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The civil liability of workers for injury or damage caused in their employment

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From time to time during the past 20 years, the question of the civil liability of workers for injury or damage caused in the course of their employment has been raised in the International Labour Organisation. The Inland Transport Committee, in particular, has been concerned with the liability of transport workers, and in 1956 a meeting of experts on the protection of employed drivers against civil law claims arising out of their employment suggested possible methods of providing such protection.[2] The International Labour Office has, more generally, collected and disseminated [3] information on the subject.

Following the submission of a resolution on the subject to the International Labour Conference in 1972 (which was not considered for lack of time), a study of the question was undertaken in the Office. On the basis of a questionnaire sent to member States, information was obtained from 46 governments fairly representative of the different regions of the world; a number of the replies also either transmitted information from employers' or workers' organisations or indicated that these had been consulted. The information has been analysed in a report which is available from the International Labour Office in English and French.[4]

Any comparative study of a legal issue is complicated by the fact that each of the different legal systems concerned is a coherent whole and that it may be misleading to isolate, from their general context, solutions given to one particular issue in such systems. That problem would be crucial if the purpose

[1] International Labour Office.

[2] ILO document LPD/1956/D.6. The report was submitted to the Inland Transport Committee in March 1957 and to the Industrial Committees Committee of the Governing Body in May 1957.

[3] See, for instance, the report submitted to the Fifth International Congress on Labour Law and Social Security, Lyons, September 1963.

[4] ILO: *International survey of civil liability of workers* (Geneva, 1976).

of the study were to determine the reasons why one solution is preferred to another in particular countries. In this case, however, it seemed that the aim was a more practical one, namely to define the nature and scope of the issue and to review the types of solutions which have been found necessary and appropriate in different countries. Accordingly, the questionnaire did not seek to elicit, and the report does not examine, the general legal rules on civil liability in the various countries; the information analysed bears primarily on the types of specific adaptation made to these rules in respect of the civil liability of workers for injury or damage caused in their employment.

In this article it is proposed to set out some of the conclusions which seem to flow from the information obtained.

Nature of the problem

It may be useful at the outset to make clear what type of liability is at issue. The study deals with civil liability, i.e. with the obligation to compensate or make good injury or damage caused to others; it does not deal with criminal liability nor, in particular, with the various forms of disciplinary action which may be taken against a worker who has caused injury or damage. Civil liability generally takes one of two forms: liability for injury or damage resulting from wilful or negligent disregard of the rights of others (liability in tort); and liability for the breach, non-performance or misperformance of contractual obligations. A variant of the latter form of liability exists in the socialist countries of Eastern Europe under the name of material liability; it is a form of contractual liability established by labour codes and specifically linked to the employment relationship.

Liability may arise in relation to the employer, to fellow employees, and to persons or bodies unconnected with the employing undertaking (third parties). In a great many countries liability to fellow employees is limited because most potential claims, in their case, relate to employment injuries and because social security legislation bars concurrent civil claims except in cases of very serious fault. Liability to third parties is usually paralleled by liability of the employer for the fault of his employee; it was suggested in many government replies that third parties normally choose to seek redress from the employer rather than from the worker, and in a small number of countries direct action by third parties against the worker is not possible at all. However, with a very few exceptions, the employer may claim from the worker, by way of recourse, amounts which he has had to pay to a third party as the result of the fault of the worker. In view of all this, the main incidence of workers' liability undoubtedly lies in the relation with the employers.[1] The extent of enforcement of liability will be affected in part by general factors concerning that relation:

[1] There may be some differences in certain countries in the treatment of claims by the employer concerning damage to himself and claims by the employer by way of recourse following payments to a third party. The information supplied was not sufficiently clear on this, and for the purposes of the present article the issue is not of major importance.

how good is the individual relationship (it was suggested that liability was enforced particularly rigidly where the employment of the worker concerned was coming to an end)? how good are industrial relations in general? what is the financial capacity of the undertaking to absorb losses and/or to cover itself fully by insurance? and so forth.

