The Influence of ILO Standards on Law and Practice in the Federal Republic of Germany

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SINCE 1955, the ILO has published a number of articles in the *International Labour Review* analysing the influence of international labour standards on national legislation.[2]

As the title indicates, the purpose of the present article is to investigate the extent to which legislation on labour and social matters in the Federal Republic of Germany is modified to take account of international standards on conditions of work and life.[3] At the same time, the analysis will make it possible to define the role of the ILO in the creation of internationally valid labour law in accordance with the social principles laid down in the Preamble to its Constitution and in the Declaration of Philadelphia. This will be the main subject of Part C of the present survey.

The alignment of national labour law with international standards sometimes raises problems which transcend the purely legislative field to embrace the whole socio-political, constitutional and administrative fabric of the State. In order to grasp the extent and nature of these difficulties it seems necessary first of all to consider in general terms the existing relationship between national legislation and the system of international labour law, and this is done in Part B.

On the other hand, limitations of space render a detailed description of the effect given to Conventions and Recommendations in national law impossible, particularly as regards Conventions whose ratification continues to be held up. Such details are in any case scarcely essential to the

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[2] Previous articles have treated Greece (June 1955); India (June 1956); Switzerland (June 1958); Nigeria (July 1960); Italy (June 1961); Norway (September 1964); Tunisia (March 1965); Poland (November 1965); Yugoslavia (November 1967); the United Kingdom (May 1968); Belgium (November 1968); Colombia (February 1969); France (April 1970); Ireland (July 1972); and Cameroon (August-September 1973).

[3] See also Valentin Klotz: "Der Einfluss der Übereinkommen der Internationalen Arbeitsorganisation auf die innerstaatliche Gesetzgebung", in *Bundesarbeitsblatt* (Bonn), 1973, pp. 499 ff.

subject, which is limited to manifest effects on municipal (i.e. national) law, since our purpose here is to present typical cases. However, in order to give a clearer view of the general influence of international labour law in the Federal Republic of Germany, Part A summarises the position with regard to ratifications.

A. The general significance of international labour law in the Federal Republic of Germany

Out of the Federal Republic's total population of 61.3 million in 1971, official statistics [1] put the economically active population at 26,673,000, 82.7 per cent of whom were wage and salary earners. In addition there were at that time 2,128,000 foreign workers. These figures demonstrate clearly that the Federal Republic is one of those countries whose labour force accounts for a high proportion of the total population and which therefore cannot do without a carefully elaborated system of labour law.

In fact, the Federal Government has drawn up plans for the establishment of a comprehensive programme aimed at bringing its labour law into line with modern social requirements. In several fields it has already issued new regulations, the most important of which are the First Labour Law Revision Act of 14 August 1969 and the Works Constitution Act of 15 January 1972.[2] The long-term goal is the elaboration of a labour code, the preparation of which was entrusted in November 1970 to a committee of experts—under the aegis of the Federal Ministry of Labour and Social Affairs—representing academic circles, the judiciary, management, labour and the Länder (provinces).

These reforms have also made it possible to take greater account at the national level of the standards laid down in international labour Conventions. The present situation with regard to ratification of these Conventions is as follows.

Of the 140 Conventions so far adopted by the ILO, 54 have been ratified by the Federal Republic and have thereby become binding on it.[3] The ratification of others is under consideration. As regards ratification of the Holidays with Pay Convention (Revised), 1970 (No. 132), the Bundestag (lower House) is examining the measures needed to bring the relevant national legislation into line with the provisions of the Convention. This question will be dealt with in more detail below.

A special situation arises from the fact that the Federal Republic became a Member of the ILO as the legal successor to the former Reich, and that between 1936 and 1950 Germany did not belong to the Organisa-

[1] EEC Commission: *Report on the development of the social situation in the Community in 1972* (Brussels and Luxembourg, 1973), pp. 214 ff.

[2] *Bundesgesetzblatt* (henceforward cited as *BGBl*), I, 1969, p. 1106, and 1972, p. 13.

[3] For the list of these Conventions see the table of ratifications published twice yearly by the ILO.

tion at all. The question of the legal succession was settled satisfactorily in that, on the occasion of its application for admission, the Federal Republic recognised the 17 Conventions ratified by the Reich as binding in so far as they gave or might give rise to obligations relating to the territory under its sovereignty.[1] In addition, the Federal Government has up to now ratified nine of the Conventions adopted by the ILO between 1936 and 1950.

B. Questions of law arising from implementation of international labour Conventions in member States

It should be stressed at the outset that the two diametrically opposed doctrines of an established separation of national and international law (dualism) on the one hand, and of their inherent unity, with international law having transnational effect (monism) [2] on the other, are of minor importance outside the national context and will not be considered further here. So long as international law adheres to the legal concept of sovereignty as formulated in the decision in the Palmas case [3] and deduces from it the exclusive and indivisible power of the State to determine the content of legislation and to use the means at its disposal to enforce it, States alone can determine the way in which international law is to be implemented within their territory.[4] This raises a double question concerning the legal effects of standards laid down in international law, namely (i) their binding force *on* States in their capacity as subjects of international law, which is a matter for international law, and (ii) their application *within* States so bound (at the international level) in their capacity as sovereign powers, which is a matter for municipal law.[5]

In the light of the above remarks there appear to be three factors that have an essential bearing on the implementation of international labour Conventions in the Federal Republic of Germany, namely the role of the legislature, the autonomy of the parties to collective agreements, and the country's federal structure.

The role of the legislature

In spite of the special institutional features of the way international labour Conventions come into being, they can, as regards their legal effects, be assimilated to international treaties. There has been con-

[1] See the Federal Government's communication of 12 May 1951 (*Official Bulletin* (Geneva, ILO), 31 Dec. 1951, p. 168).

[2] See Verdross, Zemanek and Verosta: *Völkerrecht*, 5th edition (Vienna, 1964), pp. 111 ff.

[3] *American Journal of International Law* (Washington), 27, 1928, pp. 868 and 875.

[4] See Nicolas Valticos: *Droit international du travail* (Vol. VIII of *Traité de droit du travail*, edited by G. H. Camerlynck (Paris, Dalloz, 1970)), No. 627.

[5] This point is further discussed in G. Schnorr: *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung* (Munich, 1960), pp. 166 ff.

troversy about this in the past, but nowadays the analogy is largely admitted.[1] According to article 59, paragraph 1, of the Federal Constitution, only the President of the Republic is empowered to ratify international treaties. Ratification of international instruments regulating the political relations of the Federal Republic or dealing with any matter coming within the scope of federal legislative authority is subject, under paragraph 2 of the same article, to the prior approval of the legislative bodies, and such approval must be given in the form of a federal enactment. This rule applies to international labour Conventions inasmuch as they affect the social and labour legislation of the Federal Republic.

According both to currently accepted legal theory and to judicial pronouncements on the subject, the necessity of parliamentary approval through an enactment serves a double purpose, first as a prerequisite to the effective entry into force of the ratification, and secondly as a means of giving force of law to standards derived from the international instrument in the context of municipal law to the extent that the provisions are self-executing.[2] In the case of ILO Conventions, to make their provisions immediately applicable by means of the Act of Approval, though theoretically possible, would give rise to a number of difficulties. First of all, given the lack of consolidation in the labour legislation of the Federal Republic—which has no labour code—it would lead to considerable uncertainty in the law. Moreover, immediate implementation would leave the Parliament no possibility of investigating whether the provisions were genuinely applicable in the prevailing technical, social and political circumstances. Finally, labour law is subject to specific constitutional rules which again emphasise the need for more detailed analysis of the applicability of international standards within the national legal system.

