

Fundamental Principles and Rights at Work: India and the ILO

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The manner in which rights at work have been identified and articulated within both the International Labour Organisation and India since the founding of the agency in 1919, bears a close similarity. Despite what its mandate would suggest, the ILO (like India) has chosen to treat only certain selected rights as “fundamental” at the expense of issues such as those relating to conditions of work, wages and social security, which are equally constitutive of what it terms “decent work”. This paper argues that recent developments within the ILO and India indicate the need for adopting a broader and more inclusive approach to ensuring decent work.

The Declaration on Fundamental Principles and Rights at Work (DFPR) by the International Labour Organisation (ILO) in 1998 marked a decisive moment in its history. Adopted at the end of a decade that had witnessed other international organisations, multilateral trade treaties, and private monitoring arrangements voice the need for respecting minimum labour standards in an increasingly interlinked world, the DFPR was seen as a bid by the ILO to reassert its claim to be the legitimate international body to articulate and effectively monitor compliance with labour standards everywhere.

A couple of years earlier, in 1996, India led a spirited campaign of (largely) developing countries at the World Trade Organisation (WTO) Ministerial in Singapore to delink issues of trade access from adherence to labour standards. The main thrust of that campaign was underscoring that the WTO had no standing to discuss issues of labour standards. Instead, many countries, including India, took the position that it was a matter that fell squarely within the competence of the ILO. This required the ILO to respond to the view among its members that its territory was being encroached on. Through the adoption of the DFPR, the ILO was clearly seeking to renew itself in a rapidly changing world. To do this, the ILO relied on the support of the governments, employers and workers gathered at the International Labour Conference (ILC) to adopt an acceptable, minimum level of labour standards¹ to which every member-state would be willing to adhere. Based on the principles of the ILO Constitution, the DFPR identified certain principles and rights that were seen to be fundamental to the organisation, which it therefore expected all member-states to follow.

The selection of such principles and rights fundamental to the ILO, nearly 80 years after the organisation came into existence, was an important exercise in itself. What made the discussion on the choice and the eventual adoption of the DFPR interesting was what was identified as the core values and principles of the organisation by different players in the ILO’s tripartite structure. There was considerable time spent over whether they corresponded to the content of any particular ILO convention or conventions, or were merely underlying principles (a “brooding omnipresence” pervading the organisation as it were), whether these fundamental principles were indeed “rights” guaranteed through law, and the fine distinction between principles, values and rights, made even more complex by the manner in which these terms were translated into the official Spanish and French versions. This article examines the debate around the DFPR within the ILO and outside, and relates it to close parallels in international history as well as the time the Constitution of India was framed.

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It also links it to developments in the recent past to explain India's support for the DFPR at the time of its adoption.

The ILO and the Need for the DFPR

This was certainly not the first time that the ILO adopted a Declaration to reiterate its relevance and position in a changing world. The Declaration of Philadelphia² adopted in the closing years of second world war had identified social justice as a vehicle for ensuring peace and prosperity in the world. After the war, the map of the world changed considerably with the emergence of several newly independent countries in Asia and Africa, and many of them subscribed to a broad socialist outlook in their economic and social policies. Decades later, the end of the cold war, the collapse of the Berlin Wall and the disintegration of the Soviet Union, alongside the rise of multiparty democracy, rule of law and economic liberalisation across the world sought to find their reflection in the ILO as well. The ILO, which for long had been circumspect about identifying any particular political or economic system as conducive to workers' interests, now endorsed principles of democracy and pluralism (ILO 1992, 1994). The emergence of the WTO in 1995 also posed a challenge to the legitimacy of the ILO to speak exclusively on labour standards, even when such labour standards had their impact on world trade. The ILO's response to these challenges is to be found in the DFPR adopted towards the end of the 1990s.

The choice of rights selected in the DFPR and the careful avoidance of linking labour standards with trade or with protectionism on the part of the developed world was a well-balanced compromise to suit the ILO's constituents and to win support for the declaration. In any event, the voting at the ILC showed that while there were no votes cast against the declaration, there were a large number of abstentions.

