

OPEN ACCESS

ISSN 2280-4056

*E-Journal of
International and Comparative*

LABOUR STUDIES

Volume 1, No. 3-4 October-December 2012



ADAPT
www.adapt.it
UNIVERSITY PRESS

The New ILO Recommendation on Social Security

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1. The New ILO Recommendation on Social Security

The present article sets its sights on the efforts made by the International Labour Organisation (ILO) to extend coverage of social security to the poorest countries. This is by no means an easy task, all the more so because legislation regulating social security has long been a contentious issue, particularly in relation to labour market rigidity and the need to streamline the system in order to raise competition and social progress in less developed countries. Indeed, in some circles the future of international labour standards is viewed with a considerable degree of pessimism, and the rapid growth of the informal sector in both industrialized and developing countries is frequently recalled to underline the decline of the ILO in terms of standard setting.

There is no doubt that a perfect and universal Social Justice, based on a totally equitable institutional framework, is out of reach. If identified, such a system would require for its implementation a sovereign World State that does not exist¹. However, this does not mean that one cannot search for concrete answers which fit well with the present state, or to find recourse whenever possible to a legal framework that is flexible enough to adjust to different situations. The ideal is often the enemy of the good.

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¹ A. Sen, *The Idea of Justice*, Penguin Books, London, 2009.

Concerning the paper, Section I will consider the difficulties that precarious workers meet to enjoy social security protection, even those in rich countries. In Section II, the attempt on the part of the ILO to afford minimum protection to the poorest, even in the less developed countries, will be investigated. Such an effort has led to the adoption of Recommendation No. 202 on social protection floors.

2. Social Security and Precarious Workers

2.1. Vulnerable Workers

Open-ended contracts have been the most widespread form of employment for a number of years now. More recently, new methods of work organisation, often stemming from the willingness to provide undertakings with higher levels of flexibility, fostered the recourse to alternative working arrangements. The phenomenon peaked under the pressure of competition and as a result of globalisation, that is following the internationalization of the market economy, and in response to scientific and technological developments.

Employers were determined to make their companies more profitable and to reduce labour costs, and this state of affairs prompted them to experiment on new forms of work. Concurrently, public authorities encouraged the conclusion of diverse employment relationships in order to cope with unemployment issues that cannot be solved otherwise.

It is these circumstances which explain why alternative forms of employment are often associated with precarious work, yet this connection is not always accurate: a mother can ask for a part-time assignment although employed on an open-ended contract.

Nevertheless, workers under these working arrangements are usually more vulnerable because they report lower levels of job security and social protection, and they encounter difficulty to organize themselves in trade unions. Further, they are paid less and hardly enjoy supplementary benefits, also because they barely access traditional social security schemes (pension, unemployment and family allowances, and so forth).

They are usually excluded from collective bargaining and they are not provided with the safeguards detailed in the individual employment contract.

These positions are usually filled by women, young people, the elderly, immigrants and all those looking for a second or third job when remuneration for the first one is inadequate.

The terms and conditions characterising segmented employment – e.g. the quest for greater flexibility and the often precarious nature of their employment – explain the difficulties, at national and international level, of laying down necessary regulatory provisions.

Do international social security standards apply to all these forms of employment? The answer is not straightforward, but lies somewhere in between. It would be crucial to review, on a case by case basis, the main fields of international social security law and assess whether the relevant standards are appropriate to certain forms of work or employment.

The conventions on social security adopted since the end of the Second World War deal with wage earners or, more broadly, the working or resident population, with some of them specifically addressing apprentices². It is nevertheless true that workers in unstable situations find it very difficult to join social security schemes.

The ILO Constitution envisaged the possibility – in some cases even the obligation – to introduce the notion of flexibility into the legislative texts enforced, also as a way “to have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different”³.

The International Labour Conference (ILC) has therefore integrated flexibility clauses into established mechanisms of protection. Among other things, this move made it possible to exclude a number of industries or categories of workers from certain safeguards provided so far.

Those exceptions particularly affected the self-employed, apprentices, home-workers, and those operating in the informal economy. Yet this issue should be dealt with carefully in order not to deprive these workers of forms of protection needed.

The case of casual workers, but also of home-workers if one considers the rates of occupational injuries and diseases⁴, is worthy of note as further ILO recommendations frequently require that these restrictions are repealed, gradually if needed.

² See the Employment Injury Benefits Convention (No. 121), 1964, Art. 4, the Invalidity, Old-age and Survivors' Benefits Convention (No. 128), 1967, Art. 9 and 22 and the Medical Care and Sickness Benefits Convention (No. 130), 1969, Art. 10.

³ Art.19, par. 3 of the Constitution.

⁴ See Convention No. 121, Art. 4 (2) (b).

It should be noted that these workers have difficulty meeting the conditions to draw benefits, viz. the obligation to have worked or paid social contributions for a minimum period (or worked for a minimum number of hours or paid a minimum amount of contributions). Along the lines of what has been laid down by provisions at a national level, Convention No. 102 and more recent conventions concerning social security devise qualifying periods too, although the supplementary recommendations usually require these qualifying periods to be waived.

Another issue lies in the fact that benefits envisaged in national social security schemes are usually determined according to the income, which is modest if considering that of atypical workers. Alternatively, the Social Security (Minimum Standards) Convention, 1952 (No. 102) and the subsequent instruments provide for criteria that are not directly related to workers' earnings, which are also used by the ILO itself to set down "average" standards for the minimum amount.

The ILO Committee of Experts on the application of Conventions and Recommendations (CEACR) has considered the exclusion of certain categories of workers in the context of non-discrimination rules and conditions that might preclude their coverage.

By way of example, in assessing the implementation of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), an attempt has been made to provide an adequate solution at the time of including part-time workers, domestic and informal workers under social security schemes.

What emerged was that some countries have already established special schemes for certain categories of workers who otherwise would be excluded from statutory forms of protection.

