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The New ILO Recommendation on Social Security

Jean-Michel Servais *

1. The New ILO Recommendation on Social Security

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

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

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

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

2. Social Security and Precarious Workers

2.1. Vulnerable Workers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ Art.19, par. 3 of the Constitution.

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

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

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

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

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

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

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

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

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

2.2.1. Special Provisions

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

2.2.2. Independent Work

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

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

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

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

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

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

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

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

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

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

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

2.2.3. Family Workers

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

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

⁸ Par. 21.

⁹ Art. 2 (2) h.

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

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

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

2.2.4. Apprentices

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

¹⁰ Par. 21.

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

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

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

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

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

2.2.5. Home Workers

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

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

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

¹⁵ Art. 4 (2) (b).

¹⁶ Art. 1(a).

¹⁷ Art. 4.

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

2.2.6. Part-Time Workers

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

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

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

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

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

¹⁸ Par. 24.

2.2.7. Domestic Workers

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

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

3. Extending to the Poorest

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

3.1. The Search for New Solutions

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

¹⁹ Art. 14.

²⁰ Par. 20.

²¹ Par. 26 (2).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁴ Excluding workers in agriculture and sea transport.

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

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

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

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

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

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

3.2. Striking a Balance: the ILO Approach

3.2.1. The Relevance of the ILO Standards on Social Security

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

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

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

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

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

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

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

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

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

Further, the CEACR has suggested that the codified form of presentation espoused by the 2006 Maritime Labour Convention (MLC) could also be effectively used in social security, where developed legislation moved to consolidation into comprehensive organic laws or social security codes.³²

The same holds for a new holistic instrument on social security that the ILO may consider adopting in the future.

3.2.2. Social Security in a Wider Context

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

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

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

³² *Ibid.*, par. 614.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2.3. Social Security in the ILO Decent Work Agenda

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Ibid.* par. 203-205.

⁴⁵ *Ibid.* par. 390-391.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁸ Based on Article 19 of the Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁰ Par. 19-24.

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

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

Collective Bargaining in Spain: the Reform of the Regulatory Framework¹

Federico Navarro Nieto *

1. By Way of Introduction: Urgent Measures to Reform the Institutional Framework of the Bargaining System in Spain

Over the past few years, the need to review the bargaining system in Spain was deemed as a matter of urgency by both the social partners and the legal community. As a consequence, a number of changes have recently been put in place, with two significant policy reforms that introduced extensive amendments to Title III of the Spanish Labour Code (henceforth LET - *Ley del Estatuto de los Trabajadores*). These included Royal Decree-Law No. 7 of 10 June 2011 (RDL No. 7/2011) laying down urgent measures to reform the collective bargaining system and Royal Decree-Law No. 3 of 10 February 2012 (RDL No. 3/2012) – now Law No. 3 of 6 July 2012 – on urgent measures to reform the labour market. Notwithstanding such good intentions, social dialogue produced limited results, prodding social partners into concluding several agreements to keep up with the regulatory changes and to amend the collective bargaining system. Among others, the Economic and Social Agreement of February 2011 – a bipartite agreement between trade unions and employers' associations which sets forth the main criteria for the reform of collective bargaining – and the Second Employment and Collective

¹ The present paper provides a summary of the presentation delivered during the conference *XXII Congreso Nacional de Derecho del Trabajo y de la Seguridad Social*, on “*Las reformas del Derecho del Trabajo en el contexto de la crisis económica*”, that took place in San Sebastián/Donostia, on 17 and 18 May 2012.

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Bargaining Agreement of 2012 to be implemented also in the years 2013 and 2014, signed on January 2012. Although not impinging on the basic mechanisms of collective bargaining, the changes introduced in 2011 and 2012 affected the Spanish model in important respects², as it was the case for the reform of the industrial relations system of the previous year, through Law No. 35 of 17 September 2010 laying down urgent provisions to reform the labour market. RDL No. 3/2012 is illustrative of this aspect, as it envisaged some major changes – mostly in qualitative terms – that will certainly make “an impact on the balance of the bargaining system”³.

The idea which underlies the foregoing reforms is that of resorting to collective bargaining to increase the levels of internal flexibility. In addition, the Explanatory Statement accompanying these urgent provisions insists on the relationship between labour reforms and the review of the bargaining system as a way to boost employers’ competitiveness and productivity.

This intent can also be observed in the way the set of rules has been arranged. By way of example, both Law No. 35/2010 and Law No. 3/2012 refer to the reform of the bargaining system as being part of a larger chapter devoted to “Measures to promote internal flexibility of companies”. In a similar vein, the Explanatory Statement of Law No. 3/2012 states that the goal of collective bargaining must be “to promote – rather than to prevent – the adaptation of working conditions to specific company needs”.

² This idea emerges from the preliminary studies carried out by some labour law scholars on the bargaining reforms. See T. Sala Franco, *La reforma de la negociación colectiva* (Real Decreto-Ley 7/2011, de 11 de junio), AL No. 18, 2011; and *La reforma de la negociación colectiva*, in various authors, *La reforma laboral en el Real Decreto-Ley 3/2012*, TB, 2012; J. Cruz Villalón, *Texto y contexto de la reforma de la negociación colectiva*, in I. García-Perrote Escartín, J. R. Mercader Uguina (eds.), *La reforma de la negociación colectiva*, Lex Nova, 2011; J. R. Mercader Uguina, “*La reforma de la negociación colectiva en el Real Decreto-Ley 3/2012: la empresa como nuevo centro de gravedad*”, in García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012; M. Correa Carrasco, *Acuerdos de empresa*, F. Lefebvre Editions, 2012.

³ This is the argument put forward by M.C. Palomeque López, *La versión política 2012 de la reforma laboral permanente. La afectación del equilibrio del modelo laboral*, in I. García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012. In a similar vein, M. Rodríguez-Piñero, F. Valdés and M. E. Casas, in *La nueva reforma laboral, Relaciones Laborales*, No. 5, 2012, maintain that RDL No. 3/2012 undermines mechanisms of collective bargaining to adapt working conditions to company needs and increases the scope for unilateral decision on the part of the employer in relation to both internal and external flexibility, 2.

Yet one might note that a reform process should take as a starting point the function and critical aspects of collective bargaining which call for ad-hoc solutions and responses.

This assumption is partly missing in the reforms – most notably in Law No. 3/2012 – in that it underestimates the complex nature of the bargaining system and ends up confusing the two distinct levels of regulation, that of collective bargaining in a strict sense and measures aimed at increasing internal flexibility.