The DFPR identifies four issues, which it declares to be fundamental to the ILO Constitution and the Declaration of Philadelphia (now an annex to the ILO Constitution), and, therefore, binding on all members. They are freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in employment and occupation. The DFPR notes "that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognised as fundamental both inside and outside the Organisation". However, the expectation that these conventions would be identified by the DFPR was belied. While repeatedly referring to these fundamental conventions, the DFPR does not identify them. The discussion in the conference committee and in the ILC plenary session indicated the tension between identifying the conventions, and at the same time maintaining that the DFPR related to overarching principles that underpin the ILO.

Keeping the category of fundamental conventions open-ended in the DFPR has been useful since it permits the organisation to add conventions to this fluid category as and when they are adopted, and when they are deemed to be sufficiently "fundamental" to the ILO. The ILO had identified certain fundamental conventions in 1995; and Convention No 182 adopted in 1999 on the Worst Forms of Child Labour was added to this category to

correspond to the DFPR. (The reader familiar with the development of Indian constitutional theory can only be struck with the close similarity to the articulation by the Indian Supreme Court of the "basic structure doctrine" to explain the non-amendable core values of the Constitution that are not a close-ended category, and are therefore capable of being added to by the court in subsequent cases.) The ILO now identifies eight conventions as fundamental conventions, whose ratification is being promoted on an all-sided basis (with technical assistance to countries concerned) to ensure compliance with the DFPR. In addition, it identifies certain conventions as priority conventions.³

The reference in the DFPR to principles recognised as fundamental "outside" the organisation was also an attempt to draw on the wider acceptance of ILO standards by multilateral treaties, codes of conduct observed by large business houses, and other treaties.⁴ Paragraph 5 of the DFPR states that labour standards "should not be used for protectionist trade purposes" and that nothing in the DFPR and its follow-up "shall be invoked or otherwise used for such purposes"; and, further, that the "comparative advantage of any country shall in no way be called into question" by the DFPR or its follow-up. Clearly, the concern of both developing countries and the workers' groups was reflected in these formulations. India wanted the DFPR to clearly state that the ILO was the sole competent international organisation for labour standards. Yet, after much debate, this sole jurisdiction was not claimed by the ILO. The DFPR merely states in its perambulatory section that "the ILO is the constitutionally mandated international organisation and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles".

The DFPR mandates the ILO to assist members to conform to these fundamental principles and rights at work. The follow-up of the DFPR is not through the regular supervision machinery of the ILO, which remains intact. Instead, there is, first, a requirement of annual reports from countries that have not ratified the fundamental conventions. Second, there is a Global Report prepared by the office based on reports submitted by countries that have ratified the fundamental conventions or otherwise, and other available information on the fundamental conventions. This is accompanied by ILO efforts, of a promotional nature, to get members to comply with the provisions of the DFPR.

The debates within the ILC made it clear that the follow-up procedures were to be merely promotional. Countries warned against Global Reports having any "adversarial content" or of such reports turning into occasions for double scrutiny/double jeopardy (particularly for those countries that had ratified the fundamental conventions and were therefore subject to the regular supervisory procedures). Several countries were clear that the DFPR would not be a complaints-based mechanism and support was conditional on the follow-up being strictly promotional.

Choice of Rights within the DFPR

The selection of certain principles and rights as "fundamental" in the DFPR signals the acceptance of a hierarchy of rights within the ILO. Earlier editions of the regular ILO publication on conventions

and recommendations used to designate some of these standards as forming a group of what were then called “basic human rights”.⁵ The basic human rights selected by the ILO in the decades of the 1960s and 1970s were the labour standards related to freedom of association and collective bargaining, and freedom from forced labour and discrimination. Child labour, which currently forms a part of the DFPR, was however not designated a basic human right during that period.

