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THE ILO AND THE SOCIAL CONSEQUENCES OF THE COVID-19

ILO ORAZ SPOŁECZNE KONSEKWENCJE COVID-19

Summary: In this essay, the author gives account of how the International Labour Organization (ILO) is working to provide assistance to its members to overcome the social consequences of the pandemic in progress. The virtues of two of its tools and of their smooth interaction are successively analyzed. The Institution has first investigated the available data and published economic analyses on the disastrous consequences of the scourge on employment and therefore, on individual income. It has addressed a series of socio-economic recommendations to governments. It has secondly referred to the international legal corpus as a guide to the States in their responses to the exceptional situation. The ILO labour standards provide a threshold of minimum protection to the benefit of those who work or want to work. They constitute guarantees which appear even more important in difficult times to enable people to go through critical periods without intolerable trouble. Some could still be strengthened.

Keywords: International Labour Organisation, COVID-19, social protection, precarious wage-earners, self-employed workers

Streszczenie: W artykule autor wyjaśnia, jak Międzynarodowa Organizacja Pracy (ILO) działa, aby zapewnić pomoc swoim członkom w przezwyciężeniu społecznych konsekwencji trwającej pandemii. Zalety dwóch z jej narzędzi oraz ich gładka interakcja są poddawane stopniowej analizie. Najpierw zbadano dostępne dane i opublikowano analizy ekonomiczne dotyczące katastrofalnego wpływu pandemii na zatrudnienie i dochód jednostki. Skierowano serię zaleceń społeczno-ekonomicznych do rządów. Następnie odniesiono się do przepisów międzynarodowych jako przewodnika do Państw Członkowskich w ich od-

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powiedziach na tę wyjątkową sytuację. Standardy pracy ILO zapewniają próg minimalnej ochrony tych, którzy pracują lub chcą pracować. Stanowią gwarancje, które wydają się jeszcze ważniejsze w trudnych czasach, umożliwiając ludziom przejście przez okresy kryzysowe. Niektóre można jeszcze bardziej wzmocnić.

Słowa kluczowe: Międzynarodowa Organizacja Pracy, COVID-19, ochrona socjalna, niestabilni zarabiający, pracownicy samozatrudnieni

In the public debate regarding the COVID-19, much has been written on its consequences for our societies, in terms of anticipating emergency measures and of identifying vulnerable groups in need of protection. More fundamentally, the question has been how the toolkits¹ of labour and social security law should adjust to such a crisis and to do it on a long-lasting basis without going another time through special and temporary legislation.

The pandemic has shaken certainties. The financial community has recognized that globalization had been pushed too far and that we cannot depend, for our basic needs or even for a normal flow of production, on a distant country which suddenly is paralyzed. Everywhere, the State is back. In some countries, it seems even to have cut excessively in civil and political rights. In all, including among the strongest supporters of laissez-faire, it is called to help the enterprises, all of them, large stock companies as much as small and medium-sized firms, although the assistance to the SMEs seem especially important in view of their percentage of the domestic employment. They make up over 60% of in France, Germany and Switzerland and up to 78.5 % in Italy². Individual independent contractors complain of being often left out of emergency measures. A hastily decided confinement has paralyzed the national economies and has also led the States to close in on themselves with regard to their health policy, and in many respects, the financial management of the present turmoil. Fortunately international scientific cooperation has generally worked well despite the alleged makeup of the disease statistics in certain countries.

This article is dedicated to Professor Marek Pliszkiwicz whose career crossed mine a number of times. It was always pleasant. My contribution examines how a world institution, the International Labour Organization (ILO), provides assistance to its Members to overcome the social consequences of the disease. The Organization quickly put all its knowledge and expertise at the service of its Members

¹ B. Ter Haar, E. Menegatti, I. Senatory, E. Sychenko, *Editorial*, "Italian Labour Law E-Journal" 2020, vol. 13, special issue 1.

² INSEE, *Les entreprises en France*, Paris, INSEE, 2017, p.28; European Commission, *SBA Fact Sheet Germany*, 2016, <https://www.kmu.admin.ch/kmu/fr/home/faits-et-tendances/politique-pme-faits-et-chiffres>; European Commission, *SBA Fact Sheet Italy*, 2018. See also M. Berrios, „Which policies can help small businesses withstand COVID-19?“, <https://iloblog.org/2020/04/16>.

and helped them to cope, on a sustainable basis, with the social consequences of the confinement. The virtues of two of its tools and of their smooth interaction have been emphasized to help mitigate damage.