As far as the institutional framework is concerned, the interventions made in 2011 and especially in 2012 exemplified the traditional approach taken by the Government at the time of reviewing the industrial relations system. In Spain, collective bargaining is highly institutionalised, and likewise regulated is the negotiation process.

The Spanish Constitution guarantees the right to collective bargaining and the binding nature of collective agreements (Article 37.1). Further, LET strongly encourages negotiation as a means for enhancing the role of inter-professional agreements in a neo-corporatist perspective, promoting stability, attributing bargaining legitimacy to most representative organisations, and ensuring that collective agreements having force of law are generally applicable, with a view to improving the overall working conditions.

However, from the mid-1990s onwards, the Government has become more and more involved in the bargaining process, due to an awareness among decision-makers of the institutional implications of collective bargaining on the industrial relations system. Accordingly, much store was set by the institutional framework and by the need for a more precise definition of the bargaining mechanisms. Innovative rules on the bargaining structure were put in place, and new powers were allocated to collective agreements – also at a company level – in order to achieve higher levels of flexibility.

The newly-issued reforms made a significant impact on the manner in which collective bargaining is organised. This is because amendments have been made to the bargaining structure itself, also by enhancing the role of company-level bargaining. Concurrently, the reforms might produce a change in the allocation of the bargaining powers that ideally could give rise to adverse effects on the workers.

The role of trade unions and employers' associations in this bargaining model is strengthened, as sectoral-level bargaining gains momentum and helps to fill regulatory vacuums in certain sectors.

Equally enhanced is the role of company-level bargaining, particularly as regards the most representative trade unions, for they are identified as the

main bargaining party in the search for internal flexibility – either through workplace trade unions, or trade union committees in the absence of a system of employee representation at the workplace.

However – and somehow contradictory – an effective collective counterweight could be missing in small-sized enterprises at the moment of dealing with internal flexibility, as by statute employees are allocated direct bargaining power. I shall come back to this point later.

Ultimately, these reforms give to parties engaged in collective bargaining the responsibility to carry out negotiation in an effective manner – mainly by scaling back the period of validity of collective agreements after its expiration – and to resolve deadlocks autonomously, by reducing the degree of uncertainty arising from the implementation of urgent measures on the part of the Government.

In addition, new functions have been allocated to collective bargaining, in an attempt to keep up with a trend that has been in existence since the 1990s⁴.

Aside from the traditional regulatory powers which govern the working conditions more generally – viz. working time, everyday activity and remuneration – collective bargaining has also become a tool to organise work and to increase internal flexibility, by managing aspects such as functional mobility, changes in working conditions, job restructuring and so forth. The gradual shift from a static to a more dynamic bargaining model is closely related to the issue of workers' participation in decision-making. Another major aspect is that the reforms might affect the national legal system, furthering a tendency started in the 1990s that concerns the changing nature of the relationship between statutory law and collective agreements, and providing social partners with new tools to conduct negotiations, above all by prioritising the role of company-level agreements over national collective agreements⁵. In this connection, Law No. 3/2012 drew a neat dividing line between internal flexibility as imposed unilaterally by the employer (Articles 40, 41 and 47 of LET) and internal flexibility agreed upon at the company level and resulting from derogations from national collective agreements (Art. 82.3 and 84.2 of

⁴ See S. Del Rey Guanter, *Una década de transformación del sistema de negociación colectiva y la "refundación" de la teoría jurídica de los convenios colectivos*, *Relaciones Laborales*, No. 1-2, 1.996; J. Rivero Lamas, *Estructura y funciones de la negociación colectiva tras la reforma laboral de 1.997*, in REDT, No. 89, 1.998.

⁵ An examination of the regulation of company-level agreements after the labour reforms is provided in a monograph by M. Correa Carrasco, *Acuerdos de empresa*, F. Lefebvre Editions, 2012.

LET). Company-level agreements as a means to boost internal flexibility provide for a new legal paradigm, offsetting the powers of employers and narrowing down the role of national collective bargaining. In this context – and pursuant to Art. 37 of the Spanish Constitution – one might imagine a bargaining system that responds to different needs, depending on the functions allocated to each agreement.

An in-depth assessment of the reform process entails a closer analysis of the bargaining system and the effects of the Government's involvement at different levels. Of course one might also consider that the interplay of different market forces has much bearing on collective bargaining, and so has the innovation of the production system. Accordingly, the point of departure of such an analysis must be the rationale of collective bargaining and its close interrelation with the economic and business dimension, as well as with the labour market. From this perspective, an ever-changing economic and production system – as is the current one – might have a profound impact on labour relations and points out the need for long-awaited amendments in the Spanish bargaining system.

That being said, the review of the collective bargaining system must also start from the assumption that collective bargaining mainly serves to govern labour relations in that it sets down regulatory standards to prevent cases of social dumping, and ensure workers' protection by increasing the levels of employment security. More broadly, in implementing such reforms, it is also important to consider that traditionally collective bargaining provides employees with an important collective "counterweight".

2. Regulatory Changes in the Bargaining Structure

Further problems arise at the time of dealing with the bargaining system which originate from a series of factors: the fragmentation and the lack of coordination of the bargaining structure, as well as the prevalence of agreements concluded at a territorial level. This has so far contributed to increase the costs of negotiation and differences in regulation, with the system that has proven inadequate to meet macroeconomic objectives in keeping with overdue decentralisation. Rather than from the development

of the production system, this state of play results from certain historical inertia⁶.

In the last few years, the reforms of 2011 and 2012, as well as the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014 have focused on the bargaining structure and its shortcomings and on the need of a radical overhaul. The emphasis on the legal perspective produced a reform process that moved in two directions, as the following paragraphs will explain.

2.1. First Line of Action: the Bargaining Structure

The first line of action concerns the enforcement of rules on the bargaining structure to be laid down in sectoral agreements at both national or regional level. This trend is confirmed by RDL No. 7/2011 and the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014, yet this goal is pursued also by some other provisions.

In this sense, a primary role is assigned to sectoral-level bargaining – mainly at a national level – at the time of arranging the collective bargaining structure. Further, collective bargaining at a territorial level, once considered pivotal, is now given limited significance. This state of affairs enhances decentralisation through company-level bargaining in some industries, following the amendments made to Art. 41.6 of LET and above all Art. 82.3 of LET, pursuant to which pay levels might be reduced as agreed upon by derogations from national bargaining.

Decentralised collective bargaining is a major component of the 2011 reform, although collective bargaining at a national level can still have a say on the mechanisms of the whole negotiation process. This aspect emerges in the provisions laid down in the Second Employment and Collective Bargaining Agreement of 2012 to be implemented also in 2013 and 2014, whereas Law No. 3/2012 has introduced measures to favour company-level bargaining and scale back the role of higher levels of bargaining.