The basic human rights selected by the ILO corresponded closely to what were seen as “human rights” narrowly defined during the cold war. These were civil and political rights such as the rights of association and the rights that went up to make a free human being. These were the so-called negative rights, exercisable by individuals and groups against the state, which, in turn, was under an obligation not to infringe on such civil liberties. The Universal Declaration of Human Rights (UDHR) adopted by the General Assembly of the United Nations (UN) in 1948 had identified several human rights. The debates in the period of the cold war drew sharp lines of demarcation between what could properly be termed “human rights”. That the ILO chose in its categorisation of “basic human rights” only those seen as civil and political rights within the UN indicated the spillover effects of the cold war on the ILO (Haas 1964).

The group of conventions relating to “basic human rights” in the official compilations of conventions and recommendations of the ILO conspicuously did not include any labour standards related to minimum wages, social security or conditions of work. The universe of rights at work was officially divided into two groups – those that were “basic human rights” and labour standards that did not enjoy that status. It was therefore not surprising that the ILO, a few decades later, could identify a select group of conventions that it could now term fundamental conventions (Sankaran 1998). The DFPR carries this categorisation forward and as a result does not include any right concerning wages, work conditions or social security. The fundamental principles and rights are seen as the means to achieve these. The DFPR in its preamble states, “The guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential”.

Developments within India

There is an uncanny similarity between the classification of rights at work by the ILO (between those that are fundamental and, by corollary, those that are perhaps not so pivotal) and the manner in which rights were conceived and then classified in India during the course of developments in the 20th century. Early attempts at drafting a constitution for India had already indicated that the Congress Party would only settle for a written bill of rights, which could be enforced by moving the courts. The need to have a set of rights in the constitution was firmly put forward as a part of the freedom movement. The rights identified in that period envisaged no division within this category.

One of the first draft constitutions written towards the end of the 19th century (the Constitution of India Bill, 1895) included

not only individual freedoms but also rights such as those to free education by the state (Austin 1972: 53). A further refinement in Annie Besant’s Commonwealth of India Bill, 1925 was in the same mould, including not just the right to equality, and civil and political rights but also the rights to education and equal access to roads, courts and other public places. Until that time, the justiciable Bill of Rights dealt with not only civil and political rights safeguarding individual rights against the state (the so-called negative rights) but also incorporated social rights such as the rights to education, healthcare, minimum/living wages and social security (positive rights). There was remarkable consensus across the political spectrum that the yet-to-be drafted Constitution of India should have a comprehensive set of rights that would include not only negative political liberties but also the social rights that would be essential for a social transformation of the country. This was echoed and developed further in the Motilal Nehru Report on a draft Constitution set up in 1928.

The resolution adopted at the Karachi session of the Congress in 1931 distinguished between fundamental rights, labour rights, and an agrarian programme on the one hand, and economic and social policy matters on the other. Fundamental rights were spelt out to include freedom of association; freedom of speech and press; freedom of conscience and freedom to profess and practise religion, subject to public order and morality; protection of the languages, scripts and cultures of minorities; equal rights and obligations to all citizens without any bar on account of sex; no disability to attach to any person by reason of religion, caste or creed with regard to public employment, public office or power or honour and the exercise of any trade or calling; equal rights of access to and use of public wells, public roads and other places of public resort; and the right to keep and bear arms in accordance with regulations and reservations made on that subject.

Once the constituent assembly (1946-49) began its deliberations, it was influenced by the categorisation of fundamental and other rights and also the distinction between justiciable and non-justiciable rights proposed in the Sapru Report of 1945 and reinforced by the example of the Irish constitution. The constituent assembly debated the nature of rights to be included in the new constitution. The sub-committee on fundamental rights set up by the assembly in 1947 approved the division of rights into justiciable fundamental rights and directive principles of state policy – the latter were to be guides to the government but would not be cognisable in a court of law.⁶ The eventual Constitution as adopted carried forward this cleavage, with part III of it containing the more classical civil liberties, while positive social rights – socio-economic and other programmatic rights – were consigned to part IV. This hierarchy in the formulation of rights is something that was articulated and accepted more than 60 years ago during the framing of India’s Constitution (Shiva Rao et al 1968).

