1. Introduction

Since 1944, the year of the Declaration of Philadelphia, the ILO has recognised the right to social security, drawing up a series of Conventions and Recommendations providing national governments with guidelines for the construction of their own systems of social security, and outlining the legislative contents of the right to social security beginning with the assumption that “social security is a human right and all people, regardless of where they live, should be guaranteed at least a floor of basic social protection”.¹

While Social Security (Minimum Standards) Convention No. 102 (1952) is considered “the flagship social security instrument” for its delineation of the foundations of the social security system of a country (measures of health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, survivors and orphans), Employment Promotion and Protection against Unemployment Convention No. 168 (1988) acts as a reference framework for Member States with particular reference to income-support instruments in case of job loss (full unemployment) or job reduction (partial unemployment). The main aims of this instrument therefore concern “the protection of unemployed persons through the provision of benefits in the form of periodical payments and through the promotion of employment”.²

Convention No. 168 adopts the structure of Convention No. 102 by defining the contingencies covered (art. 10), the persons protected (art. 11), the duration and percentage of benefits provided (art. 19; arts. 12-16), the reasons justifying suspension of benefits (arts. 20 and 21) as well as the legal, financial and administrative guarantees available to claimants (arts. 27-30). The presence of a various innovations with regard to the provisions of previous Conventions and Recommendations

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dealing with this argument mean that Convention No. 168 can be said to represent a partial change in direction, in particular, with regard to its focus on the coordination of occupational and social security policies, as we will see below.³

2. Context and Aims

Within the limits of this brief comment, I would firstly like to draw attention to the assertion in Convention No. 168 of the principle of coordination between measures regarding social security and employment policies: “employment policy and unemployment protection must be seen in a dynamic, dialectical relation”⁴ and, in this perspective, the Member States must provide for integrated and coordinated actions (art. 2) involving their social partners (art. 3). Convention No. 168 “looks beyond the internal organization and functioning of the traditional social security system (Conv. No. 102) into the external socio-economic environment where social security interacts with the labour market, human resources development and the economy at large”.⁵

Secondly, this provision must be interpreted as a response to the new needs that have emerged following the transformation of employment and the diffusion of atypical forms of employment as well as to the necessity of helping those who are temporarily unemployed to return to the labour market. The strategy promoted by the ILO is therefore underpinned by two series of measures: income-support measures must be combined with active policies aimed at reducing the duration of unemployment. Therefore “the system of protection against unemployment, and, in particular, the methods of providing unemployment benefit, have to 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”.⁶

In brief, this means that national governments must promote links between the social security system and social and economic policy measures designed to increase occupation but they should also promote active policies helping to reintroduce the unemployed in the labour market. Convention No. 168, which promotes synergies between social security, occupation and growth, can therefore be considered “as an ideological precursor of the present integrated approach to economic and social objectives pursued by the ILO”.⁷

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⁶ ILO, Setting Social Security Standards in a Global Society (n.2), 11.
⁷ Peyron Bista (n. 5).
3. Content

Convention No. 168 provides national governments with guidelines for the definition of instruments capable of supporting the unemployed and their families in healthy and reasonable living conditions (art. 16). Although economic support is an important part of this system, it is also accompanied by active policies in support of the re-employment of the unemployed in order to ensure full, productive and fully chosen employment (arts. 2 and 7). In this perspective “Convention No. 168 requires member States to promote productive employment. This objective may be reached through various means, such as the establishment of employment services, the provision of vocational training and vocational guidance (Arts. 7 to 9)”.

It has been said that “states should build a system of protection to prepare for the various contingencies of unemployment in close coordination with their employment policy so as to enable all jobseekers to access decent work opportunities”. In defining support measures for the unemployed, Member States must respect the principles of non-discrimination and take into account the needs of the more vulnerable categories (young people, women, elderly, etc.). Art. 6 of the Convention in particular represents the link between Discrimination Convention No. 158 and the context of social security by providing that “each Member shall ensure equality of treatment for all persons protected, without discrimination on the basis of race, colour, sex, religion, political opinion, national extraction, nationality, ethnic or social origin, disability or age”. This means that the provision has “implanted these obligations in the body of the social security standards and enlarged the list of the prohibited grounds for discrimination” by including nationality, age and disability.