In some other cases, national governments implemented a variety of measures to make existing schemes – either voluntary or compulsory – more attractive, introducing more favourable conditions. An example in this connection is the watering down of certain qualifying criteria. Among others: the scaling back of the required number of years of service or contributions; the reduction of the sum to be paid into the scheme; the waiving of outstanding payments; the possibility to buy-back missing contribution periods; and the reduction of the number of employees required for a company to fall within the scope of the social security scheme⁵.

⁵ ILC, *Social Security and the Rule of Law*, General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, Report of the Committee of Experts on the Application of Conventions and

One of the issues is to come up with schemes of social security – which are a guarantee form of income – which adapt to new categories of workers who have limited resources and for whom welfare schemes are, for one reason or another, inadequate. In terms of employment promotion, the government might on some occasions fund part of these welfare schemes addressing certain categories of workers, thus acting as a substitute for the parties concerned.

2.2.1. Special Provisions

The ILO also made provisions for adjustments in relation to the employment conditions of certain groups of workers. For instance, Convention No. 102 and the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), lay down special rules on unemployment benefits for seasonal workers⁶. As for non-standard forms of employment, no specific measures have been put in place for independent work, family work, and apprentices, yet certain standards might apply which include or exclude them from legal provisions of a more general nature. Conventions and recommendations have been adopted instead for homework, part-time work, and domestic workers.

2.2.2. Independent Work

Work that is legally independent is regarded as a special form of employment. Labour and social security law were developed mainly to afford protection for wage earners and they did not normally concern autonomous workers. Nevertheless, the need to extend to the self-employed some of these safeguards became gradually clear, especially since their legal status could mask genuine forms of salaried employment.

Recommendations (Art. 19, 22 and 35 of the Constitution), Report III (Part 1B) 100th Session, 2011, ILO, Geneva, 2011, par. 219, 220, 307 and 310.

⁶ Convention No. 102 provides that the duration of the unemployment benefit and the waiting period may be adapted to workers' conditions of employment (Art. 24, par. 4). Convention No. 168 refers to special adjustments in terms of conform the qualifying period (Art. 17, par. 2), the waiting period (Art. 18, par. 3) and the duration of payment of benefit (Art. 19, par. 6) to their occupational circumstances.

Whether or not an international labour standard applies to independent workers depends on the wording of the relevant text and of course on the job description.

Nevertheless, such standards should apply to a situation that is to all appearances one of independent work but indeed dissimulate salaried employment. The ILO Recommendation No. 198/2006 on the Employment Relationship sets the demarcation line between the contract of services and the contract for services. It states that the existence of an employment relationship should be determined primarily by the facts concerning the performance of work and remuneration, notwithstanding how the relationship is carried out under any arrangement – either contractual or otherwise – that may have been agreed upon by the parties. For the purposes of facilitating such determination, the Members should consider the possibility of allowing a broad range of means for establishing the existence of an employment relationship and providing for a legal presumption – as is the case in some countries with regard to home-based work – that an employment relationship exists where one or more relevant indicators are present. Members should clearly specify the conditions applied for determining the existence of an employment relationship, basically subordination or dependence. They should also remove incentives to disguise an employment relationship and define specific indicators of the existence of an employment relationship. However, the Recommendation does not address the case of workers in quasi-salaried employment, which is a widespread category in Italy, Germany, Spain and the United Kingdom. Indeed, they are placed in-between self-employed and waged employees in terms of protection and social security.

A number of ILO instruments make use of the word “worker” without qualifiers, that is without narrowing down its meaning, either directly or indirectly, to wage earners. In this sense, some explicit reference is made to autonomous workers only, while Recommendation No. 132 of 1968 concerns the improvement of work and living conditions of tenants, sharecroppers and similar categories in agricultural work⁷. The Recommendation makes provisions for the enforcement of protective labour laws and the implementation of adequate social security schemes. The parties concerned should be safeguarded, as far as possible and practicable, against risks of loss of income resulting from natural calamities. In addition, it contains provisions regulating the

⁷ The scope of the Recommendation is indicated in par. 1 to 3.

discontinuation of the employment relationship, including compensation for the damages suffered. According to the Income Security Recommendation, 1944 (No. 67), self-employed workers should be entitled to the same insured schemes as salaried employees, upon the setting-up of a sound system to collect their contributions.

Further, consideration should be given to the possibility of insuring autonomous workers against sickness and maternity necessitating hospitalisation, long-term sickness, and extraordinary expenses incurred in cases of sickness, maternity, invalidity and death⁸.

However, this is an exceptional set of rules and generalisation must be avoided. Indeed, many of the conventions on social security in place since the end of the Second World War do provide the ratifying States with the opportunity to offer special forms of protection to certain categories of residents or the working population, thus including independent workers. Of course governments might decide to cover wage earners on an exclusive basis. In some other cases, the provisions clearly specified the scope of application, for instance by excluding autonomous workers⁹ – as is the case of Convention No. 71 on seafarers' pensions of 1946 – or including workers in salaried employment only, as laid down by Convention No. 175 and Recommendation No. 182 on part-time work of 1994.

That being said, one can observe that several countries have taken the necessary steps to include the self-employed. The main issue concerns funding, as by definition there is no employer that bears the burden of contributions. As a result, coverage is extended to this category of workers – both on a voluntary or compulsory basis – insofar as it becomes financially sustainable.

2.2.3. Family Workers

Two categories of workers fall under this label: those operating in family-run businesses in which only employees are members of the same household, and the employer's family, irrespective of the undertaking in which they perform their activity.

Some ILO standards admit derogations for small-sized undertakings or, in the maritime and fishing sectors, for small-sized ships. These cases usually

⁸ Par. 21.

⁹ Art. 2 (2) h.

include family-run undertakings or family-owned vessels which are not covered by traditional protection schemes or are subject to special provisions. However, according to Convention No. 102, small-sized enterprises might be excluded to gradually extend social security coverage to all enterprises.

The Income Security Recommendation of 1944 (No. 67)¹⁰ asks for members of the employer's family who live in his/her house other than his/her dependent spouse or children to enter into insurance schemes against certain legally defined events. This should be done considering their actual wages or, if these cannot be ascertained, the market value of their services. It is for employers to pay the relevant contributions.