As finally adopted, the part dealing with directive principles was made non-justiciable; that is, a court could not enforce them. Instead, the following articles stated,

37 The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

38 (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic, and political, shall inform all the institutions of the national life.

This formulation, which makes economic and social rights non-justiciable, also recognises that the welfare of the people and securing them the basis of a decent life lies with the state. This is in accordance with traditional Indian political thought that identifies the state not only as the repository of power but also as the entity with the duty to provide social rights to its citizens. Yet, as formulated by the Constitution, the duty was a non-enforceable one. (Subsequent interpretations by the courts have “read” such directive principles into part III to broaden the idea of justiciable fundamental rights. Thus, the right to education and health, have, in a limited manner, been read into the right to life in the Constitution.)

India and the UN

Looking at the sequence of events, it does not appear that this hierarchy between immediately justiciable rights and those needing progressive realisation was borrowed by India from the UN, which, in later years, was to bifurcate its human rights instruments into two parts. Rather, the flow of ideas could well have been in the reverse direction. This break-up of rights into the two components by the Indian Constitution was fairly prescient and anticipated by several years the fierce debate that later broke out in the UN about the nature of its enumerated human rights.

India played a key role in the formation of the UN and was one of the founding signatories to the Charter. The allies had met in Moscow in 1943 and decided to take further steps to create an international organisation based on respecting the sovereign equality of all member states. The result was the San Francisco conference held in 1945. Fifty countries participated on the invitation of the sponsoring powers – China, Great Britain, Soviet Union and the US. A Ramaswami Mudaliar was the chairman of the Indian delegation to the San Francisco conference where the participating nations signed, on 26 June 1945, the drafts of the UN Charter, the Statute of the International Court of Justice and the Agreement to establish a Preparatory Commission (Govinda Raj 1959). The invitation extended to India (as a non-independent country) in 1945 caused concerns similar to those voiced in 1919 at the time of the formation of the League of Nations (Keith 1996). The Soviet foreign minister noted at the plenary session of the San Francisco conference that “[W]e share the view held by the British Government which suggested that representative of India should be granted a seat at the Conference, imperfect though her status is” (Govinda Raj 1959: 31).

The UDHR of 1948 (drafted almost contemporaneously with the Indian Constitution) saw human rights as an indivisible whole. The categorisation into two sets of rights was to come much later when two International Covenants were adopted in 1966 at the peak of the cold war. This division corresponded loosely with the formulation in the Indian Constitution – civil and political rights that were immediately enforceable, and economic, social and cultural rights that were subject to gradual realisation. There appears to have been a natural progression of

this implicit categorisation of rights when the ILO adopted its DFP in 1998.

India played an active role in the debate about whether there should be a single all-inclusive convention on human rights or there should be two conventions – one on political rights, and the other on economic, social and, cultural rights. India clearly supported the latter position and vigorously argued for the bifurcation of the convention proposed to be created to give binding effect to the UDHR. In the work within the Human Rights Commission that had the mandate to draft the eventual convention(s), India reiterated its well-articulated position of the “primacy of political rights and...their superior justiciability” (Berkes and Bedi 1958: 147). India submitted a memorandum to the Human Rights Commission in 1951, opposing the inclusion of economic, social and cultural rights in the convention as then drafted and stated that “financially weak countries where these rights are not justiciable will not be in a position to implement them” (Berkes and Bedi 1958: 147). Father Jerome D’Souza, member of the Indian delegation to the UN, declared,

In putting the political and civil rights first, we imply not only that those civil and political rights are of their nature capable of receiving an exact expression which will facilitate enforcement by law; not only do we imply that it is not possible to give to the more difficult and less tangible elements of the social and economic rights a similar expression to facilitate enforcement. We go further...and say that according to our way of looking at life, liberty and society, it is by the exercise of these civil, political and individual fundamental rights that the improvement of social, cultural and economic standards can take place (Berkes and Bedi 1958: 148).