On close inspection, one might note that par. 2 of Art. 83 of LET clarifies the role of multi-industry agreements in determining the bargaining structure and the rules to be applied in the case of conflict arising between

⁶ For an historical overview of the regulatory framework, see, F. Navarro Nieto, *La estructura de la negociación colectiva: marco jurídico y disciplina contractual*, Bomarzo Editions, 2009.

agreements concluded at different levels. The innovation here lies in the fact that these powers are also allocated to “sectoral collective agreements at the national or regional level” (par. 2 Art 83 of LET), thus widening this practice at national level and empowering sectoral-level agreements to determine the structure of collective bargaining at this level. So far, only multi-industry agreements or framework agreements were given this special function, but they were deemed unsuitable for this purpose.

Accordingly, the new regulations, alongside intersectoral agreements, will allocate the power to determine the structure of collective bargaining and the rules to deal with possible forms of conflict arising from different-level agreements also to “sectoral collective agreements concluded at national or regional level”. Albeit indirectly, the scope of these accords is thus widened by the emphasis placed on out-of-court dispute resolution procedures, ex Art. 83.3 of LET in resolving stalemate in negotiations.

Another major innovation lies in the reform of Art. 84 of LET. Whereas Art. 82.3 LET empowers the collective agreements to lay down the mechanisms of the bargaining system, Art. 84 sets forth provisions dealing with possible overlapping between different-level agreements. Problems might arise, however, at the time of implementing the two measures concurrently. The 1994 reform was accompanied by a great deal of criticism on the part of a number of scholars for it narrows down the power of collective bargaining to set the bargaining structure on an autonomous basis, as the rules detailed in collective agreements according to par. 2 of Art. 83 of LET were only supplementary to those established by Art. 84 of LET.

Under RDL No. 7/2011, national- and regional-level agreements prevail – Art 83.2 LET over Art. 84 LET – the latter being applied only in the absence of the former. Therefore, Law No. 3/2012 has strengthened the role of collective bargaining. In this sense, according to Art. 84, section 1 of LET, “a collective agreement, once enforced, cannot be amended by provisions laid down in agreements concluded at a different level, unless otherwise agreed under Art. 83.2”.

Section 1 recalls the 1980 version of the provision in that it aims at resolving clashes between collective agreements by applying the principle of *prior in tempore*, i.e. the oldest prevails. However, three exceptions are possible under Law No. 3/2012. First off, such principle only applies if there is no other agreement in force under Art. 83.2 of LET – basically at the national or regional level – which states otherwise. Further – and pursuant to Art. 84.3 of LET – regional-level agreements are empowered to amend the rules set at the national level. Pursuant to extant legislation,

the national level of bargaining prevails in defining the structure of the bargaining system.

It is also possible to deviate from national-level sectoral agreements through subsequent agreements concluded between bodies based in the Autonomous Communities, pursuant to Art. 84.3 of LET. Yet a number of important limitations exist in this respect. For instance, in accordance with Art. 83.2 of LET, derogations are allowed only if not expressly prohibited – i.e. sectoral agreements at the national level can veto the recourse to opt-out clauses. Moreover, compliance with special conditions concerning representation is required. Finally, there are a number of cases where opting out is never possible. For instance, non-negotiable matters include the probationary period, recruitment procedures, job classification, annual maximum working hours, sanctions, minimum safety standards and mobility. Apart from that, Art. 84.2 of LET establishes the prevalence of company-level agreements in certain matters over sectoral-level bargaining. This second exception will be discussed in details later on.

The newly-issued Art. 84 of LET scales back the scope of territorial bargaining, since it is no longer given preference over sectoral agreements concluded at the national level, with derogations which are now possible through company-level agreements. This move is intended to establish higher levels of uniformity within the bargaining system which has proved unable to adapt to labour market changes and to respond to the thrust of collective bargaining towards inter-sectoral level agreements, making it complex to deal with the macroeconomic effects of collective bargaining as well as to cope with the demand of more dynamic negotiating practices on the part of employers.

2.2. Second Line of Action: the Autonomy of Company-level Bargaining

The most relevant aspect of the reforms of 2011 and 2012 concerns the increased levels of autonomy of collective bargaining conducted at company level. This is a major development that could lead to different outcomes in legal terms, as it might strike a balance between the collective regulation of the working conditions and the needs of employers in terms of internal flexibility.

Social partners and legal scholars have long agreed on the need to streamline the Spanish bargaining system, that is developing a more coordinated and simplified bargaining structure, while leaving much room for decentralised bargaining.

These amendments were necessary to keep up with macroeconomic and market needs – in terms of employment and remuneration – to meet the demands of employers, and to provide common minimum standards in terms of protection.

This approach is consistent with the assumption that collective bargaining might help increase internal flexibility and facilitate the adjustment of wages and working conditions to the level of productivity across sectors and firms, as well as to adapt working conditions and pay levels to the different levels of productivity, competitiveness and employment of the various Spanish regions.

The tendency towards decentralisation to benefit company-level bargaining is evident also in other European countries. For instance, decentralisation in Germany was first introduced through opt-out clauses agreed upon at company level, opening to the possibility to derogate on matters related to wages or working time, a move that was supported by social partners, at least initially⁷. Some recent experiences in countries like Spain and Italy go in the same direction, but in this case decentralisation is encouraged by national governments. Doubts are cast as to whether this trend will result in the imposition of a decentralisation model, whether coordinated or disorganized. Law No. 3/2012 goes beyond the mere re-organisation of the bargaining system, as it opens up to unlimited possibilities of derogating at company level according to Art 84.2 and 82.3 of LET, with the risk however of establishing a decentralised though disorganised bargaining model⁸.

2.2.1. A First Example of Increased Autonomy of Company-level Bargaining: the Regulation of Enterprise-level Agreements Pursuant to Art. 84.2 of LET

A first example of increased autonomy of company-level bargaining regards the regulation of relevant agreements pursuant to Art. 84.2 of LET. As for the bargaining structure, the re-organisation of the Spanish

⁷ Particularly relevant in this respect is the Pforzheim Agreement of 2004 concluded with employers in the metallurgic sector (*Gesamtmittel*) and the trade union IG-Metall.