The social security exemptions address members of the employer's family¹¹, usually on condition that they live under the same roof and work for him¹². In a similar vein, exemptions exist in other fields¹³. In some cases, however, the ILO recommendation laid down to supplement a convention on a given subject expressly suggests that the same protection should be granted to this specific category of worker. Examples are Recommendations No. 131 and 134¹⁴.

2.2.4. Apprentices

Few instruments exclude from their scope apprentices or other people undergoing training. International labour standards apply to apprentices in that they concern all persons employed or occupied, as the case may be, in an undertaking or at a specific task. Some conventions and recommendations specify this aspect neatly, such as the Employment Injury Benefits Convention (No. 121), Article 4, the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), Article 9, and the

¹⁰ Par. 21.

¹¹ With regard to seamen, see the Ship-owners' liability (Sick and Injured Seamen) Convention, 1936 (No. 55).

¹² See the Employment Injury Benefits Convention, 1964 (No. 121), Art. 4; the Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), Art. 37; the Medical Care and Sickness Benefits Convention, 1969 (No. 130), Art. 5.

¹³ See the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99), Art. 1, par. 3.

¹⁴ The Invalidity, Old-Age and Survivors' Benefits Recommendation, 1967 (No. 131), par. 2 and 3; the Medical Care and Sickness Benefits Recommendation, 1969 (No. 134), par. 2 and 11.

Medical Care and Sickness Benefits Convention, 1969 (No. 130), Article 10.

2.2.5. Home Workers

A number of early conventions on social security set down provisions concerning home workers, who were therefore in principle included in their scope of application. This is once again the case of Convention No. 121 of 1964 on employment injury benefits, which defines exceptions to the general scheme in respect of this category of workers¹⁵. In general terms, international labour conventions and recommendations are drafted in a manner that encompass home workers. There are, however, cases in which terms are so broadly formulated that make it possible to exclude them.

A number of standards did not formally rule out home workers, but they were not conceived for such workers and do not take account of their specific needs. Hence the ILO decision to draft ad-hoc rules in the form of Convention No. 177 and Recommendation No. 184 of 1996. Instead, the convention does not apply to independent workers operating at home, that is those who have “the degree of autonomy and economic independence necessary” to be considered independent workers under national laws or court decisions¹⁶.

States ratifying Convention No. 177 undertake to adopt, implement and review on a regular basis a national policy aimed at improving the situation of home workers. They must promote equality of treatment between home workers and other wage earners, “taking into account the special characteristics of homework” and conditions applicable to similar work carried out in an enterprise. Equality of treatment is to be promoted particularly in respect of: “[...] (c) protection in the field of occupational safety and health; [...] (e) statutory social security protection; [...] and (h) maternity protection”¹⁷. Article 7 provides that “national laws and regulations on safety and health at work shall apply to homework, taking account of its special characteristics, and shall establish conditions under which certain types of work and the use of certain substances may be prohibited in homework for reasons of safety and health”. Recommendation No. 184 requests that national laws and regulations

¹⁵ Art. 4 (2) (b).

¹⁶ Art. 1(a).

¹⁷ Art. 4.

should establish the conditions under which home workers are entitled to benefits, as other workers, from paid public holidays, annual holidays with pay and paid sick leave¹⁸. The Recommendation also deals with protection in the event of dismissal, protection of maternity and social security.

2.2.6. Part-Time Workers

Part-time workers can find themselves excluded from the social security schemes envisioned by Convention No. 102 and subsequent ILO provisions. They may not fit the definition nor meet the conditions to qualify for benefits, such as minimum length of service or earnings. However, both these provisions and those on part-time work provide for a watering-down of these terms that is conditional upon national budgetary constraints. This means that they can do away with certain requirements, amend some thresholds, and redesign basic allowances.

Part-time work is dealt with in Convention No. 175 and Recommendation No. 182 of 1994. The Convention seeks to provide those concerned with the same protection that is granted to full-time workers, particularly with regard to maternity, sick leave and termination of employment.

Under Article 6 of the Convention, “Statutory social security schemes which are based on occupational activity shall be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers [...] These conditions may be determined in proportion to hours of work, contributions or earnings, or through other methods consistent with national law and practice”.

The recommendation requires that part-time workers do not receive compensatory allowances which are lower than those provided to comparable full-time workers, usually arrived at in proportion to an hourly or performance-related rate, or on a piece-rate basis.

In order to extend the scope of application of certain social laws, the recommendation also discusses the possibility to count towards part-time workers in the total number of wage earners who operate in the company.

¹⁸ Par. 24.

2.2.7. Domestic Workers

Convention No. 189 on domestic workers requires the States to take appropriate measures, with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including maternity¹⁹.

Further, Supplementing Recommendation No. 201 adds that they should consider means to facilitate the payment of social security contributions, particularly domestic workers working for multiple employers, for instance through a streamlined system of payment. Members should consider concluding bilateral, regional or multilateral agreements to provide, for migrant domestic workers covered by such agreements, equality of treatment in respect of social security, as well as access to and preservation or portability of social security entitlements. The monetary value of payment made in kind should be duly considered for social security purposes, including in respect of the contribution by the employers and the entitlements of the domestic workers²⁰. Members should cooperate at bilateral, regional and global levels for the purposes of enhancing the protection of domestic workers in matters concerning access to social security²¹.

3. Extending to the Poorest

The following section focuses on proposals put forward to deal with the issues mentioned above, with the second part which examines the current ILO policy orientation aiming at extending social security coverage while ensuring sustainability.

3.1. The Search for New Solutions

The questions pointed out with regard to precarious workers hold also for the poorest. Their activities remain relatively impervious to the influence of national or international legal rules. This is particularly the case of those operating in the informal economies. The informal sector in middle- and

¹⁹ Art. 14.

²⁰ Par. 20.