For these reasons it is the practice of the Federal Government to ratify ILO Conventions only when national legislation is already in conformity with them. If this is not the case, steps are taken to modify the law before the ratification procedure is begun.[3]

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[1] For a discussion of the various theories in this matter see Schnorr, op. cit., pp. 107 ff., and Valticos, op. cit., Nos. 152 ff. (and, as regards the juridical effects, No. 156).

[2] In view of the amount that has been published on this question, only the more important recent works in which there is discussion of earlier literature need be cited here. These include Karl Josef Partsch: *Die Anwendung des Völkerrechts im innerstaatlichen Recht*, Berichte der deutschen Gesellschaft für Völkerrecht, No. 6 (Karlsruhe, Verlag C. F. Müller, 1964); Gerhard Boehmer: "Der völkerrechtliche Vertrag im deutschen Recht", in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Cologne and Berlin, 1965), Vol. 43; Walter Rudolf: *Völkerrecht und deutsches Recht* (Tübingen, 1967); Otto Kimminich: "Das Völkerrecht in der Rechtsprechung des Bundesverfassungsgerichts", in *Archiv des öffentlichen Rechts*, 93, 1968, pp. 485 ff. In the jurisprudence of the Federal Constitutional Court, see in particular the decisions of 30 July 1952 (*Entscheidungen des Bundesverfassungsgerichts*, Vol. 1, pp. 410-411) and of 21 March 1957 (ibid., Vol. 6, p. 294).

[3] A derogation from this principle seems to be justified, however, if the Convention simply provides that the legal status of foreign workers should be identical to that enjoyed by citizens of the host country, since this will have no effect on substantive legal provisions.

Nevertheless, this practice sometimes entails serious complications. On the one hand, experience shows that it delays ratification because, in order to modify the law, a lengthy parliamentary process often has to be followed which may be further extended by political differences; while on the other, the possibility cannot be excluded that legislative provisions contrary to those of the Convention might be adopted subsequent to ratification, which would amount to an infringement of the Federal Republic's obligations under international law (although this fact would not invalidate such provisions). This is precisely what happened when the Seafarers' Order of 2 June 1902, which was in accordance with the Seamen's Articles of Agreement Convention, 1926 (No. 22), ratified by Germany in 1930, was replaced by the Seamen's Act of 26 July 1957 [1], which introduced procedures for the termination of contract that were incompatible with the corresponding provisions of the Convention.[2] Finally, even when the provisions of national law are adapted to international labour Conventions, they are interpreted by the courts according to German legal and linguistic usage, so that they may be given a meaning different from that of the Convention on which they are based. In such cases, the judge should most definitely be required to interpret the provisions of national legislation in the context of international law.[3]

The autonomy of the parties to collective agreements

The prevailing legal opinion in the Federal Republic is that under the Constitution certain key aspects of working conditions are the prerogative of the parties to collective agreements, and that in consequence the State cannot legislate in such matters. This applies particularly to wages and the various wage-fixing procedures.[4]

The question has often been asked, therefore, how the Federal Republic can meet its international obligations when ILO Conventions regulate matters which, in national law, are the prerogatives of management and labour.[5] For although as a general rule only States, in their capacity as subjects of international law, can really be considered bound to implement the Conventions, the fact remains that under national law

[1] *BGBl*, II, 1957, p. 713.

[2] See the end of Part C below.

[3] See Gerhard Schnorr: " Die Auswirkungen des europäischen Arbeitsrechts auf die deutsche Arbeitsrechtsprechung ", in *Recht der Arbeit* (Munich), 1961, pp. 181 ff.

[4] For a fuller discussion of this point see Kurt Biedenkopf: *Grenzen der Tarifautonomie* (Karlsruhe, 1964).

[5] See Schnorr: *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung*, op. cit., pp. 216 ff.; Johannes Schregle: " Internationales Arbeitsrecht und Tarifvertrag ", in *Recht der Arbeit*, 1952, pp. 161 ff.; Rainer Faupel: *Tarifhoheit und völkerrechtliche Vertragserfüllungspflicht* (Baden-Baden, 1969); and, for a more general view, Wilfred Jenks: " The application of international labour Conventions by means of collective agreements ", in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 19, 1958 pp. 197 ff., and Valticos, op. cit., No. 644.

such implementation can come into conflict with the guaranteed autonomy of the parties to collective agreements. In such instances the Convention is either not ratified or, if ratified, is not fully implemented. Considerations of this kind dominated the parliamentary debate on the Bill to approve the Equal Remuneration Convention, 1951 (No. 100).[1] It should nevertheless be remembered that, according to the terms of Article 2 of this instrument, application of the principle of equality need only be ensured in so far as it is consistent with the prevailing methods of determining rates of remuneration. Generally speaking, the autonomy of the parties to collective agreements has not given rise to any particular difficulties with respect to the implementation of Conventions.[2]

The federal structure

Nor, on the whole, is the federal structure of the country an obstacle to the ratification and implementation of international labour Conventions. Labour and social law are matters which, according to article 74, paragraph 12, of the Constitution, fall within the competence of the federal legislature.

Up to now, difficulties have only arisen in cases where the application of international labour standards involved complementary legislation falling within the exclusive competence of the Länder. This has happened notably in the co-ordination of legislative provisions regarding the minimum age of admission to employment on the one hand and the school-leaving age on the other. Public education is the exclusive concern of the Länder, and the federal legislature possesses no means of direct action in this field. We shall be returning to this question in Part C below.

C. The application of international labour Conventions in national law

The pages that follow consist mainly of an analysis of the implementation of international labour Conventions in the national law of the Federal Republic. Reference is also made to the application of relevant Recommendations wherever appropriate. The subjects considered are grouped in accordance with the ILO *Classified guide to international labour standards*.[3]

[1] For the Federal Government's attitude on this point see *Bundesratsdrucksache*, 506/52 *c*, and *Stenographische Berichte des deutschen Bundestages* (subsequently cited as SBDB), II, p. 4526 A.

[2] A systematic study of ILO Conventions which make special provision for supplementary or detailed regulation by means of collective agreements will be found in Jenks, op. cit., pp. 199 ff., and in Schnorr: *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung*, op. cit., pp. 234 ff.

[3] Document D.19.1971 (Rev. 1973).

Basic human rights

FREEDOM OF ASSOCIATION

The right to form and to join trade unions or employers' associations is guaranteed to everybody in all occupations by article 9, paragraph 3, of the Constitution. Any agreement or measure attempting to restrict or obstruct this right is prohibited and void. The right of association cannot be suspended even in a state of emergency or war.

Legal theory and practice are agreed that the constitutional guarantee of freedom of association extends also to the existence and autonomy of workers' and employers' organisations as well as to related institutions and practices having as their specific purpose the protection and improvement of working conditions, such as collective agreements, joint conciliation procedures for the settlement of labour disputes, and direct action taken by the parties involved in such disputes. Any suppression of such institutions or practices would be unconstitutional, as would be the formation of workers' or employers' organisations that were under any sort of state control.[1]

The constitutional guarantee of freedom of association and autonomy of labour and management is reinforced by supplementary provisions of substantive labour law. Paragraph 1 of section 75 of the Works Constitution Act, 1972, imposes a duty on employers and works councils to ensure that there is no discrimination against workers on account of their union activities or affiliation.

