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TOWARDS A FORMALISATION OF INFORMAL WORKING?

SOME INTRODUCTORY REMARKS

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Social legislation as it has developed in industrialised countries since the end of the 19th century has been built around employment relationships in industrial companies. The systems put in place by labour law and social security laws, in particular collective bargaining and social insurance, have this model as their starting point and are designed to protect workers working under employment contracts for industrial companies. Now, this way of seeing social legislation, found in many countries over the course of the 20th century, has long masked the fact that these protective laws, although they developed fast, did not reach workers in the informal economy, that is to say "all the activities of workers and economic units that are not covered - under the legislation or in practice - by the formal provisions".¹ From the point of view of informal workers, social legislation looks like a system of privileges from which they will never be able to benefit. The forms of employment that exist in the informal economy are extremely diverse and include activities as different as self-employment (for example street vendors, shoe shiners), small farmers or tradesmen selling their wares or services on the street or local market, unpaid family labour and domestic work. These workers in the informal economy are particularly vulnerable and constitute, particularly in developing countries, a very high percentage of the economically active population. For example, in sub-Saharan Africa, informal employment accounts for 80 to 90% of total employment.

It is no longer possible to close our eyes to this economic and social phenomenon that affects a considerable number of countries, all the more so as it has grown in the last few decades and it no doubt now represents one of the biggest challenges for labour law and social security law in our times. Over the past three decades, many studies have been conducted on the issues of labour and employment through the concepts of the informal sector and the informal economy. These studies, whatever the disciplinary field to which they have been attached (economics, statistics, sociology, etc.), have all contributed

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¹ See paragraph I.2. of Recommendation no. 204 of the International Labour Organisation (ILO) on the Transition from the Informal to the Formal Economy (2005).

to demonstrating that in all States, a varying but large amount of labour and employment escapes the protection measures that are part of the fabric of employment and social security legislation. This phenomenon is not specific to the developing countries, since it is also found in northern countries. Here certain sectors of activity are particularly likely to be concerned, such as agriculture.

The conceptual switch from the notion of the “informal sector” to that of the “informal economy”, in particular in the literature produced by the ILO, corresponds to both a desire to take a wider approach to this phenomenon (for example, there can be informal – undeclared – employment within the formal sector) and a renewed reflection on the possible responses. This change led to the ILO adopting a normative instrument, Recommendation no. 204 concerning the Transition from the Informal to the Formal Economy, in 2015. Although this is not a binding instrument, its adoption clearly shows that the introduction of protection for informal workers is recognised by the ILO as a major challenge for international labour and social security law. First of all, a new approach to informality has highlighted the productive value of the informal economy, its vitality and capacity for initiative and innovation. Concerning developing countries, above all this implies leaving behind a strictly negative approach (stigmatising the circumvention of labour and tax regulations) to focus on the jobs created and the resources that a population that is often suffering from great deprivation can draw from them. Secondly, it has given rise, in a very large number of countries, to reflections and initiatives on how to protect these workers in the informal economy, taking account of their diversity (own-account workers, unpaid family workers, whether they work in economic units in the formal economy or the informal economy, workers whose employment relationship is unrecognised or unregulated).² Undoubtedly these workers should benefit from an extension of the application of certain protection measures resulting from employment and social security legislation in order to provide them with decent employment. In this respect, it is certainly indispensable to recognise the role of the labour inspectorate in facilitating this process and combatting the most unacceptable forms of exploitation that can hide behind the façade of the informal economy. But new rights must also be invented to better meet these workers’ need for protection, to foster the development of their activities and enable them to better organise collectively. This means embarking on a process of transition from the informal to the formal economy, progressively and with the primary aim of reducing poverty.

It is this process of formalising informal work that is promoted by ILO Recommendation no. 204. The *Revue de droit comparé du travail et de la sécurité sociale* has given us the opportunity, in a thematic issue³, to look at how this Recommendation has been received and is starting to be implemented. As seen through the eyes of the authors who have very kindly agreed to work on this project, the contributions presented give us an insight into some initiatives that have begun at national or regional level and which are part of the drive towards this transition. It was decided to deal with the informal economy only from the development angle. This choice leaves the way open to a future issue which could usefully look at the informal economy in the northern countries.