These means of action will be analyzed successively. The Institution has first investigated the available data and published economic analyses on the disastrous consequences of the scourge on employment and therefore, on individual income. It has addressed a series of socio-economic recommendations to governments (§ 1). It has also referred to the international legal corpus as a guide to the States in their responses to the exceptional situation. The ILO labour standards provide a threshold of minimum protection to the benefit of those who work or want to work. They constitute guarantees which appear even more important in difficult times to enable people to go through critical periods without intolerable trouble. Some could still be strengthened (§ 2)³.

A CALL FOR QUICK AND COORDINATED RESPONSES

The Organization regularly assesses the number of jobs lost due to the confinement and the fall in production⁴. Dramatic decreases have occurred across different income groups but especially in upper-middle income countries. The eventual raise in global unemployment during 2020 will depend substantially on future developments and policy measures. In the current situation, businesses across a range of economic sectors are facing catastrophic situations, which threaten their operations and solvency, especially among smaller enterprises, while millions of workers are at risk of a sharp decrease or drying up of their income.

The impact is especially harsh for unprotected workers people and declining working hours has occurred in the hard-hit sectors of retail trade, accommodation and food services, and manufacturing. Particularly in low- and middle-income countries, those activities have a high proportion of workers in informal employment and people with limited access to health services and social protection. Without appropriate policy measures, they face a high risk of falling into poverty; they will experience greater challenges in regaining their livelihoods during the recovery period.

The ILO calls for urgent, large-scale and coordinated action. The measures to be taken are in line with the ILO Recommendation No 205 on Employment and Decent Work for Peace and Resilience, 2017. The instrument applies to all workers and jobseekers, and to all employers, in all sectors of the economy affected by

³ See *ILO standards and COVID-19 (coronavirus)*, Version 1.2, Geneva, ILO, 23 March 2020 and Version 3.0, https://www.ilo.org/global/standards/WCMS_780445/lang--en/index.htm.

⁴ One can periodically review the news on the response of the world of work to the crisis by COVID-19 on the site <https://www.ilo.org/global/topics/coronavirus>.

situations arising from conflicts and disasters. The definition of the disaster covers the present pandemic which clearly is “a serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts”. The resilience to be built “means the ability of a system, community or society exposed to hazards to resist, absorb, accommodate, adapt to, transform and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions through risk management”.

The Recommendation suggest that the Members adopt an employment strategy, in the light of the Convention No. 122 on Employment Policy, 1964 and consider an extension, of social protection.

The measures should include support to maintain employment (i.e. short-time work, paid vacations and other subsidies), including the use of public resources to encourage enterprises to retain and/or create jobs, stimulation of the economy, and the granting of loans, financial aid and tax relief, to specific economic sectors and to micro, small and medium-sized companies.

The governments should, as quickly as possible, seek to ensure basic income security, in particular for persons whose jobs or livelihoods have been disrupted. They also should review, establish, or reinforce, if necessary, legislation on labour protection and health at work in consultation with the most representative employers’ and workers’ organizations.

The action taken should be consistent with the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and applicable international labour standards. Restrictions to these rights, such as to the organization of trade unions meetings under a state of emergency should respect the principle of proportionality and be limited to what is strictly necessary to keep with the objective pursued by the extraordinary regulations⁵. Taking advantage of the circumstances to limit social guarantees, including the freedom of association, and to attract in such a way foreign investment, as apparently did several Indian States⁶, is in complete contradiction with the Organization approach.

The Recommendation calls for two types of action in concert. An active social dialogue between employers, workers and their representatives would first allow building public confidence and the necessary consensus to overcome the crisis.

⁵ See for example with regard to freedom of association: ILO, *Compilation of decisions of the Committee on Freedom of Association*, 6th ed. Geneva, 2018, <http://www.ilo.org/dyn/normlex/en>, §§ 298, 301 and 310.

⁶ <https://www.rts.ch/play/radio/tout-un-monde/audio/tout-un-monde-presente-par-eric-guevara-frey> (19 May 2020).

True collective bargaining can bring solutions adapted to a particular branch of activity or a given company.

Recent examples may be pointed out. UNI Global Union, Auchan Retail and Carrefour Group have signed on 9 April 2020 a joint declaration on the implementation of good business practice in response to the health problems caused by the plague. Together, they agree to examine the introduction of all useful and appropriate measures, derived from good corporate practice, to prevent, reduce or eliminate the risks of contagion for their employees and customers⁷.

