

The Standards Initiative: Implementing the workplan for strengthening the supervisory system

Working Paper concerning article 19, paragraphs 5(e) and 6(d), of the Constitution (action 4.3)

Article 19, paragraphs 5(e) and 6(d), of the ILO Constitution

Paragraph 5(e): If the Member does not obtain the consent of the authority or authorities within whose competence the matter lies,¹ no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.

Paragraph 6(d): Apart from bringing the Recommendation before the said competent authority or authorities,² no further obligation shall rest upon the Members, except that they shall report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

¹ Concerning the ratification of Conventions.

² Concerning enactment of legislation or other action.

1. Introduction

1. Paragraphs 5(e) and 6(d) of article 19 of the ILO Constitution embody a central obligation arising from Membership in the ILO: taking action as regards Conventions and Recommendations adopted by the Conference. The provisions were introduced in the Constitution through the 1946 amendments as one of a series of measures to improve the effectiveness of the standards system.
2. This Working Paper follows-up on the decision taken by the Governing Body in March 2017 on the workplan for strengthening the supervisory system, prioritizing the examination of action 4.3 concerning article 19(5)(e) and (6)(d) for November 2017.¹ The document provides an inventory of the different uses made of the provisions throughout the years, highlighting points made in past discussions, in particular as to the opportunities and challenges to achieve their different objectives. It serves as background to the policy elements and options for an approach to the contemporary use of the provisions sketched out in the Progress Report on actions on the implementation of the workplan for strengthening the supervisory system.²

¹ GB.329/INS/5(Add.)(Rev.); [GB.329/PV](#).

² [GB.331/INS/5](#).

2. Genesis and purposes

3. Discussions during the 1930s, in particular at the International Labour Conference (ILC), stressed the need for the ILO to have information submitted by governments on the effect given to unratified Conventions and the application of Recommendations.³
4. Paragraphs 5(e) and 6(d) of article 19 were introduced in the ILO Constitution by the 1946 instrument of amendment as a result of a series of discussions by ILO bodies, which illustrate how the information sought, pursuant to these provisions, was meant to serve different purposes:
 - (i) in 1943 the Governing Body decided to include the question of reports by governments on the difficulties for ratification as an element of the ILC discussion on the “future policy, programme and status of the ILO” – the main objective of the proposal was to lay down “more precise obligations” upon governments regarding the ratification of adopted Conventions;⁴
 - (ii) the 1944 Report to the ILC broadened the objective – by recalling that while Conventions are binding with ratification, the adoption of Conventions and Recommendations “place[s] all Members of the Organisation under a definite legal obligation to take certain action the object of which is to maximise the probability of the ratification of Conventions and the effective application of Recommendations”;⁵
 - (iii) in 1945 the ILC, through a Resolution of the Conference Committee on the Application of Conventions and Recommendations (CAS) submitted proposals noting that “certain obligations of States Members in respect of Conventions and Recommendations as well as certain aspects of the constitutional practice of the Organisation in this regard must be clarified or amplified in order to ensure the working of the Organisation with increased efficiency”;⁶

³ This information was not published in a visible manner nor regularly. See, in particular, Report of the Committee on the Application of Standards (CAS) at the 14th ILC (1930, p. 633); and the Resolution concerning the effects given to recommendations adopted by the Conference at the 15th ILC (1939, p. 739). See also comment from the Delegation on Constitutional Questions at the 29th ILC (1946, p. 40), noting that: “the quality of the information available on these subjects could, in the judgment of the Delegation, be substantially improved if Governments were to undertake to supply detailed information to the Office in a prescribed form at appropriate intervals”.

⁴ Minutes of the Governing Body, 91st Session, p. 142; see also p. 59 for the decision taken by the Governing Body on the agenda of the 26th Session (1944) of the Conference.

⁵ Report I “Future policy, programme and status of the ILO”; pp. 96 and 102.

