

## BOOK REVIEW

*L'organisation internationale du travail et le BIT*, by Georges Scelle, introduction by Achim Seifert (Éditions Dalloz, 2020, 333 pp.).

*Reviewed by Lance Compa*<sup>†</sup>

The re-issuance of Georges Scelle's seminal *L'organisation internationale du travail et le BIT* (The International Labor Organization and the International Labor Office) nearly a century after its initial publication provides a new and timely look at early work on the challenge of creating global labor standards.

Published in 1930, Scelle's history of the ILO in its first decade of operation contains time-capsule treasures of international, social, and labor issues of the time. Here is the United States, hosting the 1919 founding conference in Washington but refusing to join the ILO as isolationism took hold of American international policy (the United States would join in 1934 under Franklin Roosevelt's New Deal.) Here are France and Britain and the Netherlands, moving workers' newly-won footholds in domestic labor legislation and social insurance to an international plane. Here is growing rivalry between the communist First International and the socialist Second International.

Here is defeated Germany, now the Weimar republic, striving to rejoin and play a role in the international community. Here is the USSR renouncing the ILO as a bourgeois institution that blunts class struggle. Here is fascist Italy inside the ILO with its government-controlled unions. Here is the colonial question, and the problem of massive postwar migration. Here are China as a new republic, and India with Mahatma Gandhi, who had been a labor lawyer for twenty years in South Africa, leading an independence movement.

With hindsight we know, as Scelle could not, just how fraught these issues were – precursors to the Great Depression, the rise of fascism, World War II, decolonization, the Cold War, developing country dictatorships (Brazil, Indonesia, Argentina, Chile . . .) Neoliberalism and the Washington

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Consensus, and other historical landmarks that came later in the twentieth century. Still, Scelle's work was prescient. Throughout the course of events and trends, the same demands for workers' rights and fair labor standards in the global economy recounted by Scelle in 1930 persist into today.

A prominent law professor who straddled academic and government affairs in France and internationally, Scelle was well-positioned for this project. He was a confidante of Albert Thomas, the first ILO secretary general, and provided close counsel to Thomas and other ILO leaders in the early years. He was named to the ILO's first Committee of Inquest roster in 1922, and later served on the Committee of Experts and the ILO administrative tribunal for internal staff grievances.

Achim Seifert's superb introduction to the new edition offers a modern "law and society" framework to locate Scelle in the intellectual milieu and policy debates of his time. Seifert notes the influence of Emile Durkheim and Léon Duguit, and widespread discourse about "industrial democracy" and its meaning. He places the analysis of the ILO in a context of Scelle's views on how French society should be organized and the policies he advocated as chief of staff in the labor ministry of a new reformist government elected to power in 1924.

Scelle's ambitious goal, says Seifert, was to provide a treatise-quality volume "corresponding to the standards of juridical science," but one that also reached a popular audience to publicize the ILO's work and build support for this new supra-national institution. As Seifert puts it: "The theoretical framework in which the Scellian concept of international law inserts itself, notably its sociological approach to law, permits him to conceive of the structure of the ILO, but also its activities, as the precursor of a future international society whose silhouette becomes visible when one analyzes this international organization."

In his public policy work and his academic writing, Scelle called for a balance of power and class collaboration between workers and employers under the rubric of "industrial democracy." For Scelle, this meant independent organizations of workers and employers with mandatory membership in each branch of economic activity would reach agreements on labor and social protection, which would then be codified in legislation for the entire branch. He took his vision from the French domestic scene to the ILO, which he calls "an embryo of an international people that can become the foreshadowing of a united humanity."

Organized in three parts, the book first covers the antecedents of international labor standard-setting and the formation of the ILO in the Treaty of Versailles. It then moves to the internal structure and functioning of the organization, and finally to the ILO's impact in the outside world.

