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## ABSTRACT

The present work analyzes the development of the international standards in the area of financing and administration of social security and their influence on the reforms of social security systems in transition economies of Eastern Europe. Particular attention is given to the concept of the rights-based approach to development as a leading principle behind the development agenda of international organizations. In particular, ILO Convention No. 102 and other international legal standards regulating the financing and administration of social security schemes are examined regarding their suitability for the ratification by transition economies. The research of possible reasons is undertaken to answer the question as to why the standards have received an unusually low level of ratifications. Examples of several Latin American countries are provided to illustrate the lack of sustainability as a result of pension reforms which were carried out in contradiction to the basic principles of the financing and administration of social security systems as provided by ILO legal instruments. Further, the mechanisms of financing and administration of social security systems in Russia and Ukraine are analyzed in order to assess the countries' readiness to ratify ILO instruments in these areas, as well as to assess the suitability of the instruments for these countries. The research has showed that despite being largely outdated, ILO Convention No. 102 still has significant influence on the development of social security systems and provides for fundamental principles in the areas of financing and administration of social security schemes. Russia and Ukraine are currently at different stages of readiness to ratify the Convention, as they adopted contrasting strategies in the development of social security systems. In particular, due to the introduction of privately funded social security schemes Russia is likely to be reluctant to proceed with the ratification. However, the research has revealed no legal obstacles for Ukraine to be able to ratify the Convention.



## INTRODUCTION

Following the fall of the Soviet Union, the newly established states in Eastern Europe faced the need to undertake major economic and social reforms with the purpose of transition from centrally planned to market economy. For several years, the reform of the social security systems in some of these countries was postponed for various reasons. The universal and generous social protection scheme inherited from the Soviet Union proved to be unsustainable very fast, and for several years large segments of society were excluded from the welfare system. One of the main new challenges, apart from financial constraints, was to combat informal economy. Another major challenge related to ensuring good governance of the social security system. In the context of transition from centralized economy, new methods of financing and administration of social security schemes had to be developed in order to ensure the sustainability of the social security system and provide social security coverage to the population.

At the international level, the recognition of the right to social security as a human right by the Universal Declaration of Human Rights initiated a move towards the adoption at both the regional and international levels of legally binding treaties entailing obligations stemming from an act of ratification as well as international supervision with a view to reinforce the foundations of international social security law and securing its effective implementation through stricter obligations. In parallel to the recognition of the right to social security as a human right, the action undertaken in the wake of the Second World War by the ILO aimed at placing the focus on giving substance to this fundamental human right by setting the basis of social security as a new social institution, as well as regulating the standards of financing and administration of social security schemes.

However, despite the fact that the social security system developed in the Soviet Union encompassed all the nine branches of social protection provided by the ILO Social Security (Minimum Standards) Convention No. 102, the Convention

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itself was never ratified by the Soviet Union. Even after the dissolution of the Soviet Union, the newly created states were reluctant to ratify the instrument, and the Convention remains unratified by Russia and Ukraine, the two countries examined by the present work. One of the reasons for it may be that the developed countries are reluctant to ratify an instrument which proposes a lower level of protection than it is already guaranteed by these states.

As Convention 102 does not provide for any mechanism of ensuring that workers in informal employment can have access to social security benefits, it can be presumed that the Convention does not represent an optimal legal mechanism for the countries in transition and developing countries where the informal sector is large. In addition, being based on the principle of collective financing the Convention does not explicitly allow for the establishment of contributory social security schemes.

As a result a question arises: whether these countries do not ratify the Convention because they do not consider it useful and their legislation already provides a higher level of protection, or are they reluctant to be bound by the international obligations on social security standards in the period of economic transition? Another reason for non-ratification may be that the national legislation of member States does not comply with the provisions of the Convention. It is possible that the social security systems in place have taken other routes of development, and therefore it would be too problematic and even impossible to ratify the Convention.

Thus, the present work is an attempt to examine the relationship between the international standards of financing and administration of social security schemes within the light of the rights-based approach to development and the reforms of social security systems undertaken in Russia and Ukraine in the recent years.

The work is structured as follows. Chapter One provides an overview of the development of the international standards on social security and the rights-based approach to development. The following chapter is dedicated to examining the adequacy of the international standards in the area of social security in the modern



## Introduction

world. Chapter Three outlines the international standards of financing and administration of social security systems. Chapter Four analyses the reforms of social security systems in Russia and Ukraine in the context of ILO standards and the rights-based approach to development. Finally, conclusions are made regarding on the one hand, the adaptability of the international standards in the area of social security to the social and economic realities of transition economies, and on the other hand, the compliance of the legislation of Russia and Ukraine with the international standards of financing and administration of social security.

## Introduction

## CHAPTER ONE

### THE DEVELOPMENT OF THE INTERNATIONAL STANDARDS IN THE AREA OF SOCIAL SECURITY AND THE RIGHTS-BASED APPROACH TO DEVELOPMENT

#### *1. The rights-based approach to social security*

##### *1.1 Social security as a human right*

The period following World War II was characterized by the emergence, on the one hand, of a more general approach undertaken by the United Nations guaranteeing the right to social security through both declaratory and binding human rights standards and, on the other hand, a more technical approach developed by the ILO aiming at giving substance to the general concept expressed in these human rights instruments aiming at making this right operational by laying down the main elements of social security now envisaged as a social institution.<sup>1</sup>

At the international level, the right to an adequate standard of living is guaranteed by article 25 of the Universal Declaration of Human Rights, Art. 11 of the International Covenant on Economic, Social and Cultural Rights, Art. 27 of the Convention on the Rights of the Child and Art. 28 of the Convention on the Rights of Persons with Disabilities. According to Art. 9 of the International Covenant on Economic, Social and Cultural Rights, *'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance'*.

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<sup>1</sup> See A. SUIPOT, *The Position of Social Security in the System of International Labour Standards*, in *Comparative Labor Law and Policy Journal*. 2006, Vol. 27, p. 113-121.

## Chapter I

The right to social security is firmly established in the international law.<sup>2</sup> Numerous acts provide for it, such as: the International Covenant on Economic, Social and Cultural Rights (articles 9 and 10); the International Convention on the Elimination of Racial Discrimination (article 5 (iv)); the Convention on the Rights of the Child (article 26); the Convention on the Elimination of All Forms of Discrimination against Women (article 11); the International Convention for the Protection of Migrant Workers and Their Families (article 27).<sup>3</sup> Certainly, the role of the International Labour Organization is crucial in the international regulation of the right to social security and the protection of adequate standards of living.

According to Art. 9 of the International Covenant on Economic, Social and Cultural Rights the States Parties recognize the right of everyone to social security, including social insurance. In paragraph 4 to the introduction to the General Comment No 19 on The Right to Social Security (Art. 9)<sup>4</sup>, United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights notes that the wording of article 9 of the Covenant indicates that the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right. At the same time, the Committee expressed its concern over “the very low levels of access to social security with a large majority (about 80 per cent) of the global population currently lacking access to formal social security. Among these 80 per cent, 20 per cent live in extreme poverty”.

As regards the relationship of the right to social security with other rights, the Committee underlines that the realisation of other rights cannot substitute for the right of social security. However, the realisation of this right “plays an important role in supporting the realization of many of the rights in the Covenant”.<sup>5</sup>

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<sup>2</sup> See L. LAMARCHE, *Social Protection is a Matter of Human Rights: Exploring the ICESCR Right to Social Security in the Context of Globalisation* in K. de FEYTER and F. GÓMEZ Isa, *Privatisation and human rights in the age of globalization*, Antwerp, 2005. Oxford, Intersentia, p. 328.

<sup>3</sup> M.S. CARMONA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*. Social Forum 2008, Geneva 1-3 September 2008.

<sup>4</sup> General Comment No 19 on The Right to Social Security (Art. 9), United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-ninth session, November 2007

<sup>5</sup> Idem

The right-based approach to development traces back to TH Marshall's distinction among civil or legal rights, political or democratic rights and social or welfare rights in 1950.<sup>6</sup> Since then, it has been common in international legal doctrine to recognize the difference between civil and political rights on the one hand and economic and social rights on the other. The key to this classification has been the assumption that the nature of these two kinds of rights is different. The basic concept to differentiate between these sets of rights has been the role of the state (the positive and negative rights argument). In case of civil and political rights the scope of the rights lies in the principle that a person should be able to realize these rights freely from state interference. On the other hand, when it comes to social and economic rights there is an obligation for the state to interfere in order to provide for the realization of these. However, this argument has been challenged on the basis of the equality of human rights adopted as a principle by the United Nations<sup>7</sup> Also, according to Ivan Hare, the distinction between positive and negative rights "is not very persuasive since a number of traditional civil and political rights, such as the right to a fair trial, may require very substantial government expenditure."<sup>8</sup> Generally speaking, the European Court of Human Rights is known for having adopted and spread a wide approach to social security putting a high degree of responsibility on governments to ensure social protection.<sup>9</sup> Ivan Hare also argues that the European Convention on Human Rights contains provisions that require the state to make expenditures in order to guarantee certain civil and political rights. This regards the right to free legal assistance (Art. 6(3)(c)), the right to education (Art. 2, Protocol 1), as well as the state's duty to hold free and periodic elections (art. 3, Protocol 1). Moreover, according to the author the

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<sup>6</sup> D. HARTLEY, *Social Policy and Human Rights: Re-thinking the Engagement, Social Policy & Society*, 2007, volume 7:1, Cambridge University Press, p. 1–12.

<sup>7</sup> Thus, as P. ALSTON writes in its study '*Core Labour Standards' and the Transformation of the International Labour Rights Regime* cited herein after, "starting from the Vienna World Conference on Human Rights, the official United Nations position has been that 'all human rights are universal, indivisible and interdependent. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.' See the Vienna Declaration and Programme of Action, para. 5, in *Report of the World Conference on Human Rights: Report of the Secretary General*, UN Doc.A/CONF.157/24 (part I), 13 Oct. 1993.

<sup>8</sup> I. HARE, *Social rights as fundamental human rights*, in *Social and Labour rights in a Global Context. International and Comparative Perspectives*, edited by B. Hepple, 2002, Cambridge, pp. 153 - 181.

<sup>9</sup> M. COUSINS, *The European Convention on Human Rights and Social Security Law*, Antwerp, 2008, Oxford.

European Court of Human Rights has gone further in this approach when interpreting the provisions of the Convention.<sup>10</sup> Thus, in *Airey v. Ireland* the Court stated that:

*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. ... It must therefore be ascertained whether [the applicant's] appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.*<sup>11</sup>

On the other hand, social and economic rights may have negative character and require that the state merely does not interfere as these rights are exercised. This, for instance, regards the right to join a trade union or the right not to be evicted unlawfully from one's home. These examples are used by Ivan Hare to illustrate the thesis that the distinction between negative and positive rights is artificial and at times simplistic.<sup>12</sup>

A separate issue has been the justiciability of these two kinds of rights. Generally, civil and political rights are more often applied by courts than social and economic rights. The latter are usually realized through legislation and social policies. In addition to this, civil and political rights have been recognized as such that can be applied directly, are subjective and enforceable, while social and economic rights often have declarative nature and are reflected in constitutions or economic development programmes to be realized gradually.<sup>13</sup> It goes without saying that the level of realization of social and economic rights in a country depends on such factors as the level of economic development, the institutional

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<sup>10</sup>I. HARE, *Airey v. Ireland, Osman v. United Kingdom, Social rights as fundamental human rights*, in B. HEPPLE, *Social and Labour rights in a Global Context. International and Comparative Perspectives* by, Cambridge, 2002, pp. 153 - 181.

<sup>11</sup> I. HARE, *Social rights as fundamental human rights*, 1979 – 80, 2 EHRR 305, para. 24, in B. HEPPLE, *Social and Labour rights in a Global Context. International and Comparative Perspectives*, 2002, Cambridge, pp. 153 - 181.

<sup>12</sup> Idem

<sup>13</sup>B.SCHULTE, *Defending and enforcing rights to social protection*, Max Planck Institute for Foreign and International Social Law, 2004, Munich.

architecture of a certain state, whether the rights are regulated by the constitution and laws or are mere political declarations.<sup>14</sup>

Because the right for social security is often guaranteed by the constitutions of European countries and is also in the scope of the European Convention of Human Rights, social security has been in the focus of European constitutional courts. For instance, when in 1995 the government of Hungary planned to implement austerity measures, the Constitutional Court of the country analysed the case referring to the right for social security provided in the Hungarian Constitution. The government's austerity package contained substantial cuts in the levels of social security benefits, and the main question was whether such deterioration in the standard of living violated the Constitution. In its ruling, the Court admitted that: 'the right to social security means neither a guaranteed income, nor that the achieved living standard of citizens could not deteriorate as a result of the unfavourable development of economic conditions'. While the Court acknowledged the government's right to make amendments to the country's social policy due to changes in the economic situation, the Court stressed that such interventions must be made according to certain principles. First, a minimum guaranteed social protection must be maintained. Second, the amendments have to be made with respect to the rule of law and the right to property guaranteed by the Constitution. The Court stated that: 'dramatic changes could not be introduced overnight and the acquired rights and legitimate expectations of current claimants must be respected'.<sup>15</sup>

In June 2010, the Romanian Constitutional Court passed a landmark decision<sup>16</sup> which declared that the government's anti-crisis measures which consisted in the reduction of social guarantees were unconstitutional. In its decision,

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<sup>14</sup> For a discussion regarding the introduction of the principle of the justiciability of social rights in a development context see C. SCOTT and P. MACKLEM, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, University of Pennsylvania Law Review, Vol. 141, 1992

<sup>15</sup> Decision 43/1995 (30 June 1995), I. HARE, *Social rights as fundamental human rights*, in *Social and Labour rights in a Global Context. International and Comparative Perspectives*, edited by B. Hepple, 2002, Cambridge, pp. 153 - 181.

<sup>16</sup> Decision No. 874 of June 25, 2010 on the objection of unconstitutionality of the provisions of the Law on some measures necessary to restore the budget balance, Official Gazette No. 433 of June 25, 2010.

the Court referred to the practice of the European Court of Human Rights and to the provisions of the European Convention of Human Rights. Thus, the Constitutional Court of Romania stated: “Recognizing the discretion of the states in matters of social legislation, the European Court of Human Rights stressed the obligation of public authorities to maintain a fair balance between public interest and the need to protect fundamental rights of citizens, balance is not maintained when, by reducing economic rights citizens must pay an excessive and disproportionate burden. In such a situation, there is a breach of Article 1 of Protocol No. 1 to the Convention on Human Rights and Fundamental Freedoms caused by the breach of the reasonable and proportionate reduction of property rights (Case v. Iceland Kjartan Asmundsson Case Moskau v. Poland).”<sup>17</sup>

Therefore, the Court made its decision by arguing that the lowering of the social standards was disproportionate in view of the public interest and constituted an excessive burden for citizens. To support this opinion, the Court also referred to Romanian Constitution and stated that: “In terms of the provisions of article 53 of the Constitution, it is considered that the measures proposed by the constitutional control law derived are not proportionate to the situation resulting in restriction of certain rights and also affect pension rights, as it is covered by article 47 par. (2) of the Basic Law.”

However, despite these examples it must be acknowledged that these principles ‘are in essence procedural and are thus distinct from the judicial approach to the vindication of substantive civil and political rights’.<sup>18</sup> In this respect, the European Court of Human Rights is of opinion that member States are better positioned to decide on the matter of social security, ‘due to their ‘direct and continuous contact with the vital forces of their countries’.<sup>19</sup>

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<sup>17</sup> Decision No. 874 of June 25, 2010 on the objection of unconstitutionality of the provisions of the Law on some measures necessary to restore the budget balance, Official Gazette No. 433 of June 25, 2010

<sup>18</sup> I. HARE, *Social rights as fundamental human rights*, in *Social and Labour rights in a Global Context. International and Comparative Perspectives*, edited by B. Hepple, 2002, Cambridge, pp. 153 - 181.

<sup>19</sup> *Idem*



## Chapter I

Resource implications has also been used as an argument to distinguish social and economic rights. According to paragraph 1 of Art. 2 of the International Covenant on Economic, Social and Cultural Rights, 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'

As regards the obligation of the state to devote the maximum of its available resources, it should be mentioned that the state is not obliged to devote all its economic wealth or the resources it does not possess yet. In other words, the amount of the resources that are allocated to the protection of social rights is left to the complete discretion of the states. It is also presumed that retrospective measures are prohibited, and if they are introduced, the state must prove that it considered all the alternatives before doing so and is able to justify its actions fully.<sup>20</sup> Similarly to the International Labour Organization's core labour standards, state parties of the International Covenant on Economic, Social and Cultural Rights must ensure the basic level of the standard of living. Thus, according to the UN Committee on Economic, Social and Cultural Rights General Comment 3 on the nature of States parties obligations, 'the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.' Also, the Committee underlined that 'if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*.'

However, the question of the evaluation of a state's compliance with the Covenant is problematic. The Committee mentions an example of a 'State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education'. Despite this fact, in a more complicated case, where a state

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<sup>20</sup> M. S. CARMONA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*. Social Forum 2008, Geneva 1-3 September 2008.

with high standard of economic development does not guarantee the respective standard of living, it would be harder to establish the non-compliance with the Covenant. The Committee noted that while making the assessment of a state's performance in this respect, the question of resource constraints must be taken into account. According to the Committee, in order to determine whether a state has taken measures 'to the maximum of its available resources', the state has to demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'<sup>21</sup> Again, the notion of these minimum obligations is not clearly established in the international human rights statutes, and the question remains whether a state should raise the level of its social guarantees as it makes progress in economic development. Despite this fact, there is a mentioning of the obligation of the obligation of the progressive realization of the economic, social and cultural rights in the Covenant.<sup>22</sup>

The review of these major international human rights instruments illustrates the emergence of the right to social security as a right of its own, the realization of which is progressive. From a workers' right recognized in 1919 by the ILO Constitution, the right to social security has progressively been dissociated from occupational status and become an integral part of the set of human rights. Its generalization was recognized as a progressive objective and conditioned by various factors such as the level of economic and social development, economic and political stability as well as the existence of durable peace. Although the ideological and philosophical cornerstones of such recognition had been already developed as early as during the XVIII century, following the Second World War its implementation had become a political project to be carried out in the near future. The recognition of the right to social security as a human right by the UDHR initiated a move towards the adoption at both the regional and international levels of legally binding treaties entailing obligations stemming from an act of ratification as well as international supervision with a view to reinforcing the foundations of

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<sup>21</sup> The nature of States parties obligations (Art. 2, par.1): . 14/12/1990. CESCR General comment 3. (General Comments).

<sup>22</sup> M.S. CARMONA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*. Social Forum 2008, Geneva 1-3 September 2008.

international social security law and securing its effective implementation through stricter obligations. Nevertheless, most of these general human rights instruments remained silent as to the definition and content of the right to social security. In parallel to the recognition of the right to social security as a human right, the action undertaken in the wake of the Second World War by the ILO aimed at placing the focus on giving substance to this fundamental human right by setting the basis of social security as a new social institution.<sup>23</sup>

### *1.2 Free market and the protection of social and economic rights*

The period starting from the early 1980s has been marked as the rise of neo-liberal thinking in international economic development. Contrary to the Keynesian approach, which regarded social security and economic growth going hand in hand, neo-liberal thinkers concentrate on the priority of free competition. As regards social security, neo-classical economists promote the shift towards individual responsibility, the reduction of State's interventions and guarantees, as well as the increase in the role of banks and private financial institutions in the management of social security funds. This approach has had a dramatic impact on the globalization process.<sup>24</sup>

The priority to guarantee social and economic rights has been questioned in the contexts of economic development, globalisation, international competition and the transition towards free market economy. Liberalisation brought the discussion regarding "hard" and "soft" law in relation to international labour standards and the social security law. The movements towards corporate social responsibility, governance standards (i.e. "soft" law), and the inclusion of social security matters in the structural adjustment plans by international financial institutions have been widespread in the international arena.<sup>25</sup> Also, as regards developing countries and

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<sup>23</sup> See J.FUDGE, *The New Discourse of Labour Rights: From Social to Fundamental Rights?*, *Comparative Labor Law & Policy Journal*, 2007, Vol. 29.

<sup>24</sup> E. REYNAUD, *Social Security for All: Global Trends and Challenges*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 123-150.

<sup>25</sup> On the mixed views regarding the efficiency of corporate codes of practice and corporate social responsibility standards as opposed to international norms see R.-C. DROUIN, *Promoting*

countries in transition, the major question was whether social and economic rights should be guaranteed during the period of rapid economic development or transition to market economy, or whether economic growth should be considered as the first priority. Privatization and human rights is another important issue in the context of free market policies and the protection of social rights. Increasingly, privatization was seen as a means to increase efficiency through competition in the provision of social services through simultaneous reduction of the role of the government.<sup>26</sup>

Consequently, it was argued by many that “soft” law could make up for the lack of comprehensive social security regulations or labour standards in the periods of fast economic transformations. In addition, some saw the adoption of the Declaration on Fundamental Principles and Rights at Work 1998 as a major shift towards the use of soft law instruments (such as the Declaration) in order to make the international labour law regime more flexible in response to the increase of the role of the liberal approach and the international trade law.<sup>27</sup> Alain Supiot calls this phenomenon the *proliferation of standards* covering social issues in the context of globalization. This process along with the rise of the inclusion of matters related to social security in international trade and financial agreements led to the fall in the influence of the ILO in this area.<sup>28</sup>

In this context, “hard” labour law can be considered as “too rigid” in order to guarantee the desired level of economic development.<sup>29</sup> Being based on the principle of the protection of the weaker contractual power of the worker, labour

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*Fundamental Labor Rights Through International Framework Agreements: Practical Outcomes and Present Challenges*, *Comparative Labor Law & Policy Journal*, 2010, Volume 31, Number 3, p.591.

<sup>26</sup> See K. DE FEYTER and F.GÓMEZ ISA, *Privatisation and human rights in the age of globalization*, Antwerp – Oxford, 2005, Intersentia, 328 p.

<sup>27</sup> In P. ALSTON, ‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime, *European Journal of International Law*, 2004, Vol. 15, Issue 3, pp. 457-521.

<sup>28</sup> As A. SUPIOT writes, “Public and private initiatives in the name of “enterprises’ social responsibility” and the implicit social standards imposed by the international trade and financial institutions (in particular, incentives to dismantle the social protection systems inherent in structural adjustment plans) mean that the ILO no longer has a monopoly, assuming that it ever did. The questions that the ILO leaves to one side will undoubtedly be tackled by others, from philosophical and legal standpoints differing from those of its Constitution. This is particularly true of the social security field, where there are such colossal economic and financial issues.”, A. SUPIOT, *The Position of Social Security in the System of International Labour Standards*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 113-121.

<sup>29</sup> The “rigidity” of labour law has been, for instance, measured in the World Bank’s Doing Business Report and its so-called Hiring/Firing Index.

law can be seen as rather autonomous in relation to economy and thus hardly adaptable to economic changes.<sup>30</sup> While in the area of international trade “hard” law has not lost its influence, in social security and labour relations the transition to “soft” law, or *governance* principles has been more evident. This transition was also explained by the differences in social models and the inequality in the income levels among states. While the new rules were created mostly by private players, such as multinational companies adopting their codes of conduct, these rules could also be applied by public authorities, which led to the appearance of the so-called *global social governance*.<sup>31</sup> In any case, “soft” law should not be seen as a substitute for the regulation of labour relations and social security by the state in a traditional sense. As the recent economic crisis has proven, soft regulations are not enough to maintain the stability of market. Proper regulation is necessary, including the regulation of social security standards.<sup>32</sup>

Indeed, the acute social problems during the periods of transition and economic crises aggravated by the lack of proper social protection have proved that unbalanced social and economic policies can lead to tragic results. Social development cannot be treated separately from economic development and be regulated by a set of rules of a lower caliber than generally applicable regulations such as those that govern commerce and international trade. In fact, proper regulation of social and labour rights is an indispensable part of economic progress.<sup>33</sup> The proper regulation of social security and labour standards in the free

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<sup>30</sup> For the argumentation of the invalidity of this argument see S. SCIARRA, *Market freedom and fundamental Social Rights*, in *Social and Labour rights in a Global Context. International and Comparative Perspectives*, edited by B. HEPPLER, Cambridge, 2002, p. 98.

<sup>31</sup> A. SUPIOT, *Azione normative e lavoro decente. Prospettive nel campo della sicurezza sociale*, *Giornale di diritto del lavoro e di relazioni industriali*, 2006, Vol. 28, pages. 625-655.

<sup>32</sup> In order to support this argument, A. SUPIOT writes that: “If a free market is to be introduced in a sustainable way, it requires a legal framework that takes account of its economic (the need to trade the wealth produced by workers) as well as its social (the needs of the workers producing that wealth) dimensions. As history shows, neglecting either of these dimensions can lead only to disaster. That would be true of a world legal order where trade in goods was subject to a “hard” law and the fate of men to a “soft” law.”, in A. SUPIOT, *Social Protection and Decent Work: New Prospects for international Labour Standards: Introduction: The Position of Social Security in the System of International Labour Standards*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27.

<sup>33</sup> As DEAKIN and WILKINSON put it, “Social rights, far from being inimical to the effective functioning of the labour market, are actually at the core of a labour market in which the resources available to a society, in the form of a potential labour power of its members, are fully realized.” in S. DEAKIN and F. WILKINSON, *Capabilities, Spontaneous Order and Social Rights*, *ESCR Centre for Business Research*, University of Cambridge, 2000, Working Paper No 174.

market reality can also support the general competitiveness of a given country or region.<sup>34</sup>

Despite the fact that these statements were written in relation to the regulatory activities in the area of social security of the member States of the European Union, they are also applicable to the Members of the ILO, or the countries which participate in the international community as a whole.

The issue of pragmatism and economic rationality and their presupposed interference with the social guarantees has been contested by economic research which proves that higher social standards raise the country's competitiveness.<sup>35</sup> Also, while deregulation and individualization are the policies which are often promoted as key for fast transition and economic development by industrialized countries, they do not apply the same policies at home. This is true, for instance, in the case of the European Union.<sup>36</sup>

There is no "one size fits all" approach in relation to the regulation of social security and labour market in the period of rapid economic development or the transition to the free market from a planned economy. Several most prominent academics in the area of labour law and social security law stress on the importance

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<sup>34</sup> In support to this argument S. SCIARRA writes that: "Accordingly, not only is it possible to make an economic case for social rights – namely, that they operate as an input to the functioning of the market, by correcting market failure; in addition, it is arguable that diverse national systems of labour and social law across the member states of the EU enhance the competitiveness of the EU as a whole, provided core labour standards are maintained." In S. Sciarra, *Market freedom and fundamental Social Rights, in Social and Labour rights in a Global Context*, edited by B. HEPPLÉ, *International and Comparative Perspectives*, Cambridge, 2002, p 102.

<sup>35</sup> In particular, the 2010 Noble prize winners in economic science Peter Diamond, Dale Mortensen and Christopher Pissarides used economic models to describe the interrelation among the regulation of social security benefits, labour market policies and job search techniques. One of the findings proved that the provision of unemployment benefits of longer duration can help the beneficiary to find a job which would be better match for his skills, which in turn would contribute to the efficiency of the labour market as a whole.

<sup>36</sup> As S. SCIARRA argues, "A stereotypical notion of economic rationality, which does not include social rights among the factors leading towards innovation, simply does not reflect the choices of the same member states at domestic level, spread across the many facets of legal intervention both of a protective and supportive kind." In S. Sciarra, *Market freedom and fundamental Social Rights, in Social and Labour rights in a Global Context*, edited by B. HEPPLÉ, *International and Comparative Perspectives*, Cambridge, 2002, p 102.

of “local knowledge” when designing the regulation of social security systems.<sup>37</sup> In particular, the shift to the privatization and individualization of social security systems in the recent decades has been claimed to be the best and only solution to fight informal economy, include the self-employed into the social security system and increase the efficiency of the management of social security funds. Thus, the creation of private contributory social security schemes in addition to fully-funded schemes can be a means to extend coverage of the social security system. However, it is crucial that such developments are not accompanied by reduction in other social guarantees, and that the legislation in the country provides for social protection for the vulnerable social groups. Other factors also have to be taken into account, such as the reliability of the financial institutions in the country, the level of development of the financial market, the level of corruption etc. Being based on the principle of collective financing, the ILO standards in the area of social security do not affront the development of social security schemes based on individual contribution. However, provided sound regulation is ensured, contributory social security schemes could be an important way to guarantee better standards of social protection.<sup>38</sup>

Therefore, with the shift to neo-classical thinking in economic development the ILO has lost the touch with reality to some extent when it comes to the extension of public social security schemes with private and supplementary schemes. This is especially true for the countries in transition from a planned economy, which had to reform their social security systems starting from the end of 1980s – the era of neo-liberal thinking. The vacuum of ILO authority in this

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<sup>37</sup> See, for instance, A. SUPLOT, *Azione normative e lavoro decente. Prospettive nel campo della sicurezza sociale*, *Giornale di diritto del lavoro e di relazioni industriali*, 2006, Vol. 28, pages. 625-655.

See S. DEAKIN and M. FREEDLAND, *Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 151-165.

<sup>38</sup> As S. DEAKIN and M. FREEDLAND put it, “... the extension of contributory social insurance schemes is one of the means by which social security systems could be strengthened. The potential feasibility of this approach is indicated by the recent experience of several countries that have successfully combined economic growth with a widening of social insurance coverage. However, the difficulties inherent in such a route are also clear: these include problems in matching social insurance model, which developed initially in western Europe, to the very different conditions of other regions and countries. This is not an issue to which Convention 102 currently offers a solution.” in S. DEAKIN and M. FREEDLAND, *Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 151-165.

respect, aggravated by the unwillingness to reform its standards in social security, may have been one of the reasons for the increase of the role of the international financial institutions in the reform of social security systems in developing and transition countries.

### *1.3 The Rights-Based Approach to Development and the World Bank*

For many years of the World Bank's work, the Bank's Articles of Associations have been interpreted in a way to prove that the Bank has neither the mandate nor the competitive advantage to deal with such issues, as human rights, domestic political governance etc.<sup>39</sup>

Being involved extensively in the work on legal system reforms in many countries, the World Bank had to develop its own approach to legal reform. The Bank's philosophy regarding the relationship between law and development in the 1960s and 1970s consisted in importing laws, educate lawyers and copy the models for legal institutions which were supposed to be effective elsewhere. In the 1980s and 1990s the leading approach was to empower the leading legal and judicial bodies in a country, which were seen as important for the development of the rule of law. This period of the World Bank's activity was known as 'the legal and judicial reform movement'.<sup>40</sup> The 1990s were the peak of the World Bank's work in the new countries that emerged from the fall of the Soviet Union. Inevitably, the approach of empowering judicial and legal institutions, 'the legal and judicial reform movement', was predominant in the activities the Bank undertook in the region.

The neo-classical approach promoted by the World Bank in the developing countries starting from the early 1980s had a dramatic impact on the path the social and economic development took. In return for the structural adjustment loans the

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<sup>39</sup> C. SAGE and M. WOOLCOCK, *Rules Systems and the Development Process*, in *The World Bank Legal Review, Law, Equity, and Development*, Volume 2, 2006, The International Bank for Reconstruction and Development/The World Bank, p. 3.

<sup>40</sup> *Idem*



countries had to implement reforms suggested by the Bank and the International Monetary Fund, which included the measures to decrease the role of the state as well as to reform social security and health care systems. With regard to social security, the so-called three-pillar model was developed by the World Bank. This model has been now spread widely around the world. As a consequence, the World Bank has become the leading organization in pension reforms, replacing the ILO. This model presupposed the limited role of the state and the reduced publicly funded pension schemes (first pillar), while the level of personal responsibility and individual pension savings accounts was increased (second pillar). This model has been particularly widely implemented in Latin American countries and eastern Europe.<sup>41</sup>

However, in the last years the philosophy of the World Bank's development work has been changing. In 2006, the *World Development Report* put emphasis on the interconnection of growth and equity. According to the Report, by increasing "equity" one can achieve faster and more sustainable growth. Equity is described through two basic principles: equal opportunities and the avoidance of deprivation of outcomes.<sup>42</sup> According to the popular saying which has been widely used in development, give a person a fish, and you feed them for a day; teach a person how to fish, and you feed them for a lifetime.<sup>43</sup>

Ana Palacio also stresses that in order to achieve the equitable development, it is necessary to adopt a multidisciplinary approach and not only concentrate on the

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<sup>41</sup> AS E.REYNAUD argues, "Generally speaking the dominance of neo-classical economic thinking has resulted in the increasing use of what Bruno Palier calls the liberal social protection repertoire, in other words the liberal way of looking at and providing social protection. This repertoire is market-orientated and gives the State only a minor role. Its main aim is to combat poverty, it relies on targeted and means-tested benefits, and it places great importance on private arrangements. It is to this liberal repertoire or register that most countries have tended to turn when they wanted to reform or develop their social protection systems over the last twenty years." in E. REYNAUD, *Social Security for All: Global Trends and Challenges, Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 123-150.

<sup>42</sup> A. PALACIO, in Foreword to *The World Bank Legal Review, Law, Equity, and Development*, Volume 2, *The International Bank for Reconstruction and Development/The World Bank*, 2006

<sup>43</sup> AS A. PALACIO puts it, "Articulating equity in such a way carries with it this important implication: it enfranchises the poor so that they become actors in the development process, rather than mere beneficiaries. As the President of the World Bank observed in July 2006, "What most poor people want are not handouts, but opportunities." Development expands the choices people have so that they can lead lives of value." in A. PALACIO, in Foreword to *The World Bank Legal Review, Law, Equity, and Development*, 2006, Volume 2, *The International Bank for Reconstruction and Development/The World Bank*.

judicial institutions. Focus should also be made on “access to justice, governance reform, financial sector legal reform, environmental justice, and human rights.”<sup>44</sup> In fact, the development of legal institutions and regulation in general should be seen in conjunction with the development in broader terms, as the legal system is the basis for other areas of human existence, such as economic activity, social and political life. That is why the development of a legal system is fundamental to the development of society in general.<sup>45</sup> The authors argue that “the rules of the game in any given context should be understood in a dynamic way” and that “all interventions undertaken in the name of “development” (e.g. providing microcredit, primary education, maternal health, upgraded roads etc.) change local power dynamics and social relations precisely because they (hopefully) make the most marginalized groups better-off, not only economically, but also socially and politically.”<sup>46</sup>

For many years, the development work of the World Bank, as well as of many other development organizations, was guided by the economic principles of the free market. While law and legal standards are based on values, the perfect market is “valueless”. In particular, the perfect market operates regardless of equity principles and the equality of opportunities. Particularly in the post-communist transition countries, the development institutions were focused on the development of a free market with such principles as competition, individualism, the protection of private property etc. Other aspects of development which are more related to values were given less importance. However, the problematic aspect of this approach is that a perfect market is more of an academic invention which does not exist in reality.<sup>47</sup>

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<sup>44</sup> Idem

<sup>45</sup> C. SAGE and M. WOOLCOCK, *Rules Systems and the Development Process*, in *The World Bank Legal Review, Law, Equity, and Development*, 2006, Volume 2, The International Bank for Reconstruction and Development/The World Bank , p. 6.

<sup>46</sup> Idem

<sup>47</sup> As C. SAGE and M. WOOLCOCK put it, “The problem is that there is no such thing as a perfect market, and even if there were, human suffering may be more critical to a holistic notion of poverty and human well-being than economic metrics. In human terms, there is no such thing as a valueless model, any more than there is a functioning legal system that is inherently just. [...] Within development circles, these concerns have led to an increased focus on the importance of equity for sustained pro-poor development, as well as an increased interest in issues such as governance, participation, accountability, and rule of law” in C. SAGE and M. WOOLCOCK, *Rules Systems and the Development Process*, in *The World Bank Legal Review, Law, Equity, and Development*, 2006, Volume 2, The International Bank for Reconstruction and Development/The World Bank , p. 6.

### 2. *An outlook of the development of international law on social security*

#### 2.1 *The first and the second generations of international standards in the area of social security*

Social protection systems as they are known today only became widely spread in the 20<sup>th</sup> century even though the first forms of government-financed social assistance mechanisms trace back to the 16<sup>th</sup> century. In 1598 the English Poor Laws were adopted in order to provide financial assistance to the most vulnerable categories, such as women, children and the elderly. In the 19<sup>th</sup> century social assistance schemes for the unemployed were mainly financed by trade unions and similar workers' organizations. The first country to introduce a nation-wide old-age social insurance programme was Germany. In the 19<sup>th</sup> century Otto von Bismarck passed the reforms which were inspired by the need to guarantee the functionality of the German economy, as well as to offset the risks of the arrival of socialists to power. The old-age pension system was accompanied by a sickness insurance scheme in 1883 and followed by a compensation programme for workers the year after. The United States of America followed this reform in 1935 when President Roosevelt signed the Social Security Act which linked the term 'social insurance' to economic security.

The international efforts to promote social security initiated after the First World War with the creation of the ILO and the International Conference for National Unions (now the International Social Security Association).<sup>48</sup> By that time social security systems developed in several regions of the world. Also, the October revolution in Russia was a considerable stimulating factor for the Western world which feared similar developments.<sup>49</sup> When the Atlantic Charter was signed in 1941 it contained the declaration of commitment to improved labour standards, economic advancement and social security for all.