⁶ *Record of Proceedings*, ILC, 27th Session (1945), Appendix IX. The CAS submitted as suggestions that: (i) “It should be an obligation for Members to present to the International Labour Office reports at regular intervals as requested by the Governing Body on the submission of Conventions and Recommendations to the national legislative authorities as well as on the action taken by them, indicating in case of non-ratification of Conventions or of non-acceptance of Recommendations by the appropriate authorities the reasons therefor in respect of each such Convention or Recommendation”; (ii) “Members, besides keeping under constant review the question of ratification of Conventions and of acceptance of Recommendations, should be required to submit unratified Conventions and Recommendations which have not been accepted to the appropriate legislative authorities at as frequent intervals as practicable, but in any case at intervals of not more than five years, if no legislation covering the provisions of the Conventions or Recommendations has been enacted or other action taken during this period”; (iii) “In the case of Conventions which have not

- (iv) in 1946 the ILC, through the Delegation of the Conference on Constitutional Questions at the 29th ILC adopted in its reports most of the suggestions made by the CAS. These reports highlight the core elements of the new procedure: the effectiveness of the examination of the information arising from the reports, which in turn depends on the contribution of the employers and workers' organizations, and the evaluation of the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The provisions were thus conceived as a tool to obtain information on the impact and relevance of standards: (i) through the submission of reports, the provisions encourage Members to give effect to the standards adopted by the Conference and share information on causes that might prevent ratification as well as actions to give effect to standards even in the absence of ratification; (ii) through the examination of the information, guidance may be derived for ILO activities, in particular as regards technical assistance for the ratification of standards, future standards-setting action and recognition of the efforts made by countries to give effects to standards even in the absence of ratification.⁷
- (v) In 1947, as a consequence of the adoption of the provisions, the mandates of the CAS and the CEACR were broadened accordingly.⁸

3. Inventory of the uses

3.1. Initial stand-alone use of reports on unratified Conventions and Recommendations

5. The first reports under article 19(5)(e) and (6)(d) were requested in 1950 on 12 instruments (six Conventions and six Recommendations) and less than half of the reports received. The report form followed closely the terms of article 19(5)(e) and (6)(d).⁹ The reports were examined by the CEACR and subsequently by the CAS. The focus was on the instruments per se rather than a specific topic (though the CEACR regrouped them by topics in its report).¹⁰

been ratified, each of the Members should undertake, without prejudice to the consideration of ratification, to submit to the International Labour Office periodical reports as requested by the Governing Body on any measures taken to make effective in whole or in part the provisions of each such Convention"; and (iv) "Each of the Members should undertake to supply reports to the International Labour Office in the manner prescribed by the Governing Body on the measures which it has taken to give effect to all or any of the provisions of any Recommendation adopted by the Conference."

⁷ See 1946 Reports, chapter V, from para. 48.

⁸ See Minutes of the 102nd Session of the Governing Body (June–July 1947), pp. 49 and 234; Minutes of the 103rd Session of the Governing Body (December 1947), p. 56 and Appendix XII, p. 167.

⁹ GB.108/IOC/D.1 (June 1949).

¹⁰ Minutes of the 112th Session of the Governing Body, Geneva, June 1950. Report of the Committee on the Application of Conventions and Recommendations (Appendix XIII, p. 154). The CAS set up a subcommittee to facilitate the discussion.

3.2. Combined use of reports on unratified Conventions and Recommendations with reports on ratified Conventions for the purpose of General Surveys

6. While the initial stand-alone approach outlined above was undertaken in subsequent years, it soon became apparent that it would be useful to have a clearer overview of the status of these instruments both in countries that had ratified them and in other countries, by combining the reports under articles 19 and 22. The first “General” Survey, which was based on both article 19 and article 22 reports, was prepared in 1956. The view was that the general discussion of the Conference Committee “could thus assume the character of a review by stages of the effect given to all the principal Conventions and Recommendations, which would make it possible for the Conference to have a fuller and more useful picture of the effect of the Conventions and Recommendations than had been available in the past.”¹¹ From 1956 to 1999 the number of instruments on which reports were requested every year varied from one to eight, with the exception of a special General Survey for the 50th anniversary of the ILO that covered 17 key Conventions.