Scelle traces the path from early efforts by utopian socialists Robert Owen and Charles Fourier to the International Workingmen's Association

of 1864 and later non-governmental organizations that promoted international labor standards, like the 1897 Association for Workers' Legal Protection and the 1900 International Association for Labour Legislation. Their pressure led to international conferences of governments, employers, unions, and allied organizations to set standards, notably the 1906 Berne Conference that outlawed the use of white phosphorus in match production and outlawed the importation and sale of matches made with the deadly substance. A later Berne Conference in 1913 took up hours of work and night work by women and children. But before it came to fruition, Scelle notes tersely, "Came the cataclysm of 1914."

After the cataclysm, Part XIII of the Versailles Treaty created the ILO on the premise that "peace can be established only if it is based upon social justice" and "the failure of any nation to adopt humane conditions of labor is an obstacle in the way of other nations which desire to improve the conditions in their own countries." The link between peace and social justice, and overcoming the ever-present temptation for governments and companies to seek competitive advantage from lower labor standards, are still the *raison d'être* of the ILO.

Scelle highlights the ILO's tripartite structure. It gives civil society organizations of workers and employers a constitutional role alongside states in decision-making and governance, unlike the League of Nations or any other international organization then or since, where private actors are limited to advisory and observer status. Scelle also emphasizes the importance of countries' near-universal participation in the ILO, sometimes even by governments and employer groups not fully committed to the organization (trade unions were always committed, seeing the ILO as a check on moves to lower labor standards in their countries). The ILO had 55 member states when Scelle wrote; today it has 187 members out of 193 countries in the United Nations.

#### THRESHOLD CHALLENGES

Scelle's recounting of the ILO's agenda during its first decade confirms that *plus ça change, plus c'est la même chose*. The organization addressed working hours and leisure time, minimum wage and living wage, child labor and women's work, forced labor and indentured servitude, union organizing and collective bargaining, informal workers and the self-employed, migrant workers and indigenous workers, occupational safety and health, and conditions in what we now call supply-chain systems. These issues still confront international labor protagonists, and the ILO is still the place where governments, workers and employers still work to reconcile domestic sovereignty and global standards.

Scelle is especially insightful in discussing the challenges of such reconciliation. How can governments cede a measure of governance to private sector groups without sacrificing their own authority? Initial proposals called for a 1–1–1 delegate system, one each from government, employers, and workers. But the ILO settled on a 2–1–1 system with two government delegates from each country, and a two-thirds approval threshold for key decisions, requiring coalition-building across the three groups to adopt conventions.

Can member states attach “reservations” to conventions that they ratify, as is common in many international instruments, or must they ratify—if they choose to ratify—the convention in its entirety? On this challenge, the ILO opted to preclude reservations, but built in some degree of flexibility in most of the conventions based on differences in level of development and enforcement capacity.

In a body with global membership among sovereign nations, how can small countries or poor countries be assured of equal treatment from large and rich, and how can the latter not lose ground to the more numerous former? The ILO addressed this with a bottom-up force of each country having an equal number of delegates voting on key decisions, and the top-down force of a Governing Body, which runs the organization and sets its agenda. The GB has a permanent majority from countries “of the most considerable industrial importance” and members rotating from the rest.

Are ILO conventions international law? Or are they a contractual agreement among ratifying states? On this point, Scelle advocates the first view, in line with his overarching view of the need for supranational authority after the “cataclysm” of World War I. But he acknowledges that the ILO adopted the second position, with governments holding each other to account for voluntarily ratified conventions through their national labor law systems.

Who has authority to interpret the ILO constitution or its conventions? The ILO’s charter says the International Court of Justice has the ultimate say. Scelle supports such an oversight role for the ICJ, in keeping with his desire to move toward supranational governance.

When Scelle wrote, a handful of constitutional interpretation cases had gone to the ICJ, but none requiring interpretation of a convention. In 1932 the ICJ decided whether Convention No. 4’s prohibition on night work by women applied to women in management or professional jobs. In a 6–5 vote, the ICJ said the plain text of the convention did not create exemptions or exclusions based on white-collar versus manual distinctions, so it applied

to all women workers (that convention has since become officially obsolete under ILO review procedures).<sup>1</sup>

Scelle would likely be surprised and disappointed that the 1932 ruling on women's night work is still the only convention interpretation case taken to the ICJ. As time passed, the ILO moved toward resolving problems *en famille* rather than entrusting a court, however eminent but with no special labor expertise, with telling it what conventions mean.