In the same manner, the International Organisation of Employers (IOE), the International Trade Union Confederation (ITUC), and Industri All Global Union have signed on 22 April 2020 a joint statement to which several global brands have already joined (such as Inditex, C&A, H&M, Adidas, Marks & Spencer, Primark, Bestseller, Tchibo and PVH, VF Corporation and Zalando). The document aims to mobilize sufficient funding to ensure business continuity, payment of wages, as well as income-support and job retention schemes to protect garment workers 'income, health and employment. Employers, workers, retailers and major brands involved in the collaboration will form an international working group – convened by the ILO – to implement measures to limit the damage caused by the calamity to enterprises and livelihoods. The working group has committed to support the development and expansion of social protection systems for workers and employers in the garment industry as part of the recovery⁸.

The States should also strengthen their international cooperation, including through the voluntary and systematic exchange of information, knowledge, good practices and technology for coordinating closely and making complementarity among responses.

Convention N° 122 and of course Recommendation No 205 are programmatic in nature. They serve to translate the ILO's values into integrated development programmes. They invite the States to adopt policies and draw up programmes. They intend essentially to prompt action. They set goals to be attained by means of promotion activities and their implementation relies in particular on non-legal modes of regulation: defining political projects; economic measures; information, training campaigns; recourse to non-legal provisions, etc. In short, they reflect the determination to regulate by setting objectives, drawing from modern human resources management methods to do so. They do not impose specific, immediately applicable legal obligations on the States concerned. They are couched in general and flexible terms, and contain no obligation of result for an employer or any other person, but an obligation of means that is placed on the States themselves: to conduct certain activities, to draw up or implement certain projects, to encourage certain approaches, etc.

⁷ <https://www.uniglobalunion.org/news>.

⁸ <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS 22 April 2020>.

These standards are found first and foremost in the fields of employment, vocational training and the fight against discrimination. The concept of programmatic standards also covers rules that directly facilitate communications between social groups and other institutions, in order to enable them to find a solution to the problems identified; as have been said, they 'shape a process'. Many provisions on collective industrial relations are in this category.

The programmatic standards thus have the advantage of affording an appropriate framework for the coordination of legal and non-legal means of implementing a social policy that, in the 21st century, reflects the same preoccupations as at ILO's inception: concern for the individual, understanding for the requirements of the economy and the desire to consolidate social cohesion, in each country and among all Nations.

Most international labour standards however belong to a second category, which has a more specific technical content. They deal with conditions of employment in the broad sense, and with social security. They are immediately enforceable and impose to the ratifying States obligations of result. They constitutes the floor of the workers 'protection.

THE WORKERS 'PROTECTION FLOOR IN THE ILO LAW

If the ILO does not have the same capacity as its Member States to legislate in the urgency, its international standards cover nevertheless most work situations affected by the disaster⁹ (A). Some provisions relate specifically to groups who have suffered particularly from the present circumstances in their working conditions and/or in their income security. The recent events have shown the need for improving this protection (B).

A. The ILO standards as the foundation for a crisis-resistant social and labour protection system

The ILO has established minimum labour standards that aims to be applicable everywhere and in all circumstances, including in time of crisis.

a) Homeworking and the conciliation of professional and family life

All forms of teleworking have extensively been used during the confinement. Homeworking in particular has considerably increased. The change could have lasting effects in work organization. Most of the international labour conventions and recommendations are written in general enough terms to cover homeworkers. Convention No. 177 and Recommendation No. 184 of 1996 deal more specifically

⁹ The full text of all the instruments mentioned in this contribution and related references can be found on the ILO website <https://www.ilo.org/global/standards>.

with this category; they do not apply to the self-employed. States must promote equal treatment between homeworkers and other employees. Information about or knowledge of the health risks and usefulness of protective rules are of particular importance in this case.

Working from home can make it easier to reconcile professional life and family responsibilities. Recent experiences however have highlighted the difficulty of carrying out a professional activity with the children present. It also brings with it well-known disadvantages, such as marginalization in the enterprise and the difficulty of monitoring protective legislation, as on personal data or on working time.