This privileged position of civil and political rights was to continue for several years after the Indian Constitution was adopted. The courts too used this approach to exercise their power of judicial review and held laws such as those on land reform as unconstitutional for violating the fundamental freedoms of citizens. Currently, both part III (fundamental rights) and part IV (directive principles of state policy) are seen as two “wheels of a chariot” and given equal importance. Yet it cannot be denied that the right to remedy continues to be available only to the fundamental rights in India. As a result, directive principles such as the one relating to compulsory primary education have been used to expand existing fundamental rights or have had to get transformed to “rights” within the constitutional/legal framework so that they can become justiciable.⁷

Non-Ratification of Fundamental Conventions

Given the prime importance accorded to the chapter on fundamental rights in the Constitution since its inception, it is surprising that India has the poorest ratification record of fundamental conventions in south Asia. Freedom of association, equality and non-discrimination, freedom from forced labour and child labour are guaranteed fundamental rights in the Constitution. Given the underlying philosophy in the Indian Constitution of “here and now” fundamental rights and “gradual” social rights, one would imagine that ILO conventions that related to the DFP would have been readily ratified since they overlapped to a great extent with constitutional provisions, while those relating to social security, minimum wages, working conditions and special groups of workers

would be more difficult to ratify. Yet, India remains one of the few countries that are yet to ratify Conventions Nos 87, 98, 138 and 182, relating to freedom of association, collective bargaining and child labour. At least with regard to the DFPR, these rights appear to have taken on the characteristics of rights that will only very gradually be realised, with no guarantee of them being enforced here and now.

The reasons for non-ratification are many. Though freedom of association is a fundamental right in India, it is a limited one for government employees in that they can only form autonomous organisations (not trade unions) that are separate for each grade of employees and these cannot be affiliated to other trade unions. Such fragmentation prevents the possibility of diluting the strong hierarchies that prevail among groups of government employees. The Constitution permits complete prohibition of the right to associate to those in the security forces. Such constitutional provisions have often provided a justification for non-ratification of Conventions Nos 87 and 98. The reluctance to have ILO standards that would allow trade union rights to government employees (including those working in ministries and departments, the police, armed forces, and civilian employees under their control) has been a recurrent feature of India's discussions at ILCs (Sankaran 1998, 2009).

Tabling a report to the Indian Parliament in 1978, the government stated,

Government of India has not so far been able to ratify Convention No 87 concerning Freedom of Association and the Protection of the Right to Organise, and Convention No 98 concerning the Right to Organise and Collective Bargaining, mainly because the existing law and practice pertaining to the public servants do not fully meet the requirements of these two Conventions. Article 6 of Convention No 98 states that the Convention does not deal with the position of public servants engaged in the administration of the State. The supervisory bodies of the ILO have observed on a number of occasions that some Governments have applied these provisions in a manner which excludes large groups of public employees from coverage by Convention No 98.⁸

The report went on to discuss the features of Convention No 151 concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service. After noting the divergence between the requirement of this Convention and the Indian position, it said, "*From the position explained above, it will be seen that the requirements of the Convention are not fully met. In the circumstances, the Government of India do not propose to ratify the Public Service Convention (No 151) at this stage*" (emphasis in the original).

Similarly, reporting to Parliament in 1982 on Convention No 154 concerning the Promotion of Collective Bargaining adopted by the ILO in 1981, the government stated,

The Government of India subscribes to the idea of promoting collective bargaining. However, the main hurdle in ratifying this Convention is the fact that it applies to all branches of economic activity, yet but for the few exceptions already mentioned, the bulk of the workers in the country are either unorganised rural workers or those working in the urban informal sector and hence it may not be possible to immediately extend measures for promoting collective bargaining in these sectors ... *It would thus be seen that while the Government of India would like to take all possible measures, as envisaged in the Convention,*

*to promote collective bargaining, it may not be possible at this stage to ratify the Convention, mainly because of its wide coverage*⁹ (emphasis in the original).

