Central Government, Decentralization, and the Application of Standards: India and the Labour Inspection Convention

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Introduction

In an unprecedented outcry, the Indian government representative to the 2019 Conference Committee on the Application of Standards (CAS or Committee) lashed out in apparent exasperation about the call by the Committee on Convention No. 81. The official's response seems to question the entire integrity of the procedure of the ILO Committee, its key argument being that India should not be on the list of cases to be publicly reviewed. The fundamental integrity of the International Labour Organisation (ILO) is being questioned, the Indian government labeling its procedures deeply flawed and threatening to withdraw its participation unless the ILO entirely reforms its structures and processes. In a rare view behind the scenes of tripartite wheeling and dealing, it is alleged that both governments and employers had asked that the case be dropped. The request refers to standing practice that issues make the list only when supported by two of three of the tripartite constituents. The Indian government considered that it was betrayed and exposed by the public scrutiny of what it calls “a frivolous complaint.” This situation is unfortunate but in a sense also a sign that the mobilization of shame has not yet become ineffective.
What Caused This Upset?

Technically, the issue at hand is not a case like the others in this journal. The source is merely the outcome of the yearly CAS proceedings, in which at the end of a session further questions are asked and suggestions to be accepted or not accepted.

Relative to the response of the Indian government, the requests by the Committee do not seem exceptional enough to explain the indignation. The Indian government is called upon to ensure that draft legislation (in particular the Code on Wages and the Occupational Safety and Health and Working Conditions Act) is in compliance with the convention, that effective labor inspections are conducted, that resources are increased, that collaboration is promoted, that registers are established, and that (data) information is collected and sent to the ILO in Geneva in an annual report. These are all fairly standard requests, with perhaps one or two exceptions. The requests are simply to ensure that the operation of a self-certification scheme does not interfere with or impede the powers in functions of labor inspectors to carry out regular and unannounced visits in any way. Further, the Committee invites the Indian government to accept a Direct Contact Mission, which is most likely why the government is dismayed. Notwithstanding the standard polite invitation, the suggestion of the use of that instrument reflects the urgency of the situation, given that it is usually only introduced in cases of persistent noncompliance. In this case, 2005 was the first year an Indian trade union alleged that inspectors were not allowed to enter export processing zones and special economic zones (SEZ) without the permission of the development commissioner, who is the administrative authority in the zones.

Background

In the early 1990s, like many other countries in the developing world, India began establishing SEZs and export processing zones (‘EPZs’) with a view to promoting export-oriented economic growth. As Amita Punj explains, “Cheap labour is a significant input contributing towards the success of these zones.”

The SEZ Act was adopted in 2005, adjusting the labor rights regime to the

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1 ILO, Report of the Committee on the Application of Standards, Part One, General Report, Provision Record, 108th Session, Geneva, June 2019, para. 391.
2 A. Punj, “Special Economic Zones: Operational Adjustment of Labour Law,” Journal of National Law 5, no. 1: 78–98.
needs of what is in a sense euphemistically called development. Many labor
lawyers will recognize that one person's development can easily lead to anoth-
ner's exploitation, and thus the need for labor law that is applied and enforced.

In its reporting to the ILO, the Indian government has consistently stipu-
lated that all labor laws are applicable in SEZs because no legislation allows
relaxing any law relating to the welfare of labor. However, the ILO supervisory
machinery scrutinizes not only the formal application of laws and regulations,
but also and possibly even more their application in practice. Some of the ob-
ligations of Convention No. 81, for instance, the provision of Article 4 on the
principle of having a coherent and coordinated inspectorate system under a
single central authority, has been effected by the decentralization of powers to
the SEZs. In India, a number of SEZs were designated with different regimes,
but in all of them a so-called development commissioner was appointed.
These officials are responsible for attracting investment and therefore appoint-
ed to take over the task of exercising inspection powers in the SEZs. It is sug-
gested that these SEZs compete on trade not only with other countries, but
also with each other for economic investment. The lax enforcement through
weak inspection, according to a union representative from India, is seen as a
way to promote investment. The Code on Wages Bill identifies labor inspectors
as “facilitators” and requires them to warn of infractions and provide addition-
al time to rectify a violation before any penal procedures are initiated. The sys-