The autonomy of management and labour is regulated in greater detail by the Collective Agreements Act of 9 April 1949 (as amended by the Act of 11 January 1952 [2]), and by the Conciliation and Arbitration Machinery in Labour Conflicts Act (No. 35) of 20 August 1946.[3]

It would seem that in these circumstances the Federal Republic could have ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).[4] For a long time, however, the Government hesitated to do so, being reluctant, in view of the postwar political situation, to abandon the power to dissolve the trade unions by administrative authority [5], a power which was contrary to Article 4 of Convention No. 87.

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[1] See in particular A. Hueck and H. C. Nipperdey: *Lehrbuch des Arbeitsrechts*, 7th edition (Berlin, 1963-70), Vol. 2, pp. 27 ff. and 61 ff.; Biedenkopf, op. cit.; and Gerhard Schnorr: *Öffentliches Vereinsrecht* (Cologne, 1965), pp. 236 ff.

[2] *BGBl*, I, 1952, p. 19.

[3] *Official Gazette of the Control Council for Germany*, 31 Aug. 1946, p. 174.

[4] The Right of Association (Agriculture) Convention, 1921 (No. 11), had already been ratified by the German Government in 1925.

[5] Article 9, paragraph 2, of the Constitution prohibits associations the aims or activities of which are contrary to criminal law or which are directed either against the constitutional order or against the notion of international understanding.

During 1955 and 1956 this question was a subject of controversy between the Federal Government on the one hand and the German Confederation of Trade Unions and the then parliamentary Opposition on the other [1] which led to the Opposition presenting a motion for the ratification of Conventions Nos. 87 and 98.[2] The latter instrument was ratified in 1956 as a result of this initiative, while the former was ratified a year later after the Federal Government had introduced its own Act of Approval.

The above-mentioned discrepancy between German law and Article 4 of Convention No. 87 with regard to the dissolution of workers' or employers' organisations by administrative authority was the subject of several direct requests for information which were sent to the Federal Government by the ILO Committee of Experts on the Application of Conventions and Recommendations, a group established by the ILO Governing Body and consisting of independent experts appointed in their personal capacity to examine the information supplied by member States on the measures taken to give effect to Conventions and Recommendations. Following these requests the legislature inserted special provisions regarding workers' and employers' organisations in section 16 of the new Associations Act of 5 August 1964 [3], according to which any prohibition order or restrictive measure imposed on such organisations by the authorities could only take effect if the competent Administrative Court confirmed its legality.[4] In its 1965 report the ILO Committee of Experts noted this new enactment " with satisfaction ".

The circumstances surrounding the ratification of Conventions Nos. 87 and 98 are a good example of how political factors can sometimes hinder ratification. They also show that it is useful for Parliament to have the opportunity of considering what measures to take with regard to international labour standards, as prescribed by article 19 of the ILO Constitution. Thanks to this procedure the German trade unions were able to secure ratification of the Conventions in question despite the Federal Government's initial hesitations.

FORCED LABOUR

The Forced Labour Convention, 1930 (No. 29), was ratified by the Federal Republic in 1956, and the Abolition of Forced Labour Convention, 1957 (No. 105), in 1959. The Federal Government and the Bundestag considered ratification possible by virtue of the fact that article 12 of the Constitution expressly prohibits compulsory labour (paragraph 2) and

[1] See the minutes of the Bundestag sessions of 25 May 1955 and 6 June 1956 (*SBDB*, II, pp. 4523 ff. and 7783 ff.).

[2] *Bundestags-Drucksachen*, II/1367 and 1368.

[3] *BGBl*, I, 1964, p. 593.

[4] For details of this procedure see Schnorr: *Öffentliches Vereinsrecht*, op. cit., pp. 257 ff.

forced labour (paragraph 3). Paragraph 1 of the same article states that " all Germans have the right to free choice of occupation, place of employment and place of training ". In addition, paragraph 1 of article 2 declares that everyone has the right to develop his personality in full freedom. Jurisprudence accords full recognition to these basic rights: the Federal Labour Court has ruled on a number of occasions that the worker has the right not only to decide freely whether he wishes to sign an employment contract, and if so with whom, but also to take the initiative in terminating an existing employment relationship.[1]

Nevertheless, this prohibition of forced or compulsory labour is subject to certain strictly limited constitutional reservations which on the whole correspond to the exceptions provided for in Article 2, paragraph 2, of Convention No. 29.

Although German legislation is generally in conformity with the provisions of these two Conventions, the question of forced labour has been the subject of a long and indeed still unfinished exchange between the ILO Committee of Experts and the Federal Government. The differences of opinion which have appeared clearly reflect the problems of defining forced labour in the various forms it now takes.[2] The underlying reason for the adoption of Convention No. 29 in 1930 was to combat forced labour in the colonies; since then, however, forced labour has come to be used in independent countries too as a means of political pressure, which makes it more difficult to distinguish from permissible obligations to work.

Compulsory civilian service for conscientious objectors and the obligation to perform certain tasks in case of military defence on a state of emergency had been the subject of exchanges between the ILO Committee of Experts and the Federal Government [3] even before the promulgation of the laws adopted to give effect to article 12 *(a)* of the Constitution, thanks to which it was possible to bring these laws [4] into line with the provisions of Conventions Nos. 29 and 105.

It was more difficult to bring prison legislation into conformity with the international prohibition of forced labour because of three problems.

Up to 1969 prisons were allowed to place prisoners at the disposal of private firms for work outside their precincts. This was unquestionably in breach of Article 2, paragraph 2 *(c)*, of Convention No. 29, which lays down that work exacted as a consequence of conviction in a court of law is not considered to be forced labour provided that it is carried out

[1] See Gerhard Schnorr: " Die Rechtsprechung des Bundesarbeitsgerichts zum Grundgesetz ", in *Jahrbuch des öffentlichen Rechts*, 1960, pp. 183 ff., and 1967, p. 178.

[2] See N. Valticos: " Les normes de l'Organisation international du Travail en matière de protection des droits de l'homme ", in *Revue des droits de l'homme* (Paris), 1971, No. 4, pp. 708 ff.

[3] In this connection see ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), International Labour Conference (ILC), 53rd Session, 1969, p. 187.

[4] Civilian Service as Substitute for Military Service Act of 16 July 1965 (*BGBl*, I, 1965, p. 984), and Ensurance of Services Act of 9 July 1968 (ibid., 1968, p. 787).

under the supervision and control of a public authority and that the person concerned is not placed at the disposal of private individuals, companies or associations. Following several direct requests from the ILO Committee of Experts to the Federal Government, the above-mentioned national provisions were repealed by the First Criminal Law Reform Act of 25 June 1969.[1] Under section 21, paragraph 2, of the penal code as amended, prisoners may be employed outside prison precincts only with their consent. However, the Committee of Experts had taken the view that, for the hiring out of prisoners' services not to fall under the ban on forced labour, not only the consent of the prisoner concerned was required, but also payment of normal wages and social security contributions. It held that only where these guarantees existed could the acceptance of employment be considered entirely voluntary.[2] In this connection the Bill on Prison Sentences placed before the Federal Parliament in 1973 provides for the payment of wages and the application of social security schemes to prison labour in general (sections 40 and 174-177, the entry into force of which would, however, in accordance with section 180, depend on the adoption of a special Act). On the other hand, the Bill only requires the prisoner's consent for work outside the prison (sections 11 and 39), whereas in 1974 the Committee of Experts indicated in a general observation that the provisions of Article 2, paragraph 2 *(c)*, of the Convention " apply equally to work in workshops which may be operated by private undertakings inside prisons " and that " accordingly, the use of the labour of convicted persons in such workshops would be compatible with the Convention only if it were subject to the consent of the prisoners concerned and to safeguards of the kind mentioned above ".[3]

Another difficulty related to imprisonment for certain crimes against the State and its institutions under the penal code. From 1966 to 1969 a succession of reports by the Federal Government and observations by the ILO Committee of Experts attempted to clarify the extent to which these provisions and their practical applications in the Courts were in accordance with the provisions of Article 1 *(a)* of Convention No. 105, which forbids forced or compulsory labour as a measure of political coercion or education, or as a punishment for holding or expressing certain political views. The provisions for the protection of the State were formulated more precisely in the First Criminal Law Reform Act. In view of the information supplied by the Government on the application of the amended provisions, the Committee of Experts has not reverted to

[1] *BGBl*, I, 1969, p. 645.

