THE ILO SUPERVISORY BODIES' « SOFT LAW JURISPRUDENCE »

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Summary

Dramatic events took place at the June 2012 Session of the ILO's International Labour Conference (ILC) when the Employers' group challenged the interpretation of the right to strike as inherent to the Convention concerning Freedom of Association and the Protection of the Right to Organise, 1948 (No. 87) by the Committee of Experts on the Application of Conventions and Recommendation. As part of their protest, the Employers' group put a stop to the usual proceedings within the ILC, which has brought together representatives of governments, workers and employers to discuss labour issues on a regular basis since the foundation of the ILO in 1919.

The arguments presented by the Employers have several dimensions. The Employers contended *inter alia* that since the right to strike is not included in Convention No. 87, the Committee of Experts should not express an opinion on this issue and should not be "making policy" in this regard as its mandate is "to comment on the application of Convention No. 87 and not to interpret a right to strike into Convention No. 87", particularly since ILO Conventions are politically negotiated texts by the constituents. They claimed that the mandate of the Committee of Experts has not changed since the ILC set it up in 1926. More broadly, the Employers also maintained that the ILO supervisory system was in crisis - because, *inter alia*, the Committee of Experts had overstepped its mandate. Most of the arguments that the Employers presented in support of their case are not new however. The Employers have in fact been developing their arguments against the interpretations of the Committee of Experts and the content of the right to strike for quite some time – since 1989 to be exact, when the alliance between workers and employers within the ILO fell along with the Berlin Wall – and their arguments raise long-standing issues concerning interpretations in the ILO, the mandate to interpret conventions within the ILO, and the legal significance of the supervisory bodies' comments. However, what is significant about the June 2012 events is that the Employers escalated their negotiations tactics, without being provoked, by paralysing the work within the ILC.

Several explanations can be put forward to explain why the Employers changed their tactic in June 2012 and one of them is, in the words of the Employers, that the Committee of Expert's work has influence outside the ILO. More specifically, they suggested that "the critical issue was that [the Committee of Experts'] observations were being viewed by the outside world as a form of soft law labour standards jurisprudence". Furthermore, with the consolidation of the concept of fundamental principles and rights at work, increasing reference has been made outside the ILO to the eight fundamental conventions and the Employers are worried that the interpretation that the Committee of Experts is giving to these conventions will not stay within the ILO. What is troubling the Employers is that this "soft law jurisprudence" is having an impact outside the ILO.

This presentation will explore what the Employers mean by "soft law jurisprudence" when referring to the Committee of Experts comments, as this term is not usually used to describe its work. To do so, it will examine interpretation at the ILO, how the Committee has had, over the years, the task of interpreting conventions and what influence the work of the Committee has, both intentionally and unintentionally, discussing the issue in the general context of the legal effects of soft law.