Concerns have also been expressed over the years about self-certification
and inspections undertaken by certified private agencies. A web-based self-
inspectorate system for businesses has been introduced based on self-assess-
ment and reporting. This seems to mean that labor inspectors will be invited to
the enterprise only when the self-assessment report reveals a violation or a
complaint has been made. Further, after such a report, the inspector should
initiate an inspection only after a so-called necessity test is applied. Whereas
the government and to some extent the employers in India regard these devel-

3 Individual Case, CAS Discussion, 106th ILC session (2017), Labour Inspection Convention,
1947 (No. 81), India (Ratification: 1949).

4 CEACR, Observation on the Application of the Labour Inspection Convention, 1947 (No. 81)
by India (ratification 1949), adopted 2018, published 108th ILC session (2019).

5 CAS Discussion, 106th ILC session.
The lack of detailed information and accurate data is regarded as particularly inadequate. The international trade union Industriall Global Union, which has observer status at the CAS, also complains that the number of inspections cannot be independently corroborated because trade unions do not have access to the SEZs. Violations, then, are most likely largely underreported. Not only is the number of inspections low, few violations have been reported.\(^6\)

All in all, it cannot be upheld, by the Indian government or any other party, that the Committee’s comments were unusual or out of order under the standard supervisory machinery. The question, therefore, is what the purpose of the government’s attack on the ILO and its procedure is. Further, how will the relationship between the ILO and the Indian government proceed or develop, when the latter is unwilling to accept the authority of the international labor community as it is vested in the ILO?

The position of the government is somewhat reminiscent of the 2012 challenge of the employers’ group when it contested the supervisory bodies’ interpretation on the right to industrial action.\(^7\) No one denies that in recent years political behavior across the world has become more and more harsh and adversarial. For the ILO order, this situation is very disturbing. After all, the ILO is not able to impose anything or to enforce, let alone use force. The ILO, it is often emphasized, relies on cooperation, convincing, and perhaps on occasion a little coercion. It stands or falls on the will of the constituents to work together in good faith.

**Lesson to Learn?**

All seems permitted in the light of economic development. In many countries, the quality of labor is sacrificed in the name of high revenues. India is not alone in this regard. Governments across the world, not only in the developing world, but also possibly even more so in the developed world, have often shifted large parts of their public tasks to private or semi-public bodies. Decentralization has on many occasions failed to increase the quality of these services. However, as a way to impose efficiency standards that the government in its public capacity would have had difficulty selling to the population, it might

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\(^6\) Individual Case, CAS Discussion, 108th ILC session (2019), Labour Inspection Convention, 1947 (No. 81), India (Ratification: 1949).

\(^7\) ILO, Report of the Committee on the Application of Standards, Part One, General Report, Provisional Record, 101st Session, Geneva, May-June 2012, paras. 22–23.
have been quite successful. Budget control may be thriving, but public services are not. This case does not suggest that the central government’s duties under public international law shift to a nongovernment or semi-government agency. The central government remains responsible for the proper implementation and application of ILO standards.

Ideally, the government of India and the ILO supervisory bodies will find a way past this stalemate. Clearly the situation benefits no one, in particular the workers in the SEZs, who are hit the hardest. India has always been a complying Member State, willing to cooperate. A deeper issue is at hand here. Power relations in Member States are shifting away from the central government. The underlying checks and balances have not always moved along in step. It sometimes takes the ILO some time to recognize developments and even longer to address them. This is evident in the debate on decent work in the supply chain, where no single central government can carry ILO responsibilities. It is true again here. Like it or not, the ILO bears the responsibility of resolving the matter. The somewhat petty way in which the government of India exposed itself reveals a deeper issue. If we want the central governments of Member States to retain their positions in the ILO system, a debate how to organize that responsibility is needed. A possible start is one on decent work and the role of the central government in relation with other decentralized public and private agents, in particular in SEZs or EPZs.