3.3. Special reports on unratified fundamental Conventions

7. At the same time, in order to strengthen the procedures for supervising the constitutional obligation of non-discrimination,¹² the Governing Body decided, at its 208th¹³ and 209th¹⁴ Sessions (November 1978 and February–March 1979) that Members which had not ratified Convention No. 111 should be asked to submit reports under article 19 of the Constitution of the ILO every four years, in addition to those normally required under article 19 on other instruments. Simple report forms were adopted by the Governing Body with five questions, including on the effect given to the Convention and the difficulties and prospects as regards to ratification.¹⁵ The reports were examined by the CEACR and discussed by the CAS. At its 264th Session (November 1995) the Governing Body extended these arrangements to other unratified fundamental Conventions.¹⁶

¹¹ Minutes of the 129th Session of the Governing Body, 27–28 May and 24 June 1955, Annex X.

¹² See Resolution concerning the Promotion, Protection and Strengthening of Freedom of Association, Trade Union and Other Human Rights adopted at the 63rd Session (1977) of the Conference, and in particular paragraph 2(a) and (b), in which the Conference requested the Governing Body to study ways of establishing or strengthening procedures for supervision of the constitutional obligation for all member States in relation to the furtherance of the principle of non-discrimination set out in the Constitution.

¹³ GB.208/17/24.

¹⁴ GB.209/9/20.

¹⁵ For example GB.261/LILS/6/8.

¹⁶ GB.264/LILS/5. At the time the question was already raised as to whether the CAS was the best forum to discuss the reports having regard to its tight schedule and suggested to supplement it with a discussion in the Governing Body (at the time within the LILS Committee); and the Employers noted that the reports should not be “purely procedural” and that they should clearly highlight the economic and social obstacles to ratification. GB.264/9/2 paras 17–57.

3.4. Promotional use of reports under the follow-up to the 1998 Declaration

8. Furthermore, under the follow-up to the 1998 Declaration and pursuant to article 19(6)(d), an Annual Review mechanism was set up, with modalities originally foreseen to be as follows: (i) questionnaires were sent to member States not having ratified one or more of the fundamental Conventions; (ii) replies were compiled by the Office for the attention of the Governing Body; (iii) the Office could resort to a group of experts (later known as Expert-Advisers) to present an introduction to this compilation; (iv) a tripartite discussion on the situation pertaining to all four categories of principles and rights would take place each year at the March session of the Governing Body; and (v) the Governing Body could, if necessary, function as a committee of the whole to allow the participation of governments that were not members of the Governing Body.¹⁷

3.5. Integrated use of reports for the purpose of the integrated approach to standards-related activities

9. At its 279th Session (November 2000), the Governing Body decided to implement, first on a trial basis, an integrated approach to the standards-related activities of the ILO in order to improve their coherence, relevance and impact.¹⁸ The purpose was to reach a consensus on an action plan in a specific area, in the context of a general discussion at the ILC. The first issue selected by the Governing Body was occupational safety and health. A survey covering 40 standards and 15 codes of practice was conducted among member States.¹⁹

3.6. The impact of the Social Justice Declaration

10. With the adoption of the Social Justice Declaration in 2008, and the introduction of the recurrent discussions on strategic objectives at the ILC “some adaptation of existing modalities of application of article 19” was envisioned.²⁰ Concretely, this entailed: (i) aligning the topic of the General Survey with that of the recurrent discussion (allowing the outcome of the General Survey to be taken into account in the recurrent report and thus enhancing the value of General Surveys);²¹ and (ii) redesigning the article 19 questionnaire (allowing for a comprehensive overview aiming at better responding to the objective of article 19 to obtain information on law and practice and obstacles to ratification, as well as

¹⁷ These modalities evolved, in particular in light of the adoption of the Social Justice Declaration. See 2010 Report to the ILC on the review of the follow-up to the 1998 Declaration.

¹⁸ GB.279/4 and GB.279/PV.

¹⁹ The consolidated questionnaire covered: (1) law and practice (15 points); and (2) the need for promotional activities, the use of standards as a guide or model for national law and practice, intentions regarding ratification, obstacles to ratification, codes of practice, technical cooperation, information and the possible need for new standard-setting activities. The provisions of the standards and codes of practice corresponding to each question were specified in the annex to the questionnaire. The responses were summarized in the report and set out in the form of graphs and tables.