The pandemic has shed light on the importance of paid and unpaid care activities. One of the first concerns related to the containment, the closure of schools and the discontinuation of daily care services was to manage the leaves persons with family responsibilities need to look after a child or other dependent persons. Short-time arrangements on redistributing unpaid care work between women and men, between families and the State should be substituted by viable and sustainable options, in line with Convention No 156 and Recommendation No 165 on workers with family responsibilities, 1981.

Furthermore paragraph 10 of Recommendation No. 134 on medical care and sickness benefits, 1969, states that appropriate provision should be made to help a person protected who is economically active and who has to care for a sick dependant. Paragraph 23 and 19 of Recommendation No. 165 adds that a worker, man or woman, should obtain leave of absence in the case of illness of a dependent child or of another member of the worker's immediate family who needs that worker's care or support; their special obligations should be taken into account in shift-work arrangements and assignments to night work.

b) Working time

An employer could not draw argument from his obligation to stay closed as a precautionary measure to compel staff to take time off. Convention (Revised) No. 132 on holidays with pay, 1970, article 10 requires however that the time at which the holiday is to be taken be determined by the employer after consultation with the employed person concerned or his representatives. In doing so, work requirements and the opportunities for rest and relaxation available to the employed person shall be taken into account.

c) Termination of employment

In the current situation, many fear losing their job. There are several ways to put an end to the employment relationship, if to be fired is the most widely used. Like any contract, that of work is broken by private law means. In principle, the death of the boss only ends the relationships that have a personal character as in

domestic work¹⁰. The regulation of the fortuitous event and force majeure, including the distinction between the two, varies from country to country. They constitute an inevitable, insurmountable and unpredictable event, outside the will of the employer, which makes the execution of the contract impossible. Unless otherwise provided by law (Switzerland), they could be invoked in the current circumstances if the company must be closed or if the contamination risks are serious, for the employee or for the colleagues of an affected worker, They suspend the execution of obligations to work and pay wages. In this case, the worker normally benefits, in European countries at least, from cash unemployment or sickness benefits.

The ILO Convention No. 158, 1982, regulates the termination of the employment relationship at the initiative of the employer. It states that the employment relationship will not be broken unless there is a valid reason for it related to the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. The employee shall be entitled to a reasonable period of notice or, instead, to compensation, unless he is guilty of serious misconduct, that is, behaviour of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period. The instrument stresses that temporary absence from work due to illness should not constitute a justified reason for dismissal (Articles 4-6 and 11).

The instrument applies in principle to all branches of economic activity and to all employed persons. However, a State may exclude from all or some of the provisions workers with a fixed-term contract or engaged for a specified task, those serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration and those. Adequate guarantees must be provided against recourse to fixed-term employment contracts intended to avoid the protection (Article 2).

In the case of collective dismissal, the employer will notify the competent authority as soon as possible, communicating the relevant information. He shall also provide it to the representatives of the workers concerned and give them, as soon as possible, an opportunity to consult on the measures to be taken to avoid or limit terminations and measures to mitigate its adverse consequences for affected persons, for example, finding them other jobs (articles 12 and 13).

Every interested worker shall be entitled to end-of-service compensation, unemployment insurance benefits or a combination of the two (article 12).

Other ILO standards deal with insolvency of the employer. Granting a preference to certain creditors is a longstanding legal practice; they are paid with the assets of the insolvent debtor before others, not privileged, that can be paid pro rata. This is a traditional method of protecting workers' claims. Article 11 of Con-

¹⁰ Convention and No 189 and Recommendation No. 201, 2011, deal more generally of their situation, including with regard to their health.

vention No 95 Protection of Wages Convention, 1949 includes such a provision. Convention No. 173 and Recommendation No. 180 on the protection of workers' credits in the event of employer insolvency, 1992, also contain such a rule. They mention the main privileged debts: wages and other amounts due (paid vacations, paid absences, end-of-service compensation, other compensation, social security, and insurance premiums, etc.). They add that privileged protection of workers' claims may be limited to a certain amount, but the Convention requires that workers' claims be of a high rank.

Convention No. 173 establishes a second means, which is also dealt with by European directive No 2008/94 of October 22, 2008¹¹: the creation of an institution that guarantees the payment of workers' claims in cases in which the insolvent employer cannot face them. The instrument set a limit on the sums thus protected (essentially the same as for privileges). The complementary Recommendation sets forth the principles of such funds.

d) Social security

Convention No. 102 of 1952 establishes minimum standards in this field. Several instruments adopted later are based on its provisions, but provide broader protection in terms of persons covered and amount of benefits.