⁸ As pointed out by M. Rodríguez-Piñero y Bravo Ferrer “by leaving the structure of the reform of 2011 unscathed, this provision has gone much further, as it introduces some new elements that may limit the role of collective autonomy, undermine the structure of collective bargaining and open up to reductions in wages and working conditions somehow reflecting the substantial loss of power of trade unions during the crisis”. See M. Rodríguez-Piñero y Bravo Ferrer, *Flexibilidad interna y externa en el Real Decreto-Ley 3/2012*, *Diariolaleyes*, 10.

model necessarily implied a decentralisation process. This idea is further upheld by some recent studies on collective bargaining conducted by the social partners⁹. In economic terms – and as discussed earlier – such a reform seems appropriate to increase working time flexibility and to conform pay levels and working hours to productivity levels across sectors and companies nationwide. Therefore, reviewing the levels of bargaining autonomy at the company level against the centralisation thrust of sectoral agreements was seen as of fundamental significance.

A number of rules have been introduced by the reform. First of all, once enforced, a collective agreement cannot be superseded by provisions laid down in agreements concluded at a different level pursuant to Art. 84.1 of LET, unless an agreement concluded in accordance with Art. 83.2 LET states otherwise – e.g. a recently-issued sectoral agreement prevails over the company-level agreement. Secondly – and here lies the major innovation of the reform process – under certain circumstances enterprise-level agreements can deviate from sectoral agreements according to Art. 84.2 of LET. For the purposes of Art. 84.2 of LET, provisions set down at company level “prevail over sectoral agreements at the national, regional or lower level” when it comes to such subjects as remuneration, pay for overtime and shift work, working time and holiday, job classification, recruitment procedures, and work-life balance.

Much dissatisfaction arose with the regulations introduced by RDL No. 7/2011, as sectoral agreements at the national level – as laid down by art. 83.2 of LET – still leave to company-level agreements the scope to deviate from the national level in the sectors listed in Art. 84.2 of LET. In other words, following the reform of 2011, sectoral agreements continued to limit the role of enterprise-level bargaining. By contrast, Law No. 3/2012 narrowed down the power of sectoral-level agreements, thus moving away from “standardised forms” of agreements, particularly at territorial level. The reform of Art. 84.2 of LET by means of Law No. 3/2012 is successful in that it protects employers from the risk of a sort of “over-standardisation” of agreements concluded at local level and enhances the role of collective bargaining more generally. Yet this is half a victory, given the maze of subjects on which enterprise-level agreements prevail.

⁹ Economic and Social Agreement of February 2011 and Second Employment and Collective Bargaining Agreement of 2012, to be implemented also in 2013 and 2014.

2.2.2. Increased Autonomy of Company-level Bargaining and the New Provisions of Art. 82.3 LET: a Further Example

The store set with the flexible nature of the reform of Art. 84.2 of LET loses momentum with the new version of Art. 82.3 of LET, which establishes that company-level agreements can regulate a number of issues that were traditionally only the province of sectoral collective bargaining, thus making amendments to the bargaining structure.

Art. 82.3 LET provides for the scope for a company-level agreement to deviate from those regulating working conditions in the company. This option was included in the LET by means of Law No. 11/1994 that governs opt-out clauses on pay levels in order to favour derogations from collective agreements in businesses facing financial problems. The new regulation makes this rule applicable to all companies, with a view to increase working time flexibility. Opting out is possible, paradoxically, in a higher number of cases than those provided by Art. 84.2 of LET: working hours, working time organisation, shift work arrangements, pay and pay levels, work organisation, changes in functions – whereas exceeding the limits provided for functional mobility in Art. 39 LET – and voluntary increase in the forms of social security protection.

At this point, investigating the reasons justifying the widening of subjects allowing for derogations might be of interest. Traditionally, the areas allowing for a deviation by collective agreements by virtue of Art. 41 of LET – which concerns substantial changes to working conditions – has been the result of an attempt to adapt to the changing demands of work organisation, incompatible with the static nature of current collective regulation and with the employers' needs.

Yet the new version of Art. 82.3 of LET opens to derogations also for purely quantitative issues – e.g. working time – casting doubts about the use of opt-out mechanisms rather than to adapt work organisation and working conditions to exceptional or specific circumstances, as a way to increase competitiveness with respect to competitors in the same sectors.

One thing is to facilitate the harmonisation of rigid sectoral regulations and company needs in areas such as wages or working time, another thing is to give preference to company-level bargaining, depriving the sectoral collective agreement of its proper function, i.e. the setting of common standards.

Derogation clauses are allowed only if based on “economic, technical, organisational or productive grounds” (Art. 82.3 par. 3 and 4 of LET).

So far, legal requirements included:

a) objective circumstances documented by the employers;

b) a justification of the reasonableness of the measures to be taken, such as business competitiveness and job preservation. Following the 2012 reform, employers are only required to indicate objective reasons, which are however loosely defined in legal terms. A justification is based on economic grounds “when from the data on the company performance it emerges a difficult economic situation, in cases such as current or expected losses, or persistent reduction in revenue or sales. Persistent reductions mean a drop for two consecutive quarters in revenue or sales, that must be lower than the same time-period of the previous year”. A justification is regarded as technical “when changes occur, among others, in the means of the production”, organisational “when changes occur, among others, in working systems and methods or in the organisation of production” and productive “when changes occur, among others, in demands for the products or services that employers intend to place on the market”.

An overall analysis of the motives provided statutorily shows that opting out is no longer limited to exceptional cases arising from a difficult business situation. Unlike the past, Art. 82.3 of LET is not intended to safeguard jobs in a scenario of economic crisis. In addition, consensus within the company is seen as implying that some valid justifying reasons exist (Art. 82.3 par. 6).

Drawing on this assumption, the monitoring of company-level agreements should only document the existence of fraudulent practices, or any form of deceit, duress or abuse. This approach is in line with the objective of increasing legal certainty and confidence in the effectiveness of the bargaining system. In this context, however, employment tribunals will have to deal with cases in which the agreements concluded do not detail the justifying reasons, especially following the consent on the part of the employee committee.

Opt-out clauses must be agreed upon by both the employers and employees’ representatives. In the case there are no employee representatives in the company, negotiations take place directly with workers through a committee composed by the workers themselves or by union representatives at a sectoral level. This helps to overcome the problem of small-sized businesses for which – pursuant to the earlier version of Art. 82.3 of LET – derogations from collective agreements on matters related to pay levels were not applicable, as there was no scope to set up representative bodies.

However, the regulation of these committees might give rise to some questions. First, a non-union committee is not an instrument of collective regulation even if derogating from national collective agreements.