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2 To use the list included in ILO Recommendation no. 204 on the Transition from the Informal to the Formal Economy, 2015.

3 *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 6-141.

Each of the contributions presented here shows, in its own way, the importance of being able to measure the complexity of what is covered by the informal economy, with the different local, national or regional specificities, before embarking on an appropriate process of transition. One other thing that emerges from these articles is the need to avoid taking only a top-down approach to this process of transition, conducted by the State, possibly with the support of international partners such as the ILO. It is indispensable that the players in the informal economy, such as cooperatives or local-level mutual support structures, be closely involved, that they be able to express their real needs and expectations so that the transition has a chance of being implemented. The process therefore requires that the leaders of the countries concerned recognise a form of legal pluralism that links the mechanisms of state law to other sources of regulation.

Recommendation no. 204 links in with other recently adopted international instruments. These include, for example, ILO Recommendation no. 202 on Social Protection Floors (2012) and ILO Convention no. 189, the Domestic Workers Convention. Recommendation no. 204 is also closely linked to the Sustainable Development Goals adopted by the General Assembly of the United Nations in 2015.⁴ This therefore represents a renewed worldwide strategy, which three of the contributions here particularly put into perspective: that of Jacques Charmes, former research director at the Institut de recherche pour le développement (IRD) and economist and leading specialist in development economics, who looks back at the very genesis of the notion of the informal economy;⁵ that of Frédéric Lapeyre, head of the Informal Economy Unit at the Employment Policy Department of the International Labour Organisation, who proposes a reading of this strategy informed by his great knowledge of the issues on the ground,⁶ and finally, that of Professor Rachid Filali Meknassi (Mohammed V University, Rabat), who has devoted several works to this question and who takes a critical look at the legal thinking on informality from the 1970s until the adoption of the Recommendation⁷ (first part).

4 Goal 8.3 in particular: «promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage formalization and growth of micro-, small- and medium-sized enterprises including through access to financial services”.

5 J. Charmes, « Informal economy, social protection and transition to the formal economy: the terms of a debate », in the present issue, pp. ... A French version of this paper is available in the French print version of the journal : see J. Charmes, « Économie informelle, protection sociale et transition vers l'économie formelle », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 10-17.

6 This paper is not reproduced below in this English Electronic Edition but can be found in the French issue: see F. Lapeyre, « L'Organisation Internationale du Travail face au travail dans l'économie informelle », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 18-33.

7 R. Filali Meknassi, « The uncertain markers of the transition from the informal to the formal economy », in the present issue, pp. ... A French version of this paper is available in the French print version of the journal : see R. Filali Meknassi, « Les balises incertaines d'une transition de l'économie informelle à l'économie formelle », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 34-43.

The issue then presents, broken down continent by continent, contributions on the situation in Africa, Central America and Asia. For Africa, Elmarie Fourie, of the University of Johannesburg, discusses several experiments conducted in the countries of the Southern African Development Community (SADC)⁸. Her contribution considers the adoption of ILO Recommendation no. 204 and reflects on the conditions under which international, regional and national initiatives could effectively contribute to a lasting improvement in the situation of workers in the informal economy. Birane Thiam, Permanent Secretary of the Council of Labour and Social Dialogue (CTDS) of the West African Economic and Monetary Union (UEMOA), shows how the issue of informality has gradually been taken into account by this Organisation, which is first and foremost an organisation intended to encourage regional economic integration⁹. He highlights some of the links that can exist between the regional and national levels in the implementation of policies intended to support workers in the informal economy. Professor Mohamed Koriche, of the University of Algiers 3, presents a contribution on the situation in Algeria, a country that has the particularity of having undergone the transition to the market economy relatively recently¹⁰. He insists on the fact that the development of informality is closely linked to the crisis in formal employment that resulted from that transition and to the willingness or otherwise of the public authorities to exercise their powers, in particular in terms of policing the employment market (labour inspectorate). Starting from these observations, he makes a detailed analysis of the different measures that have been adopted in response to this situation.