Special mention may be made of Convention No. 121 and Recommendation No 121 on Employment Injury Benefits, 1964, if the disease has been contracted through occupational exposure¹². The Convention suggests three means by which the States can determine what are occupational diseases: (a) by prescribing a legal list of recognized occupational diseases, comprising at least the diseases enumerated in Schedule I to the instrument; (b) by including in their legislation a general definition of occupational diseases broad enough to cover the diseases enumerated in Schedule I; (c) by prescribing a list of diseases supplemented by a general definition.

The left-hand column of Schedule I lists 29 categories of occupational diseases and the right-hand column the types of work involving an exposure to risk. If a protected person contracts one of the diseases listed and is employed in a job involving exposure to the corresponding risk, the disease is presumed to be occupational in origin. Recommendation No. 121 specifies the conditions in which a disease is presumed to be occupational in origin. Recommendation No. 194, 2002, invites the States to draw up such a list of occupational diseases for the purposes of prevention, registration, declaration and reparation¹³ and calls for the list to be periodically updated. The document should contain at least those diseases

¹¹ JOL. 283 du 28.10. 2008, pp. 26-4.

¹² See the Recommendation no 194, 2002 on the List of Occupational Diseases, annex 1.3.9.

¹³ See the 1996 Code of practice on the recording and notification of occupational accidents and diseases.

enumerated in Schedule I to Convention No. 121. It should also comprise, to the extent possible, the diseases mentioned in an annex to Recommendation No. 194, which point 1.3.9 clearly covers the COVID-19 contracted at work: it concerns diseases caused by biological agents at work not mentioned in the preceding items where a direct link is established between the exposure to these biological agents arising from work activities and the disease(s) contracted by the worker.

With regard to the present crisis, one should also refer to Convention No. 130 and Recommendation No. 134, 1969, on medical care and sickness benefits¹⁴, to Convention No. 168 and Recommendation No. 176 on employment promotion and protection against unemployment, 1988.

Convention No. 102 and subsequent instruments on social security provide three formulas for evaluating the extent to which the benefits granted under national laws and regulations attain the required rates, including one that cover all residents and, consequently self-employed workers. The rate of benefit must therefore attain, for a defined “standard beneficiary”, a certain percentage of the reference wage or earnings. The conventions have however their limitations when it comes to ensuring a given minimum benefit package; they neither define priority benefits nor require universal coverage¹⁵.

In contrast, the Income Security Recommendation No. 67, 1944, brought together in a single instrument all provisions for income maintenance in case of inability to work or to obtain work and recommended the extension of these provisions to all workers, whether employed, self-employed, urban or rural, as well as to their dependants. The instrument relies on social insurance as the main protection mechanism. It was the first to define social assistance as a complement to social insurance extending protection to the vulnerable and needy population¹⁶. It has been completed the same year by the Medical Care Recommendation (No. 69). More recently, Recommendation No. 202, 2012, promote the establishment and maintenance of national floors of social protection.

e) Health at work

COVID-19 has shown the importance of effective health care services, but also, in many countries, the underinvestment and the underpayment of hospital staff. This is one point on which the calamity should provoke policy changes, in line with Convention No. 161 and Recommendation No. 171, 1985, on occupa-

¹⁴ Paragraph 8 specifies that a person protected for sickness benefit should be granted a cash benefit in cases of absence from work involving loss of earnings which is justified on the ground that he is isolated for the purpose of quarantine.

¹⁵ ILC, *Social Security for Social Justice and a Fair Globalization*, Report VI, 100th Session, 2011, ILO, Geneva, 2011, paras. 99 and 439.

¹⁶ ILC, *Social Security and the Rule of Law*, Report III (Part 1B), 100th Session, 2011, ILO, Geneva, 2011, paras 39 and 40.

tional health services. Convention No. 187, 2006, focuses on the promotion of health and safety at work. It provides that States must not only elaborate, apply, control, but also periodically review a national program of safety and health at work in consultation with business and union organizations. The current situation clearly requires such a review.