Accordingly, it is a mere alternative to individual agreements, as it neither represents a collective counterweight to the power of employers, nor does it provide information rights and safeguards to negotiating parties. Compounding the problem is the technical complexity of trade-union committees which is unsuitable for the purpose, as workers may be discouraged and refrain from appointing one. At a more theoretical level, trade-union committees could represent an opportunity for trade unions to appeal to workers in small-sized businesses – who are generally non-unionised – yet it is likely that these workers would rather opt for appointing a non-union committee, as seemingly more informal and easier to deal with.

In the event of the latter, a risk might arise in that a genuine workers' countervailing power in the consultation process might not be provided. This aspect – alongside the objective grounds for which derogations from collective agreements are allowed – enhances the central role of agreements concluded at company level in increasing internal flexibility.

A cursory analysis of Art. 82.3 seemed to indicate that derogations were initially intended as a “safety valve” within the bargaining system, to be used in exceptional cases and mainly in relation to pay levels. Yet recent changes converted it into a means to respond to physiological needs, both as a way to avoid job losses and reduce labour costs as well as to facilitate the reorganisation of work and to increase business competitiveness. In this connection, it might be the case that Art. 82.3 of LET will be mainly used to fight off competition with other companies by abating costs and increasing productivity – through an increase in working hours – rather than boosting competitiveness by means of technological, organisational and human capital investment.

Moreover, opt-out clauses are mainly viewed as a tool to enhance business flexibility, rather than a way to enhance the autonomy of company-level agreements within the bargaining structure. This prevents the development of a coordinated bargaining system as advocated by Art. 84 of LET. Moreover, company-level agreements are basically configured as an alternative to national collective agreements, indirectly casting doubts on their effective binding nature.

3. Compulsory Arbitration: the Cases of Deadlocks on Derogations from Collective Agreements (Art. 82.3 of LET)

If disagreement upon possible derogations from collective agreements arises, various solutions can be put in place to overcome possible stalemate, according to Art. 82.3 of LET. Whereas requested by either party, a joint committee must be called upon to solve the issue (Art. 82.3 par. 7 of LET). However, if the intervention of the joint committee is not expressly requested, or if the committee is unable to put forward a solution, the parties may resort to out-of-court forms of conflict resolution in the case of disputes happening at the national or regional level, under Art. 83 of LET (Art. 82.3 par. 7 of LET). If still no solution is found, one of the parties – most likely the employer if workers reject the derogations proposed – may require the intervention of the National Advisory Commission on Collective Agreements (CCNCC) – in the case of companies with branches in more than one Autonomous Community – or of the relevant authority within the Autonomous Communities in all other cases (Art. 82.3 par. 8 of LET).

The new par. 8 of Art. 82.3 of LET sets the obligation to initiate public arbitration procedures – i.e. the jurisdiction must not be indicated, it suffices that one of the parties submits a request – through the CCNCC, which consists of a tripartite structure involving also representatives from the public administration who are called upon to settle the dispute. With respect to the voluntary nature of the arbitration mechanism that traditionally acts as a safeguard of the bargaining autonomy in Spain, Law No. 3/2012 attributes to it special constitutional significance as it is related to the protection of productivity and freedom of enterprise (Art. 38 of the Constitution). Art. 82.3 of LET specifically refers to major changes in terms of work organisation, which could undermine the binding character of collective agreements. In such a situation it is not possible to speak of a proportional reduction of constitutional rights at the expense of the right to collective bargaining. Spanish case law admits the introduction of compulsory arbitration procedures only in the event of exceptional circumstances or if justified by reasons of general interest.

Alternatively, the recourse to mandatory arbitration procedures agreed upon over collective autonomy is a viable avenue to pursue.

The ability to structure and regulate issues through inter-professional agreements having force of law concluded at national and regional (Art. 83 of LET) could prevent the recourse to mandatory forms of dispute settlement procedures. In this sense, some sectoral agreements at the

national level have introduced compulsory arbitration in the case of disagreement over negotiations on opt-out clauses.

Leaving aside the dogmatic character of some of the problems accompanying the provisions laid down in par. 8 of Art. 82.3 of LET, particularly relevant are the practical consequences that the present regulation entail. Operational problems could arise due to delays in courts caused by an increase in the number of disputes on internal flexibility mechanisms or in the appeals against the decisions resulting from arbitration procedures.

In historical terms, the legal community favoured the recourse to mandatory arbitration for labour dispute resolution which brought about a change in the relationship between collective bargaining and business management. As a consequence, while in 1994 collective bargaining influenced decision-making and enhanced the role of unions in conflict resolution processes – through Art. 85.1 of LET¹⁰ – now it is employers who may unilaterally impose amendments to collective agreements for the benefit of the company.

4. Reviewing the Rules on Bargaining Legitimacy

Changes in bargaining legitimacy resulting essentially from RDL No. 7/2011 could be introduced only if supported by a wide political consensus. Measures of this kind are usually justified by technical and legal grounds, although some of them are just a matter of political choice. This is the case of the new role given to company-level union representatives (Art. 87.1, par. 2 LET) in the bargaining process. In the Spanish system, the power to negotiate enterprise- or lower-level agreements is given to works councils and workers' representatives at the various plants or, alternatively, to branches from the most representative union which operate in company representation units. Until now, there was no preference in terms of bargaining legitimacy, but RDL No. 7/2011 established that “participation in negotiations will be permitted to unions if they agree so”. This aspect has major political implications, as clearly pointing to a further involvement of trade unions through company-level union branches, both in terms of negotiation and promotion of internal flexibility and in the processes of workers' relocation (Art. 40, 41, 51 and

¹⁰ See M. E. Casas Baamonde, *Arbitrajes de consultas, judicialización de las relaciones laborales y estructura de la negociación colectiva*, *Relaciones Laborales* No. 2, 1994, 21.

82.3 of LET). It also gives unions – especially the most representative – more bargaining and consultation power, as non-unionised representatives are excluded from the negotiation process.

As for non-sectoral negotiation, Art. 87.1 of LET identifies three possible agreements: enterprise- and lower-level agreements, so called “*franja* agreements” and agreements signed at the level of corporate groups or networks of enterprises. Regarding agreements directed to a group of workers with a specific professional profile” (*franja* agreements), bargaining legitimacy will be granted to union branches the members of which are appointed by this group of workers through personal, free, direct and secret ballot (Art. 87.1 par. 4 of LET).

As for negotiation for agreements in corporate groups, the absence of specific regulation poses problems of legal certainty, especially as the rules concerning bargaining legitimacy are very unclear. RDL No. 7/2011 provides a special set of rules in these cases (Art. 87.1 par. 3), granting bargaining legitimacy to unions that – pursuant to Art. 87.2 of LET – meet the criteria of representativeness concerning sectoral agreements.