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<sup>48</sup> H. VON ROHLAND, *From Bismarck to Beveridge: Social Security for All, World of Work, Responding to the crisis: Building a 'Social Floor'*, 2009, No. 67.

<sup>49</sup> See B. HEPPLER, *Labour Laws and Global Trade*, Oxford and Portland, 2005, Hart Publishing, p. 302.

## Chapter I

Since the adoption of the ILO Constitution in 1919 the international Labour Organization attributed a lot of importance to the area of Social Security. The first conventions regarding social security were adopted at the first session of the International Labour Conference in 1919. The most recent international legal instruments in the area of social security were passed in 2000 and cover maternity protection. As the overall purpose of the ILO is to reach social justice in the world by the promotion of decent work, social security plays a crucial role in achieving this objective. The ILO adopts International Labour Standards with the scope of setting the minimum level of protection that must be guaranteed by the states through the ratification of ILO conventions and their incorporation into national legal systems. The famous formula from the Preamble of the ILO Constitution proclaims that '*universal and lasting peace can be established only if it is based upon social justice*'. In addition to this, the Preamble states that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'. Therefore, the mandate of the ILO lies in the improvement of labour standards through, *inter alia*: "...the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of freedom of association".

Traditionally, the system of ILO Conventions and Recommendations in the area of Social Security are divided into three "generations". The first generation of these standards covered only certain categories of workers and not the whole society. This generation of standards referred to the notion of social insurance. Each international legal instrument regulated a specific social risk (contingency), and separate legal instruments for particular sectors of economy (like industry and agriculture).<sup>50</sup>

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<sup>50</sup> See A.HEREDERO, *Social security: protection at the international level and developments in Europe*, 2009, Council of Europe, p. 11.

## Chapter I

The second generation of standards was created after the Second World War and the adoption of the Atlantic Charter in 1941. These standards were inspired by the Beveridge Plan of 1942 which underlined the responsibility of the state to provide the adequate level of social protection. The underlying idea of the report was that in order to be viable the social security system has to be based on full employment principle. The basic principles introduced by the Beveridge report were universalism and unity of social security according to which the necessary social minimum has to be guaranteed to each citizen. However, in addition to this principles the report was characterized by pragmatic approach, as the social security benefits were tied to the person's income. The UK's Beveridge Plan set up the first unified social protection system. Two years later, in 1946, an all-nation security system was set up in France through the efforts of Pierre Laroque.<sup>51</sup> The new approach to social security was enshrined in the Declaration of Philadelphia of 1944. According to the Declaration, the International Labour Organization must "further among the nations of the world programmes which will achieve ... the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care" (section III(f)).<sup>52</sup> Thus, the Declaration proclaimed the extension of social security measures and coverage, as well as comprehensive medical care as programme objectives of the ILO. It also called for the promotion of cooperation among social security institutions on an international or regional basis, as well as research activities and studies of common problems faced by national social security systems. By envisaging the right to social security in a human rights perspective, *i.e.* as a right stemming from the need of protection, but also from the very new standpoint that it should be functional, the Declaration of Philadelphia laid the foundation of ILO's activity in the area of social security. The objective of such a functional definition was to guarantee a basic income to all in need of such protection, to provide comprehensive medical care and for the protection of childhood and maternity.<sup>53</sup> It paved the way to the adoption of the next generation of ILO standards in the area of social security which later focused on founding social security as a new social institution. The same year

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<sup>51</sup> H. VON ROHLAND, *From Bismarck to Beveridge: Social Security for All, World of Work, Responding to the crisis: Building a 'Social Floor'*, 2009, No. 67.

<sup>52</sup> A. SUPIOT, *The Position of Social Security in the System of International Labour Standards, Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 113-121.

<sup>53</sup> UDHR, Article 22. It is noteworthy that international recognition of social and economic rights was possible before the recognition of civil and political rights and before the UDHR.

the adoption of two central Recommendations based on the principles affirmed by the Declaration of Philadelphia – the Income Security Recommendation, 1944 (No. 67) and the Medical Care Recommendation, 1944 (No. 69) – laid down the main characteristics of integrated and more inclusive social security systems.

In 1944 the two abovementioned ILO recommendations in the field of social security were adopted: the Income Security Recommendation No. 67 and the Medical Care Recommendation No. 69. The latter was particularly important because it separated health care in a branch. The adoption of these two recommendations was the first step towards legal systematization of social security standards on the international level. However, taking into account the legal nature of a recommendation, it wasn't legally binding for the ILO member states yet.

The unique circumstances prevailing on the eve of the end the II World War and the adoption of the Declaration of Philadelphia also permitted the adoption of the first structured legal expression to the notion of social security through dedicated international labour standards. As the experts working on the drafting of Convention No. 102, the flagship social security convention of the ILO, will later state, “the post-war context was characterized by a generalized movement towards including additional classes of the population, covering a wider range of contingencies, providing benefits more nearly adequate to needs and removing anomalies among them and, in general, unifying the finance and administration of branches hitherto separate. The transformation of social insurance was further accompanied by the absorption or co-ordination of social assistance, and the emergence of a new organisation for social security conceived as a public service for the citizenry at large. In order to meet special cases of need, there was a movement towards relaxing the link that then existed between entitlement to benefit and the payment of contributions, while at the same time major reforms were carried out with a view to achieving a measure of unification of the financing and management of insurance schemes that had hitherto been entirely separate”.<sup>54</sup>

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<sup>54</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951.

## Chapter I

The two Recommendations adopted in 1944, in conjunction with the Declaration of Philadelphia – the Income Security Recommendation (No. 67) and the Medical Care Recommendation (No. 69) – gave international substance to the new emerging concept of social security and therefore represent a milestone as the basis for the international community's approach to social security in the post-war period.<sup>55</sup>

The Income Security Recommendation No. 67 regrouped under this general objective all branches of social insurance that existed previously albeit separately, also adding the family allowances to the list and coordinating the means of protection by having recourse to the complementary techniques of social insurance and social assistance. As the ILO Director General puts it, "Recommendation No. 67 advocates income security by restoring, up to a reasonable level, income which is lost as the result of an inability to work (including old age), or to obtain remunerative work, or because of the death of the breadwinner. Furthermore it calls for the unification or coordination of social insurance schemes, the extension of such schemes to all workers and their families, including rural populations and the self-employed, and the elimination of inequitable anomalies."<sup>56</sup>

Due to its technical specificities, the Recommendation on medical care (No. 69) devotes a separate standard to medical care which had emerged as representing a new branch of social security which should be guaranteed *universally*. Recommendation No. 69 sets as an objective the establishment of a medical care service which shall be national in scope and co-ordinated with the general health services of the country, under the central supervision of the State. Pragmatically, it provides the option between social insurance complemented by social assistance and a public health service, the main objective being to guarantee universal access to health care services. Such a health service might in some countries be organised independently of those branches of social security concerned with cash benefits. This conception reflected the growing tendency to set up public services affording, as far as possible, all kinds of medical care, preventive or curative, without

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<sup>55</sup> G. PERRIN, *Le rôle de l'organisation internationale du travail dans l'harmonisation des conceptions et des législations de sécurité sociale, Droit social*, 1970, p.457.

<sup>56</sup> "Social insurance and social protection", Report of the Director-General (Part I), International Labour Conference, 80th Session, p. 40, 1993.

distinction as to the temporary or chronic nature of the illness or as to the occupational or general origin of the disease or accident. Such services can be evolved from the publicly-financed medical care services which then existed in many countries but operated with insufficient resources. A national service providing medical care only, but in all conditions (including maternity) in which it is necessary, was therefore conceptually different from a sickness insurance schemes which although they ensured both sickness allowances and medical benefits, were only granted in a limited range of the conditions in which medical care is necessary.

### *2.2 An evolution more than a revolution*

In historical perspective, this new model has replaced the previous model which corresponded to a less advanced stage of social development.<sup>57</sup> Building on the basis provided by previously adopted ILO instruments, the 1944 Recommendations provide for cash benefits in case of maternity, sickness, invalidity, old age, death of breadwinner, unemployment, employment injury and family responsibilities, together with medical care on all occasions when it is required. They however go beyond the range of social risks established by earlier Conventions and Recommendations by adding provisions on family responsibilities and by recognizing the provision of comprehensive medical care as representing a separate social risk. In addition, Recommendations Nos. 67 and 69 provide for a special design of social security systems recognizing ‘the need to complete the exact framework of risks and contingencies by ensuring that additional services may be granted subject to the availability of resources in a case of need which is not encompassed among these risks and contingencies. The recognition of this possibility and the proposed solution actually mark the integration of international

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<sup>57</sup> G. PERRIN, *Le rôle de l'organisation internationale du travail dans l'harmonisation des conceptions et des législations de sécurité sociale, Droit social*, 1970, p.457



assistance in social security as a complementary mechanism intended to protect from destitution and misery'.<sup>58</sup>

The originality of Recommendations No. 67 and 69 however lies essentially in the coherent and codified form of presentation and in the comprehensive coverage in respect of both persons and contingencies. Nevertheless, instead of advocating the substitution to already existing protection mechanisms by an entirely new institution based on the new social security doctrine, R67 and R69 rather capitalized on the recognized advantages of the previous methods of protection while at the same time they also tried to circumvent their major shortcomings. While they reflected the main aspects of the newly emerging notion of social security, Recommendations Nos. 67 and 69 also recognized the possibility to combine and adapt existing social insurance and social assistance schemes in order to respond to the new needs that had emerged in the post-war world. These instruments therefore were originally the result of the fusion of the Bismarck social insurance tradition with the universalistic approach advocated by the Beveridge report. Such a pragmatic approach defined social security by reference to its essential missions rather than defining it in an analytical way and with a high degree of detail as to its structural aspects. The right to social security sets a goal that has to be pursued through various means and the realisation of that objective has the priority over the means which are used to achieve it. This choice is inspired by the ethic of responsibility which is based ultimately on the desire to never lose sight of the ultimate goal, namely the right to social security. In this context, the pursuit of the objective must take precedence over ideological purity of the means. The chosen solution also has the advantage of compatibility with the various national practices and this contextual element is aimed to guarantee the greater effectiveness of the norm.<sup>59</sup>

This originality of the Recommendations appears first in the spirit of realism and conciliation which animates the proposals of the Conference under the various

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<sup>58</sup> Both instruments recognise the subsidiary nature of the assistance to supplement the remaining gaps in the social security system. See PERRIN, *Histoire du droit international de la sécurité sociale*, Paris, 1993, p. 237.

<sup>59</sup> J.-M. BONVIN, *L'Organisation internationale du travail, Étude sur une agence productrice de normes*, Paris, 1998, PUF, p. 241.

national approaches. The Recommendations are aimed to take into account the diversity of national solutions and possibilities, putting on an equal footing unification or coordination of existing plans. The originality “manifests itself in the last adjustments made to the basic principles in accordance with the key principles of an organization devoted to the protection of workers and, as such, guarantees of a body of supreme international standards on social insurance.”<sup>60</sup>

### *2.3 The regulation of organization and financing and the regulation of coverage*

The concern for pragmatic objectives and solutions led Recommendations Nos. 67 and 69 to soften the Beveridge conception of a single and central social security institution administered by the State and to suggest, as an alternative, the general coordination of different existing social insurance and social assistance schemes. Such an approach permitted to take into account the important historical traditions of social insurance and social assistance and, at the same time, promote the coherent development of emerging social security systems characterized by the unity of their administrative structures.<sup>61</sup> Apart from being widespread among many countries, that model had also proved its effectiveness.

The concern for practicality also resulted in different social groups being targeted by Recommendations Nos. 67 and 69. Recommendation No. 67 suggests to progressively extend social security to all workers and their families, including rural population and the self-employed<sup>62</sup>. In addition, it recommends that social assistance measures should be taken with a view: to secure the well-being of dependent children; to provide benefits to invalids, aged persons and survivors if

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<sup>60</sup> G. PERRIN, *Histoire du droit international de la sécurité sociale*, Paris, 1993, p. 237.

<sup>61</sup> In the area of medical care, organization by way of social insurance was also made possible wherever complemented by social assistance in order to meet the requirements of needy persons who were not yet covered by social insurance. In other cases, the establishment of a public medical care service was recommended. Social assistance and social insurance were therefore seen as complementary means which needed to be coordinated and act together so as to reach excluded members of society but which could in the future be unified.

<sup>62</sup> Subject to a guaranteed minimum granted by way of social assistance to those in need.

they are not insured; as well as to guarantee assistance for all persons in want. For its part, Recommendation No. 69 went beyond the world of work and recognized that medical care should represent a separate branch of social security and be guaranteed to all member of society, regardless of occupational status, thereby giving an early recognition to the human right to health.

### *2.4 The level of protection*

Reflecting workers' aspiration to greater security, Recommendation No. 67 departs from the proposals formulated by Lord Beveridge suggesting the provision of a subsistence minimum for all and considering that social security was to exclusively provide egalitarian protection to the entire population, leaving it to each individual's decision to secure greater protection better suited to their capacities and needs.<sup>63</sup> Instead, the Conference gave preference to earnings related benefits characterizing social insurance schemes and considered that income security implied responding to the needs of individuals and of their families based on the level of previous work related earnings and subject to a guaranteed minimum granted by way of social assistance and a ceiling of earnings taken into consideration for the purpose of computing contributions and benefits. In so doing, it again combines the universalistic approach promoted by the Beveridge report with the social insurance tradition existing in a consequent number of countries and promotes a policy guaranteeing replacement of work related earnings going beyond the mere provision by social security of a subsistence minimum. Nevertheless, Recommendations Nos. 67 and 69 as well as the Beveridge conception all confirmed the role of social assistance as the last *safety net* with the 1944 Recommendations being the first international standards integrating means tested social assistance within the scope of social security for all persons in need. (See paragraphs 22, 23 and 24 of Recommendation No. 67).

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<sup>63</sup> See G. PERRIN, *Reflections on fifty years of social security*, *International labour review*, 1969, Vol. 99, no. 3, p. 249-292.

### *2.5 The principle of participative management*

Another important feature of Recommendations Nos. 67 and 69 relates to the recognition that representatives of protected persons should participate to the administration of social security. While such participation represents continuity with the first generation ILO instruments, it represents departure from the Beveridge conception of social security. In the Beveridge conception, a consequence of the proposed unity of structure of social security was that it would be neither only nor mainly financed by way of workers' and employers' contributions but largely by public financing. The participation of representatives of workers and employers to the administration of the system could therefore not be motivated on this ground and the management of social security conceived as a public service was consequently essentially entrusted to the State. While acknowledging the developments related to the emerging social security doctrine and recognizing the increased role of the State, Recommendations 67 and 69 again retained pragmatic solutions acknowledging the long term interests of protected persons by ensuring their participation to the design and implementation of social security systems. Recommendation No. 67 suggests that workers and employers should be very closely associated to the administration of compensation of employment injuries and the prevention of occupational accidents and diseases. More generally, Recommendation 67 recognized the specificity of the social administration of social insurance and suggested that it should be unified or coordinated within a general system of social security services. Contributors should, through their organisations, be represented on the bodies which determine or advise upon administrative policy and propose legislation or frame regulations.<sup>64</sup>

By being the first international instruments to propose rules on the manner in which the human right to social security should be implemented, the 1944 Recommendations also aimed at striking the most practicable balance between the social insurance tradition and principles and the recognition of innovative solutions

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<sup>64</sup> For the importance of participative management of social security in the context of the democratic development see V. RYS, *Reinventing social security worldwide: back to essentials*, The Policy Press, 2010, p. 48 ss.

consisting in the unity of structure of social security systems. They provided guidelines for the efficient coordination of the numerous protection schemes that had been established prior to the II World War as well as they set the general principles regulating in a coherent way social security systems established subsequently with a view to progressively widening the circle of persons protected by channeling social solidarity and by emphasizing collective responsibility with regard to guaranteeing the right to health and social income. Compared to social insurance the beginnings of which were regional and progressive, the rapid expansion of the concept of social security was worldwide although major differences existed in the scale and scope of social security systems as well as in the methods used to achieving expansion of social security in some cases gradually by consolidating and modernizing existing social insurance schemes to cover the major part of the population or by establishing an entirely new public service covering the entire population. Social security, as a central social institution, was requested to provide a satisfactory and concrete response to the growing demand for better and more effective health protection not limited in time and secure cash benefits ensuring effective income maintenance.

### *2.6 Convention No. 102 as the flagship of development of International Social Security Law*

The idea behind drafting the Convention was to unite the Recommendations 67 and 69 in one legal document as well as to give a binding nature to social security standards. The Convention established a minimum level of social protection allowing ratifying countries to choose the contingencies and methods of protection, but at the same time establishing minimum standards which have to be respected in order for a country to comply with the Convention. Convention No 102 is the first legal instrument to embrace all the nine branches of social security (medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit). The Convention set the minimum protection level for each of the contingencies and puts the social risk under an umbrella of common principles,

such as, for instance, the collective financing of social security schemes (the workers must not finance more than 50 % of expenses<sup>65</sup>). According to par.1 Art. 71 of the Convention: “The cost of the benefits provided in compliance with this Convention and the cost of the administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means and takes into account the economic situation of the Member and of the classes of persons protected.”

What was the innovation of the Convention 102 is that it introduced a unified approach to the regulation of nine contingencies. The subsection which regulates every contingency is designed according to a common framework. All social risks are regulated with respect to common principles, such as for instance governance and financing mechanisms. The basic principles of the Convention 102 include: the principle of collective financing; adjustment of benefits; mechanisms of appeal; general state responsibility; the participation of protected persons in the administration whereas the administration of social security is not carried out by the state or controlled by the latter.<sup>66</sup>

The state is responsible to guarantee a sufficient level of protection which would be enough to maintain a decent lifestyle for the worker and his family. The Convention also established some principles of governance of the social security schemes. The social security schemes can be administered either:

- by the public authorities of the state or by a Government department responsible to a legislature or
- jointly by workers and employers.

In the case when the administration of social security schemes is not carried out by the state, the representatives of the protected persons should participate in the administration according to the national legislation.<sup>67</sup> In any case, the state bears

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<sup>65</sup> Par.2 Art. 71 of the Convention No 102.

<sup>66</sup> D. PIETERS, *Social security: an introduction to the basic principles*, Kluwer Law International, 2006, p. 9 ss.

<sup>67</sup> Par. 1 Art. 72 of the Convention.

general responsibility to ensure the proper functioning of social security and the due provision of benefits.

The adoption of this Convention allowed to transform “though gradually, the leading ideas of the Philadelphia Recommendations on income security and medical care into stricter obligations”.<sup>68</sup> Also, Convention No. 102 “laid the basis for a system of social security unified by common principles of organization and intended to guarantee a minimum level of protection sufficient to maintain the beneficiary and his family in health and decency”.<sup>69</sup>

The Convention united under a single umbrella all social protection branches which had been identified during the social insurance period complemented by the family allowances branch, as envisaged by the 1944 Recommendations. Convention No. 102 thereby made the synthesis of Recommendation No. 67 and Recommendation No. 69 adopted 8 years earlier and proposed a system organized in a holistic manner in lieu of the mere juxtaposition of identified social risks characterizing the social insurance period.

With a view to take into consideration the wide variety of existing social security systems, Convention No. 102 focused on the questions considered to be of critical importance and regarding to which international agreement was considered desirable and likely. The creator of the Convention wanted to avoid the situation that the member States would be incapable or unwilling to accept it due to the issues of relatively minor importance. Therefore *what* benefits should be provided and for *whom* were considered to represent two key issues to be addressed by the new instrument. Conversely, the question of *how* benefits were to be provided was considered of secondary importance as long as the benefits granted were at an adequate level and the social security systems were administered properly.<sup>70</sup>

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<sup>68</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951, p. 7.

<sup>69</sup> General Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Organization, 91th Session of the International Labour Conference, 2003.

<sup>70</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951, p. 6.

## Chapter I

In respect of each of the nine contingencies covered, the Convention established in a systematic manner a set of parameters providing for each risk covered a definition of the contingency against which protection is to be provided, the minimum coverage required (in relation either to the number of employees or the economically active population, or to all residents of small means), the minimum level of benefits to be provided, their duration and the conditions of payment (form and method of payments).

The internal structure of the various parts of the Convention is aligned to a large extent, to cover all the main technical elements of a social security system through fundamental norms, which are moderate but significant. These standards regard:

- The definition of contingencies covered;
- The circle of protected persons;
- The conditions of allocation, the nature and amount of benefits,
- The duration of benefits and any waiting periods.<sup>71</sup>

In addition, general standards include rules for the suspension of benefits, the right of appeal, and the financial and administrative organization of social security systems.

A notable innovation of the Convention (No. 102) in contrast to the pre-war conventions on social insurance was to establish quantitative standards which specify the percentage required for the coverage and the minimum level of benefits to be granted. With regard to the protected categories, the scope of the various branches has three options corresponding respectively to prescribed classes of employees, or prescribed classes of the workforce, or finally to prescribed classes of residents or to all residents whose means during the contingency do not exceed prescribed limits, except for unemployment benefit or employment injury benefits

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<sup>71</sup> G. PERRIN, A. BARJOT, *Histoire du droit international de la sécurité sociale*, Association pour l'étude de l'histoire de la sécurité sociale, Paris, 1993, p. 741.



for which workers only are concerned.

Moreover, in addition to previously described options there is an option intended for Members which ratify the convention with temporary exceptions, because their economy and medical facilities are not sufficiently developed - such Members may be restricted to protect categories prescribed for employees of large industrial enterprises.

Similarly, the standards for minimum benefits to be granted in the scope of the contingencies, except for health care, are set as a percentage of earnings. With a view to maximum utility, Convention No. 102 needed to supplement the deficiencies of the first generation of Conventions. “These Conventions are very precise in certain matters, but in a vital particular—the amount of benefit—they are silent. Their very precision, for example, in the matter of persons protected, is a stumbling-block to ratification by Members whose social security systems do not conform to a classical pattern of social insurance but might nevertheless be recognised as globally adequate”.<sup>72</sup> One of the main objectives therefore was to define exact standards of basic protection likely to be internationally accepted, although with temporary exceptions allowed for the developing countries.<sup>73</sup> In this respect, in 1961, the CEACR observed that: “The movement towards social security which sprang from the desire to provide minimum protection to the least favoured workers against risks involving their work and earning capacity, is ... turning towards the provision of a substantial body of protection against a very wide range of the hazards of existence. The purpose of the Convention was to set certain average minimum standards for this movement. It is encouraging to see that these standards are already reached or exceeded in certain, if not in all types of protection and that the movement seems destined to pursue its course rapidly. In this connection and from the point of view of general development it seems that the Convention offers not merely a choice of rules by which to ascertain whether or not the requisite minimum standards are reached; it also supplies-and this is perhaps the main function of "minimum standards"-a yardstick for the measurement of the

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<sup>72</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951, p. 6.

<sup>73</sup> The “standard beneficiary” was defined as covering the beneficiary, his spouse and two children, for whom benefit rates are determined in relation to previous earnings.

extent to which its provisions are superseded by higher standards of social security. Social security can no longer be considered a luxury. It answers the call which must be heard for any social policy to be comprehensive. It necessarily reposes on other aspects of economic and social policy, such as public health, employment, prevention of risk, vocational guidance and retraining and so on. In its turn, well organised social security ensures rational use of social resources and increased productivity; it is not only indispensable to the welfare of the individual, but also seems a prerequisite for smooth economic development and the stability of society as a whole.”<sup>74</sup>

Convention No. 102 consequently relates the minimum level of benefits payable in respect of the various contingencies entailing suspension of earnings or loss or reduction of support, to the wage level of the country concerned. It offers a choice between three alternative methods of calculation to suit the practice in various schemes considered to provide reasonable equivalence in the accepted obligations: benefits may be proportionate, wholly or in part, to the previous earnings of beneficiaries or their breadwinners; they may be fixed at uniform rates with a fixed minimum<sup>75</sup>; or they may depend upon the means of the persons concerned during the contingency, the amount being fixed as in the previous case, when the person concerned has no means of justifying a reduction.

Rather than determining the level of benefits in detail according to specific formulas and by reference to these legal categories - which could be the source of difficulties for the ratification and implementation of minor points - the Convention No. 102 focuses on such areas as the percentage of population protected and the level of benefits, depending on national parameters.<sup>76</sup> These references allow for the adaptation of social protection system to the capabilities of every country while contributing to the regulation of international competition, as export oriented industries in most developing countries are covered by the scope of social security

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<sup>74</sup>General Survey of the Committee of Experts carried out in 1961 on minimum standards of social security, para. 189-190.

<sup>75</sup> In each case which the Convention relates to the wage of ordinary adult male labourer.

<sup>76</sup> Reference to the wage of a skilled manual male labourer or an ordinary manual male labourer.

regulation.<sup>77</sup> The level of the minimum standard however was the source of a dilemma between the necessity to take into account considerations of fairness acknowledging the difficulties encountered by slightly developed countries in setting up a social security system and on the other hand, the need not to lower the standards of the first generation Conventions adopted in the previous twenty or twenty five years. The compromise consisted in allowing temporary exceptions for developing countries, notably in the important matter of the range of persons protected.<sup>78</sup>

Among other technical standards established by the Convention, it is worth mentioning the conditions for the allocation and the duration of benefits. As regards short-term benefits, the eligibility criteria are very flexible and allow for a wide margin of appreciation to the national law-maker. Indeed, these provisions are formulated in such a way so as to guarantee the benefits to the persons who have completed, or whose breadwinner has completed a qualifying period in order to prevent abuse. On the other hand, as regards long-term benefits, the Convention provides for minimum periods of contribution, employment or residence that may be required for the granting of benefits in accordance with the standards established by the Convention and the minimum qualifying period to qualify for reduced benefits.

As regards the duration of benefits, it must in principle be equal to the duration of the contingency. This principle is very protective, consistent with the recommendations of Beveridge, with the possibility to limit the provision of medical services in case of morbid condition to twenty-six weeks or, if justified by an overriding declaration, thirteen weeks. However, health care benefits cannot be suspended while the sickness benefit is paid. In addition, they the duration of benefits should be prolonged if the beneficiary is affected by a disease recognized by national law as a justification for continuing care. Similar restrictions are also applicable to the attribution of sickness benefit (26 and 13 weeks), unemployment

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<sup>77</sup> M. VOIRIN, *Les normes internationales de sécurité sociale à l'épreuve du temps*, in *Fragniere JP (éd.), Repenser la sécurité sociale*, Lausanne, 1995.

<sup>78</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951, p. 6. An analogy can be found with today's quest for the basic social floor.

benefit (13 weeks during a period of 12 months, when categories of employees are protected and 26 weeks during a period of 12 months, when all residents are protected) and maternity benefit (12 weeks, unless a longer period of absence from work is required or permitted by national law). As regards the disability benefit, it can be replaced by old-age benefit, for which the standards for the level of protection are identical.<sup>79</sup>

Convention No 102 is one of the most flexible instruments in international law. It adopts a 'pick-up' approach which guarantees to the adhering states the right to choose which mechanisms to adopt and from which ones to opt-out. The Convention, in particular, contains flexibility clauses which concern the personal coverage and the replacement rates of social security benefits (the minimum level of benefits). This approach was adopted in order to take into account different situations and levels of economic development in the member states of the International Labour Organization.<sup>80</sup> The specific standards for different branches have two levels, namely the minimum level and a higher level. In this way, the countries whose economy is not sufficiently developed and which may rely, in a statement to that effect at the time of ratification, may derogate temporarily from certain minimum standards to implement the reduced standards provided for them. This option is meant to address the problem of the extreme diversity of economic capabilities and levels of development of the ILO member States.<sup>81</sup>

However, it is unclear if the proposed solution has in effect been used by ILO member States, especially taking into account the low ratification rate. One of the reasons for it may be that the developed countries are reluctant to ratify an instrument which proposes a lower level of protection than it is already guaranteed by these states.

In contrast, another form of flexibility in conditions of ratification, applicable to all Member States, has been widely used. There is the possibility of

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<sup>79</sup> G. PERRIN, A. BARJOT, *Histoire du droit international de la sécurité sociale*, Association pour l'étude de l'histoire de la sécurité sociale, Paris, 1993, p. 741.

<sup>80</sup> Working Party on Policy regarding the Revision of Standards, *Follow-up to consultations regarding social security instruments*, Geneva, November 2001

<sup>81</sup> G. PERRIN, A. BARJOT, *Histoire du droit international de la sécurité sociale*, Association pour l'étude de l'histoire de la sécurité sociale, Paris, 1993, p. 741.

ratifying the Convention in part for at least three branches, one of which must relate to the unemployment benefit, old-age benefit, employment injury benefit, disability benefit or survivors' benefit.<sup>82</sup> Also, under Article 3 of the Convention, a Member whose economy and medical facilities are insufficiently developed may, if and for so long as the competent authority considers necessary, avail itself, by a declaration appended to its ratification, of the temporary exceptions provided in the established list of the articles of the Convention.<sup>83</sup> Under paragraph 2 of Article 3, each Member which has made a declaration under paragraph 1 of this Article shall include in the annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation a statement, in respect of each exception of which it avails itself—

(a) that its reason for doing so subsists; or

(b) that it renounces its right to avail itself of the exception in question as from a stated date.

The partial ratification of the Convention (No. 102) clearly does not exclude the subsequent decision to advance the acceptance of its obligations until the full ratification of the minimum standards for all branches of social security. The Convention thereby sets the conditions for progressive achievement the objectives established under each of the nine branches through the possibility of being ratified “à la carte”. The minimum requirement for the acceptance of three branches, also aims at ensure that the obligations resulting from the choice of the branches should be reasonably equivalent.

A final form of flexibility that clearly differentiates the Convention 102 from the pre-war conventions on social insurance, apart from the Convention (No. 44) unemployment in 1934, relates to the possibility of taking consideration the existence of insurance that are not mandatory under the national legislation when this insurance is controlled by public authorities or administered jointly by employers and workers, covers a substantial part of the population.

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<sup>82</sup> Article 2 of Convention 102.

<sup>83</sup> Articles: 9 (d); 12 (2); 15 (d); 18 (2); 21 (c); 27 (d) ; 33 (b); 34 (3); 41 (d); 48 (c); 55 (d); and 61 (d).

Thus, Convention No. 102 became the first international legally binding instrument systematizing social security as a new social institution with its own legal framework distinct from labour law.<sup>84</sup> In spite of the major transformations affecting the subject area during the second half of the XX century, Convention No. 102 has remarkably withstood the test of time since it still constitutes the foundation of the architecture of international law aimed at the harmonisation of national legislation on social security. In particular, it clarified the extent and understanding of the concept of social security, articulated into nine separate branches, according to the analytical design of the material scope of this institution, as it was formed during the historical development of social insurance, avoiding recourse to a binding definition which would undoubtedly lead to controversies. The agreement was reached on the operational design concept that inspires the international definition of social security in all organizations and all instruments dealing with this subject.<sup>85</sup>

Just like the Philadelphia Recommendations Nos. 67 and 69 before it had for the first time organized in a comprehensive and systematic manner the elements composing social security, Convention No. 102 became the first international treaty to set out in a single instrument an integrated series of objectives based on commonly accepted principles and establishing a minimum social threshold for all member States, according to their level of development. In various ways Convention No. 102 is aimed at laying down at one and the same time, minimum standards to be observed and a plan for more comprehensive protection to be realised. Thereby, it supplies a yardstick for measuring the extent to which existing systems reach or exceed the prescribed level. The large flexibility provided by the Convention in adjusting each branch's parameters to local circumstances and capacities is counter-balanced by a set of general principles of organization and good governance that are common and cross-cutting to the entire social security system.

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<sup>84</sup> See, for instance, D. PIETERS, *Social security: an introduction to the basic principles*, Kluwer Law International, 2006, p. 9 ss. and A.G. HEREDERO, *Social security: protection at the international level and developments in Europe*, Council of Europe, 2009, 241 p.

<sup>85</sup> G. PERRIN, A. BARJOT, *Histoire du droit international de la sécurité sociale*, Association pour l'étude de l'histoire de la sécurité sociale, Paris, 1993, p. 741.

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In historical perspective, Convention No. 102 also marked a shift in the normative orientation of ILO social security Conventions. Whereas the previous generation was aimed at establishing institutional models, Convention No. 102 set minimum standards. Instead of aiming at establishing a clear-cut and necessarily controversial definition of the concept of social security, it provided an architectural framework within which, instead of being fossilized, social security systems could evolve over the second half of the XX century until the present day. By establishing a minimum standard, it logically called States to improve it and thereby also permitted to initiate the revision of the first generation conventions with a view to establishing higher standards for the different branches of social security based on the principles established by Convention No. 102.

The flexibility of its provisions was aimed to allow Convention 102 to pass the test of time, and to encompass the newly emerging social security models, in which that part of responsibility that is renounced by the State would be taken up by private insurance schemes, enterprises and insured persons themselves. Convention No. 102 allowed for the attainment of a certain minimum level of social protection through different methods, including the coexistence of a dual social security system, both public and private. In the last resort, it is important to ascertain that, irrespective of the nature of the different schemes, the main principles setting the basic parameters for the administration, financing and functioning of social security schemes are observed and the level of benefits prescribed by the Convention is attained in full (CEACR 2003). Given these essential safeguards, the form of organization was considered of secondary importance as long as the benefits are guaranteed collectively in case of illness and loss or insufficiency of means of support by limiting the financial participation of the insured in financing the scheme and granted to as wide a circle of the population as possible, but primarily to workers and their dependants.<sup>86</sup>

The important number of flexibility patterns established by Convention No. 102 reflects the realistic acceptance of the fact that unemployment and

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<sup>86</sup> The same regards the recognition of supplementary social insurance schemes, as the Convention recognizes that the same level of coverage can be achieved in different ways. See General Survey of the Committee of Experts carried out in 1961 on minimum standards of social security.

underemployment were still endemic in vast regions of the Third World, that large sectors of economy were still of an informal nature and sometimes remained outside the monetary economy, and that there could be a severe shortage of adequate medical infrastructure.<sup>87</sup> Accordingly, the income maintenance and medical care guarantees advocated by Recommendations Nos. 67 and 69 needed to be reduced and adapted to a *de facto* situation which precluded the granting of such guarantees to large sectors of the population. Convention No.102 therefore set the basic parameters of social security organized as a social institution while it encouraged a dynamic process of gradual application of social security measures by fixing a minimum level to be gradually achieved worldwide and to serve as an objective and a benchmark for countries aspiring to establish or develop their social security systems in view of the prevailing socio-economic conditions and irrespective of level of development.<sup>88</sup>

The design provided by the Convention had no intention to freeze social security or hinder its development, despite the fear that was at times expressed. Indeed, on one hand, developments in social security recognized at the national level were carried out inside branches established within the framework of the Convention, without questioning the framework itself. Thus, progress made in the branches of unemployment benefit and family benefit, for example, respect the unity and the unique nature of these branches. On the other hand, the minimum standards established by the Convention provided the possibility to improve the original standards and induced to go beyond them, either by means of national legislation or through other international instruments in accordance with the idea of increasing the standards. However, one has to admit that the changes to the international regulation of social security introduced by Convention 102 did not significantly alter the original, on the national or international levels, except for the extension of the range of services provided within the branches, the increase in the

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<sup>87</sup> In order to achieve, immediately or in the near future, high ratification rates among both highly developed and less developed countries, the adoption of “minimum standard” and “advanced standard” was originally given consideration. The Conference ultimately decided in favour of the adoption of a single instrument setting minimum standards.

<sup>88</sup> Preparatory work, ILO Convention 168, 1986 IV(1).



level of benefits and better integration of the perspectives of prevention and rehabilitation in the design of protection.<sup>89</sup>

### *2.7 The third generation of international standards on social security*

When the ILO Convention 102 was being adopted at the International Labour Conference in 1952, the idea was to adopt a second legal instrument which would provide a higher level of protection. However, because of the high level of complexity of the issue, such instruments were adopted much later when the revision of the first generation of standards took place. The third generation of social security standards encompasses the instruments which provide higher and more specialized standards of protection, but they still follow the structure of Convention 102. The examples of such legal instruments can be Convention No. 130 on Employment Injury Benefits and Medical Care and Sickness Benefits, Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits, Convention No. 121 on Employment injury Benefits, Convention No. 168 concerning Employment Promotion and Protection against Unemployment.