Convention No. 155 on Occupational Safety and Health, 1981, determines the responsibility of the authorities (prohibitions, supervision and administrative authorizations, procedures to declare diseases and accidents, surveys, statistical analysis, investigation and inspection systems, coordination of services) and of manufacturers and sellers of materials and products. It establishes the obligations of the employer to ensure safety (including for example to uphold social distancing), to provide adequate protective clothing (masks) and protective equipment at no cost for the workers and to give due information and training¹⁷. The worker also has the obligation to collaborate (as has his representatives) and to report any dangerous situation. A worker who deems it necessary to interrupt a work situation for believing, on reasonable grounds, that it poses an imminent and serious danger to his life or health, must be protected from retaliation¹⁸. This «right to withdraw» (*droit de retrait*), as called by the French legislation, should be applied with common sense: the nature of the work have an influence on the exercise of the right to cease work. It cannot be exercised if the danger is a normal condition of employment (as for firefighters). In Poland, Canada or New Zealand for example, workers may only refuse such work if the understood risk of serious harm has materially increased in a given situation, that is, the risk of harm has become significantly more likely¹⁹.

The three conventions apply to all workers, without being limited to employees. Other instruments consider a specific branch of activity²⁰: such as commerce and offices, construction, mines, agriculture, maritime and dock work. Some deal with a category of workers for which it has been understood that they should benefit from additional guarantees: children and young people, older workers, migrants²¹, women.

Those provisions are supplemented by less mandatory measures called «codes of practice» whose publication is subject to approval by the Governing Body. They compile everything that is known and experienced on a given topic in terms of identified problems and suggested policy solutions. They have been adopted for specific

¹⁷ Article 16 (3) and 21.

¹⁸ Article 13; see also Article 19 f) and Article 3 a) iv of its Protocol, 2002.

¹⁹ ILC, 98th session, 2009, Report III (Part 1B), § 149, Geneva, ILO, 2009; *ILO standards and COVID-19 (coronavirus)*, op. cit.

²⁰ For further details, see my book *International Labour Law*, 6th revised ed., The Hague, Kluwer, 2020, §§ 652-653.

²¹ The above-mentioned ILO report on *ILO standards and COVID-19 (coronavirus)* contains detailed information on the international labour standards that ensure their protection (pp. 24-27).

sectors of activity (construction, opencast mines, coal mines, steel industries, metal industries, non-ferrous, agriculture, ship building and repair, forestry, for example), on protecting workers against certain risks (such as radiation, lasers, display units, chemicals, asbestos, airborne substances) and on certain safety and health measures (for example, occupational health and safety management systems; ethical guidelines for monitoring the health of workers; registration and notification of accidents and occupational diseases; protection of personal data of workers; safety, health and working conditions in the transfer of technology to developing countries).

Finally, the Organization has elaborated guides and manuals to help the people in charge of complying with these measures. Its activities on health and safety at work include other programmes that may be of special use in time of coronavirus such as research, data collection and dissemination, technical advice and cooperation to its members.

In June 2019, the International Labour Conference declared in the Centenary Declaration for the Future of Work that “Safe and healthy working conditions are fundamental to decent work” and adopted a resolution requesting the Governing Body “to consider, as soon as possible, proposals for including safe and healthy working conditions in the ILO’s framework of fundamental principles and rights at work”²². The scourge has shown how essential are in everyone’s life, the rights to health at work and, I would add, that to social security which is linked to it.

f) Nurses

Women globally make up over 70 per cent of workers in health, including those working in care institutions. As a result of the pandemic they are facing a double burden: longer shifts at work and additional care work at home²³.

Convention No. 149 and Recommendation No. 157 of 1977 reflect the particular concerns for nursing personnel regarding their working conditions, including remuneration. They aim at promoting the quality of care and services to attain “the highest possible level of health for the population”, and, at the same time, at providing education and training, employment and working conditions (including career prospects and remuneration), which are likely to attract persons to the profession and retain them in it²⁴. Each State should, if necessary, endeavour to improve existing laws and regulations on occupational health and safety by adapting them to the special nature of nursing work and of the environment in which it is carried out.

The Recommendation contains detailed provisions on the protection of health and social security. Conditions of employment and work should preferably be de-

²² Resolution on the ILO Centenary Declaration for the Future of Work (adopted on 21 June 2019), *International Labour Conference*, 108th Session, para. 1.

²³ ILO, <http://www.ilo.org/global/about-the-ilo/newsroom>, 7 April 2020.

²⁴ Article 2 of the Convention; paragraph 4 of the Recommendation.

terminated by negotiation between employers 'and workers' organizations. The participation of nursing personnel in the planning of nursing services and consultation in decisions that concern them is strongly encouraged. The Recommendation deals specifically with remuneration. With a view to making the most effective use of available nursing personnel and to preventing the withdrawal of qualified persons from the profession, measures should be taken to make possible temporary and part-time employment; the conditions of employment should be equivalent to those of permanent and full-time staff respectively, their entitlements being, as appropriate, calculated on a pro rata basis²⁵. An annex to the Recommendation provides suggestions for practical application.