[2] See ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4), ILC, 52nd Session, 1968, para. 79, p. 212. This source will henceforward be referred to in abbreviated form as *Report of the Committee of Experts*, followed by the date of the session.

[3] *Report of the Committee of Experts*, 1974, Vol. A, p. 69.

this point in recent years. The matter in question presented an extraordinarily delicate problem of delineation. While forced labour is to be condemned, it cannot be contested that States have the right to defend themselves against breaches of law and order by means of legal sanctions. This right must be recognised in cases where deprivation of liberty imposed by due judicial process is limited to serious offences against public order and is not used to prevent the exercise of the fundamental human rights recognised by the international community, including the right of opposition.[1]

A third divergence between national law and the Abolition of Forced Labour Convention, 1957, arose with respect to section 114 of the Seamen's Act of 26 July 1957. This section provided that any crew member deliberately abandoning his ship in a foreign port would become liable to imprisonment if his desertion delayed the rest of the voyage or if, in order to avoid such delay, considerable expense had to be incurred. The Committee of Experts held this to be contrary to Article 1 *(c)* of Convention No. 105, which prohibits recourse to forced or compulsory labour as a means of labour discipline. The Committee also considered, however, that the prohibition did not apply to penal sanctions imposed in cases where desertion would place the ship or its passengers directly in danger.[2] Following repeated commentaries by the Committee of Experts, the Government submitted a Bill to Parliament in 1973 which envisaged modification of several provisions of labour law, including the total abrogation of section 114 of the Seamen's Act.[3]

DISCRIMINATION

The implementation of the Equal Remuneration Convention, 1951 (No. 100), has certain aspects of interest for the future of international law. Although, in general, international labour Conventions are implemented by means of national legislation, the application of the above instrument shows that judicial decisions can also make a major contribution.

Furthermore, it appears that formal observance of a Convention does not always suffice in view of the social and economic situation as a whole, and that national authorities may be forced to take supplementary measures in conjunction with management and labour in order to remain faithful to the spirit of an international instrument.

The Government originally hesitated to ratify Convention No. 100 because it doubted whether, in view of the autonomy of management and labour in the wages field, its implementation could be ensured. Although Article 2 of the Convention makes it clear that the mere promotion of equality of remuneration amounts to implementation if, within the exist-

[1] See also Valticos: " Les normes de l'Organisation internationale du Travail en matière de protection des droits de l'homme ", op. cit., p. 714.

[2] *Report of the Committee of Experts*, 1968, para. 93, pp. 216-217.

[3] *Bundestags-Drucksache*, VII/975.

ing framework, the parties to collective agreements have competence for determining rates of pay, the Federal Government felt that such promotion necessarily implied a certain direct governmental influence which is prohibited by article 9, paragraph 3, of the Constitution.[1]

However, once the Federal Labour Court had ruled (15 January 1955 [2]) that the basic principle of equal rights for men and women (article 3, paragraph 2, of the Constitution) and the prohibition of all discrimination based on sex (paragraph 3 of the same article) were also binding in the determination of wage rates in collective agreements, there was no further obstacle to the ratification of Convention No. 100. Its implementation is henceforward ensured by the fact that, upon complaint by any female worker, the Courts must declare wage rates which discriminate against women to be null and void, and in the case of collective agreements must also award women workers the same remuneration as is paid to men for work of equal value.[3] The Convention was ratified in 1956 at the proposal of the then parliamentary Opposition.[4]

In subsequent judgements, the Federal Labour Court has gone even further. In a decision of 18 October 1961 [5] it laid down the principle that the Courts, like all organs of State, are bound in their interpretation and application of municipal law by Convention No. 100 and by Article 119 of the Treaty of Rome (establishing the EEC), which contains similar provisions. It follows that they must apply the principle of equality of rights between men and women laid down in article 3, paragraph 2, of the Constitution in accordance with the provisions of Convention No. 100 and Article 119 of the Treaty of Rome as regards the determination of wages.[6] This ruling is valid not only for remuneration fixed by collective agreement but also for the rates paid by any employer in his own firm independently of any such agreement.

The Federal Republic thus offers an interesting example of the part that judicial decisions can play in the implementation of international labour standards. Convention No. 100 is observed inasmuch as the establishment of different wage rates for men and women is held to be null and void whenever the essential characteristics of a particular job are identical. However, another problem has arisen which cannot be solved in this way. It sometimes happens that, in the case of certain jobs generally

[1] See the Federal Government's reply to a question in Parliament on 3 June 1953 regarding the possibility of ratification (*SBDB*, I, p. 13178 B).

[2] *Amtliche Entscheidungen des Bundesarbeitsgerichts*, Vol. 1, pp. 259 ff.

[3] With regard to this latter point see particularly the Federal Labour Court's judgement of 25 January 1963 (ibid., Vol. 14, pp. 61 ff.).

[4] *SBDB*, I, p. 4524 C.

[5] *Amtliche Entscheidungen des Bundesarbeitsgerichts*, Vol. 11, pp. 338 ff.

[6] For the effects of these international prescriptions regarding equal remuneration on national jurisprudence see also Schnorr: "Die Auswirkungun des europäischen Arbeitsrechts auf die deutsche Arbeitsrechtsprechung", op. cit., and "L'apport du droit communautaire au droit du travail et de la sécurité sociale", in *Cahiers de droit européen* (Brussels), 1970, pp. 551ff.

done by women, collective agreements provide for special categories of remuneration at rates lower than those payable in comparable occupations. From a strictly formal point of view the existence of these low-wage categories appears to be compatible with the provisions of Convention No. 100, since the distinction made is not between male and female workers but simply between certain types of work. Nevertheless, in view of the fact that the low-paid jobs are generally held by women, it may be said that the existing wage structure places women workers at a disadvantage.

Inasmuch as this state of affairs falls more within the scope of the social and economic relations between management and labour than within that of the application of the law, the problem can hardly be solved in the Courts. It can only be tackled effectively by appropriate political measures. A suitable approach would seem to be a concerted effort on the part of the competent authorities, management and labour to take a close look at the present wage structure and draw up plans for eliminating the inequalities.

In this connection there already exists a national committee, composed of representatives of the workers' and employers' confederations, which was set up at the instigation of the Federal Government to investigate how the principle of equal remuneration for work of equal value could best be implemented. Following a number of interventions by the workers' representatives, the ILO Committee of Experts decided that it should pay close attention to the work of this body through the reports submitted in accordance with article 22 of the ILO Constitution.[1] By 1973, however, the national committee was still not in a position to communicate any tangible results, a fact which in the Government's opinion was manifestly related to the question of the autonomy of the two sides of industry. The Federal Government then decided to request two independent experts [2] to give an authoritative opinion on the subject of wage policy, with a view to bringing it into line with Convention No. 100. Their conclusions are to be submitted in the spring of 1975 and will serve as a working document for the national committee.[3]

Some of the above-mentioned social and economic problems also arise with regard to the implementation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which was ratified by the Federal Republic in 1961. This Convention requires ratifying States to promote a policy tending to eliminate all discrimination on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. Its implementation is already largely ensured by the fact that

[1] See *Report of the Committee of Experts*, 1965, 1967 and 1969.