²⁰ Follow-up to the Declaration, section I(B).

²¹ The discussion of General Surveys by the CAS was held at the same session of the Conference as the related recurrent discussion from 2010 to 2013. Since then, with a view to facilitating the integration of standards-related aspects into recurrent discussions, General Surveys have been examined by the CAS one year in advance of the related recurrent discussion.

the effect given or proposed to be given to Conventions and Recommendations; providing useful information focusing on understanding member States' needs – including as to technical cooperation and standards-related activities; and ensuring that the workload on member States would not be increased).²²

4. An ongoing institutional debate: Potential, challenges and opportunities

11. Stemming from the above summary on the genesis and uses of article 19(5)(e) and (6)(d), four main objectives can be singled out as to its implementation: (i) promoting ratification; (ii) inducing countries to take a look at where they stand in relation to the ratification and implementation of instruments, including by giving effect to their contents even in the absence of ratification (also to provide due recognition of efforts undertaken); (iii) guiding the implementation of the instruments; and (iv) evaluating the impact and relevance of standards.
12. These purposes envisioned for article 19, paragraphs 5(e) and 6(d), have been pursued in varying degrees. For illustration purposes reference may be made to two modalities tentatively explored in institutional debates:
 - (a) *A procedure to note substantial conformity*: Already the 1946 Conference Delegation on Constitutional Questions suggested that with a view to enabling Members to receive credit internationally for social legislation which approximates to, or is superior to but differs in detail from the international standards embodied in a Convention, consideration should be given in connection with the new system of reports on unratified Conventions contemplated by the proposed amendments to article 19 of the Constitution to devising a procedure whereby formal note could be taken of the fact that the situation disclosed by such reports was not less satisfactory than the requirements of the Convention. While this option was examined by the Governing Body and the Conference in 1947²³ no procedure was put in place.²⁴
 - (b) *The evaluation of standards*: The report of the Director General to the 81st ILC (1994) raised the question of the role of General Surveys as a tool for the evaluation of standards and how such a tool might be improved. Subsequently, in March²⁵ and

²² GB.202/12, paras 18–70. It also impacted the Follow-up to the 1998 Declaration (see footnote 17).

²³ Minutes of the 101st Session of the Governing Body (March 1947), pp. 45 and 56 and Appendix VIII, p. 96; Minutes of the 102nd Session of the Governing Body (May–July 1947), p. 85 – “the Chairman said that all members of the Governing Body were conscious of the dangers of accepting a state of fact rather than a legal obligation. Nevertheless, the proposals made by the Standing Orders Committee aimed at meeting the difficulties of certain States which were unable to ratify Conventions owing to some technicality. The Governing Body decided to submit to the Conference for approval the arrangements suggested by the Standing Orders Committee with regard to a procedure whereby formal note could be taken of the fact that the situation disclosed by reports on an unratified Convention were not less satisfactory than the requirements of the Convention”.

²⁴ A new attempt to give effect to this possibility, in relation to fundamental Conventions was set out in a 2011 draft resolution concerning the coherence of the multilateral system submitted to the Conference in relation to fundamental principles and rights at work – see *Provisional Record* No. 2: Part C(b), 100th ILC (2011).

²⁵ GB.262/9/2 and GB.262/LILS/3 paras 45–58. See in particular para. 58: “It is incumbent upon the Governing Body to examine if – and how – the evaluation of standards may be extended and