Drawing on the evolution of case law on these matters and bargaining practices in corporate groups, these legal provisions may appear too strict, as they do not provide bargaining legitimacy to workers’ representative bodies or trade union branches set up within corporate groups. The law should have taken into consideration that in recent years the role of workers’ representatives – and union branches – within corporate groups has been reinforced by EU Directive 94/45 as well as by Spanish legislation by means of Law No. 10/1997. For this reason, legitimacy could also have been attributed to representative bodies set up within corporate groups or to those trade unions mostly represented in workers’ representative bodies.

A major amendment in the regulation of sectoral bargaining units regards the introduction of specific rules for those sectors where collective bargaining does not take place due to an absence of representative bodies, establishing for these cases certain criteria to be met by both trade unions and employers to gain bargaining legitimacy (Art. 87 and 88 of LET). Bargaining legitimacy is attributed to most representative trade unions and employers at the national or regional level in the sector to which the subsector refers or in geographical areas where no collective agreement applies. The new regulations do not, however, lay down the specific criteria to be fulfilled, posing major problems in terms of legal certainty in identifying the bargaining parties.

5. Period of Validity and Renewal of Collective Agreements

One of the most significant problems of the Spanish bargaining system lies in the paralysing effect generated by the automatic extension of collective agreements (Art. 86.1 of LET) or by the prolongation of the period of validity of collective agreements after their expiration (art. 86.3 of LET). In this respect, no specific mechanism has been put in place in the past to encourage the renewal of agreements, with the 2012 reform which is the only attempt to lay down some significant changes to stem the downsides of this paralysis.

An important innovation is the scope to revise the agreement during the period of validity (Art. 86.1 par. 2 LET). This possibility was not expressly provided in legislation before the reform, often questioning the legitimacy of a revision during the period of validity of the agreement, that was finally acknowledged by case law.

Recently-issued legislation introduces the scope to review the agreement provided two requirements are met. First, the review must be agreed on by all the signatories parties – since there is no obligation to review an agreement that has not expired, according to Art. 89.1 of LET – and, second, the review can be carried out by all the subjects who have acquired bargaining legitimacy under Art. 87 and 88 of LET. This means that participation in the review process is not limited to the signatories. This can produce a paradoxical effect in that bargaining parties that did not sign the collective agreement can be involved in the review process too and this can prejudice the balance of an agreement.

As for the validity of the collective agreement after its expiration, if no agreement is reached by the parties during the review process, the previous agreement continues to be valid. This means that before the reform of 2012 only clauses concerning obligations expired, whereas normative clauses remained valid until the enforcement of a new agreement, unless the parties had agreed otherwise (art. 86.3 of LET).

This provision is of a clear political fashion, as it is aimed at strengthening the bargaining position of workers' representatives. Also, it limited the regulatory gaps in the governing of working conditions in the period preceding the conclusion of a new agreement, ensuring legal certainty and industrial peace. Arguably, it also has some drawbacks in that it does not favour the renewal of agreements, stiffening the bargaining process – upon the assumption that higher-level agreements could not affect lower-level agreements in the period of validity after their expiration – and hampering the development of new bargaining units.

Law No. 3/2012 establishes that the collective agreement remains in force during the review process and potential out-of-court conflict resolution procedures for a maximum of one year, after which the agreement is no longer valid unless otherwise agreed¹¹. After this period, the applicable higher-level collective agreement is implemented.

It is essential to note that the focus is on the contractual relationship between the parties. Therefore, the parties can still negotiate the clauses of the agreement that remain in force after its expiration, and the duration of the additional period of validity. This aspect can be extremely important to avoid regulatory gaps in the absence of higher-level collective agreements.

Two issues are of interest here, namely the duration of the additional period of validity and its effects, as well as the problems of regulatory gaps in case higher-level collective agreements are not implemented. Regarding the first issue, a time limit aims at facilitating the renewal of agreements and a one-year extension which seems reasonable.

With regard to the second issue, problems could arise in situations in which there are no valid collective agreements concluded at higher levels. Problems due to regulatory gaps exist also in other countries that have adopted different solutions in line with their own legal system or by means of specific statutory provisions.

Devising a common framework that goes beyond minimum standards is a complicated matter, given the technical nature of the provisions laid down in agreements already expired. In this regard, mention should be made of a court decision that rejects the application of so-called *convenios extra-statutarios* – i.e. agreements that do not comply with the LET – after their expiration, as these are a “consequence of a pact concluded autonomously by the parties and which expressly provided a fixed duration, and for which there is no reason to prolong its validity after its expiration, contravening what had been previously agreed upon” and “its implementation during its validity is not indicative of the will of the employer to grant a greater benefit than those imposed by the applicable law or collective agreements”¹².

It is difficult to provide a forecast of future scenarios. These reforms could speed up negotiations, but also exacerbate conflict, lead to an increase in out-of-court conflict resolution procedures or, less likely, employers might continue applying collective agreements after their

¹¹ Law No. 3/2012 amended RDL No. 3/2012 that envisaged a period of two year.

¹² See STS 11-5-2009 (RJ 2009, 4548).

expiration¹³. When a sectoral agreement expires, it is reasonable for employers to carry on applying it, as a supplement of the provisions adopted at the company level to make up for the absence of sectoral collective agreements. Another solution could be the conclusion of sectoral agreements providing minimum standards, to avoid regulatory gaps at the sectoral level¹⁴, that should be signed by the most representative social partners. In any case, in consideration of potential problems that could arise in terms of legal certainty and conflict, it seems also reasonable that the dissenting parties resort to arbitration procedures before the end of the period of prolongation of the agreement, reducing the number of controversial issues to be solved through subsequent dispute resolution procedures.

6. Concluding Remarks

In conclusion, businesses' demand in terms of internal flexibility will significantly affect the future of collective bargaining. In such a scenario, a new cultural approach is required, with collective bargaining that will become increasingly important within the national industrial relations system. Without amending the bargaining structure, the current reforms may result in a completely unstructured system that could ultimately undermine the socio-economic role of bargaining and the normative character of collective agreements. To avert this risk, it will also be necessary to strengthen employee representation and participation within companies and enhance their role in the collective bargaining processes.

¹³ See. J. Cruz Villalón, *Procedimientos de resolución de conflictos y negociación colectiva en la reforma de 2012* in García-Perrote Escartín, J. R. Mercader Uguina (eds.), *Reforma laboral 2012*, Lex Nova, 2012, 414.