[2] Professor Rohmert (Darmstadt), a labour relations expert, and Professor Rutenfranz (Dortmund), a specialist in occupational medicine.

[3] See the Federal Government's reply to a question in Parliament on 29 November 1973 (*SBDB*, 67th Session, Appendix 37).

article 3, paragraph 3, of the Constitution contains similar prohibitions. The Federal Labour Court has ruled that the forms of discrimination prohibited under the Constitution cannot be subject to the appreciation of a judge, but must be considered forbidden by virtue of absolute and imperative principles valid for the legal system as a whole.[1] The Court has therefore declared illegal the pension systems of certain undertakings that discriminate between male and female employees, the disparities in public service family allowances laid down in certain collective agreements, and any distinction in the treatment of married and unmarried mothers at work.[2] EEC Order No. 1612/68 concerning the free movement of workers within the Community contains special antidiscrimination provisions with respect to foreign workers which are directly applicable in the Federal Republic.

It should not be forgotten that such prohibitions can only be effective if discriminatory behaviour is itself liable to prosecution. Nevertheless, in a free economy, social and economic structures inevitably lead to certain forms of discrimination which cannot be eliminated by legislation. This applies particularly to the labour market, where the economic situation may bring about marked differences in the demand for male as opposed to female workers, and where women with family responsibilities do not have the same opportunities as those without. In a free-enterprise system such socio-economic disparities cannot be eliminated by means of orders or prohibitions. The best one can do to ensure equality of opportunity is to take special measures to help the disadvantaged. Convention No. 111 has led to the adoption of such measures, or has at least provided an impetus for progress in this direction. The Employment Promotion Act of 25 June 1969 and the Vocational Training Act of 14 August 1969 [3] provide incentives designed to ensure equal access for all to the various trades and professions, and a large-scale complementary programme has been set up to encourage the employment of female workers.[4] It is to be hoped that once these complementary measures have been adopted it will also be possible to take full account of the Employment (Women with Family Responsibilities) Recommendation, 1965 (No. 123).

Labour administration

The Federal Republic has ratified all the Conventions in the field of labour administration—with the exception of No. 85 which relates only

[1] Judgement of 28 March 1958 (" Arbeitsrechtliche Praxis Nr. 28 *a* zu Art. 3 GG ").

[2] See, in addition to the judgement of 28 March 1958, those of 25 January 1963 and 15 January 1964 (*Amtliche Entscheidungen des Bundesarbeitsgerichts*, Vol. 14, pp. 61 ff., and Vol. 15, pp. 228 ff.).

[3] ILO: *Legislative Series*, 1969—Ger.F.R. 1 and 2.

[4] See *Bundestags-Drucksachen*, V/909, VII/367 and VII/1148, and ILO: *Summary of reports on unratified Conventions and on Recommendations*, Report III (Part 2), ILC, 56th Session, 1971, pp. 9-10.

to non-metropolitan territories—without having to modify its existing laws to any significant extent. It is however worth mentioning that as a consequence of the ratification of the Labour Inspection Convention, 1947 (No. 81), safety inspection by the appropriate authorities was extended to commercial premises by means of an amendment to paragraph 139 *g* of the Industrial Code.[1] This is a particularly good example of the standard-setting effect of ILO Conventions since, in accordance with Article 25, paragraph 1, of Convention No. 81, the Federal Republic could have excluded commercial premises from the instrument's field of application, but did not in fact do so.

Practice with regard to labour statistics has also been influenced by the relevant Conventions, particularly the Convention concerning Statistics of Wages and Hours of Work, 1938 (No. 63), which has led to more detailed classification. In its first report on implementation of the Convention after its ratification in 1954, the Federal Government stated that the necessary legislative amendments had been introduced through the Statistics (Wages and Hours of Work) Act of 1956. It is worth noting that the Convention could have a favourable secondary effect on attempts at standardisation within the Common Market, as the countries in question have not yet been able to agree on a common method of compiling labour statistics.

Employment policy

The effects of Conventions and Recommendations relating to employment policy are noteworthy in two respects.

(1) In 1954 the Federal Republic ratified the Employment Service Convention, 1948 (No. 88). In its first report on the application of this instrument, the Government informed the Committee of Experts that there was no need to amend existing legislation since it was already in conformity with the Convention's provisions.[2] However, a communication from the German Confederation of Trade Unions aroused some doubt as to whether the Convention was being fully implemented. This doubt arose from the distinction, peculiar to German law, between policy and administration. Whereas Article 1, paragraph 2, of the Convention provides that " the essential duty of the employment service shall be to ensure . . . the best possible organisation of the employment market as an integral part of the national programme for the achievement and maintenance of full employment and the development and use of productive resources ", the civil service department concerned was, in accordance with the legislation then in force, empowered only to act as

[1] Fourth Federal Amendment to the Industrial Code, 5 February 1960 (*BGBl*, I, 1960, p. 61).

[2] ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 40th Session, 1957, pp. 166-168.

an intermediary between firms looking for personnel and persons seeking employment.

The Federal Government at first argued that the policy of full employment laid down in the above-mentioned Article was its own (political) responsibility and not that of the civil service. A similar difficulty arose over the implementation of Article 6 *(e)*, under which the employment service is again entrusted with tasks of a political nature in that it is required to assist other public and private bodies in social and economic planning.

The Committee of Experts having noted that the functions of the employment service were more limited than those envisaged by Convention No. 88 [1], the legislature began by amending the Placement and Unemployment Insurance Act then in force [2] with a view to bringing it into line with the Convention. However, the new text simply laid down in a general way that, within the framework of federal economic and employment policy, and in conjunction with other public or private agencies, the Federal Employment Institution should seek to prevent or eliminate labour shortages and unemployment. It was clear that a provision so vague neither satisfied the legal necessity of giving the employment service specific powers nor did it measure up to the detailed programme envisaged in Convention No. 88.

The Employment Policy Convention and Recommendation, 1964 (Nos. 122), on the other hand, are important milestones in German employment policy. In order to pave the way for ratification of the first and application of the second, the Federal Government drew up a detailed employment and economic programme [3] which led to the preparation of a new body of laws on employment policy, the most important of which are the Employment Promotion Act of 25 June 1969, the Vocational Training Act of 14 August 1969 (both already cited), and the Training Promotion Act of 19 September 1969.[4] The legislation regulating employment policy is complemented by the economic stabilisation measures taken under the Economic Stability and Growth Promotion Act of 8 June 1967 [5], a law which is of particular importance in this connection because, in the event of general economic stability being threatened, it provides for concerted action on the part of the Federal Government, the Länder, the trade unions and the employers' associations, with the employment service also playing its part.

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[1] See *Report of the Committee of Experts*, 1957, p. 85.

[2] Amendment of 23 December 1956 (*BGBl*, I, 1956, p. 1018); see also ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 42nd Session, 1958, and *Report of the Committee of Experts*, 1958.

[3] Idem: *Summary of reports on unratified Conventions and on Recommendations*, Report III (Part 2 A), ILC, 57th Session, 1972, pp. 21-26.

[4] *BGBl*, I, 1969, p. 1719.

[5] Ibid., I, 1967, p. 582.

It was against this background that the Federal Republic ratified Convention No. 122 on 17 June 1971. No doubt this important turning point in the history of national employment policy corresponded to the general economic situation of the time, but it should not be forgotten that the international labour Conventions had a major influence on the way in which it was reached.