November 1995²⁶ the Governing Body discussed ways to strengthen the evaluation of standards in supplementing the role played General Surveys prepared by the CEACR and discussed by the CAS. Several limitations of the role of General Surveys in this regard were noted, including the limited amount of time in the CAS discussion, the scope of General Surveys, and the capacity for the CEACR to assume a role in this regard.²⁷ Throughout the institutional debates on the use article 19(5)(e) and (6)(d) challenges have recurrently been noted to achieve its full potential. In particular, and in light of the abovementioned purposes, these relate to the choice of the most suitable reporting arrangements to ensure the receipt of pertinent information (including as to the scope of topics and instruments covered, and report forms) as well as on the modalities of institutional treatment and follow-up given to the information obtained in order to maximize its usefulness.²⁸ This has led both to a focused and strategic use of reporting under these provisions,²⁹ and to recalling the room for improvement to give them full effect. At the same time, since their introduction, the potential and opportunities arising from these provisions have also been recurrently highlighted,³⁰

strengthened. From the comments already made, it may be observed that its legal bases, such as they have been incorporated in article 19, exist. Furthermore, the General Surveys have fully proved their worth and there have been no opinions expressed at the Conference that they should be overhauled. On the contrary, to supplement the work of the Committee of Experts and introduce a system whereby the relevance of instruments would be monitored – a system demanded by those drafting the Constitution in 1946 also apparently by the constituents in 1994 – this evaluation could possibly be entrusted to the Committee on Legal Issues and International Labour Standards of the Governing Body, without undermining the role that the Conference might later play because of the presence of technical advisers in the groups. Indeed, the Organization does not yet have a procedure by which the member States might expound the difficulties they encounter in the area of ratification or propose the revision of provisions they consider obsolete. A procedure of this kind, the operating conditions of which must be carefully established, should allow an objective examination of requests or proposals to be made, with a view to lending assistance to member States and also to guiding the Governing Body and Conference in the drafting of standards – whether they are revising these standards or adopting new ones. It should be flexible and adapted to the means of action and resources of the Organization.”

²⁶ GB.264/LILS/WP/PRS/1, paras 71–75 and GB.264/9/2.

²⁷ Workers noted, in this regard, that General Surveys were not ideal to carry out an evaluation of GB.262/9/2, para. 19.

²⁸ For example, already early on after the provisions were introduced, the CEACR in its first use of the procedures in 1950 expressed reservations on its capacity and the appropriateness to, based on article 19 reports submitted to it, express precise judgements on the extent of the conformity of the existing legislation with the texts of the Conventions and Recommendations in relation to which the governments were under no obligation to apply. It alluded to the challenges stemming from the lack of time and heavy workload, as well as to the low number of reports received and the relevance of information contained therein, linked to the form of the reports or the lack of understanding of the procedure. See Report of the CEACR, 1950 (33rd Session) (General Report, p. 13).

²⁹ For instance, as a result of that same first evaluation of the reports in 1950, the CEACR supported limiting the number of instruments and their grouping by subjects to facilitate the task of governments and also their examination to obtain an overall picture of the situation on these matters in the different countries. See Report of the CEACR, 1950 (33rd Session) (General Report, p. 14)

³⁰ Quoting again the initial 1950 CEACR Report (p. 13), the Committee noted at the time that the new procedure “will provide, it is hoped, some fuller indications than in the past of the influence which Conventions, whether ratified or not, and Recommendations have had on national law and practice” and “bring to light some of the causes which have prevented more widespread ratification of Conventions and application of Recommendations”. The Committee also noted that “(t)he information contained in such reports is of considerable importance for the purpose of guiding the ILO in its future decisions and in its consideration of the necessity for revising past decision” the

notably during the discussions in the 1990s following the 1994 Report of the Director-General to the Conference, which bolstered a renewed interest in the implementation of these provisions to enhance the impact of standards in context of globalization.³¹

13. More recently, the Conference adopted two resolutions calling for the strengthening of modalities under article 19(5)(e) and (6)(d):

- (a) The 2016 resolution on advancing social justice through decent work (following the ILC evaluation of the Social Justice Declaration) called upon the ILO to “ensure that there are appropriate and effective linkages between the recurrent discussions and the outcomes of the Standards Initiative, including exploring options for making better use of article 19, paragraphs 5(e) and 6(d), of the ILO Constitution, without increasing the reporting obligations of member States”.³² In the same vein, constituents have been stressing during consultations the need to further use to its full potential the modality provided by General Surveys.³³
- (b) The 2017 resolution and conclusions concerning the second recurrent discussion on fundamental principles and rights at work, called upon the ILO to actively and as a matter of urgency “strengthen the Annual Follow-up to the 1998 Declaration concerning non-ratified fundamental Conventions as a promotional tool with a view to: (i) assessing more fully the efforts made in accordance with the 1998 Declaration by Members which have not yet ratified all the fundamental Conventions and the Protocol of 2014 to the Forced Labour Convention, 1930, thus permitting the identification of areas in which ILO technical assistance may prove useful to them; (ii) facilitating exchange of experiences and lessons learned; and (iii) making the Annual Follow-up more accessible and visible.”³⁴

