V. ILO Core Conventions: Prospects for U.S. Ratification

ILO's 1998 Declaration: Ratification Campaigns for Convention 111 on Employment Discrimination

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A Timeline of Calls for ILO Campaigns

Following a consensus at the 81st Session of the International Labour Conference **(1994)** for a more intensive promotion of fundamental rights, the Director-General began a campaign to promote ratification of the fundamental Conventions. Working in the International Labour Standards department at that time, I had the "lucky" responsibility of organizing the drafting, signature, and dispatch of the first round of Director-General letters to member states. They were to be personalized according to each State's ratification record and past utterances on ratification prospects (available through General Survey questionnaire replies and a range of other sources, including formal workshops aimed at ratification, statements in other UN bodies, etc.) and to offer a surprisingly new approach from the Secretariat, although Standards Specialists in the field for years had job descriptions that included support for ratification of the whole body of international labor conventions, and support for their application in law and in practice—a range of technical assistance options to help foster social dialog on the utility of ratification. There were seven texts involved: Conventions No.'s 87 and 98 on freedom of association, 29 and 105 on forced labor, 100 and 111 on non-discrimination, and 138 on minimum age for entry into employment, soon to be followed by the Worst Forms of Child Labour Convention, No. 182, adopted by the ILC in 1999. Regular reports were made to member states on this campaign.

With the **1998** Declaration on Fundamental Principles and Rights at Work and their follow-up, another ratification campaign sprang into action. The Governing Body's LILS (Legal Issues and International Labour Standards) Committee examined member state responses in documents divided according to the four pairs of fundamental conventions. The most recent session of the ILC **(2010)** included a discussion on the future of the follow-up and decided, in a Resolution on the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work, to, among other things, maintain the annual follow-up concerning non-ratified fundamental conventions (with some adaptation of the present modalities of application of article 195(e), of the ILO Constitution.

In **2008**, the International Labour Conference adopted the ILO Declaration on Social Justice for a Fair Globalization (Social Justice Declaration), which envisages that ILO members, in the context of the implementation of the Decent Work Agenda at the national level, review their situation regarding the ratification of fundamental ILO conventions as well as those regarded as most significant from the viewpoint of governance.

In **2009**, the ILC Conclusion on Gender Equality at the Heart of Decent Work instructed that the International Labour Office "… through a practical plan of action, strive for universal ratification and effective implementation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equal Remuneration Convention, 1951 (No. 100)." Other important texts were, of course, mentioned in those ILC Conclusions—first from the point of view of improving ratification rates and analyzing obstacles to ratification [Workers with Family Responsibilities Convention, 1981 (No. 156),

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Maternity Protection Convention, 2000 (No. 183), Part-Time Work Convention, 1994 (No. 175), and the Home Work Convention, 1996 (No. 177)]; second, for ratification [Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and Convention No. 182 mentioned above]; and third—and supremely important from the viewpoint of the Office—action to support member states to ensure their effective implementation.

Follow-up information is provided in papers to the Governing Body. For example, the November **2010** LILS document titled General Status Report on ILO Action Concerning Discrimination in Employment and Occupation states: "Promoting the ratification of Conventions relevant to equality and non-discrimination remains an important strategy to encourage action at the national level. The Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the Equal Remuneration Convention, 1951 (No. 100), have now been ratified by 169 and 168 member states, respectively. In line with the Conclusions on gender equality at the heart of decent work, adopted by the International Labour Conference in 2009, the Office is working towards universal ratification of Conventions No.'s 100 and 111, and improved ratification of two other key equality conventions—the Workers with Family Responsibilities Convention, 1985 (No. 156), and the Maternity Protection Convention, 2000 (No. 183)."

And the Result—by Numbers—Is …

To date, for the fundamental equality texts, the ratification campaigns (which have included—across regions—letters, workshops, technical advice, public awareness campaigns, individual coaching, etc.) have resulted in this ratification total for the two texts that I wish to focus on today:

- Convention No. 100: 168 (most recent = Namibia in 2009)
- Convention No. 111: 169 (most recent = Samoa in 2008)