(2) The Fee-Charging Employment Agencies Convention (Revised), 1949 (No. 96), raised a different problem. By means of some minor amendments to the Placement and Unemployment Insurance Act (AVAVG) which was in force until 1969, the Federal Republic fully complied with the prohibition on fee-charging employment agencies embodied in the Convention. On the basis of an ILO interpretation [1] of Article 1, paragraph 1 *(a)*, of the Convention, the legislature had also, in section 37, paragraph 3, of the AVAVG, made it unlawful for an undertaking to hire workers to a third party. This prohibition had however been set aside by the Federal Constitutional Court in a decision of 4 April 1967.[2] The Court gave its opinion that the provision of workers' services by so-called temporary work agencies was a business like any other and could therefore be carried on by virtue of the right of free choice of occupation laid down in article 12 of the Constitution, so that the AVAVG prohibition on the hiring out of workers' services was unconstitutional.

Two legal issues were raised in consequence. On the one hand, Convention No. 96 could not be implemented in the way intended by the ILO because this would have been contrary to a fundamental constitutional principle, whence an incompatibility between the treaty obligations implicit in international law and the legislator's obligation to comply with the Constitution. On the other, the constitutional right applied only to the actual hiring out of workers' services. It was thus necessary to draw a legal distinction between the hiring of employees and the supply of labour for profit, which remained illegal.[3] The legislature attempted to solve the question by adopting the Manpower Provision Act of 7 August 1972 regulating the activities of temporary work agencies.[4] This Act authorises such agencies to hire workers to other firms, but on two conditions: (i) the right to operate an agency of this sort is subject to the

[1] In response to a request from the Swedish Government. See *Official Bulletin* (Geneva, ILO), July 1966, pp. 390-396.

[2] See *Amtliche Entscheidungen des Bundesverfassungsgerichts*, Vol. 21, pp. 261 ff.

[3] For a detailed study with bibliography and examples of case law see Gerhard Schnorr: "Le travail temporaire", in *Cahiers de droit européen*, 1973, nº 2, pp. 131-183. The ILO's approach to the question has been described by Nicolas Valticos: "Temporary work agencies and international labour standards", in *International Labour Review*, Jan. 1973, and that of various Western European countries by G. M. J. Veldkamp and M. J. E. H. Raetsen: "Temporary work agencies and Western European social legislation", ibid., Feb. 1973.

[4] *BGBl*, I, 1972, p. 1393.

approval of the Federal Employment Institution, which will only issue the necessary licence with certain provisos and generally for a fixed period; and (ii) workers can only be supplied if the agency assumes all the obligations of an employer and if, in particular, the employee's contract is not limited to the duration of a single job and the agency goes on paying him even when it is unable to place him in a job. If these conditions are not fulfilled, the agency is deemed to have been guilty of illegal placement activities.

General conditions of employment

Although both the law and practice of the Federal Republic with regard to collective agreements and employment contracts provide for a fairly high level of general working conditions [1], it has not ratified most of the Conventions in this field. None of the ten Conventions concerning hours of work has been, and of the three concerning holidays with pay only the one relating to agriculture has received ratification (in 1955). The reason for this state of affairs is not always that German labour legislation lags behind international standards; more often it is that these instruments contain detailed technical provisions incompatible with the Federal Republic's legal system and thinking, so that the amendment of legislation that ratification would require raises much greater difficulties than might be imagined.

There are so many aspects to this question that only a few can be mentioned here. For example, there exists in the Federal Republic a well-developed system of minimum wages guaranteed by collective agreements. For occupations and industries where management and labour are not in a position to conclude such agreements, the system is complemented by the Minimum Conditions of Employment Act and the Home Work Act. As far as working conditions are concerned, therefore, it would have been perfectly possible to ratify the Minimum Wage Fixing Convention, 1970 (No. 131).[2] Nevertheless, the Bundestag's Labour and Social Affairs Committee decided against it [3]; previously the Federal Government had considered that national practice was in conformity with the Convention's provisions but that ratification was not particularly urgent.[4] The Committee decided as it did because it believed that implementation of certain of the Convention's provisions would involve unacceptable governmental interference with the autonomy of management and labour as guaranteed by the Constitution.

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[1] See, for example, ILO: *Year book of labour statistics 1973* (Geneva, 1973).

[2] The Minimum Wage-Fixing Machinery Convention, 1928 (No. 26), had been ratified by the German Government in 1929, and the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99), in 1954.

[3] *Bundestags-Drucksache*, VI/3024.

[4] Ibid., 2639.

Another example is the position with regard to holidays, which in the Federal Republic are traditionally considered a matter of the law of contract. Thus the Federal Leave Act of 8 January 1963 [1] lays down minimum standards for legally binding agreements, while allowing the worker a certain amount of latitude to divide up his entitlement as he pleases or even to take pay in lieu of it. The Holidays with Pay Convention, 1936 (No. 52), and the Holidays with Pay Convention (Revised), 1970 (No. 132), on the other hand, severely limit these rights under the law of contract and require the State to prohibit the relinquishment of the leave entitlement.[2]

In spite of these difficulties relating to legal theory and practice, the Federal Government has been trying for some time to bring its legislation progressively into line with international labour standards. The Bundestag presently has before it a draft amendment to the Home Work Act and various other items of labour law.[3] The new text would so modify the Federal Leave Act that Convention No. 132 could be ratified. The Bundestag's Economic Affairs Committee gave its approval in principle on 13 February 1974, and its adoption by Parliament can therefore be expected in the not too distant future.

Employment of children and young persons

So far all attempts to bring measures for the protection of children and young persons into line with the corresponding international labour Conventions have failed because the measures in question are too closely associated with matters that either fall under the exclusive legislative authority of the Länder or are in fact regulated differently from one Land to another.

This is true in particular as regards the minimum age at which young persons may be admitted to industrial or other work. Conventions Nos. 59 and 60 set the age limit at 15, and the federal legislature is certainly empowered by article 74 of the Constitution to enact similar provisions. Nevertheless, up to now an obstacle has stood in the way: authority to legislate with regard to education is the prerogative of the Länder, which have fixed the minimum school-leaving age at 14. There would thus be a gap of a year between leaving school and starting work, which would not be advisable in social terms, and the law currently in force therefore authorises the employment of young persons from the age of 14.[4] It was thus necessary to wait for the extension of compulsory

[1] *BGBl*, I, 1963, p. 2.

[2] See ILO: *Summary of reports on unratified Conventions and on Recommendations*, Report III (Part 2), ILC, 48th Session, 1964, p. 46, and the Federal Government's standpoint given in *Bundestags-Drucksache*, VI/2639.

[3] Ibid., VII/975.

[4] See ILO: *Summary of reports on unratified Conventions and on Recommendations*, Report III (Part 2), ILC, 44th Session, 1960, pp. 6 and 16; and 53rd Session, 1969, p. 127.

schooling to nine years, i.e. up to 15 years of age, which required more or less time to bring about in the different Länder. Now that this point has been virtually reached, the Federal Ministry of Labour and Social Affairs has drawn up a new Bill for the protection of young workers. This text, which covers all sectors, gives effect to the provisions of the Minimum Age (Industry) Convention (Revised), 1937 (No. 59), the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937 (No. 60), the Minimum Age (Underground Work) Convention, 1965 (No. 123), the Night Work of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 79), and the Night Work of Young Persons (Industry) Convention (Revised), 1948 (No. 90). Here we have a most striking example of the influence of a whole series of ILO Conventions on the legislation of a member country. It should be mentioned that the Bill also forbids the employment of children on light work although Article 3 of Convention No. 60 permits it under certain conditions, while on the other hand considerable use is made of the authorisation afforded by Article 4 to derogate from the prohibition for cultural purposes. If Parliament enacts the Bill as it stands, there will be no further obstacle to ratification of the above Conventions.

