transnational diffusion of ILO jurisprudence encouraged by staff in the ILO Standards Department operated largely independently of contemporaneous ILO reform initiatives with a traditional international lawmaking focus. The Governing Body – preoccupied with discussions of how the organization’s embrace of a Decent Work Agenda should be implemented within its standard-setting and technical cooperation programs – seems to have been largely unaware of (and uninterested in) the growing influence of ILO jurisprudence. However, in 2012, these parallel tracks for law reform – international and transnational – abruptly came together when the Employers Group not only voiced its displeasure with the hardening ILO jurisprudence concerning the right to strike but also adopted the rhetoric of social dialogue to demand that the implementation of standards should be constituent-driven rather than left to experts. These complaints did not come out of nowhere, as the Employers Group had been objecting to this jurisprudential hardening on the right to strike for some time (see La Hovary 2013: 341–3), but their objections to the work of the Committee of Experts in this area were now voiced with particular bluntness.

These developments have been the subject of extensive discussion by legal commentators. One set of commentary focuses criticism on the employers group’s claims concerning the right to strike, emphasizing the established place of this principle within the broader corpus of international human rights law (Swepston 2013). Other commentators have endeavored to show that the employers’ position was not consistent and that it shifted in response to political dynamics at the end of the Cold War (La Hovary 2013). And a variety of views have been expressed on whether the Committee of Experts was too audacious in its interpretation (Ewing 2013; Bellace 2014, 2015).

At a practical level, the employers’ more assertive position is a source of concern within the Standards Department. Work stopped on updating the Turin Center’s manual for judges because the employer representative had specifically criticized it for suggesting that comments by the Committee of Experts were more useful for judges than comments made by the tripartite Conference Committee on the Application of Standards. Standards Department officials voice the hope that the employers might “see the big picture again.” They point out that, for both employers and governments, regulated strikes are preferable to unregulated strikes and that judges applying

ILO standards often find that national limitations on the right to strike are justifiable. While they acknowledge, in private, that the juridical work of the standards supervisory bodies does occasionally cause controversy, their assessment is that reform proposal to separate the interpretation of standards from standards application would never work in practice.

As for the Employers Group's proposals that the ILO should move away from standards enforcement entirely toward a social dialogue model, members of the Standards Department insist that standards application is what makes the ILO distinct and what constitutes its *raison d'être* within the international system. Veteran jurists express the hope that a combination of high-quality research and concrete immediate objectives will allow the ILO standards supervision system to pass through the current period of tensions and resume its distinct role in the organic and incremental elaboration of transnational labor law.

CONCLUSION

It is important to emphasize that the discussion in this chapter remains somewhat preliminary, reflecting ongoing developments on the ground. However, even with this qualification, it is apparent that ILO jurists are playing a leading role in efforts to reinvent an organization approaching its centenary. As we have seen, their contributions are informed, in some cases explicitly, by the conceptual diversity of contemporary legal thought. As the ILO searches for ways to realize its institutional and normative capacities, jurists express strikingly different visions of how this can best be accomplished. The conflict over the "right to strike," even if temporarily defused (see ILO 2016: 4–5), has brought these differing visions into appreciably more direct relation with one another.

It might be tempting to label these differing ILO reform projects as motivated by paradigmatically distinct conceptual structures, functionalist and formalist respectively. Yet ILO jurists involved in advising the Governing Body and their colleagues in the Standards Department similarly situate their initiatives as a move away from a prescriptive, command-and-control regulation. Moreover, both of these projects for recasting labor standards draw on a similar cocktail of juridical techniques. For instance, in the governance reforms endorsed by former Legal Advisor Francis Maupain, we see the development of a holistic reading of the ILO Constitution with the aim of reframing the organization's mandate so as to enhance legal coherence. Yet a similarly holistic and synthetic reading of the corpus of international labor standards underlies the development of ILO jurisprudence. It is true that the Employers Group currently expresses a preference for the constituent-based lawmaking system grounded on the work of the Conference, while the Workers Group prefers

to rely on quasi-adjudicatory monitoring processes. Yet both lawmaking processes now incorporate a concern for interpretive coherence, on the one hand, and for flexibility, on the other hand, that make them difficult to classify in terms of a formalist/functionalist divide. Moreover, in the work of the ILO's legal practitioners, it is difficult if not impossible to identify any underlying modality of interpretation that would be recognizable to a structuralist legal philosopher.

My analysis suggests that the deeper difference between these ILO reform initiatives lies not at the level of interpretive technique but rather in how each legal project frames the relation between national and extra-national authority. The reforms enthusiastically endorsed by the ILO Governing Body adhere to a positivist tradition of international law, one in which international institutions are the venues through which relations between states are regulated and in which a clear hierarchy of norms is maintained. In this vision, elaborated by specialists in public international law such as Francis Maupain, priority is given to elaborating the authority of international regulatory structures and their relation to sovereign states. By contrast, reform initiatives incubated within the ILO Standards Department have tended to adopt a transnational approach to lawmaking, in which norms elaborated by judicial or quasi-judicial structures are available to be taken up by receptive audiences in a manner that is more organic than rationally orchestrated. In this vision, it is the substantive content of law that is preeminent, and institutional hierarchy recedes into the background.

For those seeking to explore the contours of legal thought in the contemporary moment (as well as sources of counter-hegemonic potential), the conceptual configurations assembled and sustained by ILO jurists offer rich terrain. Their various internationally and transnationally oriented experiments at recasting labor standards and observing the tensions between them offer us a sense of the political stakes inherent in these distinct framings of the nature of global governance. Efforts to revitalize the normative machinery for social regulation are a reminder that it is important to ask not only how law is made but also for whom and by whom it is made. The analysis of the ILO shows that, in the contemporary moment, all of these questions remain open to creative reformulation.

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