A particular word should be said about collective liability. It is a generally accepted principle that, where two or more persons jointly cause damage by fault, they are jointly liable, normally in proportion to the degree of their respective fault. There are several points of interest in the practical application of this principle to the problem now under consideration. First, joint liability is widely admitted in cases in which individual liability within a group cannot be determined; individuals may then be expected to contribute to the compensation either in equal shares or on the basis of relative earnings. Second, where it is impossible to determine who, among a group of workers acting jointly, has caused the damage, there may be a reversal of the normal burden of proof; it is sufficient for the employer to show that the damage was caused by the group, and it is then the difficult task of individuals within the group to show that they did not commit any fault. Third, several replies pointed to the applicability of the foregoing practices to liability for damage caused by unlawful acts in connection with industrial disputes; in the view of the Government of New Zealand this is one of the most serious aspects of the whole problem of civil liability.

Persons affected

Who are the workers concerned by the question of civil liability? Potentially, no category of workers is exempt. At the same time it is clear that certain occupational groups are more exposed than others, not always for the same reasons.

One such group is that of transport workers, and more especially workers engaged in road transport. Some governments drew attention to the fact that a high proportion of judicial decisions on civil liability relate to this category of workers. In some cases their liability is governed by special provisions in legislation or collective agreements. They are also in the front rank of workers as regards the coverage of the risk of liability by insurance. The reason for their greater exposure to claims would seem to be not only a high risk of accident, but a considerable involvement of third parties in such accidents, a high risk to life as well as to property and, no doubt, the fact that in many cases there is an insurer capable of meeting the claims made on them.

A second group is that of workers handling, or responsible for the care of, cash or goods. Again their liability is often the subject of special provisions in legislation or collective agreements; these provisions rarely limit liability, but either make it more onerous than is the case for most workers or establish procedures, such as guarantee funds, for making it effective. Apparently, claims are more readily brought against them than against other workers. It was suggested in one reply that this might be due to the fact that in their case

misperformance is more readily detected. However, an important reason for their vulnerability may be that in their occupation the temptation and the opportunity to commit minor crimes—petty larceny, minor embezzlement—are great, and that a deterrent may be felt to be more necessary than in other occupations.

Two groups of workers who are not singled out so clearly as the preceding ones, but in respect of whom there exists sufficient evidence to show that liability is an issue in their occupation, are workers in hotels and restaurants, and domestic workers. What makes liability particularly relevant in their case is a high incidence of relatively minor damage, in particular " breakage ". This is reflected in some special legislation, collective agreements and model contracts.

Finally, it seems reasonable to deduce that the risk of liability is above the average in occupations where there are special arrangements to insure that risk. This appears to be the case in a number of countries as regards certain categories of workers in construction—an occupation with a high risk of accident—and as regards health service personnel.

Apart from the risks of liability of particular occupational categories, there is the further question of the vulnerability of workers at particular occupational levels. To put the issue in somewhat different terms, is there any evidence that well-paid workers—i.e. workers who may be expected to be able to meet claims—are more exposed to claims than others? And to place that issue in a wider perspective, is the risk of liability greater for workers in developed than in developing countries?

There is certainly evidence that in many countries a high degree of liability is placed on workers assuming important functions or holding supervisory positions; moreover, where Courts are able, under national law or practice, to evaluate liability by reference to various elements of the work situation, the level of responsibility is one of the elements taken into account. This would seem to flow primarily from the view that those holding positions of responsibility, or possessing advanced skills, may be expected to show a particularly high level of care. In practice, however, the persons concerned will generally also be amongst the better-paid.

There is no evidence that employers or third parties pressing claims for damages have consciously sought out the well-paid worker. Conversely, however, it may well be true that in many countries they do not trouble to seek out the worker who is known to be badly paid or otherwise poor. One European country suggested in its reply that in cases where the worker's wage was low it was more readily assumed that the employer must bear the burden of the damage. Moreover, while most countries, developed and developing, expressed the view that the problem of civil liability was not widespread, a substantial number of developing countries—and of developing countries only—ascribed this to the " known inability of workers to meet financial demands ", and thus no doubt reflected an opinion prevalent in these countries.

Incidence of the problem

It was, as we have just seen, the view of most countries that the incidence of cases involving the civil liability of workers was not very great. A variety of considerations were advanced in support of that view. There appeared to be relatively few court decisions. The subject did not appear to be one leading to industrial disputes. Social services were not aware of the problem. Third parties preferred to sue the employer and the employer usually refrained from claiming from the worker, for reasons of good industrial relations or otherwise. Disciplinary action, rather than material claims, remained the main deterrent for the employer.