In 1944, Recommendation No. 67 enshrined a new principle, that of extended coverage in contingencies involving, *inter alia*, “loss of earnings due to the unemployment of an insured person who is ordinarily employed, capable of regular employment in some occupation, and seeking suitable employment, or due to part-time employment”. Subsequently, aware of the fact that the hypothesis of a satisfactory level of employment could not be applied to developing countries, close attention was given to the special economic situation of these countries and their objectives as regards the setting up and further development of social security schemes. Minimum objectives and standards for social security were therefore fixed and the principle of flexibility enshrined in the ILO standards with a view to encouraging a dynamic process of gradual application of social security measures by fixing a minimum level to serve as an objective and a benchmark for young

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<sup>89</sup> G. PERRIN, A. BARJOT, *Histoire du droit international de la sécurité sociale*, Association pour l'étude de l'histoire de la sécurité sociale, Paris, 1993, p. 741.

countries willing to establish and develop social security systems. Meanwhile, industrialized countries with highly developed social security schemes had started facing persistent structural unemployment making it impossible to continue targeting the objective of full employment. Traditional social security and employment promotion policies revealed their limits.<sup>90</sup>

Also, in 1974 the International Labour Conference adopted a resolution concerning industrialisation, the guarantee of employment and the protection of the incomes of workers, but the proposals regarding a new instrument setting higher standards in the area of unemployment proved controversial, most developing countries considering that the economic crisis of the 1970s was not a suitable moment in view of the high level of unemployment and the preference given to economic solutions capable of promoting employment.<sup>91</sup> Ultimately, the economic crisis of the 1970s did not allow the rapid adoption of a new instrument as this had been the case during the Great depression of the 1930s. Convention No. 168 could only be adopted in 1988, i.e. a gap of almost 20 years since the adoption of Convention No. 130.

### *2.8 A new consensus*

Convention No. 168 reflects the consensus among the international community that any development policy must comprise employment policy among its objectives. In historical perspective, the first Beveridge Report, while proposing the adoption of social security guarantees to cover all situations of need for the entire population, was explicitly based on the hypothesis that, if the proposed social security system were to be viable, it had to rest on the maintenance of full employment and the prevention of widespread unemployment. It was clear that the adoption of measures to maintain a high level of employment lay outside the

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<sup>90</sup> Preparatory work to ILO Convention 168, 1986 IV(1).

<sup>91</sup> Rapport de la Commission d'experts pour la sécurité sociale (Genève, 26 novembre – 3 décembre 1975).

domain of social security policy, since this was a distinct area of public action designed to maintain a healthy economic climate throughout society.<sup>92</sup>

Thus, Convention No. 168 focuses on employment promotion and protection against unemployment. To this end, each Member needs to take appropriate steps to coordinate its system of protection against unemployment and its employment policy. As such, it requires that the terms of the unemployment benefit, contribute to the promotion of full, productive and freely chosen employment and must not be such as to discourage employers from offering and workers from seeking productive employment<sup>93</sup>. Furthermore, the measures taken in case of disruption of income need to be closely coordinated with existing preventive services such as training of persons who have not yet accessed the labour market, retraining of unemployed, providing vocational rehabilitation of disabled persons, mobility allowances and vocational guidance. Moreover, beyond the traditional scope of systems of protection against unemployment Convention No. 168 contains a series of provisions with respect to new applicants for employment under which States must take account of the fact that there are many categories of persons seeking work who have never been, or have ceased to be, recognized as unemployed or have never been, or have ceased to be, covered by schemes for the protection of the unemployed. The Convention consequently requires the provision of social benefits to certain of these categories.<sup>94</sup>

### *2.9 Embedding social security within social protection*

Social security thus became embedded in social policy and social protection and was henceforth to be coordinated with employment policy and provide the means to achieve the "priority objective" to implement a policy promoting full, productive and freely chosen employment. This approach confirmed at the

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<sup>92</sup> Preparatory work to ILO Convention 168, 1986 IV(1).

<sup>93</sup> See E. LEE, *International Labour Standards and Social Policy Principles*, Carnegie Council, 2002, p. 12, [http://www.carnegiecouncil.org/resources/articles\\_papers\\_reports/692.html](http://www.carnegiecouncil.org/resources/articles_papers_reports/692.html)

<sup>94</sup> See M. HUMBLET AND R. SILVA, *Standards for the XXst century. Social Security*, International Labour Office, 2002, p. 21,

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international level the progress of the idea of prevention, a trend that characterized most newly established unemployment protection schemes implementing unemployment protection to temper down or accompany the effects of active labour market policies aiming to make labour law more flexible. Certain unemployment protection schemes in industrialized countries had already begun adopting specific benefits in the form of services and cash transfers, either for workers who were in imminent risk of losing their jobs or for the unemployed themselves, in order to promote their re-entry into active employment as soon as possible. This approach called for further co-ordination between social security and employment policy in order to adjust the social action of the one to the economic ends of the other by means of concerted participation in the training of human resources.

## CHAPTER TWO

### ADEQUACY OF THE INTERNATIONAL STANDARDS IN THE AREA OF SOCIAL SECURITY IN THE MODERN WORLD

#### 1. *Criticism of the ILO standards in the area of social security*

The Convention No 102 has been one of the most criticized legal instruments of the ILO. It has been argued that because it has been the ILO's primary convention on social security for over fifty years it should be reconsidered.<sup>95</sup> In fact, the whole conceptual ground of the Convention, the social insurance based model, came under scrutiny in the recent years with many experts speaking about the crisis of this model.<sup>96</sup> The social insurance model which represents the basis of the Convention, grounds on "contributory principle" and the notion of "entitlement". In contrast to social assistance model, where benefits are paid in relation to needs, and universal benefits are introduced, in social insurance model the beneficiaries have to earn the right to receive benefits in the future. Such a way of development of the social security regulation at the international level is in fact not in accordance with the model which had been proposed by the Beveridge report. According to Simon Deakin and Mark Freedland, "Beveridge explicitly designed his scheme around the proposition that access to social insurance was an aspect of citizenship and, as such, universally accessible."<sup>97</sup> Despite this, Convention 102 was developed on the basis of the social insurance model, which was dominant in the western European countries in that period.

One of the main grounds for criticism is that all the nine contingencies regulated by the convention - medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor's benefits – are linked to formal employment. Therefore, if a person is not formally employed he or

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<sup>95</sup> G. STANDING, "The ILO: An Agency for Globalization?", *Development and Change*, 2008, Vol.39, No.3, pp.355-384.

<sup>96</sup> See, for instance, S. DEAKIN AND M. FREEDLAND, *Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 151-165.

<sup>97</sup> *Idem*

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she does not have the access to social security benefits. Indeed, according to the Convention, all benefits are determined as a percentage of the previous earnings of the person. Thus, according to Art. 65, par. 1 of the Convention: “In the case of a periodical payment to which this Article applies, the rate of the benefit, increased by the amount of any family allowances payable during the contingency, shall be such as to attain, in respect of the contingency in question, for the standard beneficiary indicated in the Schedule appended to this Part, at least the percentage indicated therein of the total of the previous earnings of the beneficiary or his breadwinner and of the amount of any family allowances payable to a person protected with the same family responsibilities as the standard beneficiary.”

Par. 2 of the same article specifies that “where the persons protected or their breadwinners are arranged in classes according to their earnings, their previous earnings may be calculated from the basic earnings of the classes to which they belonged”, which does not change the principle according to which paid formal employment is the basis for access to social security. As Simon Deakin and Mark Freedland put it, “this is, above all, a model based on social insurance systems of the type that were in place in more or less all developed economies at around the time the Convention was adopted. ... As the structure of Convention 102 illustrates, benefits received while the claimant is, for example, unemployed, are linked to the contributions that he or she paid when previously engaging in insurable employment.”<sup>98</sup> It is worth mentioning that this model was not in place in the Soviet Union, where there was no relation between the level of benefits and the contributions paid.

In addition, because the Convention was created in 1950s, the relatively new concept of precarious employment has not been acknowledged in its provisions. As the social insurance model is based on “contributory principle”, “it is only if employment is, on the whole, stable, that regular contributions can be levied and pay-outs for unemployment and sickness limited in their scope and duration. Highly irregular employment patterns, or long-term unemployment, tend to undermine the

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<sup>98</sup> S. DEAKIN and M. FREEDLAND, *Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 151-165.

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solvency of social insurance schemes, or make their application impracticable.”<sup>99</sup> Indeed, when the Convention was adopted, it was reasonable to predict that the majority of the population would be in stable and formal employment. In this way, the regular contributions over a long period of time (usually the whole working life of a person) were the guarantees of the financial sustainability of the system. Clearly, this is no longer the case. So-called atypical employment which encompasses employment patterns starting from part-time work to occasional work under civil law contracts, has become more a norm than an exception, particularly in Europe. This situation creates unbalances in social security schemes and, as a result, Convention 102 loses its relevance even further.<sup>100</sup>

According to the Schedule to Part XI of the Convention that regulates the periodical payments to standard beneficiaries, the replacement rates for different contingencies are the following:

<b>The rates of benefits according to the ILO Convention 102</b>			
art	Contingency	Standard Beneficiary	Percentage
II	Sickness	Man with wife and two children	45
V	Unemployment	Man with wife and two children	45
	Old age	Man with wife of pensionable age	40
I	Employment injury: <ul style="list-style-type: none"> <li>• Incapacity of work</li> <li>• Invalidity</li> <li>• Survivors</li> </ul>	<ul style="list-style-type: none"> <li>• Man with wife and two children</li> <li>• Man with wife and two children</li> <li>• Widow with two children</li> </ul>	50  50  40

<sup>99</sup> Idem

<sup>100</sup> See E. LEE, *International Labour Standards and Social Policy Principles*, Carnegie Council, 2002, p. 10, [http://www.carnegiecouncil.org/resources/articles\\_papers\\_reports/692.html](http://www.carnegiecouncil.org/resources/articles_papers_reports/692.html).

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III	Maternity	Woman	45
X	Invalidity	Man with wife and two children	40
	Survivors	Widow with two children	40

As can be seen from the table, the replacement rates range from 40 to 50 per cent of the previous income. There are views that this makes it hard to insure basic coverage for all, as the rates are too high.<sup>101</sup> Parting from the necessity to ensure the universal social security coverage, the mechanism provided by the Convention may be claimed inadequate to realize such a purpose. The UN Committee on Economic, Social and Cultural Rights has underlined that the basic obligation of the member states in relation to social security is to ensure the essential minimum of protection to all persons, with particular attention to the excluded and marginalized groups. One of such groups is constituted by workers employed in informal economy who, are not able to access formal social security schemes. The access to social security schemes should be guaranteed in a non-discriminatory manner.<sup>102</sup> In many developing countries and the countries in transition informal economy constitutes a large share of the country's economy on the whole, and employment in the informal sector is rather a rule than an exception. In particular, this is the case in the countries that used to be republics of the Soviet Union, where the share of informal sector can reach a significant share of the economy. As Convention 102 does not provide for any mechanism of ensuring that workers in informal employment can have access to social security benefits, it can be presumed that the Convention does not represent an optimal legal mechanism for the countries in transition and developing countries where the informal sector is large. In addition, being based on the principle of collective financing the Convention does not explicitly allow for the establishment of contributory social security schemes. Supplementary and voluntary schemes have been used by many developing countries as mechanisms to provide

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<sup>101</sup> U. KULKE, *Setting Social Security Standards in a Global Society, An analysis of present state and practice and of future options for ILO social security standard setting*, Inter-regional Tripartite Meeting on The Future of Social Security in Arab States, Amman, Jordan, 2008.

<sup>102</sup> M.S. CARMONA, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*. Social Forum 2008, Geneva 1-3 September 2008.



the possibility of social security coverage for informal workers. As Simon Deakin and Mark Freedland argue, “solutions may be found in the use of mechanisms outside the regular state social insurance system, for example, “micro-insurance”, that is to say, voluntary schemes tailored to meet the needs of a particular sector, with an element of fiscal subsidy from the state to compensate for the extra administrative costs of running such schemes.”<sup>103</sup> In addition, the problem could be addressed through the extension of the definition of an employee to include less protected categories.<sup>104</sup> However, this could hardly be done in relation to workers who do not have a stable employer (so-called freelancers). Also, when workers do not have the necessary means to make contributions, they would not be eager to participate in voluntary schemes. This being said, it must be acknowledged that, in theory, the Convention does not exclude informal workers from protection a priori. Despite this fact, in absence of a clear protection mechanism, the effectiveness of the ILO Convention 102 in respect of the protection of informal economy workers is questionable.

While many say that the replacement rates established by the Convention are too high for developing countries, it is also possible to say that they are actually too low. In fact, by conditioning the level of benefits to the previous income the Convention does not necessarily guarantee the protection from poverty. This probably could be achieved through the establishment of a poverty line or subsistence minimum and putting the benefits in dependence on these parameters. However, this is not mentioned in the Convention. While it is true that this measure could be unaffordable for many countries it could also be used as a measure to protect informal sector workers, who in fact have a much higher income than it is declared.

The problematic issue of informal economy workers has been addressed by the UN Committee on Economic, Social and Cultural Rights in the General Comment 19 on The Right to Social Security. According to the Committee, “States

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<sup>103</sup> S. DEAKIN and M. FREEDLAND, *Updating International Labor Standards in the Area of Social Security: A Framework for Analysis*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 151-165.

<sup>104</sup> This, for instance, was done in Ukraine to mitigate the social impact of the economic crisis, when persons working under civil law contracts were included for the purposes of social protection.

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parties must take steps to the maximum of their available resources to ensure that the social security systems cover those persons working in the informal economy”.<sup>105</sup> The Committee underlines that “this duty is particularly important where social security systems are based on a formal employment relationship, business unit or registered residence”. The Committee also suggested several measures in order to deal with this problem. Such measures, for instance, include: “removing obstacles that prevent such persons from accessing informal social security schemes, such as community-based insurance; ensuring a minimum level of coverage of risks and contingencies with progressive expansion over time; respecting and supporting social security schemes developed within the informal economy such as micro-insurance and other microcredit related schemes”<sup>106</sup>. The Committee also provided an example of good practices, where universal coverage pension and health care schemes have been introduced in order to tackle the problem of informal economy.

It goes without saying, that the Convention does not mention the principle of the basic protection for all citizens (basic social income) – an idea which has become widely shared in the international social security thinkers’ community in the last decades.

Another common reason for criticism is the outdated terminology of the Convention 102. As can be seen from the table above, the Convention focuses on the standard beneficiary who is usually “a man with wife and two children”. The terminology used in the convention is often criticized not only for being outdated but also for not corresponding to the present realities.<sup>107</sup> The ‘breadwinner’ according to the Convention is ‘the skilled manual male employee’ or (Article 65[6]). The Convention also refers to professions that no longer exist, and it is therefore impossible to calculate the necessary level of benefits or the minimum percentage of the population protected nowadays.

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<sup>105</sup> Part 4, paragraph 34 of the General Comment No 19 on The Right to Social Security (Art. 9), United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, Thirty-ninth session, November 2007

<sup>106</sup> Committee on Economic, Social and Cultural Rights, General Comment 19, *The right to social security* (art. 9) (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008).

<sup>107</sup> G. STANDING, “*The ILO: An Agency for Globalization?*”, *Development and Change*, 2008, Vol.39, No.3, pp.355-384.

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In addition to this, Article 1 provides definitions of some terms used in the Convention. Without specifying the term 'husband', the Article provides that the 'term wife means a wife who is maintained by her husband' (Art. 1, c) and that 'the term widow means a woman who was maintained by her husband at the time of his death' (Art. 1, d). As it is stated by Alain and Chantal Euzéby, "The danger for social security comes also from inside. The traditional ('Bismarckian') systems, based upon social insurance and upon a 'classic' family model, are ill adapted to the problems of the modern world. They should be adapted in the way shown by the Nordic countries: individualisation of rights, 'activation' of unemployed and assisted person, and equality of opportunities over the life cycle."<sup>108</sup> In this respect, the Convention is often accused of being gender-biased. The family model which was in place in the 1950s does not correspond to the realities in the developed countries today, while it still may be the case in many developing countries. The Convention is based on dependency model, which presumes that the wife is dependent on her husband, the breadwinner, while he's alive and is dependent on his previous income after his death. The Convention does not provide for the possibility of both spouses having paid employment, or the husband economically dependent on his wife. One can argue that this contradicts the ILO Convention No. 156 on Workers with Family Responsibilities adopted in 1981.

The Convention No. 102 may also be accused of not being based on the human rights approach. Indeed, in the last sixty years the development of the international law, especially in the area of non-discrimination, went way beyond the threshold provided by the Convention. The minimum percentage or share of the population protected specified in the Convention implies that a large share of the population (50 %) can be left out. This number becomes even bigger if to take into account informal economy workers who are not covered by social security scheme or migrant workers. While the Convention contains the provision on reciprocity regulating that migrant workers should be treated equally to national workers and should not be subject to the existence of reciprocal arrangements between the sending and the receiving countries, it still does not provide for the obligation to

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<sup>108</sup> A. and C. EUZÉBY, *Droit à la sécurité sociale et développement humain*, in *The Right to Social Security*, Antwerpen-Oxford, 2007, p. 53.

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provide basic medical care to illegal migrants. However, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 28) provides for the right of migrant workers and members of their families the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

The ILO standards on social security in general and Convention 102 in particular are also widely criticised for the monitoring and supervision mechanism associated with them. In fact, being the oldest existing organization within the UN system, the ILO played the model role when the human rights supervisory mechanism of the League of Nations before the UN supervisory system was created. Such principles of regular member states' reporting, complaints procedures, commissions of enquiry, direct cooperation and contacts between the ILO and the member states, as well as the possibility of recourse to the International Court of Justice whose decision shall be final (Articles 29 and 31 of the ILO Constitution) have been the innovations that became the basis of the UN supervisory bodies, and some of them became part of the UN monitoring and supervision procedures. The ILO supervisory mechanisms are based on the principle of cooperation rather than dispute resolution, which has been claimed to be a positive trait.<sup>109</sup> In particular, what characterizes the ILO reporting system is the fact that even in case a member state has not ratified certain convention of the ILO it still may be obliged to report to the ILO in respect of this convention. Thus, in addition to regular reporting under Article 22 of the ILO Constitution (which concerns ratified conventions), Art. 19 par. 5, e), of the ILO Constitution provides that: ... "if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, 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

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<sup>109</sup> C. CHINKIN, *Promoting compliance now and then: Mobilizing Shame or Building Partnerships?* in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80<sup>th</sup> Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2006, p. 63.

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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.”

However, the efficient supervision and monitoring depends on the willingness of a member state to regularly report on the unratified conventions and to cooperate effectively with the ILO as well as with social partners (employers’ and workers’ organizations).

There are practical problems related to the monitoring mechanism, such as the regular adjustment of benefits, the provision of statistical information, as well as the application of standards in the period of social security reforms which have been undertaking in the last decades.<sup>110</sup> As, for instance, regards the adjustment of benefits, the Convention 102 (p.10 Art. 65, p.8 Art. 66) provides that: ‘The rates of current periodical payments in respect of old age, employment injury (except in case of incapacity for work), invalidity and death of breadwinner, shall be reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living’. Therefore, the regularity and the obligatory character of adjustment is to be decided by the states independently.

A problem strictly related to the supervision and monitoring mechanisms is the enforceability of ILO norms in general, and specifically the norms on social security. ILO is often referred to as an institution ‘which does not have teeth’.<sup>111</sup>

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<sup>110</sup> U. KULKE, M. CICHON, K. PAL, *Changing Tides: A Revival of a Rights-Based Approach to Social Security*, in *The Right to Social Security*, Antwerpen-Oxford, 2007, Jef Van Langendonck (ed.), p 13 ss.

<sup>111</sup> K.TAPIOLA, *The ILO system of regular supervision of the application of Conventions and Recommendations: A lasting paradigm*, in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80<sup>th</sup> Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2006, p. 29 ss. As B. HEPPLER puts it, “Neither the Committee of Experts on the Application of Conventions and Recommendations (CEACR) nor the CFA<sup>111</sup> adopt adversarial procedures and their conclusions do not have legally-binding force. The CEACR has justifiably expressed satisfaction with the progress made in many thousands of cases by diplomacy, technical assistance and direct contacts. But there are well-known cases where the conclusions of supervisory bodies have been deliberately ignored, such as by Mrs. Thatcher’s government in respect of trade union rights in 1984. [...] At present the only way in which a legally binding finding

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However, at the same time Bob Hepple mentions that “it is sometimes argued that imposing sanctions in respect of ratified conventions would act as a disincentive to ratification”<sup>112</sup>. Kari Tapiola also states that “once the conditions are there for us to work, we can contribute with our accumulate knowledge” and that “what some see as a weakness is, in fact, a source of future strength”. The positive aspects of the ILO supervisory system are the system of reporting, even on unratified conventions, the quasi-judicial assessment by independent experts, the ad-hoc inquiries, which constitute ‘methods of quiet diplomacy’. Christine Chinkin also shares this opinion and underlines that the ILO methods “emphasise mediatory and cooperative rather than confrontational and shaming techniques”.<sup>113</sup>

However, Kari Tapiola underlines another very important point in this respect. The problem of the ILO supervisory system is that it does not deal with the root of the problem – the conscious unwillingness of the government to respect the international labour and social security norms.<sup>114</sup>

In this respect, however, the question arises: how do we measure the capacity of a state to respect the international standards on social security, for instance? Kari Tapiola mentions the problem of scarce resources. Still, at what

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that a Member state has breached an obligation under a convention can be made is through the conclusions of a Commission of Enquiry. [...] The conclusions of a Commission become binding when the Member State agrees explicitly to accept them, or abstains from referring the matter to the International Court of Justice (ICJ) under Article 29 of the ILO Constitution. In B. HEPPLÉ, *Does law matter? The future of binding norms, in Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80<sup>th</sup> Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2006, p. 221 ss.

<sup>112</sup> Idem

<sup>113</sup> C. CHINKIN, *Promoting compliance now and then: Mobilizing shame or building partnerships?*, in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80<sup>th</sup> Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2006, p. 63 ss.

<sup>114</sup> Thus K. TAPIOLA writes: It should be obvious that conclusions drawn in a case of wilful non-compliance by responsible authorities would be different from those drawn in a situation where the main problem is a lack of capacity. [...] I would dare to submit that most of the problems that the Committee of Experts deals with are problems of capacity, including a lack of awareness and also a deficiency of social consciousness. The number of countries that do not want to comply with standards although they have the capacity to do so may be rather small. In K. TAPIOLA, *The ILO system of regular supervision of the application of Conventions and Recommendations: A lasting paradigm*, in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80<sup>th</sup> Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2006, p. 29 ss.

point must a state be obliged to comply on its international obligations, or increase the level of standards?

Another reason for criticism of the ILO Convention 102 is related to this problem. The flexibility of the norms of the Convention has been widely proclaimed as a positive aspect. It has been argued, that the Convention is designed in order to accommodate two fundamental principles: universality and flexibility.<sup>115</sup> Universality is to be seen in the sense of global, i.e. standards are to be applicable to all the countries around the world. This purpose can be achieved through the flexibilization of standards, which yet have to remain quite rigid in order to guarantee the minimum level of social security. The Convention is aimed at the establishment of desirable outcomes rather than the methodology on how to achieve them. At the same time, the Convention sets the minimum standards of social security and lets the member state to choose among the contingencies as well as the level of realization. For instance, the Convention provides (in Art. 2) that every member for which the Convention is in force shall comply with at least three of the nine contingencies covered by the Convention. At least one of these three contingencies must be one of the following: unemployment benefit, old-age benefit, unemployment injury benefit, invalidity benefit or survivor's benefit. Therefore, in order to be considered in compliance with the Convention the state does not have to guarantee the protection from all the social risks regulated by it. Rather, it can pick and choose the contingencies it is ready to cover. This approach is adopted with the view of the gradual development of a social security system in poorer states. However, nothing in the Convention requires the state to raise the level of protection once it reaches the necessary level of economic development. In addition to this, Art. 3 of the Convention gives to member states 'whose economy and medical facilities are insufficiently developed' the right to declare temporary exceptions for a list of articles. According to part 2 Art. 3, "each Member which has made a declaration under paragraph 1 of this Article shall include in the annual report upon the application of this Convention submitted under Article 22 of the Constitution of the International Labour Organisation a statement, in respect of each

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<sup>115</sup> U. KULKE, M. CICHON, K. PAL, *Changing Tides: A Revival of a Rights-Based Approach to Social Security*, in *The Right to Social Security*, Jef Van Langendonck (ed.), Antwerpen-Oxford, 2007, p 13.

exception of which it avails itself: (a) that its reason for doing so subsists; or (b) that it renounces its right to avail itself of the exception in question as from a stated date.” Therefore, it is left to the full discretion of the state to decide on the level of its compliance with the Convention once it guarantees the required minimum of protection.

Besides, the minimum the Convention requires is not that high at all. Thus the minimum replacement rate is 40 % of the previous wage. The Convention does not require full population coverage. The coverage has to reach 50 % of the employed in the formal economy, or 20 % of the residents. However, in the case of replacement rate, in the globalized economy, where countries compete for foreign investment by lowering wages and taxes, the required replacement rate of 40 % can actually stop a developing country from ratifying the Convention.<sup>116</sup> Indeed, out of 46 members which have ratified the Convention by now<sup>117</sup>, only a minority (12) are developing countries. No former republic of the Soviet Union has ratified the Convention.<sup>118</sup>

The authors also mention that “many developing countries, inspired by the Convention, have embarked upon the road to social security, even though nearly all their systems are more modest in scope and, in general, do not yet encompass unemployment or family benefits”. Clearly, this is not the case in the so called countries in transition, where social security systems were widely developed in the Soviet period. However, as it has already been stated above, none of them has ratified the Convention. As a result, there is a question: whether these countries do

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<sup>116</sup> U. KULKE, M. CICHON, K. PAL, *Changing Tides: A Revival of a Rights-Based Approach to Social Security*, in *The Right to Social Security*, J. VAN LANGENDONCK, Antwerpen-Oxford, 2007, p 13.

<sup>117</sup> Albania, Austria, Barbados, Belgium, Plurinational State of Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Democratic Republic of the Congo, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Libyan Arab Jamahiriya, Luxembourg, The former Yugoslav Republic of Macedonia, Mauritania, Mexico, Montenegro, Netherlands, Niger, Norway, Peru, Poland, Portugal, Romania, Senegal, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, Bolivarian Republic of Venezuela.

<sup>118</sup> As the authors of the previously quoted publication put it, In short, the convention does not provide a widely accepted normative concept of a social security development pattern in a developing country context. However, it does provide a long-term objective for the levels of protection in every country. The international community still has to develop a broad orientation with respect to how social security systems develop in parallel to economic development. In Ursula U. KULKE, M. CICHON, K. PAL, *Changing Tides: A Revival of a Rights-Based Approach to Social Security*, in *The Right to Social Security*, J. VAN LANGENDONCK, Antwerpen-Oxford, 2007, p 13.



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not ratify the Convention because they do not consider it useful and their legislation already provides a higher level of protection, or they do not want to be bound by the international obligations on social security standards in the period of economic transition? Another reason for non-ratification may be that the national legislation of member States does not comply with the provisions of the Convention. It is possible that the social security systems in place have taken other routes of development, and therefore it would be too problematic and even impossible to ratify the Convention. In order to reply to this question, research is needed regarding the way social security systems developed in the last decades after the fall of the Soviet Union, whether the current legislation actually corresponds to the relevant international norms, and what has been the role of international institutions in the development of social security systems in these countries. This research should be made with the focus on the rights-based approach which is now prevalent in the doctrine on international development and social security.

Convention No 102 is, in fact, the mirror of the Western European industrial societies in the 1950s. The world has changed dramatically over the last sixty years, and many of the concepts provided by the Convention are not there anymore. Speaking in economic terms, the Convention has lost its 'target audience'. The rich countries have moved to another stage of development, or indeed have followed another route for their social security systems. On the contrary, the developing countries may not be in a position even to implement the minimum required by the Convention. While it is true that Convention 102 is flexible as regards the level of protection and the number of contingencies covered, it is actually quite rigid in terms of the provisions on governance and financing, as well as on the right of complaint and appeal. These provisions are a very positive feature of the Convention, but they may be incompatible with the social security systems that are already established around the world.

However, despite all shortcomings of ILO Convention No. 102 one should not underestimate its impact on the development of social security systems worldwide, and particularly in post-Soviet countries. As Alain Supiot puts it, "the rate of ratification is not really a satisfactory indicator of the actual penetration of ILO standards. Some States ratify conventions without too much concern for their

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actual implementation, while others introduce social security systems without being bound by ratification. More generally, ratifications tailed off after the fall of the communist regimes and not just in the field of social security. Since that time States have been more interested in committing themselves to the legal disciplines of international trade, about which the least that can be said is that they do not encourage a bold approach to economic and social rights.”<sup>119</sup> Despite this, it is true that social security systems in the post-Soviet countries are comparatively well-developed, with all nine branches recognised in the ILO Convention No. 102. Such level of development of the social security system is rare for developing countries, and is a direct result of the legacy of the Soviet Union.

The ILO legal instruments in the area of social security have had a wide impact on the adoption of other international legal acts in this area. Convention No. 102 was taken as a model for the European Code of Social Security, adopted under the aegis of the Council of Europe. In the preparation of the Code, the Council of Europe relied on the International Labour Office. Thus, the Code repeats the contents of the Convention, except for Part XII on the equality of treatment. Also, the legal predecessor of the Code, The European Social Charter, provides for the obligation of the Contracting Parties to maintain the social protection at the level at least equal to the one prescribed by Convention No. 102.<sup>120</sup>

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<sup>119</sup> A. SUIPIOT, *The Position of Social Security in the System of International Labour Standards*, *Comparative Labor Law and Policy Journal*, 2006, Vol. 27, no. 2, p. 113-121.

<sup>120</sup> Working Party on Policy regarding the Revision of Standards, *Follow-up to consultations regarding social security instruments*, Geneva, November 2001.

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### *1.1 The ratification rate of ILO Convention Nos. 102 and 168*

As the ILO Committee of Experts on the Application of Conventions and Recommendations puts it, “Convention No. 102 is inspired by the idea that there is no perfect model for social security: each model develops and is transformed. Each society has to develop the best means of guaranteeing the minimum level of protection. The methods selected must reflect the social and cultural values, history, institutions and level of economic development of each concerned. The Convention does not therefore require a specific approach by Member States; instead, the Convention sets out an integrated series of objectives based on commonly accepted principles establishing a minimum social threshold for all member States. The Committee therefore hopes that, in developing their national strategies for the development of social security for everyone, the member States of the ILO will take into account the provisions of Convention No. 102 and consider its ratification.”<sup>121</sup>

However, when considering the ratification rate of Convention No. 102, one must acknowledge the historical background of the adoption of the instrument and its objective. In the 1950s, the attention of the International Labour Conference was captured by developed Western countries. The minimum standards of Convention No. 102 were established in relation to industrialised societies and social insurance schemes for workers were too high for poor countries with agrarian economies.<sup>122</sup> In 1952, ILO had 77 Member States, of which the majority were industrialised economies.

Nowadays, Convention No. 102 operates in a dramatically different context compared to the one in which the instrument was developed almost 60 years ago. The change in context has brought about elements that have increased and that have decreased the relevance of Convention No. 102. Factors that have reduced relevance relate to demography, increased female participation in the labour market, increase in the informal economy, gender equality factors, privatisation and

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<sup>121</sup> *General Report of the Committee of Experts on the Application of Conventions and Recommendations*, 2003, para. 56.

<sup>122</sup> General Survey of the Committee of Experts carried out in 1961 on minimum standards of social security.

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globalisation. Factors that increased the relevance of the Convention are related to the industrialisation of developing countries, transition to the market economy of the post-Soviet countries, growing poverty linked to growing social assistance and precarious jobs, atypical forms of employment and less security in employment.<sup>123</sup>

Convention No. 102 prescribes certain minimum requirements, while aiming at the progressive realisation of more comprehensive protection standards, both in terms of contingencies covered and persons protected. As of 1 October 2010 46 states have ratified the Convention. After the analysis of the list of ratifications of Convention No. 102 it is possible to conclude that seven member States<sup>124</sup> have accepted the Convention on the whole. The most accepted part of the Convention is Part V (old-age benefits), as 43 out of 46 ratifying states have accepted this part. On the contrary, Parts VI and VII (regarding unemployment benefits and family benefits) are the least accepted parts of the Convention, as only one fourth of the ratifying states have accepted these parts. According to Article 2 (a)(ii) of Convention No. 102, each Member for which this Convention is in force shall comply with at least three of the Parts II to X, including at least one of Parts IV, V, VI, IX and X. Despite the latter provision, Part IV (unemployment benefits) and Part IX (invalidity benefits) are the least accepted branches of the Convention, being accepted by the lowest number of member States, 54.25 % and 56.52 % respectively. Only one developing country (Brazil) has ratified the Convention fully accepting all the branches of social security.

It is interesting to examine the rate of ratification of Convention No. 102 over time. From the analysis of the list of ratifications one may conclude that the ratification rate of the Convention has been steady over the years of its operation, as every ten years the Convention was ratified by between seven to ten member States. This is true except for the period from 1980 to 1989 which coincides with the major structural adjustments, when Convention No. 102 was not ratified that often.

As can be seen from the table in the annex, none of the ex-Soviet republics has ratified the Convention. Also, all Eastern European countries that were affected

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<sup>123</sup> V. RYS, *Reinventing Social Security Worldwide. Back to essentials*, 2010, The Policy Press, p. 25.

<sup>124</sup> Belgium, Brazil, Germany, Libyan Arab Jamahiriya, Luxembourg, Netherlands, Portugal.

by the political influence of the Soviet Union only ratified the Convention after 1991.

As regards the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168), by October 2010 it has only been ratified by seven states (Albania, Brazil, Finland, Norway, Romania, Sweden, Switzerland). Between the adoption of Convention No. 102 and Convention No. 168 the number of the ILO member States almost increased by two times. The political representation of countries also changed. Indeed, in 1988 the ILO had 149 Member States, the majority of which were developing countries. However, the third generation of standards in the area of social security was advanced compared to Convention No. 168, and were not designed to accommodate the needs of developing countries. Thus, Convention No. 168 was adopted to meet the needs of developed countries.<sup>125</sup> One of the reasons for this may be the fact that Convention No. 168 does not contain the same flexibility mechanism as Convention No. 102, and therefore it does not offer the possibility of gradual realisation of its provisions. This makes it particularly unattractive for developing countries.

In addition, Convention No. 168 was adopted in the so-called 'lost decade' of 1980s and in the transition phase from the concept of social security to social protection. Thus, Convention 168 was inspired by neo-liberal thinking.

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<sup>125</sup> See Preparatory work to ILO Convention 168, 1986 IV(1).

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### *1.2 Social Security, the Decent Work Agenda and the Social Protection Floor*

Social security was not included in the list of so-called ‘core labour standards’ promoted by the Declaration on Fundamental Principles and Rights at Work in 1998. As if willing to bring social security back into the limelight, the international community put social security forward as one of the main issues for discussion at the 89<sup>th</sup> Session of the International Labour Conference in 2001. As a result of the discussion, Resolution and Conclusions concerning social security were adopted. In particular, in paragraph 2 of the Conclusions the General Conference of the International Labour Organization reaffirmed the role of social security by stressing that it is “very important for the well-being of workers, their families and the entire community. It is a basic human right and a fundamental means for creating social cohesion, thereby helping to ensure social peace and social inclusion. It is an indispensable part of government social policy and an important tool to prevent and alleviate poverty. It can, through national solidarity and fair burden sharing, contribute to human dignity, equity and social justice. It is also important for political inclusion, empowerment and the development of democracy.”<sup>126</sup> As in section 5 of the Conclusions the International Labour Conference states that “Of highest priority are policies and initiatives which can bring social security to those who are not covered by existing systems”, there are opinions that in this way, the ILC put social security on the level of ‘core labour standards’ included in the Declaration on Fundamental Principles and Rights at Work.<sup>127</sup> According to Alain Supiot, “the International Labour Conference starts by affirming that social security is “a basic human right” (section 2). As it comes from the same authority as the 1998 Declaration, this provision makes it clear that the list of fundamental rights is not limited to the four “principles concerning the fundamental rights” set out in Article 2 of the 1998 Declaration, and that the action priority decided for those four principles can be extended to other issues. ... By addressing rights to social protection in this way, and going beyond the sphere of

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<sup>126</sup> Resolution and Conclusions concerning social security, International Labour Conference, 89<sup>th</sup> Session, 2001.

<sup>127</sup> See A. SUPIOT, *Social Protection and Decent Work: New Prospects for International Labor Standards: Introduction: The Position of Social Security in the System of International Labor Standards*, 2006, p. 113.

labor relations alone, the International Labour Conference supplements the 1998 Declaration, which dealt only with fundamental rights at work.”<sup>128</sup> This view, however, is contestable (see below), also in view that there has been an ongoing discussion as regards the adoption of a supplementary international instrument on the so-called “social protection floor”, aimed to compensate for the gaps and shortcomings of Convention 102, as well as to bring the international regime governing social security in accordance with the needs and the possibilities of developing countries. The 2001 ILC adopted a broader notion of social security, as well as drew a direct connection between social security and the Decent Work Agenda.<sup>129</sup> Paragraph 7 of the Conclusions state that “*for persons of working age, the best way to provide a secure income is through decent work.*”<sup>130</sup> However, as rightly noted by Alain Supiot, “*neither the Resolution nor the Conclusions adopted by the International Labour Conference comment on the normative dimension of the extension of social security.*”<sup>131</sup>

### *1.3 The Quest for Social Protection Floor*

The lack of social security coverage is one of the most pressing challenges in the area of social security worldwide. Presently, less than 80 per cent of the world population have adequate social security protection.<sup>132</sup> In order to tackle this problem and also recognising that short-term initiatives, such as cash transfer programmes, cannot provide an adequate protection from poverty, several UN

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<sup>128</sup> Idem

<sup>129</sup> The ILO’s Decent Work Agenda has three objectives: 1) to create ‘greater opportunities for women and men to secure decent employment and income’; 2) to enhance ‘the coverage and effectiveness of social protection for all’; 3) to strengthen tripartism and social dialogue.