On these and other pivotal decisions for the future of the ILO, Scelle offers his own opinions and analysis grounded in his expertise in both international law and French domestic law. Sometimes the ILO's position accorded with his view. Where the ILO went in a different direction, he carefully and generously explains the reasoning behind it, without finding fault or leveling further criticism.

#### FINDING TEETH

Scelle faces squarely the "teeth" question, the recurring criticism that the ILO is ineffectual because it has no real enforcement power. Effective enforcement is an endemic problem in labor law systems—look no further than the weak remedies under the U.S. National Labor Relations Act, for example.

Scelle expresses the goal of enforcement in language still relevant today: to "not only defend workers against failures by employers or negligence by governments, but also protect the business community against unfair competition taking advantage of others' good faith to gain competitive advantage in export markets." He reviews early proposals for "teeth" by creating a corps of international labor inspectors and an arbitration system that could result in economic sanctions. This presages contemporary developments in privately-constructed "enforceable brand agreements" like the Bangladesh Accord and the recent Lesotho gender-violence agreement among unions, NGOs and brand-name apparel firms.

But governments and employers would not accommodate such a system that intruded on sovereign mastery of labor and employment law. Instead, Scelle emphasizes "soft law" (the modern turn of phrase—he did not use it) enforcement through experts' reports, commissions of inquiry, behind-the-scenes diplomacy and other mechanisms in the court of public opinion. He explains, "The effectiveness of this system rests less on the threat of sanctions than on the publicity that can be given to violations. . . . Publicity can only be favorable to those willing to fulfil their juridical obligations." Scelle points further to the 1926 creation of the Committee of

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1. See Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932 I.C.J. (se. A/B) No. 50, at 365 (Nov. 15), [http://www.worldcourts.com/pcij/eng/decisions/1932.11.15\\_women.htm](http://www.worldcourts.com/pcij/eng/decisions/1932.11.15_women.htm).

Experts, charged with analyzing and reporting on government compliance with conventions they have ratified. "It allows worker delegates to signal negligence in implementation on the part of certain governments," creating peer pressure for change.

#### ORGANIZATIONAL STRUCTURE AND BEHAVIOR

Scelle's description of the ILO's internal structure and functioning might first seem interesting only to scholars of international organizations and organizational behavior. but it contains important insights on international labor standard-setting and enforcement.

An important threshold concern is the power assigned to the General Secretary and the International Labor Office, the permanent staff of the organization, which Scelle calls the ILO's "motor organ."

Numbering some 400 when Scelle wrote, the Office now employs 2000 people at headquarters in Geneva and country and regional offices around the world. They are international civil servants taking no instruction from any government. While no numerical quota system exists, the Office strives to achieve geographical balance with employees with requisite expertise drawn from all regions and a mix of big and small, rich, and poor countries.

The Office conducts research projects and publishes its findings. Just as today, "too many reports!" was a common complaint when Scelle wrote, although for selected users each is important. Reports can have effects, too. One reporting project underway when Scelle wrote was on working conditions in the textile industry, with a particular look at child labor in the Persian rug industry in Iran. He notes, in deflecting the common "toothless" charge against the ILO, that the British consul in Teheran reported "serious law reforms on hours and conditions" in the sector as a direct result of ILO action. This presages contemporary ILO treatment of supply chain issues and some legislative progress in several key countries.

Scelle highlights the "diplomacy" role of the Office, having to maintain relations throughout the 1920s with governments ranging from Mussolini's Italy and Primo de Rivera's Spain to the first Labor and Socialist-led governments in Britain and France. He also notes a visit by the ILO General Secretary to the "Far-East" to counter the view that the Geneva-based institution had the inevitable tendency to "Europeanize" itself.