Two countries only were able to cite statistics. These statistics are not properly comparable in that they bear on rather different objects. In Austria, where the statistics bear on the number of claims brought before the Courts, it is possible for claims to be settled by direct agreement between employer and worker (or third party and worker), or in pursuance of a collective agreement, of which a number refer to the subject; the statistics of court cases are thus likely to represent only a proportion of the total number of claims. In Poland, where a special procedure is applicable to all claims of " material responsibility ", the statistics appear to bear on all claims.

That being said, the figures cited were as follows. In Austria, with some 2.3 million persons in wage-earning employment, 491 claims were brought before the Courts in 1971. In Poland, with some 11 million persons in wage-earning employment, the total number of claims in that year was 14,448. These figures suggest that the numerical incidence of civil liability claims against workers may not be as limited as is generally thought, at any rate in developed countries. There would appear to be nothing to single out the two countries in question other than that both have been aware enough of the issue to deal with it by legislation and concerned enough with its practical application to have established statistics.

A numerical incidence of, say, one per thousand workers per year does not necessarily mean that there is a social problem of any magnitude. First, the fact that a claim is made does not necessarily mean that it is successful; Poland indicated that on the average a quarter of all claims were rejected. Second, the amount of the claim may in many cases be well within the means of the worker concerned; even without any steps for the limitation of liability, claims regarding breakage in hotels and restaurants, and guarantee fund arrangements in commerce and banking, will not be ruinous for the worker and his family. However, in determining whether there exists a social problem one must pose the question of the aim of social policy in the matter, and of possible methods of achieving that aim.

The aim of social policy

There appears to be universal acceptance of two basic principles. First, a worker in the exercise of his work must, like any other citizen, take care and show concern for the legitimate rights of others. Second, it is inappropriate to

lay on the worker the burden of the operating risks of the undertaking to which he contributes his labour.

However, the degree of emphasis which is attached to one or other of these principles, and the extensive or restrictive interpretation placed upon them, condition a wide range of approaches.

To some the starting-point is that it is improper to relieve anyone of liability for failure in a duty of care, because it is the role of society to protect life and property (private or public), there has to be a deterrent, etc. From this point of view it is possible to admit that a worker cannot be made to bear a liability without fault (arising, for instance, from the operation of a vehicle) on behalf of the employer, and to reduce the consequences of liability, in case of fault, by reference to extenuating circumstances in individual cases. It is also possible—but this is necessarily unpredictable—to forgo claims in individual cases or categories of cases. It is not possible to go further.

To others the key element is the consideration that the worker is exposed to certain possibilities of causing injury or damage by his employment—often in conditions of nervous tension—and that his earnings from such employment do not adequately compensate this risk. From this point of view it is not seen as incompatible with the worker's duty of care to envisage that, within the framework of the employment relationship, workers be entirely or partly relieved of their liability for minor degrees of negligence.

There is, in addition, the problem of ensuring that the subsistence of the worker and his family is not jeopardised by financial obligations resulting from liability. This is not a problem exclusively relevant to liability arising from injury or damage caused in employment, and some of the remedies—such as limits on the attachment of wages—are applicable to any financial claim on the worker. It is, however, a problem of key importance in the determination of social policy in the field we are concerned with, particularly as regards lower-paid workers.

It may be that, for all the differences in approach, there are similarities in result; for example, it is unlikely in most countries that a worker will be called upon to bear heavy consequences of damage caused by very minor negligence. At the same time there cannot be said to be an international consensus on a substantial number of points which are of practical importance to the worker concerned: for instance, must he pay something in any case in which a claim is substantiated, or not necessarily? should the amount he must pay be limited once and for all, or only spread over bearable instalments? is there conduct so serious that it overrides the need for the protection of subsistence, or must that be protected in any case?

It should be added that the degree of policy consideration which has been given to the matter in different countries varies greatly. Some have adopted special legislative provisions—other than the general provisions of civil codes [1]

[1] In a few codes—e.g. that of Switzerland—the responsibility of the worker for damage caused in his employment is treated separately.