<sup>130</sup> Resolution and Conclusions concerning social security, International Labour Conference, 89<sup>th</sup> Session, 2001.

<sup>131</sup> A. SUPIOT, *Social Protection and Decent Work: New Prospects for International Labor Standards: Introduction: The Position of Social Security in the System of International Labor Standards*, 2006, p. 113.

<sup>132</sup> *The Social Protection Floor, A joint Crisis Initiative of the UN Chief Executives Board for Co-ordination on the Social Protection Floor*, International Labour Office (ILO), World Health Organisation (WHO), 2009, Geneva. <http://www.un.org/en/ga/second/64/socialprotection.pdf>

organizations<sup>133</sup> have started the initiative, which received the name of Social Protection Floor. The term “social protection floor” was introduced by the World Commission on the Social Dimension of Globalization, and since then has been used to encompass “a set of basic social rights, services and facilities that the global citizen should enjoy.”<sup>134</sup>

### *1.4 The extension of social security coverage as one of the priorities in the development of the international social security regime*

An analysis of the situation in the world demonstrated that a very large proportion of the world population in most regions did not enjoy social protection or enjoyed it only very partially. Industrialized countries as well showed there were large and growing gaps in social protection. In its Resolution on Social Security, the ILC concluded that it is “now widely recognized that there is a pressing need to find effective ways to extend social protection and that “each country should determine a national strategy for working towards social security for all”<sup>135</sup>.

An explanation of what should be understood by social security for all has been specified in the *Global Campaign on Social Security and Coverage for All* which was launched at the 91<sup>st</sup> Session of the Conference in June 2003: “to achieve universal access to health care as well as basic income security for all”. A further clarification on the role of social security has been provided in the 2008 ILO Declaration on Social Justice for a Fair Globalization according to which social security is conceived to provide a basic income security for all persons in need: “based on the mandate of the contained in the ILO Constitution, including the Declaration of Philadelphia (1944), which continues to be fully relevant in the

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<sup>133</sup> ILO and WHO in collaboration with: FAO, IMF, OHCR, UN regional Commissions, UNAIDS, UN DESA, UNDP, UNESCO, UNFPA, UN Habitat, UNHCR, UNICEF, UNODC, UNWRA, WFP, WMP, World Bank.

<sup>134</sup> *The Social Protection Floor, A joint Crisis Initiative of the UN Chief Executives Board for Co-ordination on the Social Protection Floor*, International Labour Office (ILO), World Health Organisation (WHO), Geneva, 2009. <http://www.un.org/en/ga/second/64/socialprotection.pdf>

<sup>135</sup> *Social security: Issues, challenges and prospects*, International Labour Conference 89th Session, Geneva, 2001.



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twenty-first century and should inspire the policy of its Members and which, among other aims, purpose and principles: ... recognizes that the ILO has the solemn obligation to further among the nations of the world programmes which will achieve the objectives of...the extension of social security measures to provide a basic income to all in need..."

Indeed, the role of social security for all is not to discourage people from working or for example to encourage them to take early retirement but to establish a social security safeguard to support and help them to overcome hardship. Once the right to social security has been asserted the question was how to make sure that these rights are being granted and effectively implemented.

According to the ILO, the best strategy to achieve this would be to put in place a set of *social security guarantees* ensuring that *basic and modest social protection* is accessible as soon as possible to all in need, while planning to move up towards higher levels as included in Social Security (Minimum Standards) Convention, 1952 (No. 102). For instance, in 2009, the ILO Committee of Experts on the Application of Conventions and Recommendations made the following observation to the government of Bolivia: "In 2001, the International Labour Conference (ILC) reaffirmed the central role of social security and reinstated that it was a challenge which all member States had to tackle as a matter of urgency. The resolution adopted by the ILC in 2001 recognizes that "the highest priority should be given to policies and initiatives that bring social security to those who are not covered by existing systems". To achieve that objective, the Conference urged every country to devise a national strategy closely linked to other social policies. States such as Bolivia which are party to the International Covenant on Economic, Social and Cultural Rights (CESCR), to devise a national strategy for the comprehensive implementation of the right to social security and to allocate sufficient budgetary and other resources at the national level. The Committee considers that the need to devise a national strategy arises from the general responsibility of the State, established by Convention No. 102, to ensure the continuity and proper operation of the social security system. The launch of a national strategy designed to ensure the strengthening and sustainable development of the social security scheme, taking into account the above concerns, would allow

the State to exploit to the full all the potential offered by international social security standards with a view to ensuring the proper administration of schemes and enabling the gradual extension of coverage to the entire population.”<sup>136</sup>

### *1.5 Social Security and Core Labour Standards*

There has been an ongoing debate regarding the role of the ILO’s emphasis on the so-called ‘core labour standards’<sup>137</sup> for the development of social security worldwide, as well as the ratification and implementation of ILO legal instruments in the area of social security. It was claimed by many, including the ILO itself, that the promotion of ‘core labour standards’ can eventually lead to the realization of all other standards, including social security, this remains a controversial issue in legal doctrine. This debate is of importance for the present work, as ILO’s focus on the core labour standards might have been the reason for the low level of attention paid to the legal instruments in the area of social security by ILO member States, particularly the countries in transition from planned economy.<sup>138</sup>

The debate is largely due to the opinion of Philip Alston who suggested a thesis that the adoption of the 1998 Declaration on Fundamental Principles and Rights at Work by the ILO led to the dramatic change in the international labour law regime and, as a result, the decrease of the role of the ILO and its legal

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<sup>136</sup> CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Bolivia (ratification: 1977) Published: 2010, found on <http://www.ilo.org/ilolex/>

<sup>137</sup> The core labour standards include: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labor; the abolition of child labor; and the elimination of discrimination in the workplace.

<sup>138</sup> According to B. CREIGHTON, The focus on core Conventions also leaves unresolved the question of what can or should be done in relation to non-core standards. On one view, respect for the core principles should provide the basis for adoption and implementation of non-core standards. That is, respect for core principles can help create a social and economic environment where Member States can realistically look to adherence to non-core standards in relation to issues such as social security, termination of employment or occupational health and safety. This logic is not without its attractions, but clearly there is a real risk that the emphasis on the so-called core standards will serve further to marginalise non-core instruments. In B. CREIGHTON, *The Future of Labour Law: Is There a Role for International Labour Standards?*, edited by C. Barnard, S. Deakin and G. S. Mor, *The Future of Labour Law. Liber Amicorum Sir Bob Hepple Q Cris*, 2004, Hart Publishing, p.268 ss.

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standards.<sup>139</sup> According to Philip Alston's paper, the features of the transformed system of international labour law include:

- an excessive reliance on principles rather than rights;
- principles are delinked from the corresponding standards and are thus effectively undefined;
- an ethos of voluntarism in relation to implementation and enforcement;
- an unstructured and unaccountable decentralization of responsibility;
- a willingness to accept 'soft' law of 'promotional' nature as the bottom line.

Thus, Philip Alston argues that the adoption of 1998 Declaration by the ILO was a landmark in the international labour law which exchanged the 'hard' law approach with the strict system of supervision with a set of 'principles', which therefore undermined the role of the ILO's supervisory mechanism and power. According to Prof. Alston, 'the irony is that the four 'principles' identified in the 1998 Declaration as being fundamental represent only a relatively small part of the commitments contained in the documents from which the Declaration purports to have taken its inspiration.' Prof. Alston contradicts the thesis that in such a way 'core labour standards' gained the status of *jus cogens* and is of opinion that the reasons for such transformation were mainly political. First, the said transformation happened due to the popularity of the neo-liberal approach in the views regarding international development in the 1990s. The debate over the role of labour standards in international trade led the World Trade Organization to pronounce that labour standards were external to the WTO law and authority, and that the ILO was the relevant international body to deal with these matters.<sup>140</sup> Also, the Declaration and the alleged move towards 'soft' law, according to Prof. Alston, 'provided an ideal route through which the United States could escape from the dilemma of not having ratified the key conventions itself while applying sanctions in its domestic

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<sup>139</sup> P. ALSTON, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, *EJIL*, 2004, Vol. 15, No. 3, p. 457-521.

<sup>140</sup> See G. MARCEAU, "Trade and labour: Rematching an old divorced couple"? in D. BETHLEHEM, D. MICRAE, R. NEUFELD, AND I. VAN DAMME (eds), 2009, *The Oxford Handbook of International Trade Law 2009*, Oxford.

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legislation and seeking them at the WTO level for other countries' violations of CLS.'

Another reason for the decrease of the role of international labour law and ILO, according to Philip Alston, was the fall of the Berlin Wall and the transformation of power relations in the world. As the communist regimes fell in Europe, the creation of a comprehensive international labour code gradually disappeared from international debates. Thus, Prof. Alston claims that: 'The definite proof that communism was not economically viable removed the countervailing force that had long prompted liberal politicians to pay attention to a labour rights agenda at both the national and international levels. The emphasis on freedom of association and on non-discrimination that had been a feature of ILO action during the Cold War became less appealing when the prime targets were no longer communist governments such as those in Poland, Czechoslovakia, and the USSR, but instead were countries pursuing the neo-liberal agenda of labour market reform.'

It stems from the paper that the newly independent states in Eastern Europe were discouraged from maintaining the high level of social standards previously guaranteed in communist regimes due to several factors. The governments of the 'transition' countries were eager to pursue aggressive neo-liberal agenda which was in the interests of employers' groups. Labour rights and social security were not therefore the priorities. In those cases where the governments tried to maintain the social issues in the constitution or to give recognition to labour rights and social security in other ways, they were expressly advised that labour rights "could work against general current efforts to diminish the sense of entitlement to state protection and to encourage individual initiative".<sup>141</sup> As Philip Alston argues, "this advice was consistent with trends at the national level which had seen state labour law 'rolled back by aggressive deregulation, enfeebled by the funding of workplace inspectorates, dependent on the support of rump unions and workers terrified that their work will be "outsourced' and their jobs moved "offshore"".

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<sup>141</sup> P. ALSTON, 'Core Labour Standards' and the Transformation of the International Labour Rights Regime, *EJIL*, 2004, Vol. 15, No. 3, p. 457-521.

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Thus, it is argued that ‘those rights which did not make it into the premier league were inevitably relegated to second-class status’.<sup>142</sup> Even the Decent Work Agenda launched soon after the adoption of the Declaration on Fundamental Principles and Rights at Work, according to Prof. Alston, was the sign of the movement towards ‘non-normative approach to some of the labour standards that have been left out of the core group.’<sup>143</sup> Prof. Alston argues that the Decent Work Agenda, too, contributed to the fact that the standards that could be promoted through classical instruments, such as conventions or recommendations, started to be promoted through principles, which are allegedly soft in nature and do not have the standard monitoring mechanisms. Thus, Prof. Alston claims that the related Director General’s report in 2001 which speaks about ‘universal goals’ is symptomatic as well, and that the report along with the Decent Work Agenda contributed to the downgrade of ‘rights’ provided for by the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights to ‘goals’ and ‘principles’. The author suggests that this may have been done ‘out of a worry by some officials or constituents that a reference to Conventions will complicate the promotion of principles’.<sup>144</sup>

The paper by Prof. Alston launched an academic debate with Brian A. Langille responding critically to the thesis.<sup>145</sup> The main argument of Prof Langille is that the system in place is not good anyway, so the ILO had to amend it also with the view to adjust to the changing realities at the international arena. The ILO mechanism, according to Prof. Langille, “is a game of moral persuasion and, at most, public shaming. It is a decidedly soft law system. There are in fact no sanctions.” As argued by Prof. Langille, the 1998 Declaration has made no change to the existing regime in international labour law. The idea that ILO is being ‘moved off centre stage’ is also wrong, as Prof. Langille is of opinion that ILO has never been there and ‘needs to join the international (economic) institutions which occupy centre stage currently’. According to the author, the whole system is much more complex than as described by Prof. Alston: ‘The idea that there is a centre

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<sup>142</sup> Idem

<sup>143</sup> Idem

<sup>144</sup> Idem

<sup>145</sup> B. A. LANGILLE, *Core Labour Rights – The True Story (Reply to Alston)*, *EJIL*, 2005, Vol. 16, No. 3, p. 209 – 437.

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stage and that it is located in Geneva is probably a bad idea to start with. The international labour law regime is probably, and probably always was, much better regarded as a very complex motley of actors, sites of contest, modes of action, at different levels etc., probably without a single centre and shifting overtime.<sup>146</sup>

And in order to survive in new circumstances and to be able to co-operate with international financial institutions, ILO had to reform its own system. Also, this quasi-reform process at the ILO was in some way inspired by the WTO's reluctance to include the 'social clause' in its agreements, which had been discussed in the 1990s. The thesis regarding the downgrade of labour rights to principles in the Declaration is challenged too – according to Prof. Langille 'it is a shift from international labour standards to international labour/human rights, and not the other way around.'<sup>147</sup>

Prof. Langille argues that ILO's regime has in fact always been "soft", as 'the ILO has never 'enforced' anything. The real difference between the Declaration and the 'old regime' may be in the nature, purpose and organization of the soft techniques.'<sup>148</sup> Langille call the system introduced by the Declaration is a 'system of positive incentives' which is aimed at promotional activities in order to motivate countries to progressively adopt and implement standards, rather than impose them by force.

However, formally the regime had been 'hard' before the adoption of the Declaration, so it is possible to argue that in fact, both Langille and Alston are right, as it is possible that the ILO is making a conscious shift to 'soft' law in order to be able to join the major players in international development. Also, if the Declaration was a promotional technique, there may be other promotional mechanisms to follow in relation to other standards, such as, for instance, social security.

The idea behind the individualisation of 'core labour standards' was their realisation would inevitably facilitate the implementation of other standards.

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<sup>146</sup> Idem

<sup>147</sup> Idem

<sup>148</sup> Idem

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However, many developing countries find themselves in a position of being already too pressured by the necessity to ratify and implement the 'Core' Conventions, that there is often no political will or capacity left to pay attention to other important conventions, such as those regulating social security issues. In addition, low income countries are able to justify the lack of ratification of the ILO conventions on social security by the fact that the said conventions have not been ratified by some of the richest countries. For instance, the 2010 report of Bangladesh to the ILO reads as follows: "Convention 102 on Social Security (Minimum Standards) and Convention 168 on Employment Promotion and Protection against Unemployment have not yet been ratified by Bangladesh. Ratification depends upon socio-economic and cultural condition of a country and the ability to implement the provisions of the Conventions. Mere ratification imposes the burden of obligations. It's preferable and more suitable to follow the provisions of the Conventions as far as possible instead of formal ratification. We have already ratified 33 Conventions including seven Core Conventions, the burden of which is so heavy that the country bears excessive load. There are countries like USA, India, Pakistan, Canada etc. that have not yet ratified the Convention 102, but their system of social security is much better than in Bangladesh. Besides, Convention 168 was adopted in 1988. Only a few countries have ratified it. Let our country gain sound economic position to adopt scheme concerning employment promotion and protection against unemployment. It may be mentioned here that in spite of the lack of ratification the provisions of these conventions are usually followed in our country. The obstacles that prevent the acceptance of the remaining parts mainly include the socio-economic and socio-cultural condition of the country."<sup>149</sup>

Because the level of social security protection in high income countries often exceeds the requirements of Convention 102, these countries might not see the need to ratify the Convention. On the contrary, developing countries often complain that the ILO does not take into consideration their low level of available resources and economic advancement. In addition, they may feel that that have already allocated a lot of resources and attention to the ratification of the conventions on 'core labour standards'. Sometimes, because these countries have been publically

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<sup>149</sup> The report of the government of Bangladesh in relation to ILO Convention No. 102.

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‘shamed’ for the undue implementation of the ratified ‘core’ standards in practice, they are not motivated to ratify the legal instruments which require even more resources and dedication for their implementation, such as social security. Such countries often blame the ILO for not taking into consideration their position. Thus, Bangladesh states in its report that: “The ILO creates pressure on member countries for the implementation of the provisions of the ratified Convention by addressing observations and direct requests by the Committee of Experts without considering the socio-economic conditions of the member States. The ILO should encourage the countries to implement the provisions and provide confidence to adopt promotional activities. The economic conditions of all member countries are not equal. This should be kept in mind.”

Indonesia calls for more research and analysis of social security systems in developing countries on behalf of the ILO: “ILO should conduct a study concerning the development of social security in emerging economies, considering obstacles and the potential development route.”

A major problem with many ILO conventions is the fact that they are too detailed and read as national laws. This model of ‘detailed prescription and enforcement’<sup>150</sup> does not seem to work, especially in the area of social security. If the provisions of a convention are too detailed they may not be in line with a national system already in force, and therefore be an obstacle for ratification. Alternatively, the provisions may not be understood by national governments, or act as a deterrent from ratification as the country may not wish to be persecuted for future non-compliance on minor grounds. This may be the problem with Convention 102, which along with setting universal principles, also provides a range of detailed technical norms which are sometimes hard to follow, especially after more than fifty years since the creation of the Convention. It is possible therefore that the Convention has become ‘unratifiable’ and needs either to be replaced by a simpler standard or be accompanied by promotional activities and documents similar to the promotional movement in favour of ‘core labour standards’.

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<sup>150</sup> B. A. LANGILLE, *Core Labour Rights – The True Story (Reply to Alston)*, *EJIL*, 2005, Vol. 16, No. 3, p. 209 – 437.



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As Langille argues, the true problem is ‘how to make any type of rights work in the informal economy’.<sup>151</sup> This issue is particularly pressing in the area of social security, as Convention No. 102 focuses on paid employment as a basis for future benefits. In this respect, an integrated approach could be welcome, if it could provide a solution to this problem. Any ‘soft’ law promotional mechanisms, if they actually draw the governments’ attention to the need to develop the social security system can be extremely useful, especially in relation to developing countries with a large share of informal economy.

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<sup>151</sup> Idem

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## CHAPTER THREE

### THE STANDARDS OF FINANCING AND ADMINISTRATION OF SOCIAL SECURITY SYSTEMS

#### *1. The right to collective bargaining and the rights-based approach. Social dialogue as a tool for building social protection*

Since the ILO was created in 1919, social dialogue has been one of the core elements of its mandate. The necessity to guarantee the efficient social dialogue was proclaimed by the landmark Declaration of Philadelphia in 1944. However, throughout the history of the ILO, a series of important conventions and recommendations regarding social dialogue were adopted. The Declaration of Philadelphia constitutes a part of the Constitution of the International Labour Organization. In the framework of the regulation of tripartism as an important tool to guarantee social justice, the Declaration provides that “the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare”<sup>152</sup>. In 1996, the International Labour Conference analysed the question of social dialogue and tripartism as a separate issue on the agenda<sup>153</sup>. Once again, in 2002, the importance of tripartism was stressed by the ILC.<sup>154</sup> Moreover, the Decent Work Agenda promoted by the ILO encompasses social dialogue as a means to achieve decent work in a given country. The development of social dialogue is considered as one of the four strategic objectives envisioned by the ILO.

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<sup>152</sup> General Survey concerning the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) and the Tripartite Consultation (Activities of the International Labour Organisation) Recommendation, 1976 (No. 152).

<sup>153</sup> ILO: Tripartite consultation at the national level on economic and social policy, Report VI, International Labour Conference, 83rd Session, Geneva, 1996.

<sup>154</sup> ILO: Resolution concerning tripartism and social dialogue, International Labour Conference, 2002.

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In 2008, when the Declaration on Social Justice for a Fair Globalization was adopted by the International Labour Conference by its ninety-seventh session, point I, A, (iii) of the Declaration proclaimed the importance to promote social dialogue and tripartism. Another crucial moment for the promotion of tripartism is the general discussion at the 89th session of the ILC in 2001<sup>155</sup>.

### *1.1 The regulation of the Social dialogue and social security by the ILO Conventions*

In the view of the International Labour Organization, social dialogue encompasses ‘all types of negotiation, consultation and information sharing between the representatives of governments and social partners or between social partners only (bipartite), on issues of common interest relating to economic and social policy’.<sup>156</sup> As it was mentioned above, the recognition of the workers’ right for collective bargaining in the process of the drafting and application of social and economic standards was mentioned in the Declaration of Philadelphia in 1944. It was subsequently reaffirmed in the Convention on Freedom of Association and Protection of the Right to Organise (N°87), which was adopted by the ILO in 1948. In Article 2, the Convention proclaims the right of employers and workers to ‘establish and, subject only to the rules of the organisation concerned, to join organisations of their own choice without previous authorisation’. In 2002, a resolution regarding tripartism and social dialogue was passed by the International Labour Conference.<sup>157</sup>

According to the ILO’s Convention No. 98 on the Right to Organise and Collective Bargaining, 1949, Member States are responsible for the development of

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<sup>155</sup> ILO, 2001 Eighty-ninth Session, Geneva, Sixth item on the agenda: Social security – Issues, challenges and prospects, Report of the Committee on Social Security.

<sup>156</sup> The website of the Industrial and Employment Relations Department of the ILO, <<http://www.ilo.org/public/english/dialogue/ifpdial/sd/index.htm>>

<sup>157</sup> International Labour Office (ILO), 2002. ‘Effect to be given to resolution adopted by the International Labour Conference at its 90th Session’, Governing body 285<sup>th</sup> session, Geneva, November.

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mechanisms of voluntary negotiation among social partners in order to stipulate collective agreements governing the conditions of employment. There are further ILO's conventions and recommendations which complement the Convention on the Right to Organise and Collective Bargaining No. 98 by clarifying concepts and developing on the principles that it establishes.<sup>158</sup>

Another important legal instrument on social dialogue is the Convention on Tripartism, 1976 (N°144) which establishes the rules of the representation of workers and employers in tripartite bodies. According to Art. 3 of the Convention the adequate representation is achieved through the equality in numbers of representatives in any tripartite body where consultations are undertaken.

The realisation of the right for collective bargaining and the methods to bring it into practice are regulated by Convention on Collective Bargaining, 1981 (No. 154) and Recommendation No. 163 which accompanies it. The Convention and the Recommendation provide for the right of the social partners to participate in collective negotiations related to all areas covered by them (Article 5 of the Convention). Also, the progressive extension of the negotiation's scope to all conditions related to employment is envisioned. Thus, Article 2 provides the examples of such conditions which include the regulation of relationships between workers and employers as well as the regulation of the relations between the representative organisations of workers and employers.

Another Convention adopted by the ILO is relevant to the question of the social dialogue in the employment policy and social security. Namely, it is the Employment Promotion and Protection against Unemployment Convention No. 168, 1988. Article 3 of the Convention stresses on the importance to implement its provisions in cooperation with employers' and workers' organisations according to the national practices. According to Article 27 of the Convention which regulates the procedure of appeal, the claimant can be 'represented or assisted by a qualified person of the claimant's choice or by a delegate of a representative workers'

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<sup>158</sup> ILO Convention No. 154 'Promoting collective bargaining', International Labour Office, Social Dialogue, labour Law and labour Administration department, Geneva, 2005.

organisation or by a delegate of an organisation representative of protected persons.’

Also, the Labour Administration Convention, 1978 (No. 150) provides for the necessity of the involvement of workers and employers in the reforms concerning labour administration and in the management of the state institutions responsible for employment.

#### *1.2 Social dialogue and the administration of social security schemes*

Certainly, a landmark legal source for the interconnection of the right to collective bargaining and social security is the Convention on Social Security (Minimum Standards), 1952 (N°102). Article 72 of the Convention regulates the participatory management of social security schemes with the participation of the persons protected. Thus, under Article 72, paragraph 1, of the Convention No. 102, “where the administration is not entrusted to an institution regulated by the public authorities or to a government department responsible to a legislature, representatives of the persons protected shall participate in the management, or be associated therewith in a consultative capacity, under prescribed conditions”. In the practice of many countries around the world, the representatives of the persons protected, as well as the social partners in general, are also involved in the management of private and independent social security schemes and institutions. This can be undertaken either on a bipartite basis or, where the government representatives are also involved, on a tripartite basis. Apart from the participation in the bipartite or tripartite management bodies in the area of social security, social partners may be involved in the process of negotiation and drafting of the legislation in the area of social security, as well as its implementation and the allocation of social security benefits and services. In this respect, workers’ and employers’ representatives are often involved in the drafting of the legislation in the area of social security through tripartite or bipartite bodies at the national level (for instance, Economic and Social Council). The right for the social partners to

participate in the drafting of the legislation on social security matters can be regulated directly by the national Constitution, Labour Code, or separate decrees or laws.

The participation of employers' and workers' representatives in the tripartite bodies at the national level is regulated by The Convention on Tripartism, 1976 (N°144). The Convention provides that the numbers of workers' and employers' representatives shall be equal in anybody where consultations are held<sup>159</sup>.

### *1.3 Participatory management of social security schemes and social dialogue*

Another essential characteristic of the instruments adopted by the ILO during its first 20 years of existence lies in the *association of employers and workers to the administration of social insurance*. Historically, such participation was the heritage from the times when mutual funds set up by workers and employers had gone forward and assumed social responsibilities in the absence of intervention by the States. It also stems from the fact that workers and employers were the main contributors to financing social insurance institutions and therefore logically claimed to be closely involved in the related decision-making processes. The very nature of the expanding industrial sector, within which workers and employers were associated and confronted at the same time, offered optimal ground for the dissemination of the social insurance techniques as the best suited means of providing protection for the workers concerned thereby also promoting the cohesion and integration of emerging industrial societies. The social insurance model, whereby employers and workers participate to the administration of economic and social issues, paved the way to what some later qualified as "*industrial democracy*"<sup>160</sup> and in some cases reached countries before *political democracy* had been established. For the sake of completeness, it should also be recalled that the social insurance model promoted by the ILO included autonomous

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<sup>159</sup> Article 3, para 2 of Convention No.144 provides that "employers and workers shall be represented on an equal footing on any bodies through which consultations are undertaken".

<sup>160</sup> See PERRIN, *Histoire du droit international de la sécurité sociale*, Paris, 1993.

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management of insurance institutions which should not be conducted with a view to profit and under the supervision of the State as well as the establishment of appeal procedures so as to guarantee the enforceability of the right to benefits.

The principle of participative management of social security remains central in Convention No. 102 as well as in the instruments adopted subsequently, although with some necessary adaptations compared to the social insurance period, as it sits on the other side of the coin of good governance. Thus, whereas State responsibility is the rule in all cases, participative management of social security was to complement it in all cases where the administration is not entrusted to an institution regulated by the public authorities or to a Government department responsible to a legislature.

At the time of the adoption of Convention No. 102, given the extreme diversity of national social security systems, the recognition of the right of workers' and employers' representatives to participate in the administration of social security schemes was not as widespread as during the social insurance period. At the same time, the extension of the scope of social security with a view to cover a more important part of the population had caused social security to no longer be concerned only with workers' interests but more generally with the interests of all persons covered. The principle of participation to the management of social security institutions was therefore recognized with respect not only to the representatives of workers but to the representatives of the persons protected which goes beyond the limited circle of employed persons. The association or consultation of employers and public authorities was left to the decision of national laws or regulations depending of their national circumstances. The participation is however only required in cases where the administration is not entrusted to an institution regulated by the public authorities or to a Government department responsible to a legislature. While it contains the same provisions as Convention No. 102, Convention No.168 reinforces the principle of participative management by guaranteeing the participation in the administration in an advisory capacity of representatives of the protected persons as well as of the employers even in cases



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where the administration is directly entrusted to a government department responsible to Parliament.<sup>161</sup>

Participatory management is an important feature of Recommendations Nos. 67 and 69. While the participation of social partners in the management of social security schemes represents continuity with the first generation ILO instruments, it also represents departure from the Beveridge conception of social security. In the Beveridge conception, a consequence of the proposed unity of structure of social security was that it would be neither only nor mainly financed by way of workers' and employers' contributions but largely by public financing. The participation of representatives of workers and employers to the administration of the system could therefore not be motivated on this ground and the management of social security conceived as a public service was consequently essentially entrusted to the State. While acknowledging the developments related to the emerging social security doctrine and recognizing the increased role of the State, Recommendation No. 67 and Recommendation No. 69 again retained pragmatic solutions acknowledging the long term interests of protected persons by ensuring their participation to the design and implementation of social security systems. Recommendation No. 67 suggests that workers and employers should be very closely associated to the administration of compensation of employment injuries and the prevention of occupational accidents and diseases. More generally, Recommendation No. 67 recognized the specificity of the social administration of social insurance and suggested that it should be unified or co-ordinated within a general system of social security services. Contributors should, through their organisations, be represented on the bodies which determine or advise upon administrative policy and propose legislation or frame regulations (para 27).

The principle of participative management of social security therefore continues to be central with a view to ensuring, in combination with other principles such as the general responsibility of the State, that social security is managed in a sound manner. It is also an important instrument with a view to creating ownership by the persons covered towards social security institutions. It is also a key in

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<sup>161</sup> "Social insurance and social protection", Report of the Director-General (Part I), International Labour Conference, 80th Session, 1993.

safeguarding the necessary managerial transparency in case of privatization which in most cases has proved to lead to non-participative management of the institutions concerned. As the ILO Director General states, “Better governance can create the necessary confidence in social arrangements. Better management and administration of social protection schemes ensure better performance. And more flexible structures will better adapt outcomes to needs. These are areas where governments, the social partners and social security agencies, acting in concert with international assistance and technical cooperation, can do much to promote wider coverage and better benefits”.<sup>162</sup>

### *1.4 The social partners and the pension reforms. Collective agreements in the field of social security*

International experience shows that social dialogue is especially vital when pension reforms are planned and implemented. Structural reforms have been partially completed in some countries and some others countries are now contemplating reforms. Many governments consult the most representative organizations of employers and workers before any reform concerning pension matters. In Central and Eastern Europe, an ILO survey published in 2008 has revealed that the central institutions for social dialogue countries were only modestly involved in pension reform deliberations.<sup>163</sup>

As they are closely related to tripartism, reference should be made to two fundamental ILO Conventions – the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) – which affirm the right of employers and workers to establish free and independent organisations. These Conventions determine the fundamental characteristics and rights of workers’ and

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<sup>162</sup> *Social insurance and social protection*, Report of the Director-General (Part I), International Labour Conference, 80th Session, 1993, p. 86.

<sup>163</sup> ILO: Social dialogue on pension reform in South Eastern Europe: A survey of the social partners, Geneva November 2008.

employers' organizations for the promotion and defence of the interests of their members. Moreover, under the terms of Article 4 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), "Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements".

### *2. The standards of financing and administration of social security systems as regulated by the legal instruments of the ILO and the international practice*

#### *2.1 Key principles of the ILO Social security model*

The development of ILO social security standard-setting activities during the second half of the XXth century followed the Recommendations made by the Committee of Experts on Social Security: International regulation should be concerned mainly with the effectiveness and the consequences of various methods without being too attached to their form. Therefore, it seems neither necessary nor desirable to try to encourage all countries, which have very different economic and social conditions, to adopt a uniform solution for the administration of social security.<sup>164</sup>

The need for pragmatic instruments thus led to consider the question of how benefits were financed and administered as secondary as long as the States

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<sup>164</sup> Objectifs et normes minima de la sécurité sociale, Rapport IV(1), CIT, 1951, p. 133 : 'la réglementation internationale devrait se préoccuper essentiellement de l'efficacité et des conséquences des diverses méthodes sans trop s'attacher à leur forme. C'est pourquoi il ne semble ni utile ni désirable de chercher à encourager tous les pays, qui se trouvent dans des situations économiques et sociales bien différentes, à adopter une solution uniforme pour l'administration de la sécurité sociale'.

recognized that they should be financed adequately and administered correctly. Unlike earlier social insurance instruments, Convention No. 102 and other social security instruments adopted subsequently set objectives rather than they described the techniques to be applied. These instruments no longer aim at establishing a model to be transposed by member States but rather focus on setting common minimum objectives while authorizing the use of widely varying methods for the provision of the coverage prescribed in order to allow for the varying situations to be found, from country to country, as the result of one or other of the two main lines of approach - social insurance or public service in all their diverse forms<sup>165</sup> These flexibility parameters make it possible to gradually attain the full coverage of the population taking into consideration the country's economic advancement.

However, as illustrated above, certain general principles related to the organization and financing of social security guaranteeing the good governance of its institutions were also integrated into Convention no. 102 and reaffirmed by subsequently adopted ILO standards with a view to establishing essential safeguards against possible drifts.

### *2.2 Compulsory affiliation*

The question of whether affiliation to social security should be compulsory or voluntary is primarily a philosophical one that is closely related to the conception of freedom – freedom to decide to affiliate to social security or “freedom from fear and want” in the sense stressed by the Atlantic Charter. The dilemma between compulsory and voluntary affiliation dates back to the beginnings of social insurance with Germany being the pioneer in opting for the principle of compulsory affiliation of industrial workers against the risks of sickness, employment injury, old-age and invalidity. At the same time, a minority of countries remained attached to voluntary insurance considering that it better implemented the long recognized and very strong principle of individual freedom. It however quickly became evident

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<sup>165</sup> General Survey of the Committee of Experts carried out in 1961 on minimum standards of social security

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that, in the context of generalised poverty, leaving such important questions as old-age or invalidity to each individual's decision would only lead to acute social problems and therefore not reach satisfactory results.

The advantages of compulsory affiliation were hence explicitly recognized by the ILO Conventions adopted in the wake of the I World War on subjects such as maternity protection, sickness, employment injury and occupational diseases, old age, invalidity and death of the breadwinner. In the continuity of the tradition of compulsory affiliation established by the ILO instruments on social insurance, Recommendations No. 67 and No. 69 considered the principle of compulsory affiliation as indisputable so much so that its pertinence was not even technically discussed. Later, by recognizing the right to social security to everyone, as a member of society, the Universal Declaration on Human Rights, also implicitly recognized the unquestionable nature of compulsory affiliation since voluntary affiliation may by no means achieve the proclaimed objective of universal protection.

ILO instruments adopted subsequently also recognized the principle of compulsory affiliation however implicitly by introducing limited conditions under which voluntary insurance schemes could be taken into consideration for attaining the level of protection that needed to be guaranteed. These instruments aim at confirming and organizing social security in a pragmatic and efficient manner, as a new social institution. It was therefore considered preferable to set strict conditions under which large and effective voluntary insurance schemes could be taken into consideration, subject for voluntary insurance schemes to be supervised by the public authorities or administered by joint operation of employers and workers and cover a substantial part of the population with small means. Furthermore, voluntary insurance may only apply to certain social risks and in no case to employment injury and occupational diseases, maternity, and family responsibilities for which, *a contrario*, only compulsory insurance is considered admissible. The optimal standards adopted subsequently with a view to improving the protection guaranteed by the minimum standard established under Convention No. 102 also followed the same approach allowing for recourse to be had to voluntary affiliation with a view to further extending social security coverage to an even larger number

of persons than that established by the Conventions concerned<sup>166</sup> These very strict conditions imposed on the use of voluntary insurance confirm that compulsory affiliation represents the principle in international social security law whereas voluntary insurance is only tolerated on an exceptional basis.

Although initially the institution of compulsory insurance resulted in a philosophical debate over the fundamental question of individual freedoms, it appeared quite rapidly that the human right to social security could not be ensured otherwise. It is therefore generally the case that compulsory affiliation guaranteeing basic protection represents the rule and that it may be judiciously complemented by additional voluntary protection mechanisms. Compulsory affiliation also guarantees the necessary degree of social solidarity through the collective financing of social security which represents another governing principle of international social security law.

#### *2.3 Social solidarity through collective financing*

Whereas the principle of compulsory affiliation gave rise to extensive debates in the early ages of social insurance, the principle of solidarity was initially characterized by a much more implicit and multi-faceted recognition. Which solidarity was needed? Solidarity of the State with the poor through the public financing of social assistance, solidarity of employers with their workers in case of occupational accidents, solidarity between employers and workers characterizing social insurance systems, solidarity between generation, or all together. Certain changes occurred with the emergence of social security as an institution. Whereas under social insurance schemes solidarity was a consequence guaranteeing a social transfer in case of the occurrence of an insured risk, social security envisaged solidarity rather as an objective with a view to ensuring its universal application.

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<sup>166</sup> See P. GREBER; B. KAHIL-WOLFF; G.FRESARD-FELLAY; R. MOLO, *Droit suisse de la sécurité sociale*, Bern, 2010, Volume I: Précis de droit, p. 324.