The Office also had delicate diplomacy with the trade unions, themselves divided among socialist, communist, Catholic/Christian, and syndicalist factions. But relations never broke down, since union groups tended to coalesce around common interests, and also, says Scelle, because

they shared a common sense of “independence and dignity” as full constitutional participants in the organization.

Unlike ideologically divided unions, employers united around a shared business ideology that Scelle describes as “instinctive repugnance to any rules that limit their freedom of action.” Scelle declares that the ILO “was not instituted to maintain equal balance between the interests of business and workers. It was created to promote progress in the situation of workers—employers have sufficient means to defend their position.” He likens the role of the Office to that of counsel to the workers, advocating their case to the ILO Conference which had the ultimate decision-making power.

In contrast, Scelle says that employers—more disciplined than unions and governments—see their role at the ILO as one of preventing pro-union measures from going too far, curbing the reach of the Office, and serving as an “opposition party” at the Conference. This stance led to ambivalence toward the ILO’s mission that persists to now, reflected recently in a hard-fought dispute on whether the right to strike is an “intrinsic corollary” of Conventions 87 and 98 on freedom of association, as stated by the Committee on Freedom of Association.<sup>2</sup>

Summing up the ILO’s first ten years, Scelle highlights the focus on protecting the weak—children, women (reflecting the ingrained “weaker sex” view of the time), migrants, victims of forced labor and indenture, and the unemployed. He notes that an “international guarantee of a living wage appears still far off,” and instead supported the ILO’s moves to support strong safety nets for workers against “*la précarité de son existence*”—the same concern for precariousness faced by workers today.

Scelle also laments the ILO’s failure to adopt a convention on freedom of association, despite reports and proposals for such a move. It was blocked, he notes, by the natural antipathy of employers toward expanded trade union rights, and also hesitancy by many governments concerned that freedom of association entails the right to strike.

But Scelle predicts that “when circumstances will have evolved, the international labor code will include freedom of association.” Of course, the circumstances included the cataclysm of 1939–45, which he could not foresee, but which created conditions for adoption of ILO conventions 87 and 98 on freedom of association, the right to organize, and the right to collective bargaining. Those conventions now have constitutional force binding all member states, even those, like the United States, that have not ratified them.

Scelle takes the opportunity of recounting the ILO’s first decade to promote his own ideas on “industrial democracy” based on his experience

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2. On the dispute, see JEFFREY S. VOGT, JANICE BELLACE, LANCE COMPA, K. D. EWING, JOHN HENDY QC, KLAUS LÖRCHER, TONIA NOVITZ, *THE RIGHT TO STRIKE IN INTERNATIONAL LAW* (2020).

in France. He foretold what later became works councils in European Union directives. He called for mandatory sectoral unions and employer associations whose agreements would be extended throughout the sector, and other features of his preferred strain of social-democratic policies emerging in France and in several Northern European countries in the 1920s.

Scelle's conclusion is overoptimistic but admirable in its idealism. Scelle sees the ILO taking social democracy to a global scale as an international organization whose aim is:

emancipation, not only material and political, but also intellectual and moral, of the most numerous part of humanity: those who work, whose only capital is their labor. . . . The era of state particularism is over; worker internationalism as incarnated in the ILO is only the harbinger of the new order.

But when Scelle's book was published in 1930, the League of Nations was already shaky, Mussolini's rule was consolidated, the Nazis became Germany's second-largest party, and the Great Depression was starting to take hold. Things only deteriorated through the 1930s. Scelle was no seer, but who in 1930 saw clearly what was to come? The fact that events overwhelmed his ideals does not detract from the accuracy of his history and richness of his analysis of the ILO's first ten years of work.

For French-reading international labor scholars and advocates, Scelle's prescient account of the challenge of setting and implementing international labor standards in the 1920s provides important lessons for scholars and advocates in our field today. The ILO has extensive translation capacity, routinely translating long French documents into English. One hopes it can find a way to have the new Dalloz publication of Scelle's volume and Achim Siefert's introduction translated into English so a bigger international audience can learn from their insights and analysis.