—on the subject: for instance, the Scandinavian countries, Austria, the socialist countries of Eastern Europe, Argentina and Belgium. In others—Brazil and the Federal Republic of Germany—such legislation is under consideration. There also exists in some countries legislation concerning the liability of particular occupational groups. There does not appear to be systematic treatment of the subject in collective agreements, although a number of particular agreements containing relevant provisions were cited. In a few countries the Courts have, by the development of case-law, made a significant contribution to the national approach; a striking example is the Federal Republic of Germany. In one country—the United Kingdom—an inter-departmental committee studied the problem following the expression of public concern, and concluded that what was being done in the framework of private relations was adequate. Elsewhere there does not seem to have been systematic consideration of the matter by public authorities.

Methods of protection

The methods used to give effect to social policy in this area fall into three main categories: the limitation of liability by reference to the nature and degree of fault; the attenuation of the financial consequences of liability; and insurance.

Limitation of liability by reference to the nature and degree of fault

Liability for failure to take care presupposes a clear concept of the degree of care to be taken. Traditionally that concept has been measured by a relatively objective standard—the " reasonable man ", the *bon père de famille* —though necessarily what was expected was influenced by the circumstances in which the " reasonable man " found himself. In the case of the employment relationship there has been a readiness to make the standard more flexible, both as regards the circumstances and as regards the capacities of the worker. One example is section 321 *(e)* of the Swiss *Code des obligations*, which provides for the definition of the degree of care, " account being taken of the occupational risk, of the education and technical knowledge necessary for the work, and of the capacities of the worker which the employer knew or should have known ". Another is the decision of a Court in the Federal Republic of Germany that a 19-year-old inexperienced driver of a fork-lift truck was not negligent when he imitated certain risky practices of his elders without foreseeing the possibility of serious damage.

This approach has been helped by the notion of the " risk of the undertaking ", which must not be transferred to the worker. That notion may, first, lead to the limitation of the worker's liability by reference to the particularly difficult or accident-prone conditions in which the work is performed. Thus case-law in the Federal Republic of Germany has established particular rules for occupations " subject to risk ", i.e. occupations, such as driving

lorries or cranes, in which a normally careful worker may cause accidents which were objectively avoidable; in such occupations the worker is not liable for slight negligence, and only in a degree deemed appropriate to the circumstances in case of ordinary negligence. The notion of the "risk of the undertaking" may, in the second place, lead to the limitation of the worker's liability by reference to the economics of the undertaking and the need to establish a certain proportionality between the income and the liability respectively of the employer and the worker. It is by this route that the Supreme Court of the Netherlands was able to find in 1959 that a lorry driver could not be made liable for slight negligence and that the consequences had to be borne by the undertaking.

It is against this background that there has developed, in a number of countries, legislation which either excludes the possibility of claims against the worker in cases of minor or ordinary negligence, or permits the contractual exclusion of such a possibility, or permits the Courts to reject claims in whole or in part. The possibility of claims in such cases seems to be virtually excluded, for instance, in Argentina, Belgium, Brazil and Yugoslavia. Provision for the contractual exclusion of claims exists, for instance, in Switzerland and the Netherlands. Under legislation in Austria, Finland, Norway and Sweden, among others, the Courts have the power to remit compensation normally due in case of minor negligence. Moreover, some other countries appear to arrive at the same result by less formal means: for instance, in France minor negligence is not considered to constitute a breach of contract and hence not to give rise to claims in the framework of the employment relationship.

Attenuation of the financial consequences of liability

Most of the legislation which enables Courts to remit compensation normally due in case of minor negligence also enables them to limit the amount of such compensation, according to the relative gravity of the fault. In addition, there are countries—e.g. Poland—where agreed reductions may be made or—e.g. Bulgaria and Poland—where there are ceilings on the total amount payable. The Labour Code of Hungary and a decree on its application contain a detailed scale of ceilings on liability in the case of different degrees of fault.

In some countries—e.g. Brazil, Romania, Syria and Yugoslavia—there is a ceiling, rather, on the amount of the (monthly) instalments by which the compensation may be recovered. These instalments are usually small. However, the reply of the Syrian Government pointed out that they may still be a burden for a worker whose wage is close to the subsistence level, while the instalment system may imply the existence of a long-term debt.