This view was articulated by the government right from the time Conventions Nos 87 and 98 were discussed and adopted by the ILC. For instance, in the course of the discussion in the Committee on Industrial Relations in the ILO in 1949, the Indian government delegate unsuccessfully moved an amendment that the extent of the applicability of the proposed convention to public servants should be determined by national laws (ILO 1949: 472).

The government position has been more or less the same over the years, and even when the rules concerning associations of government employees were revised in 1993, no attempt was made to bring them in line with the ILO's fundamental Conventions Nos 87 and 98. Despite the close correspondence between the DFPR and the fundamental rights recognised by the Indian Constitution, the several exceptions to these rights in the Indian case were at odds with the ILO requirement that freedom of association should be available to workers "without any distinction whatsoever". Clearly, similarity in grading and arranging rights in a hierarchy has not been adequate to bring India in line with the ILO in this matter.

The position of the government was however dramatically different with respect to Convention No 141 concerning Organisations of Rural Workers and their role in economic and social development. Reporting to Parliament during the period of Emergency in 1977, the government noted,

In order that the benefits of development might percolate the lowest strata of the rural poor, it is recognised that rural population including rural workers should be associated with development programmes. ... necessary legislative and administrative steps are being and will be continued to be taken for the economic and social uplift of the rural workers; necessary infrastructure is also being provided for organising the rural labour with a view to involving them effectively in the national development programmes ... In India, the requirements of the Convention are thus fully met. *The Government of India, therefore, propose to ratify this Convention*¹⁰ (emphasis in the original).

Clearly the need to bring rural workers within the scope of governmental programmes during that period seems to have provided the necessary impetus to ratification of Convention No 141, in contrast to the non-ratification of other conventions relating to freedom of association and collective bargaining.

A somewhat similar picture unfolds with regard to the inability of India to ratify the core conventions related to prohibition of child labour notwithstanding that the Indian Constitution incorporates a fairly similar provision as a fundamental right. Right from its inception, the Constitution of the ILO permitted the ILC to take into account countries "in which climatic conditions, the imperfect development of industrial organisation, or other special circumstances make the industrial condition substantially different and shall suggest modifications, if any, which it considers may be required to meet the case of such countries."¹¹

At the First Conference of the ILO held in 1919 at Washington, N M Joshi, appointed by the British government as the representative of workers in India, spoke during the discussions regarding the adoption of Convention No 5 on Fixing the Minimum Age for Admission of Children in Industrial Employment. Joshi opposed

the government's position in the matter and pointed out that under the factories law at that time a child below nine could not be employed but that a child between nine and 14 could be employed for six hours. He challenged the delegates and stated, "Let me remind this Conference that it is going to pass a convention of eight hours for adults, and you are going to perhaps accept the statement that in India the climatic conditions are so different that children of nine can work for six hours, and seven hours in some factories, and that can be considered light work. ...I admit we have got more of the sun and some other climatic conditions. But are you willing to believe that in India children of nine years of age are as well developed as children of 14 years of age in western countries?" (ICHR 1988: 388-89). The Convention was eventually adopted with special provisions for Japan and India.

At the time of the adoption of the Indian Constitution, the sub-committee on fundamental rights decided to draft a provision prohibiting the employment of children below 14 years of age in mines, and factories and in other hazardous occupations. This draft was adopted after a very brief discussion and with no modification by the constituent assembly. There is thus a constitutional embargo on the employment of children below 14 in factories, in mines and in work that is considered hazardous. This constitutional position is at variance with the ILO conventions requiring prohibition of child labour below the age of 14 years and prohibition of all hazardous work for children until the age of 18. (We can note that it took until 2002 for the Constitution to be amended to provide the right to education as a fundamental right, and until 2009 for the Right of Children to Free and Compulsory Education Act to be passed, which operationalised this right. These two measures are seen to provide an impetus to doing away with child labour since "no-where" children who are not at school could be deemed to be part of the huge child labour force in the country.)