B. Special concerns for specific groups of workers

Inequality is both cause and consequence²⁶. A labour crisis could exacerbate it because the pandemic disproportionately affects the least protected and low-paid workers. Not surprisingly, those include youth, older workers, women, and (legal or illegal) migrants²⁷. For each of them, the ILO has adopted international labour standards²⁸. They often are in addition included in two categories of people for which protection should be further extended, the precarious workers, including platforms workers, and the self-employed.

a) Precarious work

The exceptions and flexibility clauses that the ILO conventions contain frequently exempt from their field of application all or some of the workers, whether wage-earners or not, in sectors of activity in which precarious employment is the rule. The reasons put forward relate to the need for flexibility and for reducing the company's social costs.

The wording of each convention serves to determine whether or not it applies to all or some of these workers. To put it in a nutshell, the ILO standards establishing fundamental labour rights in principle cover all employment situations. Admittedly, however, they are difficult to implement when it comes to freedom to organize, equality of opportunity and treatment and the abolition of child labour. The standards on the promotion of employment and vocational training do not

²⁵ Paragraphs 57 and 58.

²⁶ J. Malinowski, *Head of the Department of the European Social Charter at the Council of Europe*, "Caritas Europa's newsletter" on 20 February 2019; P. Belser, *COVID-19 cruelly highlights inequalities and threatens to deepen them*, <https://www.ilo.org/global/about-the-ilo/newsroom/news>, 30 March 2020.

²⁷ A. Adams-Prassl, T. Boneva, M. Golin, Ch.Rauh, *The large and unequal impact of COVID-19 on workers*, <https://voxeu.org>, 8 April 2020; ITCILO „Migrant Workers: the forgotten victims of COVID-19”, <https://itcilo.exposure.co>, 9 April 2020.

²⁸ They are analysed in my book: *International Labour Law*, 6th edition, The Hague, Kluwer, 2020.

distinguish between workers either. Since they are programmatic in nature and place no very detailed and specific legal burden on the States, they are relatively easy to apply in the short term. In terms of the policies to adopt, they refer to measures that are favourable to workers in unstable situations.

The persons concerned could on the contrary fall through the cracks, as the saying goes, of the social security systems promoted by Convention No. 102 and more recent ILO instruments. On many other subjects – industrial relations, working conditions, labour inspection – and no matter what the scope of the texts establishing the field of application, the instruments adopted were not conceived for certain kinds of work. It therefore does not suffice to theoretically extend the provisions in question to people such as home or temporary workers, workers employed in family businesses and on small farms. The regulation needs adjustments to take account of their specific situation. Furthermore it appears extremely awkward to monitor application of the rules.

b) Self-employed workers

Precarious employment is also, if not mainly, to be found among the self-employed. Independent workers occupy a separate place in the range of professional activities. Labour law was developed to face the protection of employees; it was not applied to workers who were not subordinate. However, it gradually became clear that there was a need to extend at least some guarantees to the self-employed, since the demarcation line between wage-earners and independent workers is not always easy to determine, as the gig economy shows. In some cases, the legal status of independent could even camouflage genuine economic dependence.

Whether or not an international labour standard applies to self-employed workers again depends on how the relevant text is drafted and of its purpose: some texts are not designed for them. Several ILO instruments use the word “worker” without limiting the meaning, directly or indirectly, to employees. This is particularly the case, as already seen, when they refer to social security systems that are based on the residence in a certain country, and not on the employment relationship. There are many examples however of provisions that implicitly exclude the self-employed because the situation they cover does not concern them.

The ILO Recommendation No. 198 on Employment Relationship was adopted in 2006, after a long-lasting and difficult debate. Even if the standards are contained in a not binding instrument, employers’ circles have expressed reservations about its content. It focuses on the demarcation line between the contract of services and the contract for services. It does not deal with the grey area in-between, i.e. the relationships called *parasubordinazione* in Italian, where the dependence is more economic than legal.