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In 1944, the Declaration of Philadelphia, also implicitly based itself on solidarity by establishing the objective of extending social security measures so as to provide a basic income to all in need of protection, comprehensive medical care, child welfare and maternity protection. The recognized need for protection for the life and health of workers in all occupations also implied a responsibility shared between employers and the State (Section III). By having recourse to social assistance in order to cover the gaps of social insurance with respect to dependent children and needy invalids, aged persons and widows, and more generally for “persons in want”, the Income security Recommendation No. 67 adopted the same year recommended that the cost of assistance should be shared among the entire society through tax revenues. As regards social insurance in particular, it further suggested that “the cost of benefits, including the cost of administration, should be distributed among insured persons, employers and taxpayers, in such a way as to be equitable to insured persons and to avoid hardship to insured persons of small means or any disturbance to production (...) The cost of benefits which cannot properly be met by contributions should be covered by the community”.<sup>167</sup> The Medical Care Recommendation No. 69 also implicitly based itself on the principle of solidarity by giving preference to a public service of health for the provision of care guaranteeing access to health care to all and financed by way of public funds “raised either by a progressive tax specifically imposed for the purpose of financing the medical care service or of financing all health services, or from general revenue”.<sup>168</sup> Where medical care is provided through a social insurance medical care service, it also recommends that persons not yet insured should be provided with care by way of publicly financed social assistance if they are unable to obtain it at their own expense. The service should be financed by contributions from insured persons, their employers, and by subsidies from public funds. Going beyond the restricted solidarity between members of the scheme characterizing social insurance systems, Recommendation No. 69 thereby also advocates for broader solidarity through the intervention of the State with a view to subsidize insurance mechanisms and ensure comprehensive coverage of the population.

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<sup>167</sup> ILO Income Security Recommendation No. 67, 1944, para. 26. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R067>

<sup>168</sup> ILO Medical Care Recommendation No. 69, 1944, para. 7. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?R069>

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Only a few years later, the right of every person, as a member of society, to social security regardless of financial resources was confirmed by the Universal Declaration on Human Rights of 1948. Solidarity of the entire society with its members incapable of self-support was implicitly recognized as a precondition for the effective implementation of this right.

When the time had come to establish through Convention No. 102 the practical basis for the operation of social security as an institution, it was considered that “an effective means of deriving revenue is an obvious prerequisite for the success of any scheme of social security. The methods of financing which are adopted must be such as to ensure, on the one hand, that an adequate flow of income is available to the scheme from which the costs of benefits and administration can be met; and, on the other, that the burden of the financing is distributed in an equitable and economic manner among the different groups of the population. The primary question concerning financial resources to be dealt with in the international regulations, therefore, would appear to be that of the appropriate allocation of financial responsibility among insured persons, employers and the State. (...) It would appear preferable, instead, for the regulations only to seek to set forth certain broad basic principles with which many countries could comply even though applying quite diverse financial policies. (...) It is an essential part of the concept of social security that the risk being dealt with be pooled, through collective assumption of the financial burden of paying benefits. There are various possible combinations of contribution or tax arrangements by which this may be effectuated. The language proposed (...) does not attempt to prejudge these, except that it would undertake to rule out solutions which would prove unduly onerous for persons having small means. The language also suggests the desirability of placing an upper limit on the share of employees, in order that at least half of the revenues of social security schemes will be derived in a more social manner through subsidies from general revenues or employer contributions.”<sup>169</sup> Therefore, after recalling that the cost of social security should be borne collectively by way of insurance contributions or taxation or both, Convention No. 102 provides that “The cost of the benefits provided in compliance with this Convention and the cost of the

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<sup>169</sup> Preparatory Work for Convention No. 102, Objectives and minimum standards of social security, Report IV(1), International Labour Conference (ILC), 34th Session, 1951, p. 113-114.



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administration of such benefits shall be borne collectively by way of insurance contributions or taxation or both in a manner which avoids hardship to persons of small means and takes into account the economic situation of the Member and of the classes of persons protected. ... The total of the insurance contributions borne by the employees protected shall not exceed 50 per cent. of the total of the financial resources allocated to the protection of employees and their wives and children. For the purpose of ascertaining whether this condition is fulfilled, all the benefits provided by the Member in compliance with this Convention, except family benefit and, if provided by a special branch, employment injury benefit, may be taken together.”<sup>170</sup> All ILO instruments adopted subsequently upheld the approach retained by Convention No. 102 thereby contributing to enshrine the principle of solidarity as a fundamental principle of international social security law.

The importance devoted to the principle of solidarity is closely related to the question of financing of social security and hence to the general public policies being pursued in each particular country. While recognizing the fundamental character of the principle of solidarity, international social security law voluntarily limits itself to setting certain basic principles leaving great latitude as regards the exact degree or type of solidarity between the workers, their employers and the State. By being recognized and reaffirmed continuously over the years the principle of solidarity has kept and gained further relevance particularly in present times characterized by the privatisation of certain branches of social security relying on market performance and therefore unable of guaranteeing defined benefits upon the occurrence and throughout the required duration of the contingency and not respecting the principle of collective financing due to the workers being the only contributors. In addition, adjustment of benefits also ensures solidarity between generations.<sup>171</sup>

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<sup>170</sup> ILO Minimum Standards of Social Security Convention No. 102, Article 71, paragraphs (1) and (2). [http://www.ilo.org/ilolex/cgi-lex/convde.pl? C102](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C102).

<sup>171</sup> As the ILO Director General states, “The realisation of the right to social security presupposes an extensive solidarity in financing the requisite protection. Originally operating within particular branches, it became a national solidarity with the development of social security systems in industrialised countries. Today, however, the feeling of solidarity is tending to weaken, as individualist values are gaining greater favour. In particular, solidarity between successive generations, which is at the basis of old-age pension systems, is being called into question, as the burden of supporting an ageing population increases. Obviously, benefit schemes must take account of demographic trends and other factors influencing the relative proportions of the active and non-

### *3. The practical application of the ILO principles of social security in the modern world*

#### *3.1 The principle of collective financing and state guarantees to ensure the financial viability of social security system*

The principle of collective financing is one of the guiding principles of the financial organization of social security system. It provides that the financing of social security benefits as well as administrative costs must be shared among different stakeholders. In order to ensure equitable financial management of the system, financial responsibilities must be distributed in a way in order not to create “hardship to persons of small means” (Art. 71 of Convention 102). Moreover, when distributing responsibilities, the economic situation in the country, the level of its development and the financial conditions of specific social groups must be taken into account. The Convention provides that the share of workers in the financing of the system must not exceed 50 %.

Apart from these basic requirements, the Convention leaves the freedom to decide on particularities to the discretion of the governments. Different methods and sources of financing may be used, such as contributions from employers and/or employees, general taxation or the combination of these.

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active members of society (thus emphasising once again the significance of reconsidering measures which lead to an undue shortening of active life). In approaching these questions the principle of solidarity should, however, continue to be accepted as one of the guiding considerations. A global, national solidarity is not the only form to bear in mind. There is also a proper place for arrangements at the occupational or the local level, for a chosen solidarity — and indeed for family and personal effort — as well as for an imposed solidarity. The appropriate balance between these different levels of protection is a complex question, which merits full discussion and which current ILO studies are seeking to clarify. We should in any event take care to avoid orientations liable to lead to the polarisation of society into those enjoying generous employment-based security and those receiving inferior protection under a residual responsibility of the community at large. In developing countries the application of the principle of solidarity through social security has generally remained limited, in view of the poverty prevalent among the greater part of the population. Conditions are, however, not everywhere the same, and questions concerning the best use of available resources call for consideration. Beyond that, progress will largely depend on the operation of a wider international solidarity which would enable these countries to raise their standards of living” In *Human Rights. A Common Responsibility*, Report of the Director-General (Part I), International Labour Office, 1988.

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Different financing methods and sources of financing may be used for different contingencies. The distinction is usually made between the earnings-related benefits (which are mainly financed from the contributions of workers and employers) and other benefits (where higher state responsibility is involved and which are financed through general taxation or directly from the state budget). Therefore, in some countries (for instance, Italy) workers and employers finance contributory social security schemes in general while the state finances non-contributory benefits.

For instance, in Finland, the state finances family benefits, housing allowances and disability allowances, as well as the major part of the basic unemployment allowances. The labour market support is funded by the state and the local authorities. Earnings-related unemployment benefits are financed through the unemployment insurance contributions of employers and employees, the unemployment funds' membership payments and government funding.<sup>172</sup>

Earnings-related pensions are paid through the insurance contributions of employers and employees. The state contributes to the financing of self-employed persons', farmers' and seamen's pensions. National pensions are financed through employers' insurance contribution and state funding. Health insurance is financed in regard to daily allowance benefits by the employees, self employed persons and employers, and in regard to medical expenses insurance by the insured persons and the state. Accident insurance is based on employers contributions.<sup>173</sup>

In 2008, National Pension Insurance benefits were mainly financed by employers (through contributions levied on them) and the state (through payments earmarked for specific benefits). From 2010, national pensions will be financed

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<sup>172</sup> See U. HAUTALA and J. TUUKKANEN, *Towards a sustainable and job-oriented pension system in Finland*, p. 618. [http://www.bancaditalia.it/studiricerche/convegni/atti/fiscal\\_sust/iv/613-628\\_hautala\\_and\\_tuukkanen.pdf](http://www.bancaditalia.it/studiricerche/convegni/atti/fiscal_sust/iv/613-628_hautala_and_tuukkanen.pdf)

<sup>173</sup> H. NIEMELÄ and K. SALMINEN, *Social Security in Finland*, Helsinki, 2003, Edita Prima Oy, p. 36.

entirely out of the state budget. The liquidity of the national pension insurance scheme is ultimately guaranteed by the state.<sup>174</sup>

The state usually finances guaranteed pensions (or basic pensions) where such exist<sup>175</sup>, as well as benefits to special categories such as students, disabled persons, youth in traineeship etc. (as, for example, in Algeria). Expenses on health care are often shared between the state and the insured.

The distribution of contribution rates among employees and employers can be a sensitive issue. In some countries, employers are paying more, in others the shares are equal. For example, in Germany the pay-as-you-go statutory pension insurance system is financed by contributions from employers and workers as well as federal subsidies. Workers and employers pay each 50% of contributions. The level of contributions is calculated in a way to ensure that together with other revenues it is sufficient to cover the estimated expenditure for the next calendar year.<sup>176</sup>

Regardless of the financing sources and mechanism, the state must assume the responsibility to ensure the proper financing and administration of the social security system, as provided by Convention 102. In the countries where private social security schemes exist, the state must provide guarantees and proper regulation in order to ensure their sustainability and proper functioning. In some countries the social security system is financed only in part because the contributions are not paid fully as requested. The state should provide guarantees, also of financial nature, in order to secure the due provision of benefits. This task is

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<sup>174</sup> See Budget Review 2010, Finnish Ministry of Finance, [http://www.vm.fi/vm/en/04\\_publications\\_and\\_documents/01\\_publications/01\\_budgets/Bk\\_2010\\_en\\_kku.pdf](http://www.vm.fi/vm/en/04_publications_and_documents/01_publications/01_budgets/Bk_2010_en_kku.pdf)

<sup>175</sup> The establishment of basic guaranteed pensions has been reported by the governments of Albania, Estonia, Finland, France, Germany, Sweden, Canada, Morocco, Mauritius etc. In Mauritius, the social security scheme for private sector employees is based on a two-tier system in which the government finances the universal basic pensions whilst earnings-related contributory benefits are paid to insured persons or their dependants, on the basis of contributions to the scheme by the insured persons and their employers. The scheme provides for the payment of three different classes of pension, namely, non-contributory (or basic) pensions, contributory pensions and industrial injury pensions. Basic (universal) benefits are wholly financed by the government from tax revenues.

<sup>176</sup> See M. BRAND, *Social Security Systems in Transition. A Comparison of Germany and Poland*, Jagiellonian University in Krakow, 2007, p. 3 ss. <http://martin-brand.de/wp-content/uploads/paper-the-system-of-social-security-in-poland-and-germany1.pdf>

very challenging, especially for the developing countries which experience the lack of resources. Some countries have affronted the risk of insufficient funds by broadening the contributions pool.

### 3.2 *Good governance and the Supervision of Social Security Schemes*

The principle of the general responsibility of the state to ensure good governance of social security schemes encompasses the state's duty to undertake regular actuarial studies of the schemes. Regular actuarial evaluation of social security schemes is crucial in order to ensure the due provision of benefits. Art. 71 (3) of Convention 102 provides that *the state "shall ensure, where appropriate, that the necessary actuarial studies and calculations concerning financial equilibrium are made periodically and, in any event, prior to any change in benefits, the rate of insurance contributions, or the taxes allocated to covering the contingencies in question."* Therefore, according to the Convention, the actuarial controls of the social security system should be both regular and be undertaken before any changes in the benefits or contributions rates. It is left to the discretion of the government to decide on such technical aspects, as the regularity of actuarial studies and the methods they are conducted.

In 2009, the Committee of Experts made the following statement in relation to the supervision of social security schemes: "Studies show that the establishment of centralized management with regard to the collection of benefits and supervision of compliance with the obligation to join the social security scheme would allow significant results to be achieved in terms of coverage and would ensure better coordination, planning and linking of strategic activities regarded as priorities from the point of view of the entire system. The creation of an independent specialized body responsible solely for supervising and controlling the social security system, without participating in the management of the system's programmes, is another

necessary component for the proper operation and viability of social security systems”.<sup>177</sup>

### *3.3 Adjustment of benefits to the cost of living*

Adjustment of benefits is one of the main safeguards to ensure their due provision. According to the Convention 102 (p.10 Art. 65, p.8 Art. 66): ‘The rates of current periodical payments in respect of old age, employment injury (except in case of incapacity for work), invalidity and death of breadwinner, shall be reviewed following substantial changes in the general level of earnings where these result from substantial changes in the cost of living’.

The Convention therefore focuses on the adjustment of long-term benefits which are likely to endure for a significant part of the beneficiary’s life. However, suggestions have been made that adjustment also should be applied to short-term benefits, especially in the countries with high inflation rate.<sup>178</sup>

An important trend is the appearance of innovative adjustment policies, such as the creation of complex indexation mechanisms or non-standard criteria for adjustment. However, in this respect it is important to ensure that such adjustment mechanism is in conformity with the requirements of the Convention. Thus, the ILO Committee of Experts on the Application of Conventions and Recommendations drew the attention of the government of Peru to the fact that “the rate of the pensions provided by the private pensions system does not appear to be determined in advance, since it depends on the capital accumulated in individual capitalization

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<sup>177</sup>See the Committee's Observation to the government of Bolivia: CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Bolivia (ratification: 1977) Published: 2010, found on <http://www.ilo.org/ilolex/>

<sup>178</sup> See the General Survey of the Committee of Experts on the Application of Conventions and Recommendations on Social Security Protection in Old-Age, ILO 1989, p.81

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accounts, and particularly on the earnings from these accounts.”<sup>179</sup> As the government did not provide sufficient statistical information for the Committee to be able to evaluate how the adjustment policies guaranteed the required level of benefits in the country, the Committee observed that “under Article 29, paragraph 1, read in conjunction with Articles 28 and 65 or 66, an average benefit at least equal to 40 per cent of the reference wage has to be secured to a person protected who has completed, prior to the contingency, in accordance with prescribed rules, a qualifying period which may be 30 years of contribution.”

Another type of adjustment has been introduced in Portugal and Japan which have linked the adjustment of benefits to macroeconomic indicators. The system of adjustment of benefits was reformed in Portugal in the recent years. Starting from 1 January 2007, the Social Support Index, IAS, was introduced, which replaced the guaranteed monthly minimum wage as a reference for the adjustment of benefits, pensions and contributions. IAS is linked to Portugal’s Gross Domestic Product and Consumer Price Index (CPI). It is updated annually based on the GDP value for the last two years and the variations of the CPI over the last 12 months. Since the new system was introduced, the Committee of Experts on Social Security of the Council of Europe has been requesting the Portuguese government to provide explanation based on statistical data regarding the reasons for the introduction of the new methods of adjustment. In particular, the Committee requested the proofs that the new system would continue to maintain the real value of the benefits in relation to the cost of living.<sup>180</sup>

Adjustment policies may be used with the purpose to combat inequalities in society and to protect vulnerable social groups. A good example of such a policy is Albania where different adjustment mechanisms are used for the pensioners in rural areas which is aimed to bring their incomes to the level of urban pensioners. The ILO Committee of Experts expressed an opinion that although the Convention does

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<sup>179</sup> See the Committee’s Observation to the government of Peru in 2002: CEACR: Individual Observation concerning Convention No. 102, Social Security (Minimum Standards), 1952 Peru (ratification: 1961) Published: 2002 found on <http://www.ilo.org/ilolex/>

<sup>180</sup> See F. RIBEIRO MENDES, *Annual National Report 2010. Pensions, Health and Long-term Care*, On behalf of the European Commission, DG Employment, Social Affairs and Equal Opportunities. Found at [http://www.socialprotection.eu/files\\_db/908/asisp\\_ANR10\\_Portugal.pdf](http://www.socialprotection.eu/files_db/908/asisp_ANR10_Portugal.pdf)

not oblige the Member States to introduce the automatic indexation of benefits, “it may be the most advanced method of adjusting the rates of the benefits to inflation and the cost of living.”<sup>181</sup>

In any case, where the government claims that it undertakes ad hoc adjustment of benefits, attention must be paid to the mechanisms of such adjustment. For instance, the Committee of Experts drew attention to the adjustment policies in Barbados several times. In 2001 the government of Barbados provided information that it undertook ad hoc adjustment of the minimum social security benefit. In reply to this, the Committee mentioned that “if upratings are confined to increases in the minimum benefit levels rather than increases to all benefits in payment the standard of living of the elderly will decrease relative to prices after their pensions come into payment. Their standard of living would also decrease relative to that of the working population. However, in the long term full uprating of all benefits in payment appears too expensive to contemplate without other further significant changes to the scheme”.<sup>182</sup>

### *3.4 Solvency provisions*

Solvency provisions are specific provisions in the national legislation aimed to guarantee the financial equilibrium of the national social security schemes. The duty of the state to guarantee the solvency of the social security system derives from Article 71 of ILO Convention 102 and the principle of the government’s responsibility to ensure the financial sustainability of the system.

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<sup>181</sup> The Committee expressed this view in its Direct Request to the government of Barbados in 2008. See CEACR: Individual Direct Request concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Barbados (ratification: 1972) Submitted: 2008 found on <http://www.ilo.org/ilolex/>

<sup>182</sup> See the Committee’s Direct Requests to the government of Barbados in 2008, 2007, 2003 concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) found on <http://www.ilo.org/ilolex/>



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Solvency provisions are specific measures that must be undertaken whenever the systems are facing difficulties in delivering on their obligations. There are many types of such measures. However, what is important is that they are actually provided by the national legislation and implemented when a scheme is running a deficit.

One type of such provisions is the establishment of detailed bail-out procedures in case of deficit. These provisions are often related to the regulation on the allocation of resources from the social security reserve funds where such exist. If these measures prove to be insufficient, the deficit may be covered by a transfer from the state budget. Where the government undertakes such a commitment in case of the deficit of the social security scheme it is the ultimate proof that it has assumed its general responsibility to ensure the system's solvency and the due provision of benefits. It is important that the amount of social security benefits is not decreased to cover a deficit or that the provision of benefits is not disrupted.

A deficit can also be covered through the establishment of a complex mechanism of system-wide bail-outs among different social security schemes. In such a system, funds are allocated from one social security scheme to another where the latter is running a deficit. The mechanism can be very complex with a strict order of the allocation of funds from many interrelated social security schemes. In addition to this, minimum liquidity requirements and the minimum working capital for private schemes can be established. Every time that an obligatory actuarial review of scheme proves that the balance of the scheme has fallen below the obligatory minimum, specific measures are undertaken.

Reinsurance mechanisms are a measure to guarantee the solvency of social security schemes. Such a mechanism is usually valid for private schemes which operate according to private law provisions. For example, legal norms on private insurance may be applicable to non-state health security schemes. The reinsurance of social security risks with private insurance companies can be an option introduced in the framework of the general liberalization of social security in a country. In this case, the state must ensure that the private providers guarantee an adequate level of social protection and comply with the standards set by Convention

102. In this respect, the ILO Committee of Experts addressed an observation to the government of The Netherlands in 2002. The government had reported that as a result of the privatization of health care Dutch employers got the right to choose whether to bear the risk of paying wages to sick employees or to reinsure it with private insurers. The disability benefit was soon subjected to the same principle. The government claimed that it aimed to introduce market forces and competition in the governance of health care. However, the Committee drew the attention of the government to the possibility that the abovementioned measures could lead to health condition being used extensively as criteria for employment. It also stressed that since the reform was introduced the scheme has been chosen by only an insignificant part of workers and employers. Also, the Committee underlined the need for the government to ensure the efficient regulation and supervision of the private insurance companies in accordance with paragraphs 2 and 3, Article 71 of the Convention.<sup>183</sup>

### *3.5 Separating social insurance budget and funds from the state budget*

One of the important conditions of the financial sustainability of a social security scheme is that the country's social security budget is separated from the state budget. Such independence is necessary to protect social security funds in case of budget deficit, to prevent the use of social security funds for other purposes, as well as to ensure the efficient control of the funds. In other words, in case the social security budget forms a part of the state budget, it becomes subject to its objectives and constraints. Where such system is in place, the sustainability of the social security system is directly dependent on the state of economy.

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<sup>183</sup> CEACR: Individual Observation concerning Convention No. 102, Social Security (Minimum Standards), 1952 Netherlands (ratification: 1962) Published: 2003, found on <http://www.ilo.org/ilolex/cgi/lex/pdconv.pl?host=status01&textbase=iloeng&document=6872&chapter=6&query=Netherlands%40ref&highlight=&querytype=bool&context=0>

### *3.6 The establishment of reserve funds as a safeguard measure*

The establishment of reserve funds is one of the possible measures to ensure the financial sustainability of a social security system. Although it is not expressly provided by Convention 102, it derives from the general principle of the government's responsibility to ensure the sound financial management of the social security system. In this regard, Article 71, paragraph 3, of the Convention provides that the member states which ratified the Convention "shall accept general responsibility for the due provision of the benefits provided in compliance with this Convention, and shall take all measures required for this purpose".

The establishment of reserve funds has become a common mechanism widely used by ILO Member States. Besides, the reserve funds in social security systems have proved to be very important in the times of economic crisis. However, the reserve funds of social security systems in many countries were severely affected by the economic crisis. For instance, the Committee of Experts has expressed its concern regarding this matter in its observation to the government of France in 2008.<sup>184</sup> The Committee noted that the Pension Reserve Fund's global assets lost 11 per cent of their value from the beginning of 2008 to October that year. While noting that the Convention does not expressly provide for the financial management of social security scheme in a crisis situation, the Committee nevertheless underlined that the Convention established parameters of financial governance to comply with. Therefore, the countries that ratified the Convention bear the responsibility to bring their social security systems to recovery according to these parameters.

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<sup>184</sup> See CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) France (ratification: 1974) Published: 2009, found on <http://www.ilo.org/ilolex/>

*3.7 The need for sound investment policies*

The necessity to regulate the possibilities of investment of social security assets stems from the principle of the general responsibility of the state over the social security system. Thus, according to Art. 71(3) of the Convention:

*The Member shall accept general responsibility for the due provision of the benefits provided in compliance with this Convention, and shall take all measures required for this purpose; it shall ensure, where appropriate, that the necessary actuarial studies and calculations concerning financial equilibrium are made periodically and, in any event, prior to any change in benefits, the rate of insurance contributions, or the taxes allocated to covering the contingencies in question.*

However, there is a general trend around the world towards the liberalization of the investment of social security assets with more assets invested in financial markets. In addition, the investment of social security funds becomes more sophisticated with more money invested internationally.

#### 4. *Social security systems in Latin America as an example of market-driven reform*

The contribution of the Americas to the development of social security internationally has been significant and characterized by a long-standing tradition of dynamism. Over the recent decades, social security systems in the Americas, particularly in the Latin American countries launched major structural reforms challenging the principles of administration and financing of social security schemes established in the legal instruments of the International Labour Organization. Chile initiated such reforms in 1981 through the introduction of compulsory contributory schemes and minimizing public social security schemes.<sup>185</sup> In the 1990s, more countries in Latin America reformed their social security systems by replacing their pay-as-you-go schemes or supplementing them with private ones.<sup>186</sup>

The core element characterizing these reforms remains the replacement of PAYG defined benefit systems by fully-funded schemes based on individual pension accounts which fall short of providing pensions of the level and on conditions required by ILO standards. In addition to failing to improve coverage the introduction of fully funded pension schemes resulted in the loss of social solidarity previously ensured through the redistribution mechanisms of PAYG schemes.

Unsatisfactory social security coverage and contributions rates, weak management and inefficient supervision, mass evasion from social security affiliation continue to be characteristic features of social security systems in the region. Over recent years, social security coverage has at best been stagnant and the

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<sup>185</sup> See S. EDWARDS, *The Chilean Pension Reform: A Pioneering Program*, 1998, p. 35 ss. Found on <http://www.nber.org/chapters/c6246.pdf>.

<sup>186</sup> These countries include Argentina, Bolivia, Colombia, Costa Rica, Dominican Republic, El Salvador, Mexico, Panama, Peru, and Uruguay. See *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 Recommendations (articles 19, 22 and 35 of the Constitution), International Labour Office, Geneva, 2011, 279 p. found on [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_152602.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_152602.pdf).

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institutions composing national social security systems are characterized by a lack of efficient coordination, with no or insufficient interaction of the different sources of financing. The region's segmented health protection systems reproduce structural inequalities: public services are allocated mainly for the poor and informal-economy workers; contributory social insurance provides protection to formal workers, and the private sector caters to the rich. Across these systems, there is little coordination with respect to their regulatory, financing and delivery functions, which often results in limiting access to health care.

The current socio-economic context in the Americas and the recent global crisis have highlighted the need of expanding the role of public solidarity in social protection. Failure of the contributory schemes to ensure decent social security benefits and enormous losses sustained during the financial crisis, has pushed many governments into a second round of important reforms which allowed workers to switch back to PAYG schemes and created new pension reserve funds with a view to ensure greater income security for the population and greater financial stability of the system. Cash transfer programmes established in some countries provide income support to the most vulnerable groups, including low-income families and children, but also help secure better labour market participation and utilization of health services and schools.

In order to illustrate the above-mentioned processes by concrete examples, we will analyse in detail the recent development of the social security system in three Latin American countries, which are representative of the continent not only by the extent of their problems, including privatization of pensions and mismanagement of multipillar systems, but also by the fact that they have ratified standards of the different generations and have shown manifestly different attitude to their application. Chile has ratified social security Conventions of the first generation and has been ignoring the comments of the supervisory bodies with respect to Conventions Nos. 35-38 for many years. Peru, in addition to all first generation instruments, has ratified Convention No. 102 and has been paying some attention to the comments of the supervisory bodies revealing a multitude of

problems facing the national social security system.<sup>187</sup> Finally, the Plurinational State of Bolivia, in addition to Convention No. 102, has ratified all the third generation Conventions, except Convention No. 168, and has been actively using the comments of the supervisory bodies for reforming its social security system in line with up to date ILO standards.

### *4.1 Privatising pension systems in Chile*

The Chilean Individual Capital Accumulation Social Insurance System was set up in 1981. As a result of the reform, the pay-as-you-go system was replaced by private contribution-based schemes, and the health care system was transformed into a two-tier system: the insurance-based scheme and a special scheme for poorer workers.<sup>188</sup>

The ILO Committee of Experts reacted to these changes. In 2000 The Committee of Experts observed that: “Legislative Decrees Nos. 3500 and 3501, adopted on 13 November 1980, established a system of individual social benefits, with the State playing only a secondary role in its administration, and did away with the PAYG system which had operated for over five decades. Since then, pensions have been administered by private sector pension funds (AFPs), private institutions set up as limited liability companies which are assigned the task of managing resources and benefits. The previous system, which operated for many years, had the advantage of ensuring that pensions were not subjected to financial market fluctuations and that there was solidarity between generations, since pensioners could benefit from increases in wages and productivity achieved by the contributing workers. Following the 1973 coup d’état this system was replaced by an individual

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<sup>187</sup> Representation (Article 24) - Chile – ILO Conventions Nos 35, 36, 37, 38 - 2000 ---- Report of the Committee set up to examine the representation alleging non-observance by Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35), the Old-Age Insurance (Agriculture) Convention, 1933 (No. 36), the Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37) and the Invalidity Insurance (Agriculture) Convention, 1933 (No. 38), made under article 24 of the ILO Constitution by a number of national trade unions of workers of the Private Sector Pension Funds (AFPs), <http://www.ilo.org/ilolex/cgi/lex/pdconv.pl?host=status01&textbase=iloeng&document=59&chapter=16&query=Chile%40ref&highlight=&querytype=bool&context=0>

<sup>188</sup> See S. EDWARDS, *The Chilean Pension Reform: A Pioneering Program*, 1998, p. 35 ss., found on <http://www.nber.org/chapters/c6246.pdf>.

funding scheme in which workers deposited funds in individual accounts. Funds in these accounts are managed by the AFPs, which make investment decisions for them. Workers were not associated in the discussions which led to the establishment of the new social security system and, despite the advent of democracy, the workers and their main trade union organizations were still marginalized from the running of the system and the discussion of its imperfections, injustices and inefficiencies and possible ways of correcting its shortcomings”.<sup>189</sup>

#### *4.2 Violation of the basic principles of international social security law*

In 2001, the Conference Committee on Application of Standards recalled that the case of the application by Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35) Convention had been examined in 1987, 1993 and 1995, as well as the subject of 3 representations.<sup>190</sup> The Committee of Experts had indicated that the private pension scheme established by Legislative Decree No. 3500 of 1980 did not meet the requirements of Convention No. 35 in the following ways: (a) the scheme did not provide for any direct contribution by employers to the financial resources of insurance funds; (b) contributions by the Government to financial resources and benefits were of an ad hoc and, ultimately, exceptional nature; (c) the pension fund administrators (AFP) were private profit making companies with limited liability; and (d) with the exception of certain trade union AFPs, the insured persons did not participate in the management of the AFPs.<sup>191</sup>

In June 2009, the case of Chile was once again brought before the Conference Committee on Application of Standards which held a tripartite

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<sup>189</sup> Report of the Committee set up to examine the representation alleging non-observance by Chile of the Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35), the Old-Age Insurance (Agriculture) Convention, 1933 (No. 36), the Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37) and the Invalidity Insurance (Agriculture) Convention, 1933 (No. 38), made under article 24 of the ILO Constitution by a number of national trade unions of workers of the Private Sector Pension Funds (AFPs), Document GB.277/17/5, 277th Session, 2000, found on <http://www.ilo.org/ilolex/>

<sup>190</sup> Article 24 Representations of 1986, 2000, and 2006 found on <http://www.ilo.org/ilolex/>

<sup>191</sup> ILCCR: Examination of individual case concerning Convention No. 35, Old-Age Insurance (Industry, etc.) Convention, 1933, Chile (ratification: 1935) Published: 2001



discussion on the situation. The Government representative of Chile recognized that the Chilean Individual Capital Accumulation Social Insurance System set out in Legislative Decree No. 3.500 “violated the basic principles of the social security systems promoted by the ILO based on tripartism. In this respect, the solidarity, coverage, gender equity and lack of representation of beneficiaries constituted aspects that precluded its social legitimacy. In this context, the ILO had published studies criticizing the system as early as 1992”.<sup>192</sup>

### *4.3 The conclusions of the International Labour Conference*<sup>193</sup>

The Conference Committee in June 2009 observed that the discussion of this case manifested concern over the viability of the private pension scheme established by Decree Law No. 3.500 of 1980 in conditions of the current financial and economic crisis, as well as preoccupation with the fact that for many years the Government has been apparently ignoring the recommendations for reforming the scheme on the principles set out by the Governing Body, in 2000, in the report of the Committee to examine the representation of the Chilean unions of employees of pension fund administrators (AFPs) under article 24 of the ILO Constitution. Following-up on the Governing Body recommendations, the Committee of Experts observed that the Chilean pension scheme based on the capitalization of individual savings managed by private pension funds (AFPs) was organized in disregard of the principles of solidarity, risk-sharing and collective financing, which formed the essence of social security, combined with the principles of transparent, accountable and democratic management of pension scheme by non-profit-making organizations with the participation of the representatives of the insured persons. The Committee of Experts pointed out in its General Report of 2009 that these principles underpinned all ILO social security standards and technical assistance and offered the best guarantees of financial viability and sustainable development of social

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<sup>192</sup> ILCCR: Examination of individual case concerning Convention No. 35, Old-Age Insurance (Industry, etc.) Convention, 1933, Chile (ratification: 1935) Published: 2009

<sup>193</sup> ILCCR: Examination of individual case concerning Convention No. 35, Old-Age Insurance (Industry, etc.) Convention, 1933 Chile (ratification: 1935) Published: 2009.

security; neglecting them, on the contrary, exposed members of private schemes to “greater financial risks while removing state guarantees”.<sup>194</sup>

The Committee of Experts further observed that the lack of control over investments by insured persons may lead to high-risk investments and therefore potential losses. This led the Conference to express fears concerning the viability and sustainability of the system. In these circumstances, the Committee of Experts was bound to observe that “the exclusion of the representatives of the protected persons (active workers and retired workers) from participation in the administration of AFPs and the Technical Investments Council is contrary to the right of the insured persons to participate in the administration of insurance system financed by their contributions”.<sup>195</sup>

#### *4.4 Introduction of the solidarity pension system in 2008*

According to the Conference Committee which examined the case of Chile at the ninety-ninth session of the International Labour Conference in 2009: “In 2006, the formulation of the draft reform had been initiated in Chile, and the ILO's contribution had been essential, both in the diagnostic phase of the model and in the final design of the Proposal for Social Insurance Reform which had been enacted in March 2008 in the form of Act No. 20.255. The establishment of a basic universal public solidarity pension which served as complement to the private pension and a safety net for those who failed to get a sufficient private or any pension to live on, was the most significant social reform in fiscal matters undertaken for the past 20 years.”<sup>196</sup> An essential step in securing this reform had been the prior creation of a Pension Reserve Fund. An actuarial system would make it possible to evaluate the

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<sup>194</sup> See *Report of the Committee of Experts on the Application of Conventions and Recommendations* (articles 19, 22 and 35 of the Constitution), General Report and observations concerning particular countries, International Labour Conference, 98th Session, 2009, p. 35.

<sup>195</sup> CEACR: Individual Observation concerning Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35) Chile (ratification: 1935) Published: 2010, found on <http://www.ilo.org/ilolex/>.

<sup>196</sup> ILCCR: Examination of individual case concerning Convention No. 35, Old-Age Insurance (Industry, etc.) Convention, 1933 Chile (ratification: 1935) Published: 2009.

sustainability of this fund every three years, with the first evaluation being carried out in 2009.

The reform was intended to provide assistance pensions to those who had not been able to contribute throughout their working lives and to those whose accumulated funds were insufficient to attain the minimum pension level. The reform strengthened solidarity measures and established a basic pension of approximately US\$150 for the 60 per cent of the population that suffered from the greatest poverty and a solidarity supplement for those on lower pensions. The whole of the reform was being implemented through the taxes paid by the people of Chile. Analyzing the changes, the Committee noted that, “while the Act No. 20.255 has supplemented the individual capital accumulation social insurance system, with a new universal social insurance scheme based on solidarity, the general logic of the Chilean mixed pension system remains focused on individual saving capacity, since persons in a position to save are obliged by law to join an AFP. In this regard, the reform has not only maintained AFPs as the principal mechanism of old-age protection, but has also strengthened their position given that if their private management generates derisory pensions they will be supplemented by a complimentary old-age pension (APS) financed by national solidarity and paid to persons whose pensions do not reach a minimum threshold”.<sup>197</sup>

#### *4.5 The analysis by the Committee of Experts on the Application of Conventions and Recommendations of social security in Peru*

Peru is bound by the obligations under the Social Security (Minimum Standards) Convention, 1952 (No. 102), in respect of five of the nine branches of social security (medical care, sickness, old-age benefits, maternity and invalidity), as well as by a number of other social security Conventions (Nos 12, 19, 24, 25, 35 to 40 and 44). Given that the problems of application identified by the Committee in its numerous comments are essentially the same for all these Conventions, the

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<sup>197</sup> See CEACR: Individual Observation concerning Old-Age Insurance (Industry, etc.) Convention, 1933 (No. 35) Chile (ratification: 1935) Published: 2010, found on <http://www.ilo.org/ilolex/>

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Committee considers it appropriate to make a general comment for all social security Conventions ratified by Peru.<sup>198</sup>

For many years, the Committee has highlighted the fact that the different components of the social security system in Peru do not give effect to certain principles common to the social security Conventions ratified by the country, namely: (i) the collective financing of benefits; (ii) the democratic and transparent management of social security institutions; (iii) providing benefits throughout the contingency; and (iv) ensuring a minimum level of benefits.

*The principle of solidarity and collective financing of social security* (Convention 102 Article 71). In accordance with the principle of collective financing of social security laid down by Convention No. 102, the cost of benefits and the cost of administering these benefits must be borne collectively by way of contributions and/or taxes (Article 71(1) of the Convention) and the total of insurance contributions borne by the employees protected shall not exceed 50 per cent of the total of the financial resources allocated to the protection of the employees (Article 71(2)). However, both in the private and in the public pension system of Peru, except in the case of voluntary contributions which the law allows employers to pay optionally, the insured are the only ones to contribute to individual capitalization accounts and to the financing of contributions for invalidity and survivors' insurance. The contributions and administrative costs are also borne solely by workers affiliated to the administrators of private pension funds (AFP) and the Office of Standards for Welfare (ONP), which is contrary to the principle of joint financing of benefits established by the ILO Conventions. The Committee pointed out that by not respecting the principles of solidarity and collective financing, the individual capitalization accounts system is not compatible with Article 72(2) of Convention No. 102.