²¹ Par. 26 (2).

low-income countries is not a monolith. It comprises traditional activities performed within the family circle, usually agricultural work in a broad sense. It also includes undeclared work, odd jobs and small, one-man operations run by carpenters, mechanics, repairmen of all kinds, and so forth. It comprises, of course, small-sized and registered businesses that are known to the authorities and which however find it relatively difficult to apply administrative, tax or social legislation.

Although sufficiently integrated into the formal sector, they have succeeded in applying standards on social protection only partly. While a number of standards concern all workers and might contain provisions that address the informal sector specifically, the exceptions and flexibility clauses laid down in the ILO conventions are targeted on workers in the informal economy only, whether they live in urban or rural areas.

Many conventions apply to wage-earners on an exclusive basis, yet high levels of poverty are reported also in autonomous work. In cases in which the law is applicable, compliance with such provisions is difficult to impose and verify, be it at an international or national level. As already discussed above, no matter what the scope of the measure laying down the field of application, those concerned could fall through the cracks of the social security system promoted by Convention No. 102 and most recent ILO instruments.

The paradox is therefore obvious. Their shaky position renders poor workers more vulnerable than others, and thus in need of transparent legislation on protection which is often lacking. The weak, more than the strong, need to be able to bank on the certainty of written texts²². Lacordaire, writing in more general terms, maintained that when it came to the rich and the poor, the weak and the strong, it was freedom that oppressed and the law that freed. We are back at the origins of social law. The arguments put forward in favour of the implementation of national and international labour and social security law to these special categories of workers are therefore grounded. The workers are thus ensured, at least in formal terms, protection on a par with that of other workers; equality of treatment is respected; and there are no second-class citizens.

Under these circumstances, Recommendations No. 67 and No 69 become relevant as they may be taken as a starting point with regard to the setting of standard and anti-poverty policies. This has been confirmed in the recent general survey carried out by the CEACR on social security

²² J.-J. Dupeyroux, *Et maintenant?, Droit social*, special issue, July–August 1981, 487.

instruments²³. Some countries address this gap in terms of coverage by progressively moving towards universal social security regimes, giving priority to achieving general access to health care, and establishing encompassing pension schemes.

Other countries have adopted broader schemes targeting low-income workers and families in informal economy who have no other access to social security benefits. Some governments set much store by the need to strengthen the administration of social security and coordination of the different schemes – which plays an important role in the shifting from informal to formal economy and the access to social benefits.

One might note that the extension of coverage does not necessarily need to go through a legislative process. An effective method of widening the scope of application of social benefits might be via collective bargaining, as the example of Argentina neatly pointed out.

In parallel, a number of instruments deal with individual well-being and the willingness to promote social progress.

Recommendation No. 102 of 1956 goes through the facilities to be granted to salaried employees of public and private undertakings²⁴ in terms of meals, rest (seats and rest rooms), recreation and transportation.

Recommendation No. 115 of 1961 applies to the housing of “manual and non-manual workers, including those who are self-employed and aged, retired or physically handicapped persons”. In addition, it sets down the objectives envisaged in the national housing strategy and the liability of public authorities in that regard. The recommendation also deals with the question of housing provided by employers, the funding of programmes concerning accommodation, housing standards, measures to promote efficiency in the building industry, the link between house building and stability of employment, and urban, country and regional planning. Finally, it includes suggestions on the methods of applying the principles laid down.

Other ILO instruments concern minimum wage setting and income protection. The reference texts in this respect are Convention No. 95, adopted in 1949, supplemented by Recommendation No. 85, Convention No. 131 and Recommendation No. 135 of 1970 on minimum wage fixing. Mention should be also made of the anti-poverty policies laid down by a number of countries. In this sense, the Parliament of India has adopted the National Rural Employment Guarantee Act, No. 42 of 2005. It aims

²³ ILC, *Social Security and the Rule of Law*, *op. cit.*, par. 50-53 and 313-317.

²⁴ Excluding workers in agriculture and sea transport.

at paying 100 employment days per year to any household in a rural area whose member(s) accept to perform unqualified manual work, with this provision that applies in 200 districts across the country. The Unorganized Workers' Social Security Act, 20 No. 33 of 2008 provides health benefits, life and disability insurances, old-age pensions and occupational injury schemes for workers in the informal economy, including agricultural workers and migrant labourers. Still in India, the Self-Employed Women Association (SEWA) has established a pension fund supplied by contributions paid by its members, that is female rural informal workers; other successful experiences exist in Brazil²⁵, India again, Iran and Tanzania²⁶. In 2003, the Brazilian government launched a new programme called *Bolsa Família*. It provides financial support to poor families who comply with certain requirements in terms of development, including schooling, vaccination, food control and ante and postnatal tests. The initiative covers some 11.3 million families, i.e. 46 million persons. There is still room for improvement with regard to its scope, as many of those who are entitled to such benefits are not really in need of such entitlement. Nevertheless, it allowed for a significant reduction of the rate of individuals living below the poverty line²⁷.

The new basic retirement scheme for rural workers introduced in 2009 by China is funded by the government both at a national and local level. Anyone above the age of 16 who does not take part in the existing pension scheme applying in urban areas is eligible to pay into the programme, with the regime that will cover farmers above the age of 60. The amount of the pension varies regionally and is based on the average local income. Pilot versions are on trial in the different provinces; it was expected to embrace 10 percent of the provinces by the end of 2009, and expand to cover the whole country by 2020. A rural pension scheme (*Prévidencia Rural*) is operating in Brazil also, under the Social Security Act, with the aim of reducing poverty and vulnerability among older men and women engaged in rural employment and excluded from social insurance schemes. It provides a non-contributory old-age pension, as well as allowances for veterans, disability, maternity, sickness and employment injury benefits, all largely funded by general taxation²⁸.

²⁵ S. Rocha, *Pobreza no Brasil. A final, de que se trata?*, Rio de Janeiro, Editora FGV, 2003.

²⁶ ISSA, *op. cit.*; T. Akson, *Extension de la couverture du système de sécurité sociale en Tanzanie. Les leçons de l'Inde et de l'Iran*, *Bull. droit comparé travail sécurité sociale*, 2008, 65–81.