¹⁴ In Spain, attempts have been made in this respect with the so-called *Acuerdo Interprofesional de Cobertura de Vacíos* of 1997.

Italian Labour Law after the so-called Monti-Fornero Reform (Law No. 92/2012)

Michele Tiraboschi *

1. The Reform of the Labour Market in Italy: Main Reasons and General Framework

Prompted by the main European and international financial institutions, and in response to a particular – and in many respects unique – institutional and political scenario, the technocratic government led by Mario Monti carried forward an impressive reform of the Italian labour market just a few months after its appointment.

This state of affairs gave rise to an array of interventions across all economic and social sectors which – albeit long-awaited¹ – previous administrations have been unable to put in place. Law No. 92 of 28 June 2012 was preceded by an even more substantial and widely debated overhaul of the pension system² and was intended to amend the regulatory framework of the Italian labour market. Once the newly-installed government took office, and straight from the inaugural address, the measure was presented for public opinion as a matter of urgency. In

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¹ See *The White Paper on The Labour Market*, which was drafted by Marco Biagi on 3 October 2001 under the Berlusconi Government. Significantly, most of the objectives set down by Mr. Monti and the Minister of Labour Elsa Fornero were already outlined by Prof Biagi ten years ago. An English version of the document is available in R. Blanpain (eds.), *White Paper on The Labour Market In Italy, The Quality of European Industrial Relations and Changing Industrial Relations*, *Bulletin of Comparative Labour Relations*, August 2002.

² For an overview of the reform of the pension system in the context of the so-called “Decree to Save Italy” see *Monti’s £30 billion survival plan*, on www.eurofound.europa.eu (Last accessed 1 October 2012).

discussing the current macro-economic context, the reform of the national labour market was portrayed as an inevitable move to secure the future of younger generations – most notably in terms of job opportunities and pension entitlement – as they have been hit the hardest by the crisis that was caused by the collapse of the financial markets³.

This is consistent with the view – not prevailing, although well-established among European commentators and decision-makers – that high unemployment rates, chiefly among young people, coupled with the steady increase in atypical and precarious employment, have been brought about by the high levels of protection for workers in salaried employment. An authoritative indication of this line of reasoning is the move made during the financial downturn by the President of the European Central Bank, Mario Draghi.

In order to safeguard the future of the youngest generations, Mr. Draghi openly questioned the long-term sustainability of the European social model. In this sense, he prodded European law-makers into reviewing national labour laws, deemed to be unbalanced in favour of adult workers (the insiders), particularly in the current recession.

The Italian Government followed Mr. Draghi's advice carefully, fuelling a polemical discussion concerning the European Central Bank and some other European bodies allegedly placing Italy under "special administration". This state of play *de facto* impinged on the effort – to date successful – on the part of both trade unions and pro-labour political parties, to counter the decisions made unilaterally by the Government⁴.

As will be discussed further, Law No. 92/2012 (hereafter the Monti-Fornero Reform) has introduced numerous innovative measures. This aspect could be observed, as this substantial piece of legislation consists of

³ For an in-depth analysis on the reasons for the reform, particularly to offset the level of protection offered to young people against those supplied to their adult counterparts, see M. Tiraboschi, *Young Workers in Recessionary Times: a Caveat (to Continental Europe) to Reconstruct its Labour Law?*, in this Journal, 1, No. 1-2, March - June 2012.

⁴ At the time of Silvio Berlusconi's last term in office, trade unions were definitely given more room to manoeuvre following the passing of Article 8 of Legislative Decree No. 138/2012 on the reform of the labour market. Then as now, the Government was prompted by the European institutions to take action. It thus empowered collective bargaining at company and territorial level to implement certain employment safeguards by way of derogation from national bargaining, in order to cope with the crisis and favor economic growth. Of course the levels of protection set down by the international Conventions, Community legislation, as well as certain limitations concerning labour issues imposed upon by the Italian Constitution were still valid. On that occasion, social partners succeeded in challenging the measures put forward by the Government. See various comments in *Diritto delle Relazioni Industriali*, Giuffrè, 2012 (under *Ricerche*).

270 controversial paragraphs, yet grouped into 4 articles to expedite the approval process. For different reasons, the reform was hailed with outright hostility by the social partners (see par. 6). Such a reaction pressured the Legislator to promptly amend the provision, with a number of changes that were already foreseen by the Parliament and took place one month after its enforcement⁵.

The reform greatly impacted the main aspects of Italian labour law, namely the legal procedures to establish and terminate the employment relationship. It also deals with the sources of labour law, this is because of the preference that has been given to norms of a compulsory character, which narrows down the role of trade union law, particularly company customs. In addition, social concertation – once pivotal in the evolution of labour law in Italy – played a peripheral role while the provision was being devised.

In contrast to what occurred in some other European countries – most notably in Spain⁶ – the reform does not touch upon internal flexibility, that is the set of legal provisions governing the employment relationship (personnel and job classification, working hours, job description, absence from work, and so forth). These aspects – which are clearly of great importance – still fall within the province of collective bargaining or are subject to mandatory forms of regulation that date back to the 1970s, such as Law No. 300/1970 (the Workers' Statute).

This approach further upholds the trend towards legal abstentionism in labour relations, all the more so if the drafters of the reform also refrain from amending the structure and the functioning of collective bargaining⁷. Indeed, the Parliament just delegated to the Government the power to deal with issues concerning economic democracy and workers'

⁵ See Law No. 134 of 7 August 2012.

⁶ Ley No. 3/2012, *de 6 de julio, de medidas urgentes para la reforma del mercado laboral*. For a reconstruction of the provisions laid down by the reform of the labour market in Spain, see M. L. Martín Hernández, *La última fase de la evolución del derecho del trabajo español: las reformas laborales del bienio 2010-2012*, in *Bollettino Speciale Adapt* No. 17, 2012; F. Navarro Nieto, *Spagna - La riforma del quadro giuridico della contrattazione collettiva*, in *Diritto delle Relazioni Industriali*, Giuffrè, No. 3, 2012; A. Baylos, *Crisi del diritto del lavoro o diritto del lavoro in crisi: la riforma del lavoro spagnola del 2012*, *Diritto delle Relazioni Industriali*, Giuffrè, No. 2, 2012; J. García Viña, *Il sistema di relazioni industriali in Spagna dopo la riforma della contrattazione collettiva. L'impegno per il contratto d'azienda*, *Diritto delle Relazioni Industriali*, Giuffrè No. 1, 2012.