*The democratic and transparent management of social security institutions* (Convention 102 Article 72 (1)). Convention No. 102 also requires that

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<sup>198</sup> This section refers to CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Peru (ratification: 1961) Published: 2010, found on <http://www.ilo.org/ilolex/>

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representatives of persons protected shall participate in the administration of social security institutions or be associated with advisory powers whenever the administration is not entrusted to an institution regulated by the public authorities or by a governmental department accountable to Parliament (Article 72(1)). The Committee has stressed that, in order to be effective, such participation must allow the latter to influence the managerial and investment decisions made by the concerned bodies. Noting the growing recognition by the Government of the need to strengthen the monitoring and surveillance activities as regards private social security entities and given the low rate of affiliation to the social security system, the Committee requested the Government to ensure the participation of representatives of insured persons in the work of the national body responsible for collecting tax and social contributions - the Superintendencia de Administracion Nacional Tributaria (SUNAT).<sup>199</sup>

*The principle of providing defined benefits throughout the contingency.* Convention No. 102 establishes the principle that benefits must be provided throughout the entire duration of the contingency at the guaranteed minimum rate. Individual savings account systems however, may not, due to reasons inherent to these systems, guarantee that the minimum rate set by the Convention No. 102; as the level of pensions depends of the funds' financial performance and may therefore not be known until the actual date of retirement. In Peru, old-age pensions are calculated on the basis of the capital that insured persons hold in their individual savings accounts (CIC). When the capital accumulated on this account is exhausted, the right to a pension may disappear, leaving pensioners who exceed the average life expectancy without their only source of income.

*Impact of the financial crisis on the private pension funds.* The Committee noted that, according to 2009 statistics (IMF), the financial crisis has affected most severely the Peruvian private pension funds, which have lost an average of 32 per cent of their capitalization. The consequences are proving to be very significant, especially for insured people close to the age of retirement, as the value of the

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<sup>199</sup> CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Peru (ratification: 1961) Published: 2010, found on <http://www.ilo.org/ilolex/>

capitalization accounts has fallen sharply, driving the level of pensions paid downwards. The crisis has been more devastating in cases where financial investments of private pension schemes were not sufficiently regulated and where there was not a supplementary pay-as-you-go component based on the principle of solidarity providing defined benefits. The Committee considered that, in view of the above figures, the Peruvian Government must be aware of the fragility inherent in the system of private management and should duly consider the possibility of establishing financial mechanisms to protect funds accumulated for pension, such as insurances, funds to safeguard the amount of pensions, or the automatic transfer of individual accounts to funds where the investment risk is very low for insured persons near retirement.<sup>200</sup>

### *4.6 Strengthening the public pension system*

*Extending guaranteed minimum pensions to the entire population.* In order to overcome the deficiencies inherent in the private administration of the pension system, the Government established in March 2007 minimum pensions granted under certain conditions for persons insured by private pension funds. This reform ensures that any person affiliated to the private pension system (SPP) who at the time of the creation of this system belonged to the public pension system (NPS), is entitled to a minimum benefit equal to that provided by the SNP or a supplementary pension if the pension from their private pension system is less than the minimum pension.

The Committee observed that the reform only guaranteed a minimum pension for a limited number of insured persons who met certain age requirements at the time of the introduction of the private pension system administered by the AFPs. It therefore invited the Government to consider extending the system of guaranteed minimum pensions to the entire population over a certain age would allow the Peruvian State to ensure a minimum old-age pension to all those whose

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<sup>200</sup> Idem

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level of pension risks being too low, in particular as a result of the current economic and financial crisis. The Government was also invited to further explore the advantages of extending the minimum pension to all residents with low incomes. The Government could, in this respect, wish to take advantage of the experiences of other countries in the region where a basic social pension of a non-contributory nature has been created, which benefits all citizens aged 65 and over who have never contributed or whose contributions are not sufficient for establishing the right to a pension.

*Granting the right to a reduced pension.* In response to the Committee's previous comments regarding the need to reintroduce a reduced pension for all insured persons who have completed a period of at least 15 years of contribution or employment (Article 29(2) of Convention No. 102), the Government indicated that it has carried out the actuarial calculations necessary to calculate the cost of this measure to the pension system managed by the ONP. Given the size of the resources concerned (approximately 70 per cent increase in the national budget), it is for the Ministry of Economy and Finance to assess and decide on the implementation of this proposal. The Government is requested to draw the attention of the Ministry of Economy and Finance to Peru's international obligation to restore the right to a reduced pension for insured persons who have completed at least 15 years of contribution or employment, in accordance with Article 29(2) of Convention No. 102, and to indicate in its next report the progress made on this matter.

*Improving management of the public pension system.* The Committee noted that the public pension system managed by the ONP appears to suffer serious malfunctioning entailing numerous delays occur in the determination of the right to pension, causing in turn considerable judicial litigation. According to a July 2008 report of the *Defensoria del Pueblo del Perú*, which is the independent public institution established by the Constitution in order to ensure respect for fundamental rights and the proper functioning of the rule of law, about 100,000 applications for determining entitlements to pension were awaiting a decision and an equally large number of cases challenging the decisions of the ONP were being considered by the courts. As per this report, the ONP is the institution against which the greatest

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numbers of complaints have been lodged by the *Defensoria*. This number is of significant importance considering that approximately 500,000 pensions are managed by the ONP and it has as many active contributors in the public pension system. The report of the *Defensoria* further noted that no up to date record of contributions by members exists, that the burden of proof as regards the contributory period is not placed on the ONP, but on the insured and that procedures for granting pensions were excessively complex. The report indicated a series of recommendations to both the executive and legislative powers in order to correct the serious deficiencies mentioned above. Given these allegations, the Committee asked the Government to demonstrate how the Peruvian State assumes the full and general responsibility concerning the provision of benefits and the proper administration of social security institutions, in accordance with Articles 71 and 72 of Convention No. 102.

*Including the minimum standards of C. 102 into the “essential” core of the right to social security*

In 2005 the Constitutional Tribunal of Peru recognized that the right to social security is a “fundamental right of legal configuration” which has an “essential core”, the violation of which by the legislature may be the subject of a constitutional complaint.<sup>201</sup> The Committee noted that while Peru has been a party to Convention No. 102 since 1961 and that the Constitution recognizes that international treaties on human rights are part of the “block of constitutionality” (norms having constitutional value), the Constitutional Tribunal does not seem to include the principles and the minima guaranteed by Convention No. 102 into the “essential core” of the right to social security. While upholding the right to social security as such, this decision also seems to devoid it of the concrete contents contained in Convention No. 102. In view of the international obligations undertaken by Peru, the Committee believed that recognition of the basic principles guaranteed by the social security Conventions of the ILO would effectively

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<sup>201</sup> Decision No. 1417-2005 PATC of 8 July 2005



contribute to the implementation in Peru of the rule of law based on the solidarity, participatory governance and social minima.<sup>202</sup>

In 2001, the International Labour Conference (ILC) reaffirmed the central role of social security and urged each country to define a national strategy closely linked to other social policies.<sup>203</sup> The need for such a strategy stems from the overall responsibility of the State to ensure the sustainability and proper functioning of the social security system, as established by Convention No. 102. The launch of a national strategy for the consolidation and development of a sustainable social security system would allow the State to fully exploit all of the potential offered by international social security standards to ensure the good administration of schemes and allow the gradual extension of coverage to the entire population.

#### *4.7 Consolidating social security system on the principles of universality, solidarity and efficiency: the case of Bolivia*

Bolivia has accepted the Parts of the Social Security (Minimum Standards) Convention, 1952 (No. 102), concerning medical care, sickness benefit, old-age benefit and survivors' benefit. It has also ratified Conventions Nos 121, 128 and 130<sup>204</sup> which set higher objectives relating to social protection. Given that the problems relating to the application noted by the Committee are essentially the same for all these Conventions and are of a systemic nature, the Committee wished to make a number of general observations concerning all the international obligations arising from these instruments for Bolivia.

The Committee examined the provisions of Act No. 1732 of 29 November 1996 and its implementing regulations<sup>205</sup> (hereinafter "the Regulations"). This

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<sup>202</sup> CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Peru (ratification: 1961) Published: 2010, found on <http://www.ilo.org/ilolex/>

<sup>203</sup> See *Social Security: A new consensus*, Geneva, International Labour Office, 2001, 114 p.

<sup>204</sup> See [http://www.ilo.org/dyn/natlex/natlex\\_browse.home](http://www.ilo.org/dyn/natlex/natlex_browse.home).

<sup>205</sup> Supreme Decree No. 24469 of 1997.

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legislation established a system based on individual funding through the insured person's accumulated capital managed by private bodies (Administradoras de Pensiones - AFP), which replaces the former system of pensions based on a pay-as-you-go system and administered by a public body, the Bolivian Social Security Institute.<sup>206</sup>

*Pension expires when the capital accumulated in the worker's individual account is exhausted (C. 102 Art. 30, C128 Art. 19).* In accordance with section 7 of the above act, the amount of the old-age pension depends on the capital accumulated in the worker's individual account. The Committee has requested the Government to confirm that the old-age, invalidity and survivors' benefits paid under the pension system are granted throughout the contingency; even where the capital accumulated in the worker's individual account is exhausted, in accordance with the international obligations undertaken by Bolivia.

*Representatives of protected persons do not participate in the administration of the private scheme (Convention 128 Art. 36; C. 102 Art. 71(2)).* The Government stated that persons responsible for the management of the private pensions system do not accept interference by the persons protected. In view of the fact that Article 36 of Convention No. 128 provides that representatives of the persons protected shall participate in the management of the schemes, the Committee expressed the trust that the Government would re-examine the matter and that it would indicate in its next report the measures which have been taken or are envisaged to give effect to this essential provision of the Convention.

#### *4.8 Introduction of the constitutional principle that public social security services will not be privatized*

In 2010 the Committee observed that: "Since February 2009, the newly adopted Political Constitution guaranteed the right of citizens to benefit free of

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<sup>206</sup> CEACR: Individual Observation concerning Convention No. 102, Social Security (Minimum Standards), 1952 Bolivia (ratification: 1977) Published: 2003, found on <http://www.ilo.org/ilolex/>

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charge from social security based on the principles of universality, comprehensiveness, equity, solidarity, standardized management, economy, opportunity, inter-cultural approach and efficiency (articles 35-45). Under the new Constitution, the State shall be responsible for administering the system under the supervision and with the participation of the social partners. The Constitution extended the right to medical care to the entire population and laid down the duty of the State to protect the right to health, in particular by promoting free access by the population to health services. The State was given the duty to ensure access to universal health insurance and the irrevocable obligation to guarantee, support financially and ensure the right to health. The Constitution also expressly guaranteed the right to a universal, solidarity-based and fair old-age pension, as well as the principle that public social security services will not be privatized or contracted out.”<sup>207</sup>

#### *4.9 Creating an independent social security supervisory authority*

With a view to ensuring the sustainable development of the social security scheme in line with international standards, the Committee drew the Government’s attention to the possibility of making greater use of technical assistance from the ILO with a view to devising, together with the social partners, a national strategy for the sustainable development of social security. The Committee stressed that: “The separation, since 1997, of the management of the short-term benefits scheme and the basic long-term scheme has resulted in each of these schemes devoting a significant proportion of their resources to the performance of administrative and operational functions, particularly those relating to membership and the collection of social contributions. Studies show that the establishment of centralized management with regard to the collection of contributions and supervision of compliance with the obligation to join the social security scheme would allow significant results to be achieved in terms of coverage and would ensure better coordination, planning and linking of strategic activities regarded as priorities from

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<sup>207</sup> CEACR: Individual Observation concerning Social Security (Minimum Standards) Convention, 1952 (No. 102) Bolivia (ratification: 1977) Published: 2010, found on <http://www.ilo.org/ilolex/>

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the point of view of the entire system. The creation of an independent specialized body responsible solely for supervising and controlling the social security system, without participating in the management of the system's programmes, is another necessary component for the proper operation and viability of social security systems.”<sup>208</sup>

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<sup>208</sup> Idem

CHAPTER FOUR

THE REFORMS OF SOCIAL SECURITY SYSTEMS IN RUSSIA AND UKRAINE IN  
THE CONTEXT OF ILO STANDARDS AND THE RIGHTS-BASED APPROACH TO  
DEVELOPMENT

1. *Labour market and social security in the last years of the Soviet Union and transition period*

1.1 *The regulation of social policies and employment in the transition period*

The labour relations in the Soviet Union were characterized by the fact that work was perceived not as a free choice of an individual, but an obligation. This obligation was imposed from the state on every person of working age. According to the principles of socialistic positivism the state was the only regulator of social relations, and the whole country was perceived as a single “factory” managed from the top. The legal norms were created to satisfy the needs of a highly hierarchical system, where labour was in the bottom of the pyramid. The role of the state was dominant in the regulation of labour relations, with enterprises entitled to issue local legal acts obligatory for the staff. As all employers were in “the property of the Soviet people”, i.e. in state property, the role of contractual way of regulating labour relations was minimized.<sup>209</sup> The state was the only regulator as well as the only employer.<sup>210</sup> From the legal perspective, this was due to the typology of property rights that existed in the Soviet Union.

However, despite the state was the main regulator of labour relations, surprisingly the main source of labour law was not a law, but regulations and by-laws. In fact, a significant role in the regulation of labour relations belonged to the

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<sup>209</sup> S. MARVIN, T. SHTRINEVA, *Principles of Labour Law*, in Reform of Labour Legislation in Russia, ILO Subregional Office for Eastern Europe and Central Asia, Moscow, 2001, p. 8.

<sup>210</sup> A. KURENNOY, *Reform of Labour Legislation in Russia: Problems and Obstacles*, in Reform of Labour Legislation in Russia, ILO Subregional Office for Eastern Europe and Central Asia, Moscow, 2001, p. 50.

organs of the communist party of the Soviet Union.<sup>211</sup> In addition to this, trade unions were basically inseparable from the state and the employers, and therefore did not perform the classical function of representation. For instance, labour disputes on the local level could be resolved by the local trade union committee which meant that the workers' representative was their judge at the same time.<sup>212</sup>

The foundations of the transition period labour law were set in the times of the New Economic Policy (NEP). By 1922 unemployment in the Soviet Union increased after the period of excessive militarization, and Party leaders recognized the need for reforms. Some institutions of market economy were restored, and there was a need to restore the protection function of the trade unions. On 12 January 1922 "The Role and Functions of the Trade Unions under the New Economic Policy" was adopted as official policy by the communist party. In this period, private trading and small private enterprises were permitted. The production in large-scale enterprises was reorganized according to commercial needs, and trade unions assumed the function to protect the workers in the new reality of 'capitalistic exploitation'. However, trade unions in this period weren't completely free to represent the interests of the workers. They were more of a mediator between the workers and the state represented by the communist party.<sup>213</sup> However, while the protection role of the trade unions increased, their role in other sectors diminished. The state took control over the regulation of social insurance, overtime work, health and safety, and stopped the state funding of trade unions. Trade unions were supposed to concentrate on the increase of productivity, and therefore in the period of NEP the workers were motivated to work efficiently. In this period the changes in salaries were determined by the condition of the labour market. Still, the labour market was not completely free, as it was heavily regulated by the state. The seventeen steps wage scale applied in the whole country was approved by the people's commissar responsible for labour and the central council of trade unions. However, the absolute value of the first step salaries (the lowest one) were not

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<sup>211</sup> K. KRYLOV, *To a New Type of Labour Legislation*, in Reform of Labour Legislation in Russia, ILO Subregional Office for Eastern Europe and Central Asia, Moscow, 2001, p. 33.

<sup>212</sup> N. LYUTOV and D. PETRYLAITE, *Trade Unions' Law Evolution in Post-Soviet Countries: the Experiences of Lithuania and Russia*, in *Comparative Labour Law & Policy Journal*, 2009, Volume 30, Number 4, p. 780.

<sup>213</sup> S. ASHWIN and S. CLARKE, *Russian Trade Unions and Industrial Relations in Transition*, 2002, Basingstoke and New York: Palgrave, p. 13.

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determined by collective bargaining taking into consideration the subsistence minimum for the profession as well as its offer and demand on the labour market. As the differences between the salaries in different steps constantly grew, the people's commissar responsible for labour (the equivalent of the labour minister) had to revise the wage scale. The reform, which was never implemented, was supposed to decentralize the regulation of wages, to increase the relationship between the lower and higher steps in the wage scale and to raise the role of collective bargaining in the regulation of wages.<sup>214</sup>

However, in 1927-1929 the NEP period was coming to an end, and the official political course turned to the extreme left. The state took complete control over the regulation of wages, and the role of collective bargaining became merely symbolic. The new primary function of trade unions was to increase production and to make the enterprise comply with the state five-year plan. Gradually, the trade unions became an annex of the communist party and completely lost any bargaining power.<sup>215</sup> In the meanwhile the salaries were deprived of their motivation function. The sole wage scale was replaced by numerous scales for workers and employees fixed on the central level. Any economic incentives gradually disappeared, and workers eventually found themselves completely demotivated.<sup>216</sup> A bright example of the merger between the trade unions and the state apparatus was the abolition of People's Commissariat of Labour in 1933 and the assumption of its functions by trade unions. The trade unions got the functions of labour inspection<sup>217</sup>, the distribution of social benefits, monitoring health and safety standards and the implementation of the Labour Code. As the unions proved to be inefficient in increasing productivity, social administration became their main role. Trade unions became a kind of social welfare departments of enterprises. In their work they depended on the management and lost any independence as well as the ability for

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<sup>214</sup> V.I. CHTCHERBAKOV, *La rémunération du travail en URSS : problèmes et perspectives*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 250.

<sup>215</sup> S. ASHWIN and S. CLARKE, *Russian Trade Unions and Industrial Relations in Transition*, 2002, Basingstoke and New York: Palgrave, p. 14.

<sup>216</sup> V.I. CHTCHERBAKOV, *La rémunération du travail en URSS : problèmes et perspectives*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 250.

<sup>217</sup> S. A. IVANOV, *Labour Law of Russia in the Transition from the Planned to the Market Economy*, in *Labour Law and Industrial Relations in Central and Eastern Europe (From Planned to a Market Economy)*, *Bulletin of Comparative Labour Relations* 31, The Hague/London/Boston, 1996, Kluwer Law International, p. 131.

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collective bargaining. From the early stage trade unions gave priority to the interests of management in the distribution of welfare benefits. For instance, they evaluated the eligibility of workers for benefits on case-by-case basis depending on the worker's attendance and other personal factors.<sup>218</sup>

Without economic incentives for productivity, the Soviet management mechanism turned out to be extremely inefficient. The resources were not used effectively, both material and human. The degradation of social conditions, poor organization and the lack of motivation caused sharp decline in labour productivity and increased turnover of labour. To compensate for low labour productivity enterprises increased their staff, as they did not have the right to modify wages. The number of administrative staff increased as well, leading to the extreme centralism in industrial relations. Even after the death of Stalin, the centralist approach in the regulation of labour relations persisted. The salary range persisted in the post-war period as well until the collapse of the Soviet Union. It was illegal for enterprises to pay workers above the centrally regulated wage rates with various coefficients, such as for harmful working conditions etc. The wages were paid according to the ratio between the higher and the lower steps in the grade continued to fall. In addition to this, the correlation between the level of education and income was broken. Half of the semi-qualified workers received medium wages, and 15 per cent even got higher wages, while 20 per cent of university graduates received a salary which was just over the minimum wage. The relationship between the performed work, both quantitatively and qualitatively, and salary was lost. The demotivation of workers caused serious problems, for example the decline of some qualifications, such as medical workers, teachers, engineers and researchers. This situation led to the total degrade in the Soviet technological sphere and science.<sup>219</sup> However, some academics sustain an opinion that the egalitarian wage scale of the Soviet System is a myth.<sup>220</sup> Wages inequality in the Soviet Union really fell between the 1960s and 1980s, but the difference in salaries within various sectors of

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<sup>218</sup> S. ASHWIN and S. CLARKE, *Russian Trade Unions and Industrial Relations in Transition*, 2002, Basingstoke and New York: Palgrave, p. 14.

<sup>219</sup> V.I. CHTCHERBAKOV, *La rémunération du travail en URSS : problèmes et perspectives*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 250.

<sup>220</sup> G. STANDING, *Le marché soviétique du travail : salaires et motivation. Comment surmonter le déséquilibre entre salaire et prestations non salariales*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 266 ss.



economy remained substantial. In this way, manufacture was the sector with the highest wages, especially in heavy machinery. The problem is that these differences subsisted long after the start of industrialization. Starting from 1970s the wage differences among sectors have prevented the free movement of workers to the underdeveloped sectors, such as the production of consumer goods and the services sector. In the 1980s wages in the services sector fell in comparison to the wages in industry. In professional employment, an absurd situation occurred as the level of wages became indirectly proportionate to the level of education. The salaries of workers with higher level of education were sometimes lower than the salaries in manual work.

### *1.2 The regulation of labour relationships in the Soviet Union*

Beginning from the first decades after the creation of the Soviet Union remuneration policy proved to be based on the professional status. The ratio between wages was fixed by the Soviet administration according to the idea that all professions could be divided into two groups: “productive” and “non-productive”. Therefore, the policy aimed to favor the socially useful work. As the status of certain work was extremely hard to change in the bureaucratic machine of the Soviet state, the wages were extremely inflexible. There was no minimum wage in the Soviet Union. Instead, every profession was attributed a minimum retribution level, and the salary of a worker depended on many different coefficients. In this way, a strict hierarchy of professions, and thus salaries, was created according to the principle of “social productivity”.<sup>221</sup> As we can see, this policy was an attempt to create incentives for workers to work harder and to produce more. The coefficients that determined an individual salary depended on such factors as the person’s tasks and responsibilities, the level of education required, working conditions, work experience etc. It was an attempt to bring some retribution justice

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<sup>221</sup> G. STANDING, *Le marché soviétique du travail : salaires et motivation. Comment surmonter le déséquilibre entre salaire et prestations non salariales*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 266 ss.

in the system. However, it was impossible to realize in a centrally planned economy where all the salaries were determined from the top.

In December 1957 the role of trade unions was enhanced by the resolution of the Central Committee of the Communist party. In this period the state power was concentrated on the increase of industrial production, which demanded more workers' involvement in production administration and better safety and social standards. According to the resolution, the collective agreement was the basis of all the trade union activity in the enterprise. However, the main duty of Soviet trade unions remained the increase of productivity. For instance, a typical collective agreement regulated the duties of trade unions and management, which included the obligation of trade unions to ensure that the workers perform the production plan, while the enterprise's administration had a duty to implement the "social development plan".

The production plan was central in the collective agreement, and the trade unions did not have any possibility to negotiate working conditions. As it was mentioned above, the level of wages, which is normally the central issue of collective bargaining, could not be negotiated by trade unions. The wage scales could be revised, but it was a difficult and conflict generating process, therefore this happened only once in ten years or so. In the centrally planned economy, the minimum wage was determined according to consumer balance. The sum of wages had to correspond to the value of consumer goods available. However, some incentives were possible on the enterprise level, with the management being able to use non-material incentives as well as some informal bonuses to motivate a valuable worker. From 1966 enterprises were allowed to pay some bonuses from a special fund, but this constituted only 5 % of the salary.<sup>222</sup> In fact, as the salaries were practically unified across the country and were extremely inflexible, the competition for jobs shifted to another, non-material sphere. In the Soviet Union, there were jobs that were more thought-after thanks to the non-salary benefits that they provided. These benefits included the access to consumer goods and resort

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<sup>222</sup> S. ASHWIN and S. CLARKE, *Russian Trade Unions and Industrial Relations in Transition*, 2002, Basingstoke and New York: Palgrave, p. 14.

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facilities etc.<sup>223</sup> In fact, this was one of the major reasons why the labour productivity remained low for years. In the system, where the salary was not a good incentive for an employee to work hard, the main incentives mechanism was broken. In a centralized economy, hard work and effort did not receive appropriate retribution, and all work was considered as socially valuable and useful. As a consequence, an informal market of jobs was created where jobs were traded according to their attractiveness in terms of access to non-salary benefits. A network of vendors was created who sold consumer goods at the work place. In the Soviet Union, a high salary did not guarantee access to goods; therefore, money had relative value in comparison to a job that could provide such access. According to the possibilities that a job could provide, it was considered prestigious or not. Corruption and rent-seeking which were the inevitable results of such a system caused the devaluation of talent, creativity and professionalism.<sup>224</sup>

In fact, the centralization of the labour market regulation, particularly wage setting, caused the development of ‘phantom’ labour law in the 1970s. A kind of unwritten set of rules was created which was applied together with the official labour law, but could be in direct contradiction to the latter. A form of mutual concessions between the bureaucratic apparatus and workers was created. For the management, the five year plan was the main ‘legal act’ to follow. The plan set quantitative criteria for the enterprises to achieve. At the same time, each worker wanted to improve their personal situation, which in the Soviet Union labour market meant to work less and still receive the same salary. In a system with bad work discipline and low productivity, the management always found itself in the situation of the lack of work force. At the same time, workers kept threatening to quit the enterprise in order to obtain benefits. Therefore, the management was forced to continue to pay wages even though the real work was not performed. In such a situation, the workers who actually did their work received double their wage. There was no legal way to encourage qualified and motivated workers, and enterprises were obliged to keep a fixed number of employees in order to receive

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<sup>223</sup> V.I. CHTCHERBAKOV, *La rémunération du travail en URSS : problèmes et perspectives*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 250.

<sup>224</sup> G. STANDING, *Le marché soviétique du travail : salaires et motivation. Comment surmonter le déséquilibre entre salaire et prestations non salariales*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 266 ss.

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funds from the top. As a result, managers resorted to illegal ways to encourage good workers. By declaring a higher production level that was actually achieved, an enterprise received more funds which could be used to pay good workers. Another common practice of the employers, who could not raise labour productivity, was to increase working time. By the silent agreement of workers, the working time was illegally extended and it was for years much longer than the official 41 hours per week established by law. As the additional working hours were not declared, the impression was created that labour productivity was growing.<sup>225</sup>

The primary source of labour law in the Soviet Union was the Code of Labour Laws, which was first adopted on the all-country level, and then on the level of the republics. Officially, the Soviet republics had their own labour codes, but the latter were the exact copies of the Code of Labour Laws of the Soviet Union.

The first Code of Labour Laws in the Soviet Union was adopted and came into force in December 1918. This was a political act which was supposed to “implement the great social achievements of the working class as a result of the victory in the Great October socialistic revolution”.<sup>226</sup> It was claimed by the Soviet power that the code was the first legal act in the world to introduce 8 hours working day. The second labour code was adopted in November 1922 as a result of the end of the civil war. This code remained in force until the adoption in 1970 of the Basic Labour Laws of the Soviet Union and Soviet republics. By 1972 all the republics of the Soviet Union have adopted their respective codes of labour laws.

### *1.3 Reforms of the late 1980s*

The general feeling of stagnation became widespread in the Soviet Union after 1980. After the election in 1985 of Mykhail Gorbachev as the general secretary of the communist party, the Soviet society started to wake up. Soon after

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<sup>225</sup> V.I. CHTCHERBAKOV, *La rémunération du travail en URSS : problèmes et perspectives*, in *Revue internationale du Travail*, 1991, vol. 130, No 2, p. 250.

<sup>226</sup> K. GORSHENIN, *Bolshaya Sovetskaya Entsiklopediya*, art. 32361

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his arrival to power, Gorbachev started to implement political and economic reforms that influenced the development of the labour market.

However, real changes were not coming for a long time, and were preceded by old-style neo-Stalinist campaigns, such as the fight against alcohol in 1985. In 1986 the communist party started another old-style campaign, which was directly related to the labour market. The campaign was aimed to combat “unearned incomes”, i.e. any non-salary earnings. In practice, this campaign was directed against poor pensioners who grew vegetables and fruit in their gardens and sold them in private markets. As a result, the supply of food fell, and the prices on fruit and vegetables from collective agricultural enterprises increased, as they were determined more or less freely.<sup>227</sup>

In November 1986 the Law on Individual Labour Activity was passed, and it came into force in May 1987. The law determined types of individual labour activity that were lawful, and it was a step towards free labour market as some forms of private enterprise were permitted, although the conditions were not favourable.<sup>228</sup>

In 1987 a big-scale economic reform was passed by Gorbachev. Its central element was the Law on State Enterprises that came into force in January 1988. According to the law, the state lost its right to command state enterprises. On the other hand, the state enterprises did not receive economic freedom either. As a result of this reform, in a couple of years managers of state enterprises took complete control over them. They were not concerned about the levels of productivity or labour force, as they did not have the right to sell the enterprises. However, they had power over cash-flow, which opened way to corruption and rent-seeking.

In addition to the mentioned reforms, Gorbachev committed to the partial liberalization of foreign trade. Starting in August 1986, it was one of the first

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<sup>227</sup> A.ASLUND, *How Ukraine Became a Market Economy and Democracy*, 2009, Peterson Institute for International Economics, p. 24.

<sup>228</sup> Idem.

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reforms, having as the main purpose to break the monopolistic position in foreign trade of the USSR Ministry of Foreign Trade. The reform aimed to favour large state enterprises and to give them better chances in foreign trade. In the meanwhile, a new pricing policy was introduced. All the significant goods traded internationally were attributed a currency coefficient and a foreign exchange rate. The ratio among these coefficients varied from 1 to 20. This system was abolished in 1990. However, several different currency exchange rates continued to exist in the Soviet Union offering opportunities for corruption and arbitrage which were widely used by the managers of big enterprises. Because the foreign trade was liberalized, the state enterprises that participated in it got plenty of possibilities for rent-seeking. The so called 'red directors' of enterprises engaged in the arbitrage mechanisms in order to use the difference between lower domestic prices and world higher prices for raw materials, as well as various exchange rates. According to the Law on State Enterprises, the enterprises were now allowed to keep profits which were previously confiscated at the end of each year. As by this time, a new, private, form of enterprises – cooperatives – already existed, the directors could transfer the profits from state enterprises to their own cooperatives and to transform virtual, 'bank', money into real cash. The appearing commercial banks could provide directors with credits to finance their businesses. What happened in reality is that the directors of large state enterprises sold the commodities that they produced to a private intermediate, a cooperative, applying lower domestic prices. This cooperative was usually owned by the director together with other persons who could provide necessary export permits and licenses. In their turn, the cooperatives sold the commodities abroad applying export prices which were at times 200 the cost of the product within the Soviet Union.<sup>229</sup>

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<sup>229</sup> A.ASLUND, *How Ukraine Became a Market Economy and Democracy*, 2009, Peterson Institute for International Economics, p. 24.

### *1.4 The Regulation of Social Security in the Soviet Union and social security in the transition period*

Historically, social protection systems in Eastern European countries have their origins in the Bismarckian social insurance model. However, since the creation of the Soviet bloc, the social security systems were largely reformed and could be characterised by several common features, such as:

- The social security budgets were a part of the State budget
- The social security systems were financed only by enterprises or administrations
- There was no ceiling for contributions and no individual approach to contributions and benefits.<sup>230</sup>

In the Soviet Union, the social security system derived from the common principle of central planning. Therefore, any person was protected from income risks by the state at any stage of his or her life. Thus, both employment for the working age population and social protection at pension age were both guaranteed by the state. In such a way, the state guaranteed security to the population throughout the lifetime. On the other hand, people with special needs were provided social assistance. This targeted social assistance was focused on such persons as children without parents, the disabled etc., who were given right for cash benefits and care in specialised institutions. Also, the law provided for extensive rights for subsidies, such as for instance partial or full exemptions for housing and utilities payments etc. In general, the systems provided for the high degree of equality. However, there were some categories of workers (such as, for instance, miners or teachers) who were given right for substantial benefits. Despite the existence of these relatively privileged groups, the system was largely egalitarian. Both jobs and retirement were guaranteed by the state, wages and pensions were determined on the central level. Due to the Soviet policy of “full employment” employment rates

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<sup>230</sup> H. LOURDELLE, *Central and Eastern European Countries: the Transition from a Planned to a Market Economy – What Consequences for Social Security?* in *Labour market and social protection reforms in international perspective : parallel or converging tracks?*, edited by H. SARFATI AND G. BONOLI, Aldershot, 2002, Hants Ashgate Publishing Ltd., p. 494.

in the Soviet Union were very high. Indeed, work was rather an obligation than a right, as “parasites of society” could even be imprisoned.<sup>231</sup> Besides, as it was already mentioned, the system encouraged the management to overstaff. As a result, there were almost no unemployed persons in the Soviet Union. Consequently, Soviet law did not explicitly provide for the unemployment insurance and unemployment benefits. Also, the fact that the labour law provided very high level of protection for workers against dismissal, it was almost impossible for employers to retrench staff. In addition to this, the law restricted internal migration by limiting private property, ability to obtain housing, the obligation to register, as well as by the widespread practice for workers to have only one employer throughout lifetime.

Similarly to the social security systems of Western European countries, the social security system in the Soviet Union developed as a result of fear of rapidly growing poverty due to fast industrialisation at the wake of the twentieth century.<sup>232</sup> After the Second World War, as the countries or republics were included in the Soviet bloc, their Bismarckian social security systems had to undertake transformation in order to correspond to the new political regime. Normally, such transformation was undertaken in two stages. At the first stage, social insurance contributions were abolished and the financial responsibility over social security was transferred to the state budget. At the second stage, the relation between the amount of benefits and the qualifying condition was abolished. As a result, the old-age benefits depended solely on the length of the person’s employment. These changes allowed for the state to claim that social security was universal.<sup>233</sup>

In the socialist system, the social security schemes were organised on a pay-as-you-go (PAYG) basis. Just like the social security systems in Western European countries, industrialisation and the related fear of poverty played vital role in the development of welfare systems in Eastern Europe. The general trait of the Soviet social security system was high level of coverage, which was induced by the organization of the labour market in the Soviet Union. The criteria for eligibility

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<sup>231</sup> A. CERAMI, *Social Policy in Central and Eastern Europe. The Emergence of a New European Welfare Regime*, Münster, 2006, Berlin LIT Verlag, p. 50 ss.

<sup>232</sup> *Balancing Protection and Opportunity, a Strategy for Social Protection in Transition Economies*, World Bank, Washington, 2000, p. 21 ss.

<sup>233</sup> V. RYS, *Reinventing Social Security Worldwide: Back to Essentials*, 2010, The Policy Press, University of Bristol, p. 36 ss.



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was also low, with men obtaining the right for old-age pension at the age of 60, and women at the age of 55. The replacement rates were also high (between 60 and 70 % in various socialist states). In addition, there were weak links between the contributions amounts and periods on the one hand, and the level of received benefits on the other, as collected contributions were further redistributed among beneficiaries regardless of their contributions levels.<sup>234</sup>

Social security became one of the most important political factors for the Soviet power, as it was often used as the main argument to distinguish the regime from the capitalist countries. Indeed, the level of social security protection in the Soviet Union and the countries of the communist bloc was higher than in capitalist countries. First, this concerned the level of benefits as compared to the level of wages. Also, the Soviet power went further in terms of anti-discrimination regulation. While in Western Europe the basic strategy was to bring women on the same level with men in terms of employment and social protection, in the Soviet Union women were considered as deserving special protection. Thus, the retirement age for women was significantly lower than that of men. Also, women's social security benefits could depend, for instance, on the number of children they brought up. The Soviet power claimed that it brought the social security to the highest level of development, as it broadened coverage and assumed total responsibility over social security system.<sup>235</sup>

However, despite the claims of the egalitarian character of the social security system in the Soviet Union and other European communist countries, in reality several different categories were created. First, the system was aimed to benefit those who had particular merit in view of the state and the communist party. So called 'personal pensions' were introduced for people with special accomplishments, public officials and party officials. Also, professions that were considered particularly important for the development of economy (such as, for instance, miners) were also rewarded in terms of social security. On the other hand, social security benefits were used as a method to punish workers that were

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<sup>234</sup> *Balancing Protection and Opportunity, A Strategy for Social Protection in Transition Economies*, The World Bank, Washington, 2000, p. 21 ss.

<sup>235</sup> V. RYS, *Reinventing Social Security Worldwide: Back to Essentials*, 2010, The Policy Press, University of Bristol, p. 36 ss..

performing badly. Thus, in ex-Czechoslovakia a unauthorised absence from work for a day was punished by the loss of the right for family allowance for one month.<sup>236</sup>

While in the post-war years the system was financially sustainable thanks to the larger number of contributors than the beneficiaries, the demographic situation changed as decades passed which generated the crisis of sustainability. As the population was aging, the ratio of contributors to beneficiaries changed dramatically. Also, early retirement provisions were often used to compensate for the rigidity of labour laws. As a result, many workers retired early. Consequently, by mid-1980s the PAYG system became financially unsustainable and inequitable. The problem of 'intergenerational equity' became highly acute, as resources were collected from the generations of current workers and redistributed among pensioners, while there was clearly not enough future entrants into the labour market. This created 'time bombs' for the future generations.<sup>237</sup>

Another problem concerned the effective participation of employers and workers in the management of social security schemes. In the Soviet Union and communist Eastern European countries, despite employers made contributions to the social security funds and in fact financed the whole social security system entirely, they were not involved in the further management of the social security system and had no control over expenditures. The fact that the universal employer – the state – was introduced changed profoundly the legal relationship between the enterprises and their employees. For instance, in the area of work injury benefits, the enterprises were no longer liable for all the costs incurred by a worker as a result of an accident at work place. Enterprises paid special levies to the social security budget, however it was the state who administered the branches of accident insurance, health care, rehabilitation and the provision of disability benefits with no role reserved for the enterprises. As a result, the latter lost any incentive to provide for the adequate level of health and safety protection at work, which in many cases

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<sup>236</sup> Idem

<sup>237</sup> J. KORNAI, S. HAGGARD and R. R. KAUFMAN, *Reforming the State: Fiscal and Welfare Reform in Post-Socialist Countries*, Cambridge, 2001, p. 9 ss.