14. Strengthening the use of article 19(5)(e) and (6)(d) may thus be deemed to be particularly timely as:

- (i) it is an integral part of the comprehensive workplan for the strengthening of the supervisory system and presents important linkages with the proposals included in the workplan (in particular streamlining of reporting, including to maximize the usefulness of reporting efforts without adding reporting obligations);
- (ii) it is linked with other important matters that are actively considered by the Governing Body (in particular on the follow-up to the 2008 Social Justice Declaration and the

information supplied being “of the greatest assistance to the Organisation in dealing with such difficulties as they have experienced and in taking them into account in the preparation of international labour legislation in the future”.

³¹ *Defending values, promoting change: Social justice in a global economy: An ILO agenda*. Report of the Director-General (Part I). 81st ILC, 1994. See also GB.261/LILS/3/1.

³² PR 13-1, 105th ILC, para. 15.1.

³³ The 2016 Advancing Social Justice report to the ILC, noted that “as experience has shown that General Surveys and the reports prepared for recurrent discussions do not cover all the standards related to a strategic objective, the Governing Body decided to supplement these sources and the results of recurrent discussions in order to provide, for each strategic objective, a complete picture of the standards which require promotion, revision or consolidation, and the possible need for new standards. To this end, it established the Standards Review Mechanism (SRM) in November 2011, and created the SRM Tripartite Working Group in March 2015 (SRM TWG)” (para. 126).

³⁴ PR 11-1, 106th ILC, para. 4(d).

follow-up to the ILO 1998 Declaration on Fundamental Principles and Rights at Work; the choice of instruments to prepare the 2019 General Survey in coordination with the 2021 recurrent discussion on the strategic objective of employment;³⁵ a strategic follow-up to the recommendations of the Standards Review Mechanism Tripartite Working Group recommendations; and other relevant actions such as the roadmap for the implementation of the programme of action concerning decent work in global supply chains and the implementation and follow-up to the 2030 Agenda);

- (iii) the submission of reports under article 19(5)(e) and (6)(d) and its use through appropriate modalities can provide a unique source of information on the state of national legislation and practice on a universal basis. Supplemented by tripartite guidance, it can strengthen the ILO's position as a rule-making Organization in the multilateral system and enhance coordination with the implementation of the 2030 Agenda.³⁶

15. Summing up, a common thread in the institutional discussion concerning the use of article 19(5)(e) and (6)(d) highlights that its potential remains to be fully tapped into and that its enhanced use must be considered in the context of the broader strengthening of the standards system.³⁷ The Constitution leaves decisions on requesting reports under article 19(5)(e) and (6)(d), and the form of the reports to the Governing Body, at its discretion. It is thus for the Governing Body to determine what are the priority needs to be addressed and take decisions accordingly on its modalities. Some options for consideration are tentatively sketched in the Progress Report this Working Paper accompanies.

³⁵ To both be examined by the Governing Body at its 331st Session.

³⁶ Such need has been recalled beyond the ILO. For example, a 2016 OECD report (*International Regulatory Co-operation: The Role of International Organisations in Fostering Better Rules of Globalisation*) notes that international organizations make a limited use of evaluation tools as regards their standards-setting activities.

³⁷ Their implementation is also closely linked with: (i) the obligation to submit to competent authorities and to report thereon (article 19(5)(b) and (c), and (6)(b) and (c), of the Constitution); (ii) the special investigations that the Office may be requested to carry out by the Governing Body or the Conference (article 10(1) of the Constitution); and (iii) the setting of the agenda of the Conference (article 14(1)).