For the rest, there are various provisions and measures aimed at the protection of wages. Can the employer make deductions from wages to satisfy claims against the worker? In a substantial number of countries he cannot do

so at all; in certain others he can do so only on the basis of procedures designed to ensure that the point of view of the worker is taken into consideration, that his agreement to the deduction is freely given, or that there is an impartial decision on the matter. Where there is a possibility of deduction, subject to the worker's agreement or to an impartial decision or not, there is sometimes a ceiling on the amount which may be deducted or on the total amount of deductions which may be made. There is nearly always a basic amount of the wage which cannot be touched.

Similarly, to what extent can a court judgement against the worker be satisfied out of wages—or, to use technical language, to what extent can wages be " attached "? In some countries certain wages cannot be attached at all (for instance, in Chile and India, the wages of labourers and domestic servants). More usually there are restrictions on the amount which may be attached, by reference to the wage level and the family and other responsibilities of the worker. These restrictions take different forms: some safeguard at least an amount equivalent to the minimum wage; others are more flexible; all are designed to safeguard the basic livelihood of the worker and his family.

Insurance [1]

Insurance is a very effective protection against certain civil claims, particularly where these are substantial. It is not, however, a panacea. It is accordingly important to define more precisely the extent to which recourse to insurance can be a valuable method of protection for workers.

First, insurance is very largely a matter of private initiative. In many countries there is an obligation to insure the risk of injury or damage to third parties in certain occupations; the main examples are road transport and the operation of nuclear installations. There have been isolated attempts by Courts in Austria and the Federal Republic of Germany to imply further insurance obligations into the employer's duty of care for his employees; these have not, however, gone beyond the coverage of certain other transport risks (damage to the vehicle, injury to the employer, etc.). Insurance thus undoubtedly plays an important role for one of the groups of workers we have already identified as particularly affected by the problem of civil liability (probably as an incidental result of public concern for the protection of the victims).

Where there is no obligation to insure, the employer usually has an opportunity to insure the risk of claims by third parties and to cover his employees also by such insurance. The extent to which use is made of that opportunity varies greatly: the practice of insuring appears to be widespread in Benelux, the Federal Republic of Germany, Kenya, New Zealand and Sweden; in some additional countries it is widespread in certain " risk " occupations (e.g. in Austria, Cyprus and Syria as regards construction; in India as regards

[1] This section deals with commercial insurance. Social insurance or other forms of social security are relevant, with rare exceptions, only to claims brought by fellow employees; as has been indicated above, they largely take care of such claims in many countries.

the handling of cash and goods). Elsewhere it appears to be little used; one government explained that this was because workers were rarely sued.

Second, there appears to be doubt regarding the extent to which it is possible to insure risks other than the claims of third parties against the employer and employee jointly. Several replies expressed doubt as to the availability to workers individually of insurance against their liability to third parties; one reason given was the difficulty of evaluating the risk. In some countries the worker cannot insure his liability to the employer or to fellow employees. On the other hand, a number of replies did refer to the existence of group insurance, sometimes through trade unions, covering workers against the risk of civil liability claims.

Third, there are the economics of insurance: it may protect against sudden, substantial loss, but the premiums, spread over a period of time, may amount to more. Where the employer pays the premiums of third party liability insurance there is no problem for the worker. To what extent is it to the worker's advantage to pay the premiums where the employer does not? Guarantee funds to cover workers' liability, financed by deductions from wages and apparently common in the case of workers handling cash or goods, constitute a form of self-insurance and may be as effective, while less expensive. Moreover, there is no evidence of any practice amongst employers of insuring their own property against the risk of damage by their workers, presumably on the ground that this is not economically sensible; as already mentioned, there exists an isolated court decision that an employer who has failed to cover his road vehicle by collision insurance cannot place on his worker the burden of covering the damage, but it would seem that, generally, insurance plays little role in claims concerning damage to the employer.

Finally, there are the imponderables. A study of the question in the Federal Republic of Germany [1] warns that the spread of insurance may encourage the bringing of claims against workers, and that where this happens it may be discovered that the insurance cover is, in one way or another, inadequate. And there remains in some countries the possibility that the insurer may claim from the worker, by way of recourse, a contribution to the payments made under the policy.

The burden on the worker

Where does all this leave the worker who has caused injury or damage?