Concerning Latin America, the article contributed by Professor Sánchez-Castañeda of the National Autonomous University of Mexico (UNAM) offers a national and regional perspective on informal employment in Mexico and Central America¹¹. He insists on the

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8 E. Fourie, « Perspectives on workers in the informal economy in the SADC region », in the present issue, pp. ... A French version of this paper is available in the French print version of the journal : see E. Fourie, « Réflexions sur les travailleurs de l'économie informelle dans la Communauté de développement de l'Afrique Australe (SADC) », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 44-63.

9 This paper is not reproduced below in this English Electronic Edition but can be found in the French issue: see B. Thiam, « La problématique de l'extension de la protection sociale aux salariés de l'économie informelle », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 64-77.

10 This paper is not reproduced below in this English Electronic Edition but can be found in the French issue: see M. Koriche, « La part du droit dans la formalisation de l'emploi en Algérie : une diversité de mesures, sans stratégie claire », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 78-89.

11 A. Sánchez-Castañeda, « Informal employment in Mexico and Central America: a complex phenomenon », in the present issue, pp. ... A French version of this paper is available in the French print version of the journal : see A. Sánchez-Castañeda, « L'emploi informel au Mexique et en Amérique centrale : un phénomène complexe », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 90-103.

obstacles that can in practice limit the effects of the measures taken with a view to the transition from the informal to the formal economy. Professor Arellano Ortiz of the Catholic University of Valparaíso provides some insights into the situation in Chile¹². He reviews the social protection policies that aimed to cover the poorest population groups, including workers in the informal economy. He examines different programmes (*Chile Solidario* and *Seguridades y Oportunidades*) which marked an important change in the way of formulating public policies on this subject.

Two contributions focus on the situation in Asia. Wei Dan, Professor at the University of Macao, looks at the informal employment situation in China¹³. After explaining how this phenomenon was gradually taken into account and measured, she looks back at the legislative changes that have mainly aimed to extend the protection granted by employment and social security law to workers in the informal economy. Although the conclusions she draws from these changes are mixed, she does highlight a turning point that occurred in 2008, leading to a more coherent approach based on the quality of employment, whereas until then the Government had seemed to be hesitating between measures encouraging the creation of informal jobs and measures to protect the workers concerned. Supriya Routh, Professor at the University of Victoria, offers a critical reading of Recommendation no. 204, based on the example of domestic workers in India¹⁴. He considers that this instrument does not manage to overcome an ideological preconception based on a binary opposition of formal and informal, which leads to the pursuit of a goal of formalisation based on an underlying model encompassing a view of labour and labour relations based on industrial society. He calls for a new approach.

This special issue underlines the significant contribution made by the ILO to the debate on the strategies to be pursued to combat informal employment, which has intensified in the developing countries. However, some of the contributions that follow also demonstrate that the strategy favoured by the Organisation, that of formalising informal work, as simple as it may seem at first glance, is perhaps not the most promising path towards solving the problem. In fact, it could lead to a restriction of the debate to the simple question of the extension of employment law to informal workers, without taking sufficient account of

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12 This paper is not reproduced below in this English Electronic Edition but can be found in the French issue: see P. Arellano Ortiz, « L'informalité en Amérique Latine : l'exemple des politiques de protection sociale des travailleurs informels au Chili », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 104-115.

13 This paper is not reproduced below in this English Electronic Edition but can be found in the French issue: see W. Dan, « Incorporer et formaliser l'emploi informel en Chine », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 116-127.

14 S. Routh, « Transitioning to the Formal: A Misdirected ILO Strategy? in the present issue, pp. ... A French version of this paper is available in the French print version of the journal : see S. Routh, « La transition vers l'économie formelle : une stratégie désorientée de l'Organisation Internationale du Travail », in *Revue de droit comparé du travail et de la sécurité sociale*, Dossier thématique « Le travail dans l'économie informelle : un défi pour le droit social », 2017/3, pp. 128-141.

the extent of the diversity of this social phenomenon and of the particular needs of informal workers. The editors of this issue of the *Revue de droit comparé du travail et de la sécurité sociale* would be delighted if it could contribute to this necessary debate on the measures needed to improve the lot of workers in the informal economy.