The States also enjoy a considerable degree of autonomy with regard to the choice of funding criteria meaning that, according art. 12, the system chosen may be contributory or non-contributory or a combination of the two. Each country may apply the Convention through a combination of contributory and non-contributory benefits, general and occupational schemes, compulsory and voluntary insurance, through different methods for the administration of benefits, and public and private participation.

This brief overview shows that Convention No. 168 leaves a certain margin of discretion to the States concerning the construction of their social security system while at the same time providing detailed rules limiting their regulatory freedom.

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8 ILO, Setting Social Security Standards in a Global Society (n.2), 32.
9 ILO, General Survey concerning social security instruments (n.4), par. 634.
10 ILO; General Survey concerning social security instruments, (n.4), par. 212.
First and foremost, unlike its predecessors, Convention No. 168 broadens the scope of the contingencies covered to include non-working in addition to the unemployed, establishing that “each Member shall endeavour to extend the protection of the Convention, under prescribed conditions, to the following contingencies: (a) loss of earnings due to partial unemployment, defined as a temporary reduction in the normal or statutory hours of work; and (b) suspension or reduction of earnings due to a temporary suspension of work, without any break in the employment relationship for reasons of, in particular, an economic, technological, structural or similar nature” (art. 10.2).

The sphere of application of the Convention regards no more than 85% of all workers in both public and private sectors, including apprentices (art. 11). It also covers part-time workers (art. 10), seasonal workers (art. 17) and those at entry-level (art. 26).

The protection guaranteed takes the forms of the temporary payment of benefits corresponding to “not less than 50% of the previous earnings, minimum wage, or minimum guarantee for living” (art. 15). Payment of benefits is integrated with rights to medical care and sickness, maternity and family benefit (art. 24).

The so-called conditionality clauses that have kept national legislators busy in recent times have also been considered by the Convention, which outlines a particularly strict system of exclusion and suspension of the right to receive benefits (arts. 20 and 21). Particularly interesting in this regard is article 20 which suspends the benefits of anyone who “refuses to accept suitable employment”. In order to determine what forms of employment are “suitable”, article 20 requires the following to be taken into consideration: “the age of unemployed persons, their length of service in their former occupation, their acquired experience, the length of their period of unemployment, the labour market situation, the impact of the employment in question on their personal and family situation and whether the employment is vacant as a direct result of a stoppage of work due to an on-going labour dispute”.

In response to this matter the ILO Expert Committee has stated that, “any employment offered by the employment service will be considered in respect of its quality, having regard to the qualifications and skills of the individual jobseeker”. This means that it is necessary to recognise “the close relationship between the concept of suitable employment and the fundamental principle of the freedom of choice of employment, which also underpins the model of social security embodied in international labour standards”.

Lastly, Convention No. 168 appears rather contradictory in that it not only contains promotional provisions (like Convention No. 122 and Convention No. 142) but also has an extremely rigorous technical content that identifies in detail the qualitative and quantitative parameters that must be

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12 ILO, General Survey concerning social security instruments (n.4), par. 225.
13 ILO, General Survey concerning social security instruments (n.4), par. 228.
respected by the Member States when constructing their social security systems, as well as establishing measures in support of the unemployed. Although it also contains provisions allowing States to gradually comply with the obligations arising from its ratification (arts. 4 and 5), overall, Convention No. 168 “sets too high standards for the majority of the governments, including industrialised countries.¹⁴ This also helps to explain why so few States have actually ratified the Convention (Albania, Belgium, Brazil, Finland, Norway, Romania, Sweden, Switzerland).

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