The most recent Governing Body document on unratified core conventions notes that "the positions of the Governments of *Myanmar* and *Somalia* are indicated in the previous section [namely, for the former, the ratification of non-ratified fundamental conventions would be considered when appropriate; and for the latter, that once a peaceful process could allow the adoption of new laws, the ratification of the ILO fundamental conventions would be possible]." The Government of *Kuwait* explained that the process of ratification of Convention No. 100 was being discussed by the Ministry of Labour and Social Affairs and the social partners before being submitted to the Council of Ministers and the Parliament. The Government of *Timor-Leste* indicated that it had developed a plan of action for the ratification of the non-ratified ILO fundamental conventions, including Conventions No.'s 100 and 111. That same paper gives only the following information from the United States: "According to the Government of the United States, federal legislation and practice appeared to be in general conformity with ILO Conventions No.'s 87 and 98, although some challenges persisted and no recent in-depth tripartite analysis had been performed regarding these conventions. The Government further indicated that to the extent that the ILO might be able to recommend relevant forms of tripartite technical cooperation, the United States would welcome such proposals" and "The Government of the United States indicated there were no efforts under way at this time to ratify Convention No. 138."

Where Are We in U.S. Deliberations on Convention 111?

Others in this forum will be able to speak to the specific steps, processes and, ultimately, formal consultations on a U.S. ratification of Convention 111. But from the information shared with me to date, it appears that the State Department has had initial meetings with the Senate Foreign Relations Committee on the convention. If the Committee is able to move the other treaty texts through the Senate, that may open up possibilities for dedicating more Committee and Senate floor time to ratifications in general. The advocacy community is active in following this.

So, What Are the Barriers, Legal and Practical?

In 2008, the ILO celebrated the 50th anniversary of the adoption of Convention No 111. The convention was forward looking in 1958, and it remains the most comprehensive, dedicated international instrument on non-discrimination and equality in employment and occupation. It is intrinsically linked to the vision of equality laid down in the 1919 Constitution and ILO's mission to promote social justice through securing decent work for all, recently reaffirmed in the 2008 ILO Declaration on Social Justice for a Fair Globalization. On the 50th anniversary of the convention, several areas of progress in its implementation were highlighted. In 2009, the International Labour Conference adopted Conclusions on Gender Equality that allow reflection—leading to action—on means of overcoming the remaining obstacles to equality between women and men. The following paragraphs rely on the Committee of Experts on the Application of Conventions and Recommendations' (CEACR) summary of Convention 111 issues and the 2009 ILC paper.

According to Article 3(f) of the convention, ratifying states have the obligation to provide information regularly on the measures taken to promote equality and also to indicate "the results secured by such action." The CEACR notes that an increasing number of countries apply the convention through a *combination* of legislative and administrative measures, public policies, and practical programs aimed at preventing discrimination and redressing de facto inequalities, and through the establishment of national equality commissions or other specialized bodies mandated to promote equality and to deal with complaints.

According to an analysis made by the ILO supervisory bodies in 2008, there have been important *legislative developments*. The CEACR has been able to note considerable progress in the adoption of legal provisions on equality and non-discrimination based on the grounds enumerated in the convention. Its Article 1(1)(a) requires ratifying countries to ensure protection against discrimination on all the seven enumerated grounds—namely, race, color, sex, religion, political opinion, national extraction, and social origin; Article 1(1)(b) acknowledges that new manifestations of discrimination will arise or be recognized, and envisages ratifying states determining additional grounds to be addressed under the convention. Countries are increasingly making use of the possibility to determine additional grounds and are taking measures, including legislative protection, to address discrimination based on additional grounds, such as age, health, disability, HIV/AIDS status, language, nationality, family status or responsibilities, and sexual orientation. The CEACR observed that, in many cases, discrimination in employment and occupation is not limited to discrimination on solely one ground. In fact, sex-based discrimination frequently interacts with other forms of inequality (race, national extraction, indigenous roots, religion, age, migrant status, disability, or health). In acknowledgement of this multiple discrimination challenge, the 2011 ILC Global Report on Discrimination will pay special attention to the interplay of sex-based and other forms of discrimination in the world of work.