It appears, therefore, that though there is an overlap in the manner in which fundamental principles and rights have been identified and prioritised by the ILO and their pre-eminent position in the Indian Constitution as fundamental rights, the similarity soon ends. India has been unable to ratify half the related fundamental conventions since many of these fundamental rights are subject to exceptions and caveats and permit exclusions and dilutions that are not in line with the DFPR. The reasons for such exceptions from the sphere of rights are often located in social, economic and political factors. Further, the granting of rights subject to caveats is a feature of the Indian Constitution, where rights are often granted or recognised only to be subject to myriad restrictions and exceptions that take away their universality.

The Nature of Scrutiny under the DFPR

The ILO has from its inception in 1919 developed an elaborate system of supervision of labour standards through reports submitted by member states, coupled with alternative reports submitted by workers' and employers' organisations, to monitor compliance with conventions and recommendations. This regular supervision has been the hallmark of the ILO system, and given its tripartite structure, the ILO is one of the few specialised agencies of the UN that permits non-governmental social partners to have a "voice". Workers' organisations, in particular,

have used this opportunity to send their observations to ILO supervisory bodies.

During the discussion before the adoption of the DFPR, the Indian delegation supported not only the choice of rights identified as fundamental to the world of work but also the method indicated in the declaration by which the ILO would follow up adherence to these fundamental principles by member-states. Speaking at the ILO on the proposed declaration before its adoption, the government adviser from India stated,

My delegation has the following observations to offer on the text of the Declaration and its follow-up currently before us for adoption. The Declaration, we believe, reaffirms a moral and political commitment to promote and observe fundamental principles and rights at work, bearing in mind specific national circumstances and the level of socio-economic development achieved by each society. It reaffirms the role of the ILO as the sole international body that is competent to set and deal with labour standards in conjunction with the promotion of social justice and progress. *It is not legally binding. ...The follow-up to the Declaration is purely promotional in nature and not punitive or complaints-based.* The Declaration or its follow-up cannot, in any manner whatsoever, be invoked, or otherwise provide a basis or justification, for the adoption or promotion of trade measures of any kind or of protectionist trade measures, nor may they be invoked for the use of labour standards for protectionist purposes or for any other measures, including those calling into question the comparative advantage of any country... *It is on the basis of the above understanding that my delegation extends its support to the Declaration and its follow-up*¹² (emphasis added).

The close similarity of views between the views of the Government of India and some of the delegates at the ILC on the identification of core principle of the international organisation and its mode of follow-up with regard to member-states is telling. The governments and employers broadly supported the use of "softer" methods of follow-up procedures for the DFPR. This reflected the shift worldwide in the nature of enforcement from a "command and control" form of regulation to one that relies increasingly on soft law options. The international shift closely resembled the shift that was then taking place in India. Liberalisation and opening up of the economy have seen repeated calls for relaxation in labour laws, for labour laws to deal with only core issues and for dismantling the "inspector raj" in favour of soft laws and a softer regulatory framework.

For a fairly long time now, employers' organisations have been calling for doing away with the inspector raj; that is, the burdensome system of inspection carried out under innumerable labour and safety laws in India. For instance, it is reported that a factory in India is, on an average, subjected to 37 inspections from various inspectors representing different agencies.¹³ In line with the widespread feeling across industry that inspections are only a source of harassment and corruption, there is a consensus among employers that inspections by government departments should be rationalised and reduced. India has enacted some laws to reduce the number of registers an employer has to maintain, and an amendment proposed in 2005 (bill pending in Parliament) to the Labour Laws (Exemption from Furnishing Returns and Maintaining Registers by Central Establishments) Act 1988 envisages reducing the number of returns to be submitted to the government. This has been opposed by unions as being further evidence of the government's policy of relaxing labour laws in