The question of medical examination of young workers has not yet been settled satisfactorily. The Ministry's Bill does not propose any change in the status quo—an examination at the time of engagement and another after one year, with the age limit for compulsory examination set uniformly at 18—whereas the Medical Examination of Young Persons (Industry) Convention, 1946 (No. 77), the Medical Examination of Young Persons (Non-Industrial Occupations) Convention, 1946 (No. 78), and the Medical Examination of Young Persons (Underground Work) Convention, 1965 (No. 124), prescribe an annual examination, in some cases up to the age of 21. Since the cost of medical examinations is borne by the Länder, the possibility of ratifying these instruments depends primarily on financial considerations.

Employment of women [1]

The Maternity Protection Convention, 1919 (No. 3), was ratified by the German Reich in 1927. It has had an appreciable influence on German legislation, since it induced the Government to bring in a law protecting women workers, who up to then had been without any protection whatever. This was the Employment before and after Childbirth Act of 16 July 1927.[2] Following ratification, however, the Committee of Experts noted a number of discrepancies between the provisions of the law and those of the Convention. There followed a discussion drawn out over several decades between the Committee and successive German Governments.

[1] With regard to equality of remuneration, see above.

[2] *Reichsgesetzblatt*, I, 1927, pp. 184 and 325.

The Federal Republic's Maternity Protection Act of 24 January 1952 [1] still did not entirely eliminate these discrepancies.[2] Thus the employer was bound to continue paying normal wages throughout the period of maternity leave to workers who, on account of their level of remuneration, were not covered by compulsory sickness insurance, whereas, under Article 3 *(c)* of the Convention, ratifying States must in all cases guarantee payment of benefits either from an insurance scheme or from public funds. Another remaining discrepancy concerned rest periods granted to nursing mothers during working hours. Finally, in particular cases and subject to permission from the competent authorities, employers could legally dismiss female workers during the period of maternity protection whereas Article 4 of the Convention absolutely prohibits this.

The untiring efforts of the Committee of Experts have however led to the adaptation of German law to the provisions of Convention No. 3 with respect to nursing breaks and maternity benefits, as embodied in the Amending Acts of 24 August 1965 and 18 April 1968.[3] As regards legislative protection against dismissal, this is not yet in conformity with the terms of the Convention, but in a circular of 26 July 1968 the Federal Minister of Labour and Social Affairs asked the Labour Ministers of the Länder, who are responsible for implementing the law, not to authorise the dismissal of workers entitled to maternity protection except in accordance with the terms of Convention No. 3 (i.e. when their absence exceeds a maximum period to be fixed by the competent authority). This is a noteworthy example of how an instrument can be considered binding by an executive authority even when the law has not been brought into line with it.[4]

Similar complications have so far prevented the Federal Republic from ratifying the Maternity Protection Convention (Revised), 1952 (No. 103) [5], but now that they have been eliminated by the developments outlined above the competent authorities might well reconsider the possibility of ratification. As for the Night Work (Women) Convention (Revised), 1948 (No. 89), it would seem that ratification will have to await some future revision of the legislation on hours of work.

Industrial safety, health and welfare

As technological progress brings with it a constant evolution in occupational safety and health measures, the influence of international

[1] *BGBl*, 1952, p. 69.

[2] See ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 36th Session, 1953, pp. 21-22, and various reports of the Conference Committee on the Application of Conventions and Recommendations (*Record of proceedings*, 36th Session, 1953; 37th Session, 1954; 49th Session, 1965; 50th Session, 1966; and 51st Session, 1967).

[3] *BGBl*, I, 1965, p. 912, and 1968, p. 315.

[4] See also " The role of the legislature " in Part B above.

[5] See *Bundestags-Drucksachen*, II/163 and 1219.

standards on the legislation of the Federal Republic manifests itself in practice less in the adoption of particular texts than in a permanent process of adaptation. On the basis of powers laid down in section 120 *e* of the Industrial Code and section 708 of the Social Insurance Code, safety regulations are issued either in the form of Federal Government orders or as accident prevention regulations established for each industry by the corresponding public accident insurance schemes; they are modified as and when developments in technology so require.

Moreover, the influence of international standards makes itself felt in a variety of ways. A typical example occurred when the ILO Committee of Experts noted that the safety regulations issued by the building industry's accident insurance scheme did not correspond to the standards laid down in the Safety Provisions (Building) Convention, 1937 (No. 62), concerning the provision of personal safety equipment and its use in construction work.[1] Subsequently the scheme's management issued supplementary regulations (VBG 36) taking the experts' observations into account without any amendment of the existing legislation being necessary.

Three instruments have had a particularly striking effect on the legislation of the Federal Republic, namely the Guarding of Machinery Convention, 1963 (No. 119), Recommendation No. 118 on the same subject, and the Occupational Health Services Recommendation, 1959 (No. 112). In order to implement them, Parliament was obliged to pass new legislation in the form of the Technical Equipment Act of 24 June 1968 and the Works Physicians, Engineers and Other Occupational Safety Experts Act of 12 December 1973.[2] However, it should be noted that procedures for ratifying Convention No. 119 have not yet been set in motion even though there are no obstacles to it in the legislation now in force.

Social security

German social security legislation has always been broadly in accordance with international standards, so that it has been possible to ratify numerous Conventions in this field without any need to make major amendments to national law. Nevertheless, a number of examples indicate that ratified Conventions have exerted a real influence on this legislation.

Prior to 1955, the Federal Republic had concluded a series of bilateral agreements guaranteeing nationals of signatory countries the same pension increases in case of employment injury on German territory as those payable to its own citizens. Originally, however, the Federal Government refused to increase similarly the benefits of nationals of countries which

[1] See ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 45th Session, 1961, p. 52; and 53rd Session, 1969, pp. 102-103.

[2] *BGBl*, I, 1968, p. 717, and 1973, p. 1885.

had ratified the Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19), but which were not parties to supplementary engagements subscribed under a bilateral agreement. The ILO Committee of Experts considered this practice to be contrary to Convention No. 19 and consequently requested the Federal Government to grant the same supplementary accident benefits to the nationals of all ratifying countries as to those of countries with which there were bilateral arrangements.[1] The Government acceded to this request by enacting the law of 27 July 1957 which brought in new provisional regulations governing the statutory accident insurance scheme [2]; these placed the nationals of all countries having ratified Convention No. 19 on the same footing as those of the Federal Republic as regards entitlement to accident benefits.

Under the former sickness insurance legislation, a claimant might be refused benefit if he had brought his incapacity upon himself in certain specified ways such as by fighting or assault. Article 69, paragraphs *(e)* and *(f)*, of the Social Security (Minimum Standards) Convention, 1952 (No. 102), on the other hand, only permits suspension of benefit if the accident has been caused by a criminal or tortious act on the part of the claimant. The relevant national regulation (section 192, paragraph 1, of the Social Insurance Code) was brought into line with the Convention by section 83, paragraph 1, of the law of 10 August 1972 supplementing the legislation in the sickness insurance field.[3]

The former Placement and Unemployment Insurance Act provided in principle for suspension of the right to unemployment benefit during a labour dispute regardless of whether the claimant took part in it or not, and whether he was directly or only indirectly affected. In order to prevent certain workers suffering undue hardship, the benefit was in fact payable as an exceptional measure, but only if the claimant did not take part in the dispute and provided it did not occur in the undertaking that employed him, his occupational group, his actual workplace or his place of residence.