Though a number of countries already have general constitutional provisions regarding equality, these provisions, while important, have generally not proven to be sufficient in order to address specific cases of discrimination in employment and occupation. Some countries have more recently opted for comprehensive anti-discrimination legislation or have addressed discrimination in broader human rights legislation, while others have introduced new anti-discrimination and equality provisions into the existing labor laws. Given persisting patterns of discrimination, the ILO considers that, in most cases, comprehensive anti-discrimination legislation is the best way to ensure the effective application of Convention 111 and indeed of the UN treaties to eliminate discrimination. Regarding substance in comprehensive legislation, here is a non-exhaustive list of features that have effectively contributed to addressing discrimination and promoting equality: covering the broadest group of workers; defining clearly both direct and indirect discrimination; prohibiting discrimination at all stages of the employment process; explicitly assigning supervisory responsibilities to competent national authorities that are well resourced in human and financial terms; providing dissuasive sanctions and appropriate remedies; shifting or reversing the burden of proof; providing protection from retaliation; allowing for affirmative action measures; and encouraging the adoption and implementation of equality policies or plans *at the workplace level*, as well as the collection of relevant sex-disaggregated data. Beyond legislation, good practice is evident in a number of countries that have adopted codes of practice or guidelines, which provides further guidance concerning the prohibition and prevention of discrimination at work to complement the legislation.

The CEACR nevertheless observed some significant **gaps in the implementation** of Convention 111. For example,

- Certain categories of workers such as casual workers, domestic workers, and migrant workers often remain excluded from the protection against discrimination enshrined in national legislation.
- Some anti-discrimination laws do not cover all the grounds set out in the convention.
- A ground frequently omitted in the legislation is social origin, which remains of importance as new forms of rigid social stratification develop.
- Protection against discrimination does not cover all aspects of employment and occupation, from recruitment to termination.

Another important implementation gap concerns **sexual harassment**, which is a serious form of direct sex discrimination and a violation of human rights at work. The CEACR in its 2002 general observation on this issue already recognized the need to take effective measures to prevent and prohibit—namely, zero tolerance policies—both *quid pro quo* and hostile environment sexual harassment at work. Laws on sexual harassment often lack clear definitions and appropriate responses in terms of remedies and complaint mechanisms. Confining sexual harassment to criminal procedures has generally proven inadequate, as they may deal with the most serious cases but not with the range of conduct in the context of work that should be addressed as sexual harassment, the burden of proof is higher, and there is limited access to redress.

Despite the requirement under the convention to **repeal discriminatory legal provisions**, such provisions still exist in a number of countries. For instance, laws still place limitations on the type of work women can do or exclude them from certain sectors or occupations—for instance, in the judiciary or the police. Protective measures still exclude women from certain occupations based on stereotyped assumptions regarding their role and capabilities. To counteract this weakness in implementation, restrictions relating to the access of women to certain types of work should be related only to maternity protection and not aimed at protecting women because of their sex or gender, based on stereotyped assumptions. Laws governing personal and family relations not yet providing for equal rights of men and women continue to impact on the enjoyment of equality with respect to work and employment, notably laws authorizing a husband to object to his wife working outside the home or requiring the husband's permission before his wife can accept certain jobs.

Enforcement remains a challenge. The implementation of anti-discrimination legislation remains a challenge almost everywhere. Where no cases or a negligible number are being lodged, the CEACR has queried whether this could indicate a lack of awareness of the principle of the convention, lack of confidence in or absence of practical access to procedures, or fear of reprisals. It has invited member states to raise awareness of the legislation to enhance the capacity of the responsible authorities, including judges, labor inspectors and other public officials, to identify and address such cases, and also to examine whether the applicable substantive and procedural provisions, in practice, allow victims of discrimination to bring their claims successfully. The CEACR has also consistently stressed the need to collect and publish information on the nature and *outcome of discrimination cases* addressed by the competent bodies, including the courts, national human rights or equality institutions, and labor inspectorates, as a means of raising awareness of the legislation and of the avenues for dispute resolution, and as a basis for examining their effectiveness.

The **complexity of sex discrimination** is part of the problem. The gender pay gap remains high as well as occupational sex segregation, women are over-represented in informal and atypical jobs, they face greater barriers in gaining access to posts of responsibility, and they continue to bear the unequal burden of family responsibilities. The CEACR is not alone in voicing its concern about the high participation of women in the informal sector in a large number of countries (often linked to economic crises and downtowns), which means that they are excluded from most of the legal and social protection and benefits available to those working in the formal sector. Such protection and benefits are also unavailable in some countries to workers in export processing zones, where serious discriminatory practices against women are well documented at least in the press. Also, stereotyped assumptions regarding women's aspirations and capabilities, as well as their suitability for certain jobs, continue to lead to the segregation of men and women

in education and training and, consequently, in the labor market. ILO has developed empowerment tools to question presumptions among, for example, program designers about what their outputs will bring in the form of women's fulfillment.