²⁷ ILO, *Bolsa Família in Brazil: Context, Concept and Impacts*, Social Security Department, Geneva, March 2009.

²⁸ ILC, *Social Security and the Rule of Law*, *op. cit.*, par. 315.

3.2. Striking a Balance: the ILO Approach

3.2.1. The Relevance of the ILO Standards on Social Security

The significance of the ILO Conventions may be evaluated by taking account of the ratification rate. On 26 July 2012, Convention No. 102 had been ratified by 47 Member States, most recently by Brazil, Bulgaria, Romania and Uruguay. Argentina has indicated that the ratification process has been initiated at the national level. China, Honduras, Mongolia and Paraguay have requested assistance from the ILO for the ratification of Convention No. 102, while the Republic of Korea has expressed a strong interest in its ratification and in the ratification of higher social security standards²⁹.

The convention has been fully ratified by seven countries, with Part V on old-age benefits that has been the most widely accepted branch.

In some other cases, the ratification of Convention No. 102 has not been regarded as necessary, for similar provisions at an international level which ensure the same levels of protection have been entered into³⁰.

One might note that the comments put forward by CEACR, at times very critical, have been worded so as to encourage action and dialogue. Of course, the more complex and serious the issues, the more elaborate the mechanisms for promoting cooperation and finding solutions in keeping with the conventions. The dialogue with national governments concerned usually allows to single out areas where the ILO technical cooperation would be useful.

The reference value of Convention No. 102 and the technical assistance should also be highlighted for countries which have not ratified it yet. Furthermore, the European Social Charter provides in Article 12(2) that the contracting parties undertake to maintain a level of protection which corresponds at least to that required by the convention. In this sense, the European Code of Social Security initiated a close cooperation between the Council of Europe and the ILO for its supervision. Under Article 74, paragraph 4 of the Code, the CEACR examines the annual reports on the Code and transmits the results to Council of Europe.

²⁹ ILC, *Social Security for Social Justice and a Fair Globalization*, International Labour Office, Geneva, 2011, par. 36.

³⁰ ILC, *Social Security and the Rule of Law*, *op. cit.*, par. 82 and 87.

Notwithstanding high levels of flexibility, most recent conventions – particularly Convention No. 168 – set too high standards for the majority of the governments, including industrialised countries.

This state of play might be regrettable, mainly for flexibility is afforded in the form of income support and unemployment benefits which supplement safeguards against unemployment. In turn, these safeguards cover the contingencies of full unemployment; partial unemployment; temporary suspension of work; part-time workers seeking full-time work; new applicants for employment³¹.

Further, the CEACR has suggested that the codified form of presentation espoused by the 2006 Maritime Labour Convention (MLC) could also be effectively used in social security, where developed legislation moved to consolidation into comprehensive organic laws or social security codes.³² The same holds for a new holistic instrument on social security that the ILO may consider adopting in the future.

3.2.2. Social Security in a Wider Context

The promotion of employment lies at the heart of ILO development and anti-poverty programmes, as poverty cannot be coped with “unless the economy generates opportunities for investment, entrepreneurship, job creation and sustainable livelihoods. The principal route out of poverty is work”³³. The strategy to eliminate poverty set down by the ILO has a number of components, which are related to both employment and international labour standards:

- developing skills for sustainable livelihoods;
- investing in jobs and the community through labour-intensive programmes;
- promoting entrepreneurship and reinvesting money through microfinance;
- promoting local development through cooperatives;
- overcoming discrimination and tackling child labour;
- ensuring basic income and social security;
- providing a safety work environment by preventing occupational injuries and illnesses.

³¹ ILC, *Social Security and the Rule of Law*, *op. cit.*, par. 93 and 98-101.

³² *Ibid.*, par. 614.

³³ J. Somavia, *Working Out of Poverty*, Report of the Director-General to the 91st session of the ILC, Geneva, ILO, 2003, 7 ff.

Microfinance in particular is a means to help people in difficult situations. It attempts at doing so while maintaining the profitability of the system. The ILO and other international institutions have pointed out the potentials of the mechanism³⁴ and some positive examples, like the Grameen Bank in Bangladesh³⁵.

Such successful experience provides for a two-tier system. On the one hand, safeguards are ensured in the event of special circumstances, viz. sickness, injuries, old age and death. On the other hand, anti-poverty measures are envisaged, such as the free provision of food and accommodation, medical assistance, and the setting up of awareness raising campaigns and public employment programmes.

Furthermore, there appears to be consensus on the need to integrate social protection within anti-poverty and economic development strategies. In the medium timescale, they are viewed as possibly establishing a “basic social security package”, in low-income countries as well³⁶. Discussion highlighted the problems brought about by the aging of the population – in terms of the costs of health care and pension schemes – and of the HIV/AIDS pandemic, also as regards the funding of the system³⁷.

³⁴ B. Balkenhol (ed.), *Microfinance and Public Policy: Outreach, Performance and Efficiency*, Geneva, ILO, 2007; ILO, *Microfinance for Employment Creation and Enterprise Development*, Geneva, 2002; ILO, *Micro-finance in Industrialized Countries. Helping the Unemployed to Start a Business*, Geneva, 2002; A. Noya, E. Clarence (eds.), *Social Economy: Building Inclusive Economies*, Paris, OECD, 2007; C. Churchill (ed.) *Protecting the Poor: a Micro insurance Compendium*, Geneva, ILO and Munich Re Foundation, 2006; L. Mayoux, *Microfinance and the Empowerment of Women. A Review of the Key Issues*, Geneva, ILO, 2000.

³⁵ See <http://www.grameen-info.org/> (Last accessed 15 September 2012).

³⁶ ILO, *Social Security: a New Consensus*, Geneva, 2002, 1–30; United Nations, *World Economic and Social Survey 2007. Development in an Ageing World*, New York, 2007; ISSA, *Dynamic Social Security for Africa: an Agenda for Development*, Geneva, 2008; E. Kalula and E. Levy, *Accès aux soins de santé et aux systèmes de santé en Afrique du Sud*, *Bull. droit comparé travail sécurité sociale*, 2008, 161–185.