According to the document, the determination of the existence of an employment relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. For facilitating the determination, States should allow a broad range of means for determining the existence of an employment relationship and of providing for a legal presumption or assimilation that an employment relationship exists where one or more relevant indicators is present. This is the case in France amongst other countries with regard to home-based work,

The pandemic will at least accelerate change in the organization of work. In spite of those obstacles, it calls for reflection on the dislocation that is likely to be experienced and on the increasingly obsolete social character of the distinction between wage earners and independent workers²⁹. The ILO has expressed concern about the risk of violence during the confinement. It is timely to remind that its Convention No 190 and its Recommendation No 206, 2019, cover beyond wage-earners, all persons “in the world of work”: they protect workers irrespective of their contractual status, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.

The social question facing industrial societies and developing countries today, as manifested by the COVID-19 crisis, concerns the impoverishment of all those, wage-earners and the self-employed, swept up, because of their forced inactivity, their inadequate salary or precarious employment, in a current that is carrying or keeping them away from established structures.

It would be useful in particular to clarify those issues in a revised ILO instrument on distant work. There is a need for more detailed rules that cover both self-employed and wage-earners and take into account the often transnational character of the work relationship. They should deal with the misuses of the IA to blur the nature of the relationship between the firm and the worker and to control the activities of the latter without regard to his/her privacy and the protection of personal data.

References

Adams-Prassl A., Boneva T., Golin M., Rauh Ch., *The large and unequal impact of COVID-19 on workers*, <https://voxeu.org>, 8 April 2020.

Belser P., *COVID-19 cruelly highlights inequalities and threatens to deepen them*, <https://www.ilo.org/global/about-the-ilo/newsroom/news>, 30 March 2020.

²⁹ See also N. Countouris, V. De Stefano, K. Ewing and M. Freedland, *Covid-19 crisis makes clear a new concept of ‘worker’ is overdue*, <https://www.socialeurope.eu> on 9th April 2020.

Berrios M., *Which policies can help small businesses withstand COVID-19?*, <https://iloblog.org/2020/04/16>.

Countouris N., De Stefano V., Ewing K., Freedland M., *Covid-19 crisis makes clear a new concept of 'worker' is overdue*, <https://www.socialeurope.eu> on 9th April 2020.

European Commission, *SBA Fact Sheet Germany*, 2016, [https://www.kmu.admin.ch/kmu/fr/home/faits-et-tendances/politique-pme-faits-et-chiffres__European Commission, SBA Fact Sheet Italy](https://www.kmu.admin.ch/kmu/fr/home/faits-et-tendances/politique-pme-faits-et-chiffres__European%20Commission,%20SBA%20Fact%20Sheet%20Italy), 2018.

ILC, *Social Security for Social Justice and a Fair Globalization*, Report VI, 100th Session, 2011, ILO, Geneva, 2011.

ILC, *Social Security and the Rule of Law*, Report III (Part 1B), 100th Session, 2011, ILO, Geneva, 2011.

ILC, 98th session, 2009, *Report III (Part 1B)*, § 149, Geneva, ILO, 2009.

ILO, *ILO standards and COVID-19 (coronavirus)*, (Version 1.2), Geneva, ILO, 23 March 2020.

ILO, *ILO Standards and COVID-19 (coronavirus) – Version 3.0*, https://www.ilo.org/global/standards/WCMS_780445/lang--en/index.htm.

ILO, <https://www.ilo.org/global/topics/coronavirus>.

ILO, *Compilation of decisions of the Committee on Freedom of Association*, 6th ed. Geneva, 2018. <http://www.ilo.org/dyn/normlex/en>.

ILO, Resolution on the ILO Centenary Declaration for the Future of Work (adopted on 21 June 2019), *International Labour Conference*, 108th Session.

ILO, <http://www.ilo.org/global/about-the-ilo/newsroom>, 7 April 2020.

ILO, <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS> 22 April 2020.

INSEE, *Les entreprises en France*, Paris, INSEE, 2017.

ITCILO «Migrant Workers: the forgotten victims of COVID-19», <https://itcilo.exposure.co>, 9 April 2020.

Malinowski J., *Head of the Department of the European Social Charter at the Council of Europe*, "Caritas Europa's newsletter" on 20 February 2019.

Servais J.M., *International Labour Law*, 6th revised ed., The Hague, Kluwer, 2020, §§ 652-653.

Ter Haar B., Menegatti E., Senatory I., Sychenko E., *Editorial*, "Italian Labour Law E-Journal" 2020, vol. 13, special issue 1.

Uni global Union, <https://www.uniglobalunion.org/news>.