The Way Forward, for U.S. Debates, Too …

ILO advice on the way forward starts with **proactive measures**. Tackling *de facto* inequalities requires proactive approaches and measures to achieve gender equality and to overcome discrimination of particularly vulnerable groups. Such measures have included affirmative action, awareness raising and training, and ensuring coherent policies in areas affecting equality of opportunity and treatment in employment and occupation. Indirect discrimination and tackling structural disadvantage remains a serious concern. The special circumstances, human rights and needs, and aspirations of the groups concerned need to be taken into account in the design and implementation of policies and programs in the areas of training, skills development, and employment promotion.

Second, there is a clear need for **more and better data** that can inform policy choices. Some countries have put in place laws, policies, and procedures that allow for the collection of appropriate sex-disaggregated statistical data as a means of identifying social and economic gaps between different groups of the population. At a global level, however, relevant data are available only to a limited extent. While data on the situation of men and women exist more often, data on ethnic or other social groups are being collected and made available by a far smaller number of countries. Because appropriate data are crucial in order to set priorities and design appropriate measures to address discrimination and *de facto* inequalities, and are also indispensable in order to monitor and assess the impact and results achieved by the measures taken, the ILO has systematically worked with ministries responsible for labor to collect and analyze relevant data, but should other government departments not also be gendered in this data collection? And ILO surely needs to work more with central statistical offices!

Third, gender equality needs to be taken on as a legitimate workplace issue by workers' and employers' organizations, and state structures need to recognize the **role that the social partners** have in achieving this goal. In keeping with the spirit of Convention 111, workers' and employers' organizations are playing an important role in promoting understanding, acceptance, and the realization of the principle of equality of opportunity and treatment in employment and occupation through the development and implementation of workplace polices and measures to ensure equality of opportunity and treatment and promote diversity at work. Trade unions in all regions have taken up anti-discrimination work, ranging from designing internal procedures to joining national public campaigns. Employers and employers' organizations have developed codes of conduct and implemented diversity management and training activities in a considerable number of countries. Collective bargaining has also been instrumental in securing the rights under the convention in practice. The 2009 ILC conclusions are strong on stressing the need for full respect for freedom of association as a precondition to enable workers' and employers' organizations to carry out their important role in the context of the equality conventions, as social dialog is key to addressing legislative and implementation gaps. Conventions 98 and 111 have a natural link.

Against these specific approaches lies the need to conceptualize **gender equality within the industrial and employment relations global dialogs**. Keeping gender equality apart, isolated and siloed without grasping the reality of what happens to women and men at work, and how that is different just because of their sex, results in unworkable solutions, or, dare it be said when we see the woeful achievements for some of the UN's Millennium Development Goals—has no results at all. As argued by one respected academic when analyzing sex discrimination legislation in Australia, "historical separation of anti-discrimination provisions from industrial relations law and sidelining of discrimination measures within the industrial relations jurisdiction make it difficult both to conceive of sex discrimination as a mainstream, industrial relations issue and to render problematic the gender equality impact of industrial relation regulation."

Noting that, at present, only 14 ILO member states have not ratified Convention 111, an instrument of fundamental and enduring importance, I cannot but express my fervent wish that universal ratification will be achieved by 2015, as called for by the ILO Director-General, and offer—to all those considering

ratification—all the expertise, technical and comparative knowledge, policy advice, and good practice skills that the massive UN specialized agency of the ILO can provide.

Endnotes

[1] ILC, Provisional Record No. 10, seventh item on the agenda: Review of the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Report of the Committee on the 1998 Declaration.

[2] ILC, Provisional Record No. 13, sixth item on the agenda: Gender Equality at the Heart of Decent Work, Report of the Committee on Gender Equality, para. 56 (a), at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_105119.pdf

[3] See ILO Governing Body document from the March 2010 Session: GB.309/LILS/3, para. 3, at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_146085.pdf

[4] See ILO Governing Body document from the March 2010 Session: GB.309/LILS/6, para. 22, at http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_145957.pdf

[5] Op. cit., paras.12 and 16. Paragraph 25 includes further information on the governance conventions that are also included in this particular document, namely that "in the United States, the Tripartite Advisory Panel on International Labor Standards (TAPILS) may consider the question of ratification of this convention, which has been included in a shortlist of instruments for examination," as does para. 39 on Convention No. 129: "In the United States, the convention may be included among the priority instruments to be submitted to the TAPILS."

[6] Sara Charlesworth, in *Sex Discrimination in Uncertain Times*, (Ed.) Margaret Thornton, ANU E Press, Canberra, 2010, p. 134.