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resulted in hazardous employment conditions.<sup>238</sup> By contrast, workers' organizations (the main trade union) were responsible for the management of social insurance funds. However, as workers' organizations were directly controlled by the Communist Party, workers did not have an independent voice regarding the administration and financing of social security system either.<sup>239</sup>

In addition, during transition the situation with the financial viability of social security system deteriorated. This was due to the appearance of open unemployment, tax evasion, workers' migration which all contributed to the sharp decline in contributions. While in the richer countries of Central Europe this problem was solved by higher rates of contributions and budget transfers, the situation in the ex-republics of the Soviet Union was worse. Despite the fact that the contribution rates were raised, the rates of benefits remained low due to inflation, or the pensions were not paid at all. In several countries (like Albania, Ukraine, Georgia) the structure of benefits was flat, which meant that the rate of benefits did not depend on the rate of contributions. Most Eastern European countries addressed the challenge by reducing the redistribution of resources among generations and linking the rates of benefits to the rates of contributions. Two Central European countries (Poland and Hungary) adopted multipillar systems which were much advertised by international financial institutions, which claimed that the introduction of private pension schemes could help diversify risks. In 1998, Poland passed new legislation which obliged nearly 2 million workers under the age of 40 to join private schemes. Also, all young workers entering the labour market were required to join private schemes as well. By 1999, more than thirty million Polish workers joined private pension schemes.<sup>240</sup>

Because the issue of social security in the Soviet Union and other communist regimes in Eastern Europe was highly political, the state had no margin for manoeuvre in the situation of high financial deficit. From the start, the regime used the propaganda of the universal protection with the special emphasis on the

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<sup>238</sup> V. RYS, *Reinventing Social Security Worldwide: Back to Essentials*, 2010, The Policy Press, University of Bristol, p. 36 ss..

<sup>239</sup> A. CERAMI and P. VANHUYSE, *Post-Communist Welfare Pathways- Theorizing Social Policy Transformations in Central and Eastern Europe*, 2009, Palgrave Macmillan, p. 35 ss.

<sup>240</sup> *Balancing Protection and Opportunity, A Strategy for Social Protection in Transition Economies*, The World Bank, Washington, 2000, p. 23.

poor and disadvantaged groups. In practice, over the years, the poor and disadvantaged were replaced by the ‘enemies of the state’ who were left at the margins of the society, with the majority of the population being offered a mostly uniform standard of protection in return for their political freedoms. However, as the incompatibility between the social promises of the state and the level of economic productivity in socialist systems became more evident, the state found itself unable to deal with the financial challenges without compromising its ideology.<sup>241</sup>

As the Soviet Union fell, the major trend in the social security schemes in Eastern and Central Europe consisted in giving more independence to social security funds from the state. However, in some Central European countries social security budgets remained a part of state budget (like in Estonia). Another important measure consisted in the involvement of social partners in the management of social security funds. This is especially relevant for the branches of social security that are financed through the contributions of employers and workers.<sup>242</sup>

The social security legislation in the Central European post-socialist countries was substantially amended or completely renewed in the years following the fall of the Soviet Union. The new economic conditions required a thorough rethinking of the whole social security systems in these countries. For instance, mass unemployment induced the introduction of unemployment benefits in all these countries, the growing inequality was the reason for the development of the system of social assistance to the most disadvantaged groups.

Thus, for instance, in Hungary, a package of social security legislation was adopted in 1997. The package included the Law on the provision of social insurance pensions, the Law on private pensions and private pension funds, the Law on compulsory health insurance and health care services. Also, the Law on social services and social insurance of 1993 was amended. The new Hungarian legislation

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<sup>241</sup> V. RYS, *Reinventing Social Security Worldwide: Back to Essentials*, 2010, The Policy Press, University of Bristol, p. 36 ss..

<sup>242</sup> H. LOURDELLE, *Central and Eastern European Countries: the Transition from a Planned to a Market Economy – What Consequences for Social Security?* in *Labour market and social protection reforms in international perspective : parallel or converging tracks?*, edited by H. SARFATI AND G. BONOLI, Aldershot, 2002, Hants Ashgate Publishing Ltd., p. 494 .

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lowered the standards of social protection through: the increase of retirement age, particularly for women, the privileges for the work in hazardous conditions were cancelled, the amount of some benefits was cut.

In Poland, the Social Insurance System Law of 13 October 1998 and the Law on Pensions from the Social Insurance Fund of 17 December 1998 introduced significant changes into the system of social insurance. In particular, the transition to the contributory system in the old-age insurance, the equality in employer's and worker's contributions was introduced, the method of calculation of pensions beyond the contributory system was amended. The Law of 25 June 1999 amended the legislation on sick leave and maternity leave. Also, the Law on accidents at work and professional diseases of 1975 was amended.

In Bulgaria, the Code of compulsory social insurance was adopted in 1999. Prior to the adoption of the Code, the Law unemployment protection and employment promotion of 1997, Health Insurance Law of 1998, and the Social Assistance Law of 1998 totally amended the Bulgarian social protection system. Significant changes were introduced in the old-age insurance scheme. Thus, the requirements regarding age and employment experience were raised; the contributory system was introduced, like in Hungary and Poland, the provision for the gradual equalization of workers' and employers' contributions was introduced.

In Czech Republic, new legislation was adopted in the areas of old-age insurance and social assistance. The new Czech Old-Age Benefits Law of 1995 increased the retirement age, especially for women, and eliminated privileges related to hazardous working conditions. The Social Insurance Law of 1993 introduced significant changes in the system of social insurance. Along with these developments, the Health Insurance Law of 1956 was amended more than 20 times. These amendments included the cut in temporary unemployment benefits and the transfer of the financing of child benefits from health care system to social insurance scheme.

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In Romania, the Law on the System of State Pensions and other Rights for Social Insurance was adopted in 2000 and had a codifying character, as it incorporated different areas of social protection in one legal act.

However, despite the fact that in many cases the level of social protection was lowered, the new legislation in Bulgaria, Hungary, Poland, Romania and Czech Republic provided for the possibility to apply the provisions of the old laws during a long transition period in case it guaranteed higher level of protection for the beneficiary.

### *1.5 Ratification of international legal instruments in the area of social security and labour relations*

All Eastern European and Central Asian states have ratified the eight ILO conventions on international labour standards. The exception is Uzbekistan, as it has not ratified ILO Convention No. 87 on the Freedom of Association and Protection of the Right to Organise. The ILO Convention No. 138 on The Minimum Age was ratified by Uzbekistan in 2009.

ILO Convention 102 has only been ratified by the following Eastern European countries: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, and the Former Yugoslav Republic of Macedonia.

The general level of the ratification of ILO conventions varies significantly among Eastern European countries with Georgia having ratified 16 conventions and over 80 conventions ratified by Poland and Bulgaria.<sup>243</sup> Also, most countries in the region have ratified the European Social Charter.<sup>244</sup>

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<sup>243</sup> A.KUDDO, *Labour Laws in Eastern European and Central Asian Countries: Minimum Norms and Practices*, 2009, The World Bank Human Development Network, Social Protection & Labor Team.

<sup>244</sup> [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp)

What is more important for this research is that the European Code of Social Security (Revised), which is a replication of the ILO Convention 102, has only been signed by 13 countries, all of which are Western European states, and it has only received one ratification – from the Netherlands. Neither Russia nor Ukraine have not signed the Code.

Finally, the Eastern European countries which are members of the European Union are covered by the EU regulation in the area of social security.

### *1.6 The regulation of financing and administration of social security systems in Eastern European countries*

The transition period in the post-Soviet countries was an unprecedented historical period. Some sustain that the path chosen by most transition countries could be compared to ‘shock therapy’. The approach to transition strategy by and large reflected the views shared by the Bretton Woods institutions, but also by the political forces that came to power in many of the new states.<sup>245</sup> The “Washington Consensus” with its neo-liberal approach was the predominant ideology behind the reforms which included ‘freeing prices, removing subsidies, opening up the national economies to external trade and investment, removing exchange controls, achieving budgetary equilibrium, privatizing enterprises, closing unprofitable companies and reducing social expenditure.’<sup>246</sup>

The systems of social security in the transition countries of Eastern Europe are still not defined. However, their main features can already be identified. The social security systems differ in the various regions of post-Soviet space: the Baltic

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<sup>245</sup> D. GHAI, *Social security priorities and patterns: A global perspective*, discussion paper, International Institute for Labour Studies, 2002

<sup>246</sup> As D. GHAI argues, ‘this approach was considered economically and politically superior to other alternatives. Economically, it consisted of a set of mutually supporting policies that would quickly put the national economies on a rapid growth path after an inevitable but short-lived recession. Politically, it would make reversal to communism virtually impossible by destroying its central pillars.’ In D. GHAI, *Social security priorities and patterns: A global perspective*, discussion paper, International Institute for Labour Studies, 2002.

countries, Central Asia etc. Even though, the social security systems across the region were influenced by common factors, such as:

- Low productivity levels caused by the centrally planned economy of the Soviet Union;
- Fast decline of employment rates and the rise in poverty;
- A crisis in public finances.

As Dharam Ghai argues, “the international financial institutions and European regional organizations exerted a decisive influence on the formulation of new arrangements. The system that emerged incorporated elements of the continental and liberal welfare models. However, in its actual working, it also shared some features of the social security systems in developing countries.”<sup>247</sup>

The following changes were introduced to the financing and administration of social security systems in the countries of the ex-Soviet bloc:

- The subsidies which were common in the Soviet system were eliminated;
- The participation of the private sector in health care and education increased, though in most countries these areas continue to be financed mostly by the state;
- Separate funds were created to finance old-age pensions, maternity benefits, disability benefits, sickness benefits. In contrast to the old system where these benefits were financed by the state, these funds are financed on a collective basis through the contributions of workers and employers;
- Unemployment benefits which are financed by the state or through contributions were introduced;
- Social assistance schemes were created due to the increase in poverty rates;

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<sup>247</sup> K. GUSOV, *Pravo Sotsialnogo Obespecheniya Rossii*, Moscow, 2008, Prospekt, p. 587 ss.



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- Some countries partially privatised their pension schemes and introduced two-tier or three-tier pension schemes.<sup>248</sup>

It is possible to say that all in all an efficient and comprehensive social security system which was in place in the Soviet Union was replaced by “a highly selective” system which did not provide a comprehensive coverage for the whole population. In a society where unemployment was practically non-existent before, many people found themselves unemployed and without the right to receive any financial support from the state. Another major problem is informal economy, which is the reason of many financial problems, as well as of the exclusion of the large proportion of the population from the social security system. By this standard, the so-called countries in transition resemble countries in the developing world.<sup>249</sup>

It has been established at the international level thanks to extensive economic research that the problem of exclusion of a big part of a country’s population from the social security system is not financial, but rather political and administrative. The reason of such exclusion is rather bad distribution of resources at the national level, and not the lack of money to assist everybody. Global challenges to pension systems and problems of Russia’s pension system.

Russia’s transition to market economy required adequate reforming of the pension system, its transformation from Soviet system of state pension coverage into the system of *obligatory pension insurance* able to adapt to cyclic character of market development independently, without participation of the state.

The principal incentive for the start of pension system reform on insurance principles for Russia, as well as for all developed countries of the world community was demographic crisis, which increases pension burden on working population and bears serious threat to financial capacity of state pension obligations. At the beginning of 2000-s it was supposed that Russia would undergo the whole acuteness of demographic crisis from the mid of 2020-s, when the amount of

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<sup>249</sup> D. GHAI, *Social security priorities and patterns: A global perspective*, discussion paper, International Institute for Labour Studies, 2002

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working people would be less than the amount of pensioners. Demographical crisis made not only Russia, but all developed countries of the world, to search the ways of their pension systems optimization. Huge influence on this process was exerted by the published research report of the World Bank “Averting the Old-Age Crisis: Policies to Protect the Old and Promote Growth”,<sup>250</sup>.

The main idea of the report lied in the fact that the only efficient means against the negative consequences of population’s aging is full or at least partial privatisation of the state (social) system of pension coverage.

Under insistent recommendations of the World Bank, in the Russian Federation, starting from the year 1998, consecutive steps on transition of state pension system to contributory principles of financing have been executed. According to the Programme of Pension Reform in the Russian Federation, approved by the Decree of the Government of the Russian Federation as of 20.05.1998 No. 463, the stabilisation of existing distribution system of pension coverage could be reached only by means of gradual rise of pension age and the simultaneous abolition of all existing privileges related to premature retirement. As an alternative to adopting this unpopular measure, a gradual transition from common distribution system to combined system of pension coverage, where a considerable role is played by the contributory mechanisms of pension financing, is stipulated. Formation of considerable pension accruals according to the developers of the programme will allow reduction of financial dependence of the pension system on correlation of the number of working age persons and pensioners, and thanks to this essentially increase its stability to face of unfavourable demographic changes.

Because of this, the 1998 Programme did not stipulate measures on rise of pension age, as well as was based on the fact, that the model of formation of state pension coverage with gradual introduction of accumulative element suggested in it will allow to balance the incomes and obligations of Pension Fund of the Russian

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<sup>250</sup>*Averting the Old-Age Crisis: Policies to Protect the Old and Promote Growth*, World Bank, 1994. This report was prepared by the group of experts from the World Bank on the basis of analysis of the experience in introduction of accumulative pension systems in several Latin American countries.

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Federation (PFR) during the whole transitional period (until the year 2020) without the increase of base rate of insurance contributions. Moreover, it was supposed that in long-term perspective the tariff policy in state pension insurance had to be oriented at gradual decrease of charging tariff for workers working in normal technological and climatic conditions. The same ideology was fixed in the § 2.10 “Pension Reform” of the Programme of Social and Economic Development of the Russian Federation for average term prospect (2002 – 2004), approved by the Decree of the Government of the Russian Federation as of 10/07/2001 No. 910-p.

In the 2001 Programme it was stated that as a result of the acceleration of the population’s ageing, the increase of the number of pensioners would be accompanied by the decrease of working people performing payments to pension system. This is why retaining of distribution principle of pension financing in prospect would lead to the deterioration of the financial state of the pension system and the decrease of the level of pensions paid. In this respect since January 1, 2002 transition of pension system to obligatory mechanisms of accumulative financing with the use of private institutions (companies’ managers and non-governmental pension funds) was stipulated, and this was realised by means of adoption of federal legislative package on pension reform.

However, many developed countries (such as France, Germany, Italy, Spain etc.), irrespective of the relevant political and economic discussions which are taking place in these countries at present, have not taken the decision to introduce compulsory accumulative components in national pension systems. The systems of pension coverage in these countries are organised according to the solidarity model and pension accruals are formed by the population exclusively on a voluntary basis.

In many respects such a healthy conservatism of the leading countries of the world is connected with the significant changes in the views of the World Bank and International Monetary Fund regarding the introduction of accumulative mechanism of pension financing as a panacea from demographic crisis, as well as with the absence of open support of accumulative system on behalf of some specialised UN institutions, namely the International Labour Organization and the International Social Security Association.

2. *Financing and administration of social security in the Russian Federation*

The Constitution of the Russian Federation does not provide for a mechanism of financing of social security system. Neither does it contain provisions related to the administration of social security schemes.<sup>251</sup> The mechanisms of financing of the social security system may be the following:

- Transfers from the state budget;
- Compulsory social insurance;
- Voluntary social insurance.

However, the primary mechanism of the social security financing in Russia is compulsory social insurance. This approach is supported by the legislation of the Russian Federation, as well as a number of decisions of the Constitutional Court of the Russian Federation.<sup>252</sup>

As it was described above, the social security system of the Russian Federation experienced significant transformation in the 1990s due to the fall of the Soviet Union. In this period, specialised social security funds were created. The funds included the Pension Fund of the Russian Federation, the Social Insurance Fund of the Russian Federation, the Federal Fund of Compulsory Health Insurance and the relevant local funds, as well as the State Employment of Population Fund. The funds; resources were not consolidated in the state budget which contributed to the transparency of their management. This system was in line with the main requirements of the financing and administration of social security schemes provided by the standards of the International Labour Organization. The funds covered all nine branches of social security identified in the Convention No. 102.

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<sup>251</sup> Article 39 of the Constitution of the Russian Federation dated 12 December 1993 provides for the following rights: 1. Everyone shall be guaranteed social security in old age, in case of disease, invalidity, loss of breadwinner, to bring up children and in other cases established by law. 2. State pensions and social benefits shall be established by laws. 3. Voluntary social insurance, development of additional forms of social security and charity shall be encouraged.

<sup>252</sup> K. GUSOV, *Pravo Sotsialnogo Obespecheniya Rossii*, Moscow, Prospekt, 2008, p. 42.

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The funds collected social security contributions on behalf of employers and beneficiaries according to the principle of participative management.<sup>253</sup>

In July 1999, the Federal Law regulating social insurance was adopted.<sup>254</sup> The law regulated the fundamental principles of social protection in the Russian Federation, which encompass the following:

- Financial stability of the social security system through the equilibrium between the level of social security contributions and the level of benefits;
- Universality and the mandatory character of social insurance;
- Accessibility of social protection to the insured persons;
- State guarantees of protection of beneficiaries from social risks;
- The delivery of social protection by the insurer irrespectively of its financial situation;
- The state regulation of the system of mandatory social insurance;
- Participatory management and participation of the stakeholders in the administrative bodies;
- Social control.<sup>255</sup>

In addition, legal mechanisms aimed at the protection of social security funds were created. The budgets of the specialized social security funds were granted independence from the state budget or local authorities. In addition, the functions of the federal and local social security authorities were separated.

The guarantees to ensure the financial viability of the social security system in the Russian Federation were regulated by Article 24 of the Federal Law “On the Basic Principles of Mandatory Social Insurance in the Russian Federation”. Such guarantees included transfers from the state budget, as well as investment of social security funds in the state obligations of the government of the Russian Federation and ensuring the profitability of such investment. The activity of private social

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<sup>253</sup> Idem

<sup>254</sup> Federal Law No. 165-FZ “On the Basic Principles of Mandatory Social Insurance in the Russian Federation” dated July 16, 1999

<sup>255</sup> K. GUSOV, *Pravo Sotsialnogo Obespecheniya Rossii*, Moscow, Prospekt, 2008, p. 42.

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security funds was also regulated. It was provided by the Law that annual budgets of such funds had to be regulated by federal laws.

However, despite the regulation described above, the process of transformation of Russian social security system was rather chaotic. A strategic approach was missing, and the laws adopted often were not grounded on sound economic analysis.<sup>256</sup>

According to the Federal Law dated 5 August 2000 No 118 social security contributions were consolidated into Uniform Social Tax (UST). The purpose of this measure was to eliminate the differences between social contributions and taxes. However, this measure goes against the main principles of the financing and administration of social security guaranteed by the international standards in the area of social security adopted by the International Labour Organization. The special status of social security contributions is aimed at guaranteeing transparency and good governance of social security schemes. Also, starting from 2001 the state unemployment fund was abolished. Therefore, the state unemployment insurance was eliminated. The unemployment insurance is nowadays provided from the funds of the state budget, which alters the social security system profoundly.<sup>257</sup>

The UST was introduced according to the Federal Law on “The Enactment of the Second Part of the Tax Code of the Russian Federation and the Introduction of Amendments in Certain Legal Acts of the Russian Federation” No 118-FZ dated 5 August 2000. The UST was allocated to the pension fund (to finance retirement pensions), federal and local funds of the compulsory health insurance, as well as social insurance fund. All employers, including individual entrepreneurs, farmers, lawyers, private notaries, are obliged to pay the UST.<sup>258</sup>

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<sup>256</sup> Idem

<sup>257</sup> Idem

<sup>258</sup> M. ZAKHAROV, V. SAVOSTYANOVA, E. TUCHKOVA, *Kommentariy k novomu pensionnomu zakonodatelstvu (postateynyj kommentariy k Federalnym zakonom “O trudovyh pensiyah v Rossiyskoy Federatsii”, O gosudarstvennom pensionnom obespechenii v Rossiyskoy Federatsii)*. M.: TK Velby, 2003.

### *2.1 Administration of the social security system in the Russian Federation*

According to the Russian legal doctrine, the factors that determine how the administration of social security is carried out include:

- The method of the funds' accumulation in financial sources which are used to finance social security system;
- The circle of beneficiaries that are covered from the funds accumulated in a certain financial source;
- The methods of social security protection carried out from a certain financial source for a certain circle of beneficiaries;
- The system of bodies which provide for social security.<sup>259</sup>

The methods of administration of social security are constantly undergoing transformation. Their relevance is concentrated in the fact that they allow the state and the society to distribute the gross domestic product among the population through the system of social protection with respect to the principles of social justice.<sup>260</sup>

The methods of social security administration which are now used in Russia can be classified according to the level of their centralization into centralized, regional, as well as local. The centralized methods can be subdivided into compulsory social insurance, social assistance from the state budget, the mixed form of social security applied to certain subjects.<sup>261</sup>

The system of compulsory social insurance in Russia is regulated by the Federal Law "On the Basics of Compulsory Social Insurance" of 16 July 1999. The law provides for legal, economic and organizational methods to ensure social protection for the unemployed (in particular cases), employees who suffered

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<sup>259</sup> M. ZAKHAROV, E. TUCHKOVA, *Pravo sotsialnogo obespecheniya Rossii: ucheb.*, M., 2005, C. 59.

<sup>260</sup> K. GUSOV, *Pravo Sotsialnogo Obespecheniya Rossii*, Moscow, Prospekt, 2008, p. 42.

<sup>261</sup> Idem

accidents at work, disabled persons or persons who have got a professional disease, maternity leave and confinement, the loss of breadwinner, old-age pension, health insurance etc.<sup>262</sup>

### *2.2 Pension reform in the Russian Federation*

The main purpose of the Russian pension reform which was launched in 2002 was the realisation of the principles of social insurance that would allow for the balance of social security rights and obligations in the long-term perspective. In addition, all measures had to be adapted to a list of macroeconomic and demographic indicators at each stage of the reform. The main purpose of the reform was to supplement PAYG schemes with private voluntary schemes funded on the individual basis. The main goal was to ensure funding for old-age pensions. However, the private schemes encountered problems with the collection and retaining of funds due to numerous reasons, such as the population's mistrust in the local financial institutions, the lack of proper governance and investment policies etc.<sup>263</sup>

Thus, at the stage of 2002, the solution of such current and long-term tasks was foreseen:

- To increase the real amount of social security pensions and to create efficient mechanisms of their protection from depreciation;
- To guarantee the financial stability of the social security system;
- To stop the trend towards the equalisation of social security pensions and to increase their dependency on the amount of social insurance contributions made on behalf of each beneficiary;
- To increase the relation between the amount of social security pension received and the level of previous revenues, as well as of insurance

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<sup>262</sup> Idem

<sup>263</sup> See K. MÜLLER, *Towards contributory approaches: pension reform in the transition countries*, 2003, p. 9 ss., found on [http://www.diegdi.de/CMSHomepage/openwebcms3.nsf/\(ynDK\\_contentByKey\)/ENTR7C7BST/\\$FILE/Towards%20contributory%20approaches.pdf](http://www.diegdi.de/CMSHomepage/openwebcms3.nsf/(ynDK_contentByKey)/ENTR7C7BST/$FILE/Towards%20contributory%20approaches.pdf)



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contributions paid for the worker. According to the developers of the reform, in this way, one could motivate of employees and employers to pay insurance contributions;

- To prevent the crisis of the Russian social security system due to the ageing of the population.<sup>264</sup>

In addition, the *current tasks* of the reform included the adjustment of the right for a certain social security pension to the length of service and the level of previous earnings. Also, the structure of social security pensions was changed, and a special pension formula aimed at the prevention of unification and the increase of differentiation of the levels of pensions was introduced. The amount of insurance contributions for an insured person and the expected duration of the payment of social security benefits started to be taken into account. An extremely important innovation was the introduction of subsidiary responsibility of the State for the obligations of the social security scheme as well as of the principle of the general responsibility of the State to guarantee the scheme's financial stability. The *long-term tasks* included the introduction of the contributory mechanism of financing with the goal to preserve the achieved level of social security coverage and possibly to increase the level of coverage through the introduction of personal accounts.<sup>265</sup>

However, not all planned measures of the 2002 pension reform were realised. One of the most acute problems is the regulation of the early retirement pensions, which cause large deficits of the pension system. The Federal Law on Labour Pensions in the Russian Federation which came into force on 01/01/2002 stipulated that early retirement pensions would not be paid to persons transferred to private pension schemes. The draft laws No. 183353-3 on Obligations of Professional Pension Systems in the Russian Federation and No.183365-3 on Insurance contributions for the financing of compulsory professional pension schemes passed the first reading in the Parliament on 26/06/2002. Since then, no developments have followed in their respect.

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<sup>264</sup> M. ZAKHAROV, E. TUCHKOVA, *Pensionnaya reforma v Rossii*, M., Valent, 2002, p 56.

<sup>265</sup> See M. ZAKHAROV, E. TUCHKOVA, *Pensionnaya reforma v Rossii*, M., Valent, 2002, p. 78.

The lack of efficient investment policies is another major problem of social security funds management in Russia. In Russia, under the present system, there are no state guaranties for the compensation for small or negative rate of return from investment of social security funds, i.e. direct reduction of the level of benefits.<sup>266</sup>

The possible reasons for the slow-down in development of accumulative component of pension system besides the above-mentioned disadvantages lie in the following:

- The absence of right of an insured person to choose the way of formation of their pension savings (voluntary or compulsory);
- The absence of guaranties of pension savings preservation and the lack of trust of citizens to non-governmental institutions;
- The absence of the property right of an insured person to pension savings and of the possibility to transfer by heritage their pension rights on accumulative pension part;
- Low returns of pension savings due to the limitedness of investment instruments and the immaturity of the capital market<sup>267</sup>;
- Non-transparency and inefficiency of work of non-governmental participants of the pension system and their lower level of accountability if compared to the state pension scheme;<sup>268</sup>

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<sup>266</sup> This problem is common for the social security systems in Eastern Europe that have undergone reforms in the period of transition. See M. LOUZEK, *Pension system reform in Central and Eastern Europe*, Post-Communist Economies, 2008, vol. 20, issue 1, p. 119-131.

<sup>267</sup> According to the Independent Evaluation Group of the World Bank, "A number of Europe and Central Asia countries assisted by the World Bank in multi-pillar reforms had financial sectors that did not have sound financial systems. At the time their pension reforms were enacted, four countries—Kazakhstan, Romania, Russia, and Ukraine—had financial sectors that, as evidenced by the European Bank for Reconstruction and Development (EBRD) financial system rating (figure 3.3), did not exhibit (1) substantial progress in bank solvency, (2) a framework of prudential regulation and supervision, (3) full interest rate liberalization with little preferential access to cheap refinancing, (4) significant lending to private enterprises, and (5) a significant presence of private banks." – See The World Bank, *Pension Reform and the Development of Pension Systems. An Evaluation of World Bank Assistance*, Washington D.C., 2006, p. 23.

<sup>268</sup> The World Bank, *Pension Reform and the Development of Pension Systems. An Evaluation of World Bank Assistance*, Washington D.C., 2006, p. 26.

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- Low level of incomes and revenues, which are insufficient not only for the accumulation of satisfactory pension savings, but even for current needs.

Thus, further improvement of accumulative components of pension system is necessary. Besides, at this stage of the reform, there were not created conditions for full realisation of other measures aimed at:

- The long-term financial independence of the budget of the Pension Fund of the Russian Federation;
- The proper level of the compensation of the lost income (the correlation between the old-age pension and the average salary in the country);
- The guaranty of the minimum subsistence level to pensioners.

One of the basic reasons for the deficit of the budget of the Pension Fund of the Russian Federation is the absence of sound actuarial studies which leads to the non-correspondence of the level of insurance contributions to the amount of state pension obligations in accordance with the current and former legislation. The pension reform of 2002 provided for the transformation of tariff policy. The insurance contribution in the amount of 14 percent points of the UST (Uniform Social Tax) was established in 2001.

Thus, the principle of the equal distribution of resources for the financing of basic and insurance parts of the old-age pension was implemented: at 14 percent points of established rate. However, the extractions in order to form the pension savings are carried out from the insurance contributions, designed to finance the insurance part of the old-age pension (presently, the amount of such extractions reach 6 percent). These means cannot be used for the current financing of pensions, which leads to creation of drop-down incomes of distribution pension system part.<sup>269</sup>

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<sup>269</sup> On inequality and pension reforms in Eastern European countries see R.HOLZMANN, M. ORENSTEIN, and M. RUTKOWSKI, *Pension Reform in Europe: Process and Progress*, 2003, The International Bank for Reconstruction and Development / The World Bank, 202 p.

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In order to compensate for this planned deficit of the resources aimed to cover the insurance part of the benefit a permanent source was created. According to Article 18 of the Federal Law of 15 December 2001 No. 167 on Compulsory Pension Insurance in the Russian Federation (in the version which was in force in the period from 01/01/2002 to 01/01/2009) the deficit of the pension fund aimed at the payment of the insurance part of the pension had to be covered by the surplus of funds which remains after financing the basic part of the pension. This mechanism really worked until 01/01/2005, when the UST rate designed for financing of the basic part of the benefit was reduced from 14 to 6 percent.

Due to similar tariff policy until the 2005 tax reform, the pension fund not only was fully financially stable, but also had a considerable reserve fund aimed at further improvement of the pension system without the allocation of federal budget resources. However, in 2005 the government passed a series of measures in order to facilitate entrepreneurship and to combat informal economy. As part of the measures, the rate of social security contributions was cut by 8 per cent, and the regressive scale of insurance contributions payment was “frozen” for 5 years. The tax was charged at the scale from 26 % to 2 %.<sup>270</sup> As a result, the pension fund was not able to meet its obligations, a deficit was created, which had to be covered from the federal budget. Thus, basic principles of compulsory pension insurance were violated: the conditions for the proper financing of accumulated state obligations were not met and accordingly – the independence and autonomy of the pension fund. Accordingly, one of the consequences of this move was growing dependence of the pension fund on federal budget for financing of basic and insurance parts of benefits.

In addition, the global financial crisis has demonstrated great vulnerability of accumulative mechanism of social security financing. Besides, its negative influence arose in the countries, most of all oriented at accumulative mechanisms of pension coverage. In Russia, in addition to the mentioned dependence on the under-

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<sup>270</sup> JON HELLEVIG, ARTEM USOV, TAUNO TIUSANEN, *The Russian Tax Reform Paving Way for Investments*, 2005, Lappeenranta, p. 8.

developed financial market, the efficiency of accumulative model is seriously limited by the following macroeconomic and demographic conditions:

- High inflation rate makes it impossible to obtain real returns from pension savings;
- Low salaries of the vast majority of workers;
- Low life expectancy and, accordingly, short period of the payment of contributions, which does not allow to form considerable pension savings in principle.<sup>271</sup>

Hence, the conclusion is the following: the main and the sole disadvantage of distribution mechanism of pension coverage – its exposure to demographic crisis – cannot be eliminated by means of increase of accumulative mechanism of pension coverage, as its functioning is also subject to negative influence of deteriorating demographic situation, as well as is accompanied by additional risks common in the financial market.

Thus, as a result of the 2002 reform the grounds of social and insurance mechanisms of development of pension system were set, including the increase of differentiation of the amount of old-age pension and making it directly dependent on insurance contributions. In addition, the reform induced the increase of beneficiaries' participation in the creation of their personal pension rights through the accumulative part of the pension. At the same time, in order to reduce the burden on employers, social security contributions for pension coverage have been considerably reduced, which lead to the actuarial disequilibrium between the available resources and the volume of long-term obligations of pension system.

At present, the Russian Federation is going through the process of development of the model of social protection. The Government has to develop the doctrine and legislation for the adaptation of the statutory pension insurance to the requirements of the market economy. The peculiarities of this period include the increased attention to the systemic principles of the administration and financing of

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<sup>271</sup> See Retiree Research Trends at <https://www.aarpglobalnetwork.org/netzine/TrendWatch/europe/Pages/default.aspx>

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social security, as well as more technical and specific parameters of the functioning of the system. In this respect, the analysed draft laws are directed both at the reform of the systemic principles of the system, as well as its technical parameters.<sup>272</sup>

The main conceptual change proposed by the reform is the adoption of the contributions based financing mechanism of the social security system instead of financing based on taxes. This choice is in line with the ILO's recommendations addressed to the Russian Federation from the beginning of the 90s. However, the main practical challenge related to this reform is the efficiency of the collection of social security contributions. In addition to this, the economic crisis and the increase in unemployment rates pose a serious threat to the financial sustainability of the system in the future. As the previous experience of reforming the social security system in Russia shows, the success of the introduction of new systemic principles depends on the adoption of high-quality regulations as well as their subsequent efficient implementation. In this respect, it is important that the draft laws provide for the gradual reform (the abolition of all preferential treatment) of the system by 2015. This has not been achieved by any of the previous reforms of the social security system in Russia.

Another important systemic principle that is going to be introduced is the inclusion of the base part of the old-age social security benefit into the system of compulsory social insurance financed from social security contributions and its adjustment to the length of service. In this way, old-age pensions are more related to the employment period and are distinguished from social (or guaranteed) old-age pensions. The introduction of common principles of adjustment also contributes to the creation of the unique nature of old-age benefit based on employment period.

At the same time the base part of the benefit is not united with the insured part. There would be fixed base parts of different kinds of benefits and categories of beneficiaries. When adopted, the Law should clarify the purpose of these base parts of benefits, as well as principles of solidarity in the system of old-age social protection. As it is practiced in many other countries, Russia is developing

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<sup>272</sup> K. GUSOV, *Pravo Sotsialnogo Obespecheniya Rossii*, Moscow, 2008, Prospekt, p. 78.

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economic stimulators in order to motivate workers to stay in employment and postpone retirement. This measure is thought to be the substitute for the increase of the pensionable age.

It is suggested by the draft law that from 2015 the fixed base part will be differentiated. Thus, it will be increased by 6 % for every year of employment beyond 30 years. It will be also reduced by 3 % for every year if the period of employment is less than 30 years. Currently, the right for old-age pension is acquired by men after 25 years of employment and by women after 20 years of employment. Therefore, the reform has an ambitious plan to introduce an equal employment period which gives the right to retirement for men and women, namely 30 years of employment. This is planned to be achieved in a five year time frame. However, it should be analysed whether this measure will in fact lead to the decrease in the level of pensions which are guaranteed according to the present legislation.

As regards the reform of the technical parameters of the social security system, the key element is the introduction of the minimum level of the social protection of citizens. Also, the draft law provides for the increase of the level of total social assistance (social security benefits and other financial assistance from the state) to the subsistence minimum in the respective region of the Russian Federation. However, the current legislation in Russia provides for the possibility of working pensioners to receive both the salary and the old-age pension.<sup>273</sup> According to the draft law, the compensation aimed to achieve the subsistence minimum will not be paid to those pensioners that are in a paid employment. In any case, in order to guarantee the increase of benefits to subsistence minimum, it is necessary to provide that the law is directly applicable and establishes clear guarantees on behalf of the state. In particular, the law has to provide for specific forms of assistance which will be analysed when determining the total level of the social protection of a beneficiary as related to subsistence minimum. Also, the way the financial responsibility is distributed between the central government and the regions should be regulated in detail.

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<sup>273</sup> V. ROIK, *Osnovy sotsialnogo strahovaniya: monografiya*, M., 2005, p. 25.

Despite the fact that the final objective of the legal reform is to adjust the social protection level of all beneficiaries of old-age pensions to the subsistence minimum, the Ministry of Health and Social Development of the Russian Federation indicates that around 3 to 4 % of pensioners who receive the basic social pension will be excluded. In respect of these vulnerable categories of pensioners it is necessary to introduce additional targeted social assistance mechanisms in order to guarantee them an income at the level of subsistence minimum. The law should not provide for the exclusion of any categories of pensioners. Therefore, the reform should provide for the increase of all the social security benefits in Russia above the subsistence minimum.

### *2.3 Replacement rates and the protection from poverty in the Russian Federation*

The ILO Convention of No. 102 and European Code of Social Security stipulate for the replacement rate to be calculated as correlation of the amount of pension of a standard beneficiary and his/her previous incomes. The rate is established at the level of 40% only for standard beneficiaries, the main requirement for which is to have 30 years of insured employment (for old age pensions). ILO Convention 102 refers to a 'skilled manual labourer' as a basis for the calculation of replacement rates.<sup>274</sup>

For other pensioners, norms of replacement are reduced proportionally. Besides, the pension must correlate not with the salaries of other employed people at present as it is provided by law in Russia, but with the former income of the individual in the period, immediately preceding the appointment of pension.