³⁷ ILO, document GB.303/ESP/3, November 2008, Geneva, par. 12 ff.; E. Fourie, *The Informal Economy, Social Security and Legislative Attempts to Extend Social Security Protection*, in R. Blanpain, W. Bromwich, O. Rymkevich, S. Spattini (eds.), *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*, *Bulletin of Comparative Labour Relations*, No. 70, Alphen aan den Rijn, Kluwer, 2009, 271–293; M. Olivier, *Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Countries Perspectives with Specific Reference to Southern Africa*, *Ibid.*, 241–293.

This issue has been raised at the ILO³⁸. A first step may be the devising of a priority package consisting of access to basic health care, income security for children facilitating access to nutrition, education and care, some form of social support to poor and unemployed people, and income security via basic pensions for the elderly and the disabled.

The Organization has reasserted the relevance of Recommendations No. 67 and No. 69 for the development of a state-of-the-art system of social security, and the principle of extensive coverage concerning social insurance, social assistance and public services. They offer a wider legal and institutional framework than the one put forward by Convention No. 102.

In developing countries, the share of the informal economy, the limited resources of national governments and most notably the weakness exhibited by management due to different factors act as a hindrance to the implementation of social security systems.

Some of these factors related to a lack of clarity concerning the administration of social security budgets at central level, to corruption, bureaucracy and waste.

In some other cases, it is the incapacity of governments to collect all dues and to invest them in a safe and profitable way which causes this state of affairs, as well as the inability to adjust the entitlement to the inflation rates, to obtain the same economies of scale of industrialized countries and to implement a performing data processing system.

Finally, reference is also made to political favouritism and to the absence of a work culture originating from inadequate implementation of social policies.

3.2.3. Social Security in the ILO Decent Work Agenda

In its report to the 87th Session of the International Labour Conference, ILC, entitled Decent Work³⁹, the Director-General stressed that at present the primary goal of the ILO is to promote opportunities for women and men to obtain decent work, in conditions of freedom, equity, security and human dignity. “This is the main purpose of the Organization today. Decent work is the converging focus of all its four objectives: promotion

³⁸ See ILO, documents GB.303/ESP/3, November 2008, Geneva, par. 43 and 14 and GB 304/LILS/5, Geneva, March 2009, par. 9.

³⁹ J. Somavia, *Decent Work*, Report of the Director-General to the 87th Session of the ILC, Geneva, ILO, 1999, 1–4.

of rights at work; employment; social protection; and social dialogue. It must guide its policies and define its international role in the near future”. The concept of decent work, as used by the ILO, attempts to group under one label elements of harmonious economic and social development, of which protective labour rules are an essential component. In this sense, social protection covers both working conditions and social security. The ILO has been reorganized around those four objectives⁴⁰ that are summarised by the expression “the Decent Work Agenda”.

In 2001, the ILC held a general discussion with the objective of determining the ILO’s vision of social security in the twenty-first century⁴¹. In 2003, the Organization launched a “Global Campaign on Social Security and Coverage for All”, which put in practice the global consensus of governments, employers’ associations and workers’ organizations to extend social security coverage, particularly in the informal economy, and raise awareness of its constructive role in economic and social terms.

In support of this action, the ILO distinguished two dimensions in widening social security coverage. The horizontal dimension aims at extending essential social security benefits to as many people as possible in the shortest possible time.

This should be done irrespective of the insecurity – which manifests in multiple forms and degrees – and the ability to tackle it. Social security should ensure that two fundamental needs are met for all, namely basic income and access to health care.

The strategy helps Member States to establish the Social Protection Floor (SPF), developed together with the United Nations. The SPF promotes a set of basic transfers or rights enabling people to access essential goods and services and extends the initiative to such other services as drinkable water, wholesome food, sanitation, health, education and accommodation. The vertical dimension of the ILO extension strategy seeks the provision of a wider range of benefits covering additional social risks and categories, and the increase of benefit rates to at least the level prescribed by Convention No. 102 and other recent social security Conventions⁴². The Organization considers that main and interlinked priorities for social security in any national context should be that to cover all in need, to

⁴⁰ For further details, see J. Somavia, *Reducing the Decent Work Deficit: a Global Challenge*, Report of the Director-General to the 89th-Session of the ILC, Geneva, ILO, 2001, 2–4.

⁴¹ ILO, *Social Security: a New Consensus*, Geneva, ILO, 2001.

⁴² See ILC, *Social Security and the Rule of Law*, *op. cit.*, par. 20; ILC, *Social Security for Social Justice and a Fair Globalization*, *op. cit.*, par. 7-9, 264, 296, 383-384.

provide benefits adequate in both social and economic terms and, to secure sustainable financing⁴³.

Extensive social security is usually limited to industrialized countries. The vast majority of the world population lacks access to such coverage. However, there exists certain levels of protection in terms of social security in most countries.

It is often the case that coverage is restricted to a few branches, and only few people have access to them as effective implementation is significantly lower than the level required by statutory provisions. Basic health protection usually includes access to health care services, and other forms of entitlement provided free of charge through health insurance, at least for certain groups of people.

Most governments provide contributory old-age pension schemes, yet many of them only concern workers in the formal economy who operate in the public sector and large-sized enterprises. Those who have no access to state-funded retirement schemes rely on the support of their families and communities. The significant variation in the expenditure levels across countries illustrates the role that policy initiatives have played in extending social security to the poorest people.

Over the past two decades, new schemes of a non-contributory nature – known as cash transfer schemes – have been set down, the aim of which is to reduce and even prevent poverty by supplying the needy with minimum financial support. Cash transfer schemes might have different features: they might be means-tested, of a definite and indefinite duration or being conditional on the receiver's action. Well-known examples of conditional transfer schemes are the *Oportunidades* programme in Mexico, the *Solidario* plan in Chile, and the *Bolsa Familia* scheme in Brazil discussed above. Similar programmes have been implemented in 16 Latin American countries and concerned some 70 million people, amounting to 12 percent of the population in the region⁴⁴.