In the opinion of the Committee of Experts, this provision was contrary to Article 69 *(i)* of Convention No. 102, according to which benefits could be suspended only if the claimant lost his job as a direct result of a work stoppage due to a trade dispute.[4] The Committee considered that

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[1] See *Report of the Committee of Experts*, 1954, p. 23; 1955, p. 34; 1956, p. 41; and 1957, p. 39; and *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 38th Session, 1955, pp. 53-54.

[2] *BGBl*, I, 1957, p. 1071.

[3] Ibid., 1972, p. 1433.

[4] ILO: *Summary of reports on ratified Conventions*, Report III (Part 1), ILC, 47th Session, 1963, pp. 202-203; *Report of the Committee of Experts*, 1965, pp. 116-117; 1967, pp. 108-109; 1968, p. 108; and 1969, p. 114; see also several reports of the Conference Committee on the Application of Conventions and Recommendations in ILO: *Record of proceedings*, 47th Session, 1963, p. 541; 49th Session, 1965, pp. 593-594; 51st Session, 1967, p. 672; and 52nd Session, 1968, pp. 619-620.

the situation is not always very clear regarding workers who do not take part in a strike and who may or may not be employed in the undertaking or at one of its branches where the strike takes place, but whose working conditions may be altered by its outcome. As for workers who do not take part in the strike, who are not employed in the undertaking or at one of its branches where the strike takes place, and who, without standing to benefit in any way from its outcome, are unable to continue working on account of lack of supplies for which they are in no way responsible, the Committee pointed out that their unemployment is involuntary, does not give rise to subsequent improvement of their working conditions, and is thus much less closely connected with the labour dispute. In the experts' opinion [1], the question of neutrality raised by the Government could not be held to apply in such a case. Following these comments, the legislature took advantage of the general revision of employment conditions undertaken in the Employment Promotion Act of 25 June 1969 to adapt the provisions relating to the suspension of benefit to the terms of Article 69 *(i)* of Convention No. 102. Section 116 of this Act lays down that workers reduced to unemployment by a labour dispute in the Federal Republic shall not be deprived of benefit unless they have personally taken part in the dispute, unless the object of the dispute is to alter the conditions of employment in the establishment where they work, or unless the grant of unemployment benefit would influence the course of the dispute. On 22 March 1973, by virtue of the powers vested in it by law, the Governing Board of the Federal Employment Institution issued instructions spelling out the terms of this section in greater detail: it made clear that workers affected indirectly by a dispute are not eligible for benefit if their conditions of employment are liable to be improved by its outcome even though they have not taken part in it. In an observation formulated in 1974 [2], the Committee requested the Government to supply more precise information regarding the scope of this legislation and its application in practice.

A fourth adaptation of the Federal Republic's legislation to the ILO's social security Conventions relates to hospitalisation. Previously, it was the administrators of the sickness insurance schemes who decided whether or not to grant benefits in this respect. The law of 19 December 1973 on the improvement of statutory sickness insurance benefits [3], however, makes unlimited hospitalisation a compulsory benefit whenever it is necessary in order to diagnose or treat an illness or to alleviate a patient's suffering. Effect has in this way been given to Articles 10 and 12 of Convention No. 102.

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[1] *Report of the Committee of Experts*, 1965, pp. 116-117.

[2] Ibid., 1974, Vol. A, p. 169.

[3] *BGBl*, I, 1973, p. 1925.

Seafarers

Legislation covering seamen and seagoing fishermen is currently undergoing substantial adaptation to international labour standards. The end of this process is not yet in sight, so that it is not possible here to do more than comment on the general trend. It is too soon to reach definite conclusions about the influence of ILO instruments on national law.

Nevertheless, it should be noted that the laws in question are broadly in conformity with the international standards applicable to seafarers; the discrepancies are in matters of detail, but they have prevented the Federal Republic from ratifying every one of the maritime Conventions. Unfortunately, when maritime labour law was completely recast by the Seamen's Act of 26 July 1957 (mentioned above in connection with the Conventions on forced labour), the opportunity was missed to bring it completely into line with the Conventions already adopted. Indeed, the new law actually diverged from the Seamen's Articles of Agreement Convention, 1926 (No. 22), which had been ratified by the German Government, in the matter of termination of contracts. This led to a prolonged exchange of views between the ILO Committee of Experts and the Federal Government.[1] In 1974 the Committee stated that it had noted with interest the Bill to amend section 63, paragraph 3, of the 1957 Seamen's Act, currently being studied by the organisations of workers and employers concerned, which was intended to bring the provision into line with Article 9, paragraph 1, of the Convention. The Committee hoped that a decision would be taken soon as to the proposed amendments.[2]

A tendency is also discernible for the Federal Government, in adapting maritime labour law to conform with ILO Conventions, to give priority to those aspects which it is empowered by section 143 of the Seamen's Act to regulate by means of ordinances. Among the instruments to have been ratified recently in this connection are the Accommodation of Crews Convention (Revised), 1949 (No. 92), the Accommodation of Crews (Fishermen) Convention, 1966 (No. 126), the Accommodation of Crews (Supplementary Provisions) Convention, 1970 (No. 133), and the Prevention of Accidents (Seafarers) Convention, 1970 (No. 134).[3] In view of the above-mentioned connection between the ratification of these instruments and the issuance of corresponding ordinances, there can be no doubt but that the Conventions have exerted a decisive influence on the latter.

Where the adaptation of national legislation to international labour standards regarding seafarers calls for major amendment of existing laws, however, early ratification of the relevant instruments cannot be anticipated.

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[1] See *Report of the Committee of Experts*, 1959, p. 28; 1960, p. 29; 1962, pp. 46-47; 1964, p. 62; 1965, p. 50; 1966, pp. 48-49; 1968, p. 43; and 1970, p. 52.

[2] *Report of the Committee of Experts*, 1974, Vol. A, p. 57.

[3] *Bundestags-Drucksachen*, VII/1135, 1133, 1136 and 1132.

D. Conclusions

The foregoing analysis of the relations between international labour standards and the legislation of the Federal Republic of Germany enables us to sketch out the following conclusions.

(1) The Conventions and Recommendations of the ILO exert a powerful influence on the social and labour legislation of the Federal Republic, despite its already high standards. This shows that it would be a mistake to think of the ILO as an organisation whose proper function is to raise the standard of labour legislation of socially backward countries to a certain minimum level. Nowadays its role is rather to ensure that such legislation takes account of all the opportunities opened up by the most up-to-date knowledge in the fields of social science in order to stimulate still greater progress. In other words, international labour standards are of major importance even for socially advanced legal systems.[1]

(2) The higher the ILO sets its social policy aims, the more likely it is that the international standards adopted to attain them will conflict with the general ideological and social structure of national law. It is frequently no longer possible to adapt social and labour legislation to international standards by formal textual amendment; before this stage can be reached there must first be an often gradual change in the whole approach to social policy.

(3) The diversity of means available under the Constitution of the Federal Republic for the application of international treaties makes it possible to implement ILO Conventions and Recommendations through the appropriate interpretation by the Courts and administrative authorities of existing national law, without amendment being required.

(4) Because the Federal Republic is a Member of the European Communities, it is sometimes necessary to find ways of reconciling Community law in the field of social policy with the obligation to implement ILO instruments. It should be remembered that the Council of Europe and the ILO do in fact collaborate in this respect, and that international labour Conventions and Recommendations therefore have a certain harmonising effect in the process of European integration as elsewhere.

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[1] See also Georges Spyropoulos: " An outline of developments and trends in labour relations ", in *International Labour Review*, Mar. 1969, pp. 315-346.