Elaboration of the complex of measures on further improvement of pension system must be directly interrelated not only within it, but it also interrelated with

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<sup>274</sup> *Social Security Spending in South Eastern Europe: A Comparative Review*, International Labour Office 2005, p. 33.



basic macroeconomic parameters of the country's development and strictly synchronised for a long-term prospect (for the whole period of pension reform). This is why correlation of all stages of pension reform with the macroeconomic situation at each stage of the reform is extremely important, and is provided by the current Budget Code of the Russian Federation.

Therefore, the replacement rate in the Russian Federation is principally different from the methodology of the International Labour Organization. In Russia, the solidarity indexation method is used, which is calculated based on the average social security benefit of all beneficiaries in the current year and the average salary in the economy for the same period, reflected in percentages.<sup>275</sup>

### *2.4 Adjustment of social security benefits in the Russian Federation*

Federal Law "Retirement Pensions in the Russian Federation" (art. 17, para 6) provides for a uniform regulation of the indexation of the insurance part of retirement pensions annually since 1 April *'in accordance with the increase of the average monthly earnings in the Russian Federation, but not exceeding the annual index of the PFR's budget income calculated for one pensioner, assigned to the payment of this part of pensions.'*

As regards the indexation in accordance with the increase of prices, it is not independent in juridical and procedural aspect. A preventive (or advanced) indexation can be undertaken in the current year if prices increase during the period determined by the Law (a quarter or half a year) exceeded the 6-percent threshold. Actually, this is an insurance mechanism assigned to avoid a sharp fall of pensioners' purchasing capacity in case of high inflation until the term of an annual indexation of the amounts of an insurance component of pensions in accordance

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<sup>275</sup> M. FILIPPOVA, *Pravo sotsialnogo obespecheniya: ucheb.*, M., 2006, p. 123.

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with the increase in average monthly earnings (applying a limit in accordance with the PFR's income).<sup>276</sup>

This measure confirms the auxiliary (or intermediate) character of the indexation in accordance with prices increase that is confirmed with the fact that annual indexation in accordance with the average monthly earnings increase (the PFR's income) since 1 April is exercised in direct relation to the indexation in accordance with prices increase in the previous year. The modification of the regulations of amounts indexation of retirement pensions's insurance part, which was determined by the legislation of 2002, in the way of conserving the indexation only in accordance with prices increase, as it has been proposed by the experts, will come into a direct collision with social and legal character of retirement pension determined in Art. 2 of the Federal Law "Retirement Pensions in the Russian Federation".<sup>277</sup>

According to the mentioned article a retirement pension is determined as monthly monetary payments and fees to insured persons as a compensation in case of loss of earnings due to incapacity for work as a reason of old age or disability, and the payments in relation of the loss of the, which shall be paid to the disabled members of the insured persons' families.

As we can see from the above, a direct interrelation of the retirement pension and previous earnings is one of the fundamental principles of social insurance in Russia. That is why when the Federal Law "Retirement Pensions in the Russian Federation" was adopted in 2001 the indexation of the retirement pensions insurance part determined in accordance with the increase of the average monthly earnings was introduced to conserve this relationship during all the period of receiving a pension, and that the amounts of assigned pensions were not were adequate compared to the changes in the level of earnings in the country.<sup>278</sup>

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<sup>276</sup> M. ZAKHAROV, E. TUCHKOVA, *Pravo sotsialnogo obespecheniya Rossii: ucheb.*, M., 2005, p. 67.

<sup>277</sup> M. ZAKHAROV, E. TUCHKOVA, *Pensionnaya reforma v Rossii*, M., R Valent, 2002, p 56

<sup>278</sup> E. KHOLOSTOVA, *Sotsialnaya politika*, 2001, INFRA-M, , p 28.

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In case the indexation is only carried out in relation to the increase in prices negative social consequences may appear. Thus, the coefficient of substitution of the lost earnings is traditionally calculated in Russia as a correlation of the average retirement pension to the average salary in the Russian Federation. As a consequence, the current challenge in the Russian Federation relating to bringing the replacement rate to 40 per cent of the lost earnings determined by the International Labour Organization Convention No 102 as minimally allowed rate remains uncompleted.

Moreover, the indexes of the planned old-age retirement pension amount growth and the correlation of the average old-age retirement pension with the rate of minimum living wage will become considerably lower, which will have a negative impact on the level of pension insurance of the citizens. It ought to be noted that an analogous (a double-stage) pension indexation order has been determined by the Federal Law “State Pension Insurance in the Russian Federation” (art. 25) concerning to social pensions.

Thus, social pensions have been annually indexed on 1 April taking into account the growth of the prices for goods and services for the previous year. In case if the rate of pensioner’s minimum living wage in the Russian Federation for the specified period exceed the rate of prices increase for goods and services, since 1 July, an additional indexation of social pensions for the difference between the annual index of growth of pensioner’s minimum living wage in the Russian Federation and an annual index of prices increase for goods and services shall be exercised.

### *2.5 Social security in the conditions of financial crisis in Russia*

The Decree of the Government of the Russian Federation No. 1662-p of 17 November 2008 provides for the continuation of pension reform in view of long-term social and economic development of the Russian Federation for the period

until 2020 (CLTD-2020). The Decree set the following long-term targets of pension system development:

- The growth of the average old age pensions by 2016-2020 up to not less than 2,5-3 minimum living wage per pensioner;
- Starting from 2010, to provide the minimum level of social security benefit not less than the value of minimum wage;
- To create conditions for the increase of the replacement rate of the lost personal income, for which insurance contributions were accrued, to not less than 40%;

The improvement of the pension system, executed in 2010, was planned to be carried out in conditions of economic growth, and the most important targets for development of pension coverage were not achieved. The crisis has considerably corrected pension policy of the majority of countries. Many of them cut social security funding, froze the indexation of pensions, reduced the accumulative component, and undertook other measures aimed at slashing costs.<sup>279</sup> Irrespective of the crisis, in 2010, the government of Russia undertook a series of measures aimed at further development of the social insurance system and the functioning of the system of pension coverage:

- Thus, the inefficient uniform social tax (UST) was abolished and individual contributions for obligatory pension insurance eliminated in 2001 were reinstated. Starting from 2011 insurance contributions shall be established at the level of 26%, approaching the necessary minimum for ensuring the financial independence of PFR (although initially it was planned to realise this measure in 2010, which would essentially reduce the pressure on the federal budget);
  - Unfair differentiation of the tariff for different categories of insurers-employers, which lead to non-observance of the pension rights of

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<sup>279</sup> See A. HEISE, H. LIERSE, *Budget Consolidation and the European Social Model The Effects of European Austerity Programmes on Social Security Systems*, 2011, Friedrich Ebert Stiftung, p. 11.

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insured persons, was eliminated. It is worth mentioning that the increase of insurance contributions tariff is carried out not immediately, but gradually over five year period (with transitional period provided for employers, for which the rate of payments to PFR was considerably lower);

- The functions of the insurer (the PFR) on administration of insurance contributions in limited combination with introduction by the insurer of individual (personified) record of forming pension rights of insured persons are renewed;

- Economically ungrounded regressive scale was cancelled, and according to the experience of the majority of countries the upper limit of salaries subject to insurance is established with the mechanism of its annual indexation.

However, the main point of pension policy, carried out in conditions of financial crisis, was to increase the measures on additional financial support for pensioners, especially the poorest ones. Among these measures it is worth mentioning the system of social extra payments to pensioners, whose level of material provision does not the value of minimum living wage in the region, as well as valorisation – recalculation of pension rights of all persons having labour length of service by 2002, and especially during the soviet period by 1991. All these social measures are provided from financial resources of federal budget not only in the period of financial crisis, but during the whole period of their payment.

At the same time, financial crisis did not allow to reach the main target of pension system, built on the principles of social insurance, – namely the long-term financial stability and balance of PFR budget. The problem of transformation of the institute of prematurely appointed pensions into independent professional pension programmes, which would liberate general national pension system from non-insurance payments to corresponding pensioners categories, remained unsolved.

### 3. *Overview of the Social security system in Ukraine*

The system of social protection and social welfare in Ukraine covers nine major social security branches listed in the ILO Social Security (Minimum Standards) Convention, 1952, (No. 102), although Ukraine has not ratified the Convention. This includes health care, sickness benefits, unemployment benefits, old-age pensions, employment injury benefits or assistance in case of occupational disease, family benefits and assistance related to pregnancy and childbirth, disability, survivors' benefits. There are special provisions for victims of the Chernobyl disaster and for veterans of World War II.

In 2008, the value of one year of employment for the purpose of calculation of social security benefits was raised from 1 % to 1.35 %. Due to this measure, the replacement rates in unemployment benefits in Ukraine were brought in compliance with the standards set by the Convention No. 102 (40 % of the previous earnings with 30 years of work experience).

According to Article 46 of the Constitution of Ukraine<sup>280</sup>, “citizens have the right to social protection that includes the right to provision in cases of complete, partial or temporary disability, the loss of the principal wage-earner, unemployment due to circumstances beyond their control and also in old age, and in other cases established by law. This right is guaranteed by general mandatory state social insurance on account of the insurance payments of citizens, enterprises, institutions and organisations, and also from budgetary and other sources of social security; by the establishment of a network of state, communal and private institutions to care for persons incapable of work. Pensions and other types of social payments and assistance that are the principal sources of subsistence, shall ensure a standard of living not lower than the minimum living standard established by law.” Other basic laws regulating social security in Ukraine include the Law on “Mandatory State

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<sup>280</sup> Constitution of Ukraine, Adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, <http://www.rada.gov.ua/const/conengl.htm>.

Pension Insurance” and the Law on “Non-State Pension Provision”, which were adopted in 2003.<sup>281</sup>

There has been an ongoing debate about old-age pension reform in Ukraine. Ukrainian old-age pension insurance has three pillars:

- The compulsory pay-as-you-go pension scheme, based on the principles of state responsibility and solidarity. The Pension Fund of Ukraine administers this scheme.

- The compulsory scheme of individual savings accounts, based on the principle of obligatory individual contributions into private accounts.

- The voluntary contributory private scheme based on the principle of voluntary individual or collective participation by workers or employers.

The first and the third pillars of old-age pension have been in place since 2004. Until now, the detailed regulation of the second pillar - the compulsory private scheme - have not been developed, and the scheme has not been implemented.<sup>282</sup>

### *3.1 Financing and administration of social security in Ukraine*

The financing of the social security system in Ukraine is undertaken through social security contributions and transfers from the state and local budgets. There are several specialised social security funds which provide benefits and receive contributions were created after the fall of the Soviet Union:

- the Pension Fund;
- the Unemployment Insurance Fund;
- the Fund for benefits for temporary incapacity for work and funeral grants
- the Employment Injury Benefits Fund.

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<sup>281</sup> N. BARANOVA, K. HIROSE, *Assessment of the Social Security System in Ukraine 2008-2009, Crisis response and future reforms*, ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe, International Labour Organization, 2010.

<sup>282</sup> Idem

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Transfers of resources from one fund to another are possible. However, each of them is a separate institution and has its own administration.<sup>283</sup> The state body that is responsible for the administration and supervision of the first pillar of the social security system is the Ministry of Labour and Social Policy with its local branches. It is foreseen that in the future the supervision of the compulsory private contribution scheme will be the responsibility of the State Commission for the Regulation of Financial Services Markets.<sup>284</sup>

Legal, financial and administrative principles of unemployment insurance are regulated by the Law of Ukraine “On mandatory state unemployment insurance”, as well as the Basics of the legislation of Ukraine on state compulsory social insurance. The functioning of the state unemployment insurance fund is guaranteed by the State. The State is the guarantor of the due provision of unemployment benefits to the beneficiaries, as well as of the relevant social services.

The administration of the fund is undertaken according to the principle of participative management by the state, the representatives of the insured persons and employers.

The supervision of the activities of the fund is carried out by the supervisory council, which, in particular, controls the allocation of the fund’s resources. The state control over the functioning of the unemployment insurance scheme is undertaken by the specialized central government body.

According to Article 16 of the Law of Ukraine “On mandatory state unemployment insurance” the expenditure of the fund directed to the payment of the unemployment benefits is protected. The financing of such expenditure has priority. The payment of unemployment insurance is carried out on the daily basis as the resources arrive on the accounts of the fund according to the principles of solidarity and subsidiarity.

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<sup>283</sup> Idem

<sup>284</sup> Idem



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Article 34 of the Law of Ukraine “On mandatory state unemployment insurance” provides for the obligatory publication in the official editions of the Parliament of Ukraine and the Cabinet of Ministers of Ukraine of the reports regarding budget performance of the unemployment insurance fund after its approval by the fund’s board.

In 2009, with the aim to ensure the payment of pensions to all beneficiaries, a daily plan of the payment of pensions was established. According to the schedule, every beneficiary was allocated his or her individual date for the receipt of the pension throughout the year. Such a measure is aimed at the gradual distribution of financial resources. Some categories were given priority in the schedule, as, for instance, war veterans and the members of their families.

Legal, administrative and financial principles of the functioning of the occupational disease and state social insurance scheme are regulated by the Law of Ukraine “On compulsory state social insurance from employment injury and occupational disease which caused the loss of employment capacity”. The state is the guarantor of the rights to social security in case of employment injury and occupational disease.

The employment injury benefits fund is the state institution which is responsible for the administration of state social insurance in case of temporary incapacity for work and funeral expenses. The fund receives and accumulates social insurance contributions and other resources according to Article 34 of the Law. The fund is responsible for the distribution of social security benefits and controls the utilization of the relevant resources.

The fund belongs to the specialised non-budget social security funds. All the insured persons are members of this fund. The fund is a non-commercial self-governed organization. The state is the guarantor of the provision of social security benefits and social services to the insured persons. The State also guarantees the stable functioning of the fund. The administration of the fund is carried out according the principle of participative management by the state, the representatives of the insured persons and of the employers.

The control over the functioning of the fund is carried out by the supervisory council, which is a voluntary body. The members of the council cannot be the members of the fund's board or in other capacities within the fund's management at the same time. The supervisory council undertakes the control over the execution of the fund's tasks.

The resources of the compulsory state social insurance from employment injury and occupational disease, as well as funeral expenses are not included in the state budget of Ukraine, and can only be used for the relevant purposes. A reserve fund is created in order to ensure the stability of the scheme. The fund submits reports about its activity in the previous year to the Cabinet of Ministers of Ukraine.

### *3.2 Replacement rates and protection from poverty*

According to Article 23 of the Law of Ukraine "On compulsory state unemployment insurance"<sup>285</sup> No. 1533-III of 2 March 2000 the level of unemployment benefit is determined by the average previous salary and the length of previous employment:

- 2 years - 50 percent;
- 2 to 6 years - 55 percent;
- 6 to 10 years - 60 percent;
- over 10 years - 70 percent.

Unemployment benefit is reduced depending on the length of unemployment:

- the first 90 calendar days - 100 percent;
- within 90 calendar days - 80 percent;

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<sup>285</sup> See the web site of the Parliament of Ukraine: <http://zakon.rada.gov.ua/cgi-bin/laws/annot.cgi?nreg=1533-14>

- in the future - 70 percent.

According to Article 16 para 3 of the Law, it is provided that the resources of the fund are first allocated to cover the expenditure on unemployment benefits. In order to ensure the financial stability of the fund, a reserve fund is created. The amount allocated to the reserve fund should not exceed the amount required to pay unemployment benefits for no less than five calendar days.

It is very important to note that the amount of unemployment benefit is adjusted to the level of subsistence minimum.

### *3.3 Adjustment of social security benefits in Ukraine*

According to the Law of Ukraine “On state social standards and state social guarantees” of 5 October 2000 No 2017 the adjustment of social security benefits is a state social guarantee, which is aimed to protect decent living standards of citizens by maintaining the purchasing power of social security benefits. The adjustment is obligatory for all state authorities, local authorities, enterprises and organisations of any property pattern.

The adjustment is carried out according to the Law of Ukraine “On the indexation of the population’s incomes” of 6 February 2003 No. 491-IV as well as the Government’s Regulation of the indexation of the population’s incomes which was enforced by the Decree of the Cabinet of Ministers of Ukraine of 17 July 2003 No. 1078.

According to the current legislation the unemployment insurance benefits are subject to indexation. The income is adjusted to the subsistence minimum, the average wage and inflation rate.<sup>286</sup>

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<sup>286</sup> See U.S. Social Security Administration, Office of Retirement and Disability Policy, *Social Security Programs Throughout the World: Europe 2010, Ukraine*, found at: <http://www.ssa.gov/policy/docs/progdsc/ssptw/2010-2011/europe/ukraine.html>

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Article 29 of the Law “On compulsory state social insurance from occupational injury and disease” the level of benefits is modified in such cases:

- the change of the degree of the loss of professional capacity;
- the change of the composition of the family of the deceased;
- the increase of the wage level according to the legislation.

The adjustment of monthly benefits is also made according to the growth of the average wage in the sectors of the national economy in the previous year, according to the data of the National Statistical Committee. Such adjustment is made starting from 1 March of the following year. The monthly social security benefit cannot be adjusted downwards. Therefore, based on this legislation it is possible to conclude that the regulation of the adjustment of benefits in Ukraine is in accordance with the ILO Convention No. 102.

### *3.4 Social security and the economic crisis in Ukraine*

The Law “On amendments to some laws of Ukraine regarding world financial crisis effect reduction on employment” adopted on December 25, 2008 and came into effect on January 13 2009 (hereinafter – the anti-crisis law) introduced the following commitment to help prevent retrenchment:

- The retraining of the employees that are facing redundancy is financed by the state in case the employer agrees not to dismiss them.
- The state also finances the wage costs for up to six months whereas for the employees transferred to another job within an enterprise.
- The financing of benefits in case of forced partial unemployment or reduction in working time (for up to 6 month in one year).

The gradual increase of the minimum wage was retained during the economic crisis. As a measure to save funds, the salaries of public sector employees

were calculated on the basis of the minimum wage for 2008. The adjustment to the present minimum wage is made for those whose salary would otherwise be lower. The benefits of public sector employees were cut which reduced their monthly income by up to 50 %. A ban to open new positions in public sector was introduced by the parliament. The ban to purchase vehicles by public institutions was also approved.

The major drawback of the present system of social assistance in Ukraine is that it is highly regressive and inefficient in terms of protecting the most destitute. Most social benefits are provided as in-kind benefits (i.e. social privileges) or on a universal basis (i.e. regardless of the household income level). Social privileges in 2007 accounted for about one third of total expenditures on all social assistance and protection programs, with even larger share before 2007. The only existing social assistance program explicitly targeted to the poor – social assistance to low-income families – suffers from a low coverage of poor population (in 2006 only 15% of the households from the bottom decile received this type of social assistance) and inadequate size of the benefit (defined at the level of the guaranteed minimum). Another program originally oriented at poor families – utilities subsidies – has even lower coverage (2.9% in urban area, and 0.5% in rural area in 2006) but significantly higher inclusion error. Given the fiscal constraints of the government, in particular in the course of recession, it is necessary to reduce unnecessary spending (e.g. remove generous benefits and privileges for non-poor households) and improve targeting and allocation efficiency of the system redistributing released resources to the most vulnerable groups of population.

One of the measures – the introduction of paid public works – has been a novelty for the Ukrainian labour market. In June 2009 the enforcement mechanism for this measure was adopted. The registered unemployed persons will be offered a possibility to work in construction and reconstruction of sport, transport, medical and touristic infrastructure, as well as at the premises for Eurocup 2012. The training, housing and the transportation from one region to another will be financed from the unemployment fund.

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State authorities will provide assistance in the recruitment of workers, e.g. pass their data to potential employers. However, the salaries will be paid by the direct employers.

According to the Labour Code of Ukraine:

- In case of dismissal by employer the person has to be notified two months in advance.
- The severance pay is equal to one monthly salary.
- A dismissed person is entitled to unemployment benefits after one month of unemployment.
- If a person quits the job voluntarily he or she is entitled to unemployment benefits after 90 days of being registered as unemployed.
- If a person quits the job “by the agreement of the parties” he or she is entitled to unemployment benefits after 7 days of unemployment.
- The level of unemployment benefit is calculated based on the official salary but it cannot be higher than the average wage for the region. The minimum unemployment benefit is 360 Hryvnas (47 US dollars) for those who were not insured and 500 Hryvnas (65 US dollars) for insured persons.

The anti-crisis law made it harder to get the right to unemployment benefits. Also, the list of persons paying the contributions was widened; the level of contributions to the unemployment fund was increased.

The list of insurers is increased to include the employers that use the work of persons under civil law agreements and military units. Also, the list of persons that are entitled to the compulsory unemployment insurance (and pay the contributions) has been increased to cover the military personnel, persons who work under civil law agreements, working pensioners, persons who work part-time, foreigners and persons without nationality who are temporary employed in Ukraine.

The list of persons who are considered employed (and that are not entitled to unemployment benefits) was increased. The anti-crisis law provided that persons who have a “personal agricultural household” (people in rural areas who have a garden) had to be considered as employed. The change of rules resulted in

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virtually all people in rural areas being considered not eligible for unemployment benefits. According to the law for people who quit their job “by the agreement of the parties” (i.e. voluntarily) the payment of unemployment benefits starts on the 91<sup>st</sup> day of unemployment. To receive the unemployment benefits a person has to be officially registered as unemployed for 91 days. These two changes have recently been found unconstitutional by the Constitutional Court of Ukraine. However, the unemployment benefits for the period the provisions were in force were not paid to the mentioned persons. In some regions these persons constituted the absolute majority of the retrenched.

The criteria for appropriate work have been widened. Now people who address the state unemployment service will have less possibilities to reject the jobs they are offered. The anti-crisis law provides that a necessary requirement for a person to receive unemployment benefits is the readiness to participate in compulsory public works in case such work is appropriate for the person. The public works can be organized in such industries as construction, the organization of the Eurocup etc.

On 25 June 2009 the Prime Minister of Ukraine announced that as a result of the government’s anti-crisis measures the level of registered unemployment decreased by 17 % as compared to the corresponding period last year.

As the unemployment fund is not financed from the state budget but from the contributions by employers and workers, some measures were introduced to increase the resources:

- The level of contributions was raised
- Resources from other social protection funds were borrowed (for example, the fund for accidents at work).
- The anti-crisis law introduced the system of control of the data on the unemployed. The state unemployment service is now able to exchange the information on the unemployed with the state tax administration and the pension fund (to make enquiries on the basis for unemployment benefits). The privacy provisions have been changed to enable the institutions to exchange information.
- Although total expenditures of the State unemployment insurance fund increased in real terms more than twofold since 2000, their size as a

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percentage of GDP in 2007 was at the level of 2001 – 0.51% of GDP. By international standards Ukraine has fairly modest expenditures on labour market policies but they are still not negligible. As in most countries, the bulk of all Unemployment Insurance Fund expenditures are allocated to passive labour market policies, including unemployment benefits and unemployment assistance. Expenditures on active labour market policies have been very low throughout the observed period, reaching a maximum of 0.15% of GDP in 2004. In 2007 (more recent data is not available) the corresponding figure was 0.10 % of GDP. There has been a positive shift in the balance between passive and active labour market policies, with a growing share of expenditures devoted to the latter.

Measures to expand, consolidate or stabilize social protection including health care, pensions, and cash transfers; measures to protect benefit levels included:

- The level of the contribution to the unemployment fund is increased to **2.2%** of the salary (the income in case of persons who work under civil law agreements and military men). The contribution is paid in such shares:
  - **1.6%** by employers (previously – 1.3 %)
  - **0.6 %** by the insured persons (previously – 0.5 %)
- The salaries of working pensioners and foreign workers are made subject to compulsory contributions to the unemployment fund. Before only employers paid the contributions in this case.
- The level of voluntary contributions to the unemployment fund has also been raised to 2.2 %. At the same time, persons who work under civil law agreements are not considered as those who pay voluntary contributions anymore (as they are obliged to pay compulsory contributions).
- The anti-crisis law provides that the contributions are paid at the same time with the salary (not once a month as before).

A new mechanism of the payment of pensions was introduced. Every pensioner was attributed a fixed date to receive the pension. This allowed for a better financial management of the pension fund.



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Measures for migrant workers, protection and support in receiving countries, measures to encourage return migration, or measures affecting the protection of migrant workers;

### *3.5 Social dialogue in the economic crisis in Ukraine*

In March 2009, two government decrees regarding social dialogue were discussed: the decree on measures promoting social dialogue in Ukraine and the plan of actions on the implementation of the anti-crisis measures proposed by trade unions of Ukraine. The first decree established the list of duties and the personal responsibility to promote the social dialogue for senior public sector executives. The second decree contained the list of anti-crisis measures suggested by the trade unions and established the officials and state bodies responsible for their implementation. However, in many cases the decrees made the distinction between different workers' and employers' associations, providing more rights for bigger associations that are parties to the general agreement.

In spring 2009, the government held two meetings with the ILO with the participation of workers' and employers' organizations.

Rights at work :

- i) measures taken in compliance with international labour standards ;
- ii) to prevent abuses (trafficking, child labour);
- iii) to strengthen labour inspection and labour administration;
- iv) to implement labour law reforms or change labour legislation or collective agreements)

The compliance with the labour law provisions by employers is monitored by the state employment service. For example, employers must submit information about the decrease in the number of workers. In case an enterprise doesn't respect the deadlines for the submission of this data or does not provide it at

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all – it is subject to a fine which amounts to the annual salaries of the number of workers that were laid off.

In November 2008, a decree increasing the responsibility of employers was passed. According to the decree in case an enterprise retrenches 10 % of its workers or more, the regional employment service undertakes the control of this enterprise.

In addition to these measures any worker can address the state employment service with a complaint regarding an employer. In this case a direct contact with state labour inspection is guaranteed. The state labour inspection has a mandate to fine companies, to stop their operation and to prepare a case before the state prosecution service.

### CONCLUSIONS

The international standards in the area of social security have evolved significantly in the recent decades. The philosophy behind social protection has undergone groundbreaking changes and passed from the concept of social insurance to the idea of universal coverage and the notion of Social Protection Floor and the introduction of social security related concepts into the Decent Work Agenda developed by the International Labour Organization. In addition to the extension of social security coverage, the level of social protection as regulated by the international legal instruments was raised.

The right to social security is firmly established in the international law and is provided for in numerous acts, such as: the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of Racial Discrimination, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention for the Protection of Migrant Workers and Their Families. Certainly, the role of the International Labour Organization is crucial in the international regulation of the right to social security and the protection of adequate standards of living. However, the central role of the rights-based approach to development in general and social security in particular has been widely recognised among other international players, including the World Bank.

Despite the advancement of the social security agenda at the international level, developing countries and countries in transition have proven reluctant to speed up the development of social security standards locally. It has been argued that the third generation of standards in the area of social security was not designed to accommodate the needs of developing countries and countries in transition. However, even ILO Convention No. 102, the basic international legal instrument in the area of social security, has not been ratified by the vast majority of the newly created states in Eastern Europe. In addition, the ILO Convention No. 168 concerning Employment Promotion and Protection against Unemployment has not

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received any ratifications on behalf of developing countries. One of the reasons for this may be the fact that Convention No. 168 does not contain the same flexibility mechanism as Convention No. 102, and therefore it does not offer the possibility of gradual realisation of its provisions. This makes it particularly unattractive for developing countries and countries in transition.

The reasons for such unpopularity of the international standards in the area of social security are numerous. First, Convention 102 does not provide for any mechanism of ensuring the access to social security benefits for the workers in informal employment. The Convention focuses on paid employment as a basis for future benefits, and it therefore does not represent an optimal legal mechanism for the countries in transition and developing countries where the informal sector is particularly significant.

In addition, being based on the principle of collective financing the Convention No. 102 does not explicitly allow for the establishment of contributory social security schemes. The basic principle of the Convention – collective financing of social security schemes – contradicts the path chosen by many countries around the world, namely the establishment of privately funded contributory social security schemes. The principle of collective financing in social security is aimed at ensuring solidarity and fairness for all stakeholders in the system of social protection. The importance devoted to the principle of solidarity is closely related to the question of financing of social security and hence to the general public policies being pursued in each particular country. While recognizing the fundamental character of the principle of solidarity, international social security law voluntarily limits itself to setting certain basic principles leaving great latitude as regards the exact degree or type of solidarity between the workers, their employers and the State. By being recognized and reaffirmed continuously over the years the principle of solidarity has kept and gained further relevance particularly in present times characterized by the privatization of certain branches of social security relying on market performance and therefore unable of guaranteeing defined benefits upon the occurrence and throughout the required duration of the contingency and not respecting the principle of collective financing due to the workers being the only contributors.

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However, privatization of social security schemes is common in developing countries. An example of this trend is Latin American countries, which are representative of the continent not only by the extent of their problems, including privatization of pensions and mismanagement of multipillar systems, but also by the fact that they have ratified standards of the different generations and have shown manifestly different attitude to their application.

The Russian Federation is an example of a country which has undertaken a reform of the social security system after the fall of the Soviet Union and introduced privately funded social security schemes. As a result, this method of financing proved to be unsustainable during the economic crisis, and the government of Russia has been contemplating on reversing the changes. Also, the privatization of social security schemes resulted in major sustainability problems in several Latin American countries, which was underlined by the ILO Committee of Experts on the Application of Conventions and Recommendations in several observations and direct requests.

Nevertheless, the pension reform proposed by the government of Ukraine encompasses the plans to privatize a part of social security schemes in the country. Such plans go in contrast with the negative experience of a number of other countries in the world, including Russia. If the reform is carried out it will also make the current Ukrainian legislation in the area of social security incompatible with ILO standards and therefore will make their ratification impossible.

Despite all shortcomings of ILO Convention No. 102 one should not underestimate its impact on the development of social security systems worldwide, and particularly in post-Soviet countries. Despite the fact that ILO standards in the area of social security are largely outdated, they still contain the core principles of financing and administration of social security schemes. Some of these principles are explicitly provided by the Convention, such as the principle of state responsibility, the principle of participative management or social solidarity through collective financing, as well as adjustment of social security benefits. Other principles can be derived from the Convention, such as solvency provisions,

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separating social insurance budget and funds from the state budget, the need for sound investment policies, as well the establishment of reserve funds. These principles have been established at the international level as good practices adopted by countries around the world.

Having inherited their social security systems from the Soviet Union, Russia and Ukraine have comprehensive social protection systems which encompass all nine branches provided by ILO Convention No. 102. Moreover, the countries' constitutions provide for the right to social security, and both countries' Constitutional Courts have analysed the right to social security in their decisions. As regards the regulation of financing and administration of social security schemes, Ukrainian legislation complies with the requirements of ILO Convention No. 102. The country is therefore in a position to ratify the Convention, and it can be concluded that the country has followed the right-based approach in the development of its social security system. The country still has major weaknesses as regards good governance of the social security system, particularly in relation to transparency and the involvement of social partners in the management of social security schemes. These issues make the social security system of Ukraine vulnerable and difficult to sustain, as well as limits its capacity to guarantee the protection from poverty. However, the legislation guarantees the minimum of protection as well as contains the fundamental principles of financing and administration established by the ILO Convention No. 102. By contrast, the Russian Federation has chosen the path of the development of the social security system which is more similar to some Latin American countries. In particular, the privatization of pension schemes prior to the development of sound investment policies and methods, as well as other mechanisms of protection of social security funds, exposed the country's welfare system to major risks during the economic crisis. The country would have to bring certain aspects of its legislation in compliance with the Convention No. 102 should it wish to proceed with the ratification.

## ANNEX

List of ratifications of Convention No. 102<sup>287</sup>

<b>Albania</b>	Has accepted Parts II to VI and VIII to X	18.1.2006
<b>Austria</b>	Has accepted Parts II, IV, V, VII and VIII. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable.	4.11.1969
<b>Barbados</b>	Has accepted Parts III, V, VI, IX and X. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable.	11.7.1972
<b>Belgium</b>	Has accepted Parts II to X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	26.11.1959
<b>Plurinational State of Bolivia</b>	Has accepted Parts II, III and V to X. Pursuant to Article 3, paragraph 1, of the Convention, the Government has availed itself of the temporary exceptions provided for in Articles 9(d); 12(2); 15(d); 18(2); 27(d); 33(b); 34(3); 41(d); 48(c); 55(d); and 61(d). Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No.128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer	31.1.1977

<sup>287</sup> <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byconv.cfm?conv=C102&lang=en>

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	applicable as a result of the ratification of Convention No. 130.	
<b>Bosnia and Herzegovina</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121	2.6.1993
<b>Brazil</b>	Has accepted Parts II to X	15.6.2009
<b>Bulgaria</b>	Has accepted Parts II, III, V, VI, VII, VIII and X	14.7.2008
<b>Costa Rica</b>	Has accepted Parts II and V to X	16.3.1972
<b>Croatia</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	8.10.1991
<b>Cyprus</b>	Has accepted Parts III, IV, V, VI, IX and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention Part X of the Convention is no longer applicable.	3.9.1991
<b>Czech Republic</b>	Has accepted Parts II, III, V and VII to X. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	1.1.1993
<b>Democratic Republic of the Congo</b>	Has accepted Parts V, VII, IX and X	3.4.1987
<b>Denmark</b>	Has accepted Parts II, IV to VI and IX	15.8.1955
<b>Ecuador</b>	Has accepted Parts III, V, VI, IX and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result	25.10.1974



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	of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	
<b>France</b>	Has accepted Parts II and IV to IX	14.6.1974
<b>Germany</b>	Has accepted Parts II to X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	21.2.1958
<b>Greece</b>	Has accepted Parts II to VI and VIII to X	16.6.1955
<b>Iceland</b>	Has accepted Parts V, VII and IX	20.2.1961
<b>Ireland</b>	Has accepted Parts III, IV and X	17.6.1968
<b>Israel</b>	Has accepted Parts V, VI and X	16.12.1955
<b>Italy</b>	Has accepted Parts V, VII and VIII	8.6.1956
<b>Japan</b>	Has accepted Parts III to VI. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	2.2.1976
<b>Libyan Arab Jamahiriya</b>	Has accepted Parts II to X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	19.6.1975

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<b>Luxemburg</b>	Has accepted Parts II to X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. Part III is no longer applicable as a result of the ratification of Convention No. 130.	31.8.1964
<b>Mauritania</b>	Has accepted Parts V to VII, IX and X	15.7.1968
<b>Mexico</b>	Has accepted Parts II, III, V, VI and VIII to X	12.10.1961
<b>Montenegro</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	3.6.2006
<b>Netherlands</b>	Has accepted Parts II to X. Part III is no longer applicable as a result of the ratification of Convention No. 130. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the Convention are no longer applicable.	11.10.1962
<b>Niger</b>	Has accepted Parts V to VIII	9.8.1966
<b>Norway</b>	Has accepted Parts II to VII. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	30.9.1954
<b>Peru</b>	Has accepted Parts II, III, V, VIII and IX. Pursuant to Article 3, paragraph 1, of the Convention, the Government has availed itself of the temporary exceptions provided for in Articles 9(d); 12(2); 15(d); 18(2); 27(d); 48(c); and 55(d).	23.8.1961

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<b>Poland</b>	Has accepted Parts II, V, VII, VIII and X	3.12.2003
<b>Portugal</b>	Has accepted Parts II to X	17.3.1994
<b>Romania</b>	Has accepted Parts II, III, V, VII and VIII.	15.10.2009
<b>Senegal</b>	Has accepted Parts VI to VIII. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	22.10.1962
<b>Serbia</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	24.11.2000
<b>Slovakia</b>	Has accepted Parts II, III, V and VII-X. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	1.1.1993
<b>Slovenia</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	29.5.1992
<b>Spain</b>	Has accepted Parts II to IV and VI	29.6.1988
<b>Sweden</b>	Has accepted Parts II to IV and VI to VIII. Part VI is no longer applicable as a result of the ratification of Convention No. 121. Part III is no longer applicable as a result of the ratification of Convention No. 130.	12.8.1953
<b>Switzerland</b>	Has accepted Parts V to VII, IX and X. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable.	18.10.1977
<b>The former Yugoslav Republic of Macedonia</b>	Has accepted Parts II to VI, VIII and X. Part VI is no longer applicable as a result of the ratification of Convention No. 121.	17.11.1991

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<b>Turkey</b>	Has accepted Parts II, III, V, VI and VIII to X. Pursuant to Article 3, paragraph 1, of the Convention, the Government accepts the obligations of the Convention in respect of Parts II and VIII but avails itself of the temporary exceptions provided for in Articles 9(d) and 48(c).	29.1.1975
<b>United Kingdom</b>	Has accepted Parts II to V, VII and X	27.4.1954
<b>Uruguay</b>	Has accepted Parts II, IV, VII and VIII.	14.10.2010
<b>Bolivarian Republic of Venezuela</b>	Has accepted Parts II, III, V, VI and VIII to X. Part VI is no longer applicable as a result of the ratification of Convention No. 121. As a result of the ratification of Convention No. 128 and pursuant to Article 45 of that Convention certain parts of the present Convention are no longer applicable. Part III is no longer applicable as a result of the ratification of Convention No. 130.	5.11.1982

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