The Social Protection Floor gives access to essential health care and minimum income security for all. According to the ILO⁴⁵, it should be supplemented with two additional levels comprising contributory social security benefits of guaranteed levels and voluntary insurance under government regulation. For people with tax-paying or contributory capacity, a second floor of benefits can be introduced. Finally, for those

⁴³ ILC, *Social Security for Social Justice and a Fair Globalization*, *op. cit.*, par. 80, 81, 86, 88, 144 and 146.

⁴⁴ *Ibid.* par. 203-205.

⁴⁵ *Ibid.* par. 390-391.

who are in need of or wish for higher protection, a top floor of voluntary private insurance arrangements can be devised, which is subject to regulation and public supervision along the lines of private insurance schemes. The approach differs from the three-pillar model promoted by the World Bank, which is based on individual savings dealt with by commercial firms.

No consensus was reached at the time of formalising this mechanism to translate it into a new instrument. Nevertheless, the Declaration on Social Justice for a Fair Globalization was laid down over the 2008 ILO Conference which included among the ILO objectives “the extension of social security to all, including measures to provide basic income to all in need of such protection, and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes”.

The document confirms a recent change in the vision of the Organization: only “fundamental principles and rights at work” constitute one of its “strategic objectives”. The international labour and social security standards are means for achieving them. In this sense, legal norms are not values themselves, but rather instruments for the drafting and actual implementation of the desirable social policies.

Member States should thus review their stand on the ratification of the ILO documents, as well as on the application of its conventions and recommendations, in the effort to reach higher levels of social justice through the ILO priorities. However, more is in store for the instruments classified as core labour standards, along with those regarded as most significant from the viewpoint of governance covering tripartism, employment policy and labour inspection⁴⁶.

While the relevance given to core labour standards – i.e. those mentioned in the previous Declaration – should come as no surprise, the priority accorded to tripartism, employment policy and labour inspection appears to be a controversial move, as raising the question as why work safety and social security are not deemed as important elements of governance.

There is overwhelming agreement, even on the part of employers, that higher rates of occupational injuries are seen as a negative indicator of performance at both company and national level. Furthermore, one may

⁴⁶ The Annex to the Declaration mentions the Labour Inspection Convention, 1947 (No. 81), the Employment Policy Convention, 1964 (No. 122), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144), “and those standards identified on subsequently updated lists”.

wonder whether a complex hierarchy of international labour conventions does not deviate from the standard-setting provisions of the ILO Constitution that treats all standards equally.

As a follow-up to the Declaration, the Annex indicates that the Organization has introduced a scheme of recurrent discussions by international labour, without duplicating the ILO's supervisory mechanisms. This constitutes one item on the agenda of the Conference, as the scheme offers the opportunity to streamline the agenda of the International Labour Conference.

Relative procedures have been agreed upon by the governing body, with the cycle of recurrent discussions that in 2011 focused on social protection and security. In addition to the traditional examination of the Governments reports on ratified conventions⁴⁷, the CEACR provides the Conference with an annual survey⁴⁸ on the application of some ILO instruments on the part of countries that have or have not ratified the relevant instruments.

The subjects of the survey are now in line with the strategic objectives covered in the recurrent item of the year and their scope, adapted so that they become a source on law and practice for the discussion⁴⁹. Drawing on the survey and on an investigation of the ILO activities in social security knowledge generation and management, policy developments and technical cooperation, the review in 2011 has developed an overall plan of action that advances the mandate of the Organization to promote policies to extend social security to all⁵⁰.

Would the new Declaration succeed in striking the appropriate balance between economic development and the necessary employment protection, especially in favour of the weakest? Could it help to provide more decent jobs to a larger number of people? It is certainly too early to make an assessment of its impact. However, some preliminary remarks may be made in this connection, with reference to the higher degree of involvement on the part of the ILO in the global debate on economic development, as pointed out by its participation in the recent G8 and G20 meetings. The ILO has had the opportunity to present its views on

⁴⁷ The reports requested under Article 22 of the ILO Constitution.

⁴⁸ Based on Article 19 of the Constitution.

⁴⁹ Document GB. 303/SG/DECL/2 303rd Session, par. 15–21, Geneva, ILO, November 2008.

⁵⁰ ILC, *Social Security for Social Justice and a Fair Globalization*, *op. cit.*; ILC, *Social Security and the Rule of Law*, *op. cit.*

employment and social issues which have been hailed⁵¹. The chance to influence the policies of the main global actors has thus been improved. The Declaration takes a further step to move development and employment issues towards the centre of the ILO concern and to give international labour standards a lower priority, save for the exceptions mentioned above. The change involves the danger of further weakening the legal dimension of the Organization. The search for improved coherence and interaction between the various items discussed at the International Labour Conference, including the general surveys of the legal experts does not compensate for the imbalance. The implementation of social security standards will not be improved by any weakening of their binding nature and by greater reliance on soft laws. Persuasion and conciliation will not work unless there is ultimately a sanction which can be invoked⁵². To deny the usefulness of sanctions would tempt many countries to backtrack on the commitment they made by ratifying conventions. Admittedly, non-binding mechanisms can usefully supplement legal procedures, but they cannot be substituted for those procedures unless the aim is deregulation. While aiming at adapting the ILO activities to the present time, the new Declaration also brings the risk that it may be interpreted in a way that reduces the strength and the impact of the ILO *corpus juris*.

The Declaration of 2008 appears as a programmatic document that intends to rationalize the ILO activities in its different fields of competence and to mobilize its means and capacity. It focuses on a better understanding of Members' needs, on the strengthening of technical cooperation, and expert advice, on the improvement of research capacity, empirical knowledge and understanding and on the development of new partnerships with non-state entities and economic actors, such as multinational enterprises and trade unions operating at the global level. Member States are invited to reschedule their social goals along these lines, also via bilateral, regional or multilateral arrangements. Other international and regional organizations with mandates in closely related fields may provide an important contribution to the implementation of the integrated approach.