these times. To reduce the effects of inspector raj, some states have limited the number of inspections, introduced mandatory prior clearance for inspections and launched self-certification schemes with certain cases randomly selected for inspections. In export-dominated industries such as garments, the presence of monitors to audit compliance with codes of conduct adopted by international chains is significant. Inspections by such “private” monitors are relied on rather than inspection reports by the labour authorities. The substitution of private inspection in such sectors has also led to several protests by trade unions. It appears that “softer” options for monitoring and compliance have emerged in India, which is in keeping with the tenor of the DFPR and its express provision that ILO monitoring cannot be used for any comparative advantage in terms of trade.

This back-peddalling on the enforcement front in India and in the DFPR was a striking feature of the late 1990s and early years

of this century. The ILO Social Justice Declaration of 2008, coupled with emerging voices for greater state regulation in the period after the financial crisis of 2008, appear to have once again given a greater role to the state and underscored the importance of ensuring that there is “fair globalisation” with tangible benefits in the form of social protection and decent work. This appears to be the case in India as well with the adoption of the Unorganised Workers Social Security Act, 2008. It may well be that the period ahead will see the wheel come full circle with both the ILO and India accepting more state regulation that provides not just the *means* for ensuring decent work but also ensures fair *outcomes*. Such a role may be inevitable for a well-balanced global strategy, encompassing both the “rights” at work as narrowly articulated in the DFPR and the broader range of social security, wage and socio-economic rights required to address the issue of decent work in the decades ahead.

NOTES

- 1 The international labour standards of the ILO take the form of conventions that are binding on ratifying countries and recommendations that are not subject to ratification and lay down guidelines for countries to adapt in their laws and policies.
- 2 Adopted by the ILC at its 26th Session at Philadelphia in 1944.
- 3 These are the Labour Inspection Convention, 1947 (No 81), Labour Inspection (Agriculture) Convention, 1969 (No 129), Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144) and Employment Policy Convention, 1964 (No 122).
- 4 Commentators have pointed out that reference to labour standards in such documents may not always relate to ILO labour standards. For instance, Alston (1993) has pointed out that “internationally recognised worker rights” referred to by the US in its trade laws do not correspond to the ILO’s labour standards.
- 5 See, for instance, ILO, International Labour Conventions and Recommendations: Arranged by Subject-matter, Geneva, International Labour Office, 1992, and its similar edition of 1982. What is interesting is that the compilations of the International Labour Code of 1939 and 1951 did not have a category termed “basic human rights”. See International Labour Code 1951, Geneva, International Labour Office, 1952 and the earlier International Labour Code 1939, Montreal, International Labour Office, 1941.
- 6 Some of the members of the constituent assembly felt that the directive principles did not go far enough in encouraging a socialist society. Several amendments that sought to nationalise industries or strengthen economic rights were withdrawn with the leading members of the assembly rejecting such an overtly socialist slant to the Constitution on the grounds that the provisions should be general, with “enough room for people of different ways of thinking” to determine the shape of the economy (Austin 1972: 83).
- 7 The debate over the Right of Children to Free and Compulsory Education Act, 2009 and the amendment of the Constitution inserting Article 21-A are instances of such transformation into enforceable rights.
- 8 Statement for Parliament, Conventions and Recommendations adopted at the 64th Session of the International Labour Conference (June 1978).
- 9 Statement for Parliament, Action taken or proposed to be taken on the Conventions and Recommendations adopted at the 67th Session of the International Labour Conference (Geneva, June 1981), LT-5630/82.
- 10 Statement for Parliament, action proposed to be

- taken on the Conventions and Recommendations adopted at the 60th Session of the International Labour Conference (Geneva, June 1975), LT-359/77.
- 11 Article 3 (3), ILO Constitution, 1919.
 - 12 <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decd.htm#SINGH>.
 - 13 An inter-ministerial committee set up by the Government of India (Govindarajan Committee) suggested ways to simplify procedures and reduce the record-keeping requirements of industrial establishments.

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