One thing may have emerged by implication: very little protection is enjoyed by the worker who acts wilfully, recklessly or with gross negligence. Limitations of liability by reference to the nature and degree of fault do not extend to those degrees of fault. Insurance sometimes does not cover them; alternatively, they may give the insurer the basis for a recourse claim. Ceilings

[1] P. Hanau: "Die Versicherung des beruflichen Haftungsrisikos der Arbeitnehmer", in *Der Betriebs-Berater* (Heidelberg), 10 Jan. 1972.

on compensation are usually substantially higher in this case, although they may still fall short of the full amount of the damage. The protection against deduction from wages may be less than in other cases. This situation appears to be widely accepted as appropriate; the only point pressed by some unions concerned with the matter is that even in such cases there should be sufficient financial limitation to ensure appropriate subsistence.

For the rest, it was recognised in a number of replies that there may be individual cases in which liability creates hardship, but it was denied that there was any evidence that such hardship was socially significant. In this connection—perhaps more than in that of the estimation of the incidence of claims—it is noteworthy that the subject does not appear to be one leading to, or prominent in, industrial disputes, and that social services are unaware of it. Perhaps it is legitimate to deduce therefrom that the average consequences for a worker of injury or damage caused by him when his mind was not fully on what he was doing—for reasons possibly lying in the work environment—are not such as to be unacceptable to the community of workers.

Possible further national action

Many questions remain unanswered. What is the real number of cases in which the civil liability of workers is enforced? Do these cases concern all categories of workers or mainly those which, as indicated earlier in this article, seem to be particularly exposed to the risk of liability? If the latter, to what extent are there safeguards peculiar to them—such as insurance in transport—which provide a certain protection? Is there evidence that the possibility of making workers liable for material loss is indeed used in the case of illegal strikes, or in that of illegal acts accompanying lawful strikes? The most important field for national action at this stage would seem to be to obtain accurate and objective answers to such questions.

What other action may be needed would seem to depend, in each country, on the answers so obtained. However, it is perhaps possible to go somewhat further. As has been seen, there exists in a number of countries special legislation which limits, in terms and to an extent considered appropriate in the country concerned, the liability of workers for injury or damage caused by relatively minor negligence. With rare exceptions this legislation dates from the past ten years. Some of the countries concerned are not only amongst the socially most advanced but amongst those in which there is a regular pattern of co-operation between government, employers and workers. It would seem to be worth the while of other countries to study such legislation, and to keep themselves informed of the results of its application, with a view to its possible adaptation elsewhere.

There may be one problem, in terms of over-all social policy. The difficulties which liability may create for the economically weak worker are paralleled by the difficulties it may create for the economically weak artisan or peasant. While the latter do not have the problem of possible damage to an

employer, they may have that of possible damage to third parties; it is more difficult to limit their liability than that of the wage earner because there is no employer from whom the innocent victim can seek compensation instead. One or two replies accordingly raised the problem of the equal treatment of different categories of citizens. Whether and to what extent this is in fact a problem may depend not only on the relative size of the categories in question but, in particular, on evidence of their respective vulnerability to civil liability claims.

Possible international action

In the resolution which was submitted to the International Labour Conference in 1972, the study analysed in the preceding pages was seen as a preliminary step towards the setting of international labour standards on the subject. This raises the questions, first, whether the subject lends itself to the setting of such standards, and, second, whether there is any interest in this being done and whether the subject is ripe for action.

It seems that it would be perfectly possible to define the aims of social policy in this field in the form of international labour standards. On the other hand it would seem to be very difficult to establish, on an international basis, standards regarding the detailed application of such policy aims. A main reason for this is the fact that the subject is closely inter-related with civil law, the details of which differ substantially in different legal systems; for instance it would be very difficult indeed to establish universally valid equivalents of the different degrees of fault.

Interest in international standard-setting in this field does not seem to be particularly great. Only three or four governments expressed the view that such action was desirable. Moreover, the number of workers' organisations pressing for such action hardly appears to be greater. Also, as suggested above, there would seem to be legitimate doubt at this stage about the degree of international consensus on the aims of social policy in this field. There may be advantage in allowing thinking to develop further before attempting to elaborate international rules; otherwise there is a risk of these rules being limited to the lowest common denominator on which agreement is possible.

Perhaps the wisest course would be to have another stock-taking, on an international basis, after an interval of some ten years. Such a stock-taking may make it possible to see more clearly than at the present time the need for international standards, the probable acceptability of such standards, and the degree of priority likely to be attached to their establishment.