Financial crises reduce social security revenue and reserves. Revenue flows are impacted by a reduction in the number of contributions received – including reductions in contribution rates – by a decrease in investment

⁵¹ Document GB. 306/WP/SDG/1 306th Session, Geneva, ILO, November 2009.

⁵² See also B. Hepple, *Labour Law and Global Trade*, Hart Publishing, Oxford and Portland, Oregon, 2005, 274.

income on assets held and by higher expenditure on unemployment benefits. The most recent one has challenged the conventional investment wisdom that a strategy of asset diversification helps limit losses. However, uncertain times also provide an incentive to improve social coverage, as is the case of South Korea, both today and in the 1990s. More generally, it has been stressed that the social and economic costs of reducing public spending levels would also involve increased human suffering and hardship, spiralling unemployment, lower consumption, reduced social cohesion and social unrest or even temporary destabilization of government as has been recently illustrated⁵³.

In response to the global financial and economic crisis, the ILC adopted in 2009 a “Global Jobs Pact”, which recognized the role of social security as an automatic economic and social stabilizer and an essential component of integrated crisis response strategies. It is well accepted that widespread poverty and economic insecurity are threats to sustained economic growth for countries at all levels of development⁵⁴. Coordinated policies to promote employment, reduce poverty and address distributional concerns have fared well at alleviating the repercussions of the crisis and moving to a quick recovery. Providing social protection benefits to unemployed workers and other vulnerable beneficiaries helps not only to prevent individuals and their families from falling into deep poverty, but to limit the fall in aggregate demand, thus scaling back the potential depth of recession and opening the way to recovery.

The Global Jobs Pact called upon countries to reinforce and extend their social protection systems through the establishment of a Social Protection Floor (SPF)⁵⁵. The integration of social security into the document and its endorsement by the UN CEB and ECOSOC⁵⁶ have clearly enhanced an awareness of the importance of the issue. The communiqués of the G20 have also reflected this understanding. Declarations in July and November 2010 reaffirmed the “commitment to achieving strong job growth and providing social protection to our most vulnerable citizens”⁵⁷ and to

⁵³ ISSA, *Coping with the Crisis: Managing Social Security in Uncertain Times*, Geneva, 2012.

⁵⁴ ILO, *World of Work Report 2008: Income Inequalities in the Age of Financial Globalization*, Geneva, 2008.

⁵⁵ ILC (98th Session), *Recovering from the Crisis: a Global Jobs Pact*, Geneva, 2009, par. 12(1)(ii) and 22(9); ILC, *Social Security for Social Justice and a Fair Globalization*, *op. cit.*, par. 33, 45, 296 and 293.

⁵⁶ In July 2009: see ECOSOC: Resolution E/2009/L.24

⁵⁷ The G20 Toronto Summit Declaration, Annex I, 26–27 June 2010, par. 14.

improving “income security and resilience to adverse shocks by assisting developing countries enhance social protection programmes”⁵⁸.

In June 2012, the International Labour Conference eventually voted for the already mentioned Recommendation No. 202 on social protection floors that synthesizes the renewed approach. The text is of a programmatic character, prompting Member States to adopt a certain policy and to take the necessary implementing measures. It provides guidelines to develop a social security strategy compatible with, and supportive of, wider national economic and social policy strategies and seeks to reduce poverty and bring employment out of the hidden economy.

Members should put in place and complete as rapidly as possible their social protection floors, by supplying basic social security guarantees and ensuring that the needy have access to essential health care and to basic income security. The social protection floors go therefore beyond the traditional social security schemes; it should include access to goods and services, defined as necessary at the national level, which constitute essential health care, including in the case of maternity, and access for children to nutrition, education, care and any other necessary goods and services.

The new instrument focuses on the extension of coverage to wider groups of the population, that is horizontal extension of coverage. As for affording higher levels of protection – vertical extension – the Recommendation encourages Member States to ratify and to assess the effective implementation of Convention No. 102 and other up-to-date ILO social security instruments⁵⁹. The text specifies a number of guidelines for the design and implementation of national social security strategies. It prompts Member States to fill coverage gaps of populations with contributory capacity through contributory schemes.

Interestingly, the Recommendation has set up a system monitoring the progress made by the States in implementing social protection floors and achieving extension strategies of national social security systems⁶⁰. It suggests the establishment of nationally defined mechanisms involving employers’ associations and workers’ organisations and, whereas

⁵⁸ The G20 Seoul Summit Leaders’ Declaration, Summit Document, 11–12 November 2010, par. 51(f).

⁵⁹ This includes giving effect to Recommendations No 67 and 69: ILC, *Social Protection Floors for Social Justice and a Fair Globalization*, Report IV (2A), 101st Session, Geneva, ILO, 2012, 180.

⁶⁰ Par. 19-24.

necessary, representatives of other bodies or persons concerned. Special attention has to be given to the concepts, definitions and methodology used in the issuing of social security data, statistics and indicators as well as to their collection, compilation and publication, with due regard to privacy. Information, experiences and expertise on social security strategies, policies and practices should be exchanged among Members and with the ILO.

In summary, the ILO underlines the pivotal role of social security and of its standards to achieve a more human globalization, to promote economic development and the unavoidable structural adjustments or to manage crises. It has identified three key factors for future policies: to extend the social security coverage, to ensure a decent level of benefits, and to guarantee the financial sustainability of the system. The government may seek technical assistance from the organization and other relevant international institutions in implementing such a policy.

ADAPT is a non-profit organisation founded in 2000 by Prof. Marco Biagi with the aim of promoting studies and research in the field of labour law and industrial relations from an international and comparative perspective. Our purpose is to encourage and implement a new approach to academic research, by establishing ongoing relationships with other universities and advanced studies institutes, and promoting academic and scientific exchange programmes with enterprises, institutions, foundations and associations. In collaboration with the Marco Biagi Centre for International and Comparative Studies, ADAPT set up the International School of Higher Education in Labour and Industrial Relations, a centre of excellence which is accredited at an international level for research, study and postgraduate programmes in the area of industrial and labour relations. Further information at www.adapt.it.

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