⁷ As a result, and in line with the Italian experience, collective agreements in the private sector are regarded within the common-law framework still governed by the Civil Code of 1942 which, and at least in formal terms, they are binding on the contracting parties only if they are members of employers' associations and trade unions.

participation. Drawing on the German model of co-determination (*Mitbestimmung*), and by means of special provisions that introduced certain participation schemes, the attempt of Italian law-makers has been to move away from the current industrial relations model – which is of a more adversarial nature – to a more cooperative and collaborative approach. The proposal was met with approval by the most reformist unions (the Italian Confederation of Workers' Union – CISL – and the Union of Italian Workers – UIL), whereas both the more antagonist General Confederation of Italian Workers (CGIL) – and the most influential employers' associations (e.g. Confindustria) firmly opposed this approach. As far as the overall structure of the reform is concerned, the Government's original intentions were to favour more flexibility in hiring by way of open-ended contracts which make the dismissal easier – mainly for economic reasons – concurrently scaling back the scope of atypical and temporary work, either in salaried and quasi-subordinate employment. One might note, however, that the give-and-take accompanying the approval of the Monti-Fornero Reform and subsequent amendments – e.g. Law No. 134/2012 – prejudiced the foregoing plan⁸.

In fact, just few weeks after the passing of the reform, a number of amendments were made to the provisions on contractual schemes and on the remedies put in place in the event of failing to comply with provisions regulating dismissals for economic reasons. In some respects, the amendments to the reform made it more complicated to conceive the overall structure of the proposal put forward by the Government, as well as the guiding principles underlying the reform process.

The same holds for the reform of the labour market safety-net measures, which, based on the model of Danish flexicurity, could play a key role in enhancing the transition between occupations, as well as leading to a more adequate balance between flexibility in hiring and flexibility in dismissals. However, a watered-down compromise was eventually reached, since the early proposals made by the Minister of Labour to introduce the guaranteed minimum wage and, above all, to repeal traditional forms of income support were firmly opposed by both social actors and the governing parties.

⁸ In actual terms, such a proposal would concern only large-sized enterprises, for the vast majority of small and medium-sized companies in Italy already enjoy higher levels of flexibility in dismissals. This is a further explanation of the strong opposition to the proposal on the part of several representative associations (artisans and small employers in the commercial and tertiary sectors), for it reduces the levels of flexibility in hiring without any gains in terms of flexibility in dismissals.

The review of the safety-net measures also introduces a number of significant amendments (see par. 5), yet representing a case of “old wine in a new bottle”. In other words, the provision of unemployment benefits funded by social contributions – and not by the general system of taxation, as hoped for – is already a well-established practice in Italy. On top of that, this system will only be fully implemented in the years to come, for its effective sustainability – alongside macroeconomic compatibility – will be monitored by the social partners, and dependent upon the development of the crisis.

In an awareness of the foregoing issues, the Legislator outlined the reasons and the purposes of the reform, reasserting the central role played by full-time open-ended subordinate employment, also with regard to the apprenticeship contract, which remains the most widespread contractual scheme for those who enter the labour market for the first time. Indeed, the preference for this contractual arrangement is not to be ascribed to a decrease in the labour costs for open-ended contracts, nor to certain simplified procedures which favour their implementation. Rather, there has been a concurrent, and in some respects radical, dwindling of the regulatory mechanisms and contributions to be borne by employers for contractual arrangements in temporary work, self-employment, and quasi-salaried employment (continuous and coordinated collaboration contracts).

The explicit intention here is to overcome the duality between insiders and outsiders – e.g. stable workers and precarious workers – of the Italian labour market. Nevertheless, the issue is dealt with in a contradictory manner. In fact, the introductory paragraphs of the document clearly state that – pending a future and uncertain harmonisation process – the reform only concerns the private sector. Accordingly, the public sector does not fall within the scope of the provision, primarily because of higher rates of trade union representation that ensure protection in terms of stability of employment.

Yet early commentators⁹ have pointed out another contentious issue, which has been acknowledged by the Minister of Labour in a number of public statements. The move on the part of the Government aimed at narrowing down the use of flexible and atypical work – especially in recessionary times – might foster another dualism that is peculiar to the Italian labour market, viz. that between regular and irregular employment.

⁹ See the contributions in M. Magnani, M. Tiraboschi (eds.), *La nuova riforma del lavoro – Commentario alla legge 28 giugno 2012, n. 92*, Giuffrè, 2012.

This is particularly the case if one considers the telling arguments put forward at an international level¹⁰, according to which the extensive hidden economy in Italy – amounting to between 23% and 27% of Gross Domestic Product (GDP), twice or three times that reported in France and Germany – alongside a sound set of safety-net measures¹¹ – now called into question (see par. 5) – helped Italy tackle the crisis originated in 2007 following the economic turmoil.

The creation of a regular monitoring system to assess the impact of the reform on the labour market on the part of the Legislator should be deemed of particular significance. The development of a system for monitoring purposes should be the domain of the Minister of Labour and Social Policies¹², who should also oversee the evaluation of the implementing stage of the reform programme, its effects in terms of efficiency and employability, and the mechanisms for entering and exiting the labour market. The results of this monitoring activity might be useful to take cognizance of the amendments to be made to the provisions laid down by the reform.

2. Flexibility in Hiring: the Tightening Up of Atypical and Flexible Work and the Revival of Apprenticeships

2.1. Fixed-term Contracts

Following the reform of 2001 which implemented the EU Directive No. 1999/70/CE, Italian legislation allows for the issuing of employment contracts of a definite duration, although this must be linked to the presence of technical, productive or organisational reasons, even in relation to the everyday activity of the employer.

¹⁰ See F. Monteforte, *The Paradox of Italy's Informal Economy*, Stratfor, August 2012.

¹¹ For a reconstruction – from a international and comparative perspective – of the system of safety-net measures which traditionally consists in a scaling back of working hours through various forms of income support, see M. Tiraboschi, S. Spattini, *Anti-crisis Labour Market Measures and their Effectiveness between Flexibility and Security*, in T. Davulis, D. Petrylaitė (eds.) *Labour Regulation in the 21st Century: in Search of Flexibility and Security*, ADAPT Labour Studies Book-Series, No. 2, Cambridge Scholars Publishing, 2012, 163 ff.

¹² Article 17 of Legislative Decree No. 276/2003 (the Biagi Reform) already made provisions for a careful monitoring system that evaluates the effectiveness of the legislative measures put in place. Regretfully, this system was never implemented.

Although questioned by a number of case law rulings on matters of fact, the aim of the Legislator was to normalise the recourse to fixed-term contracts, which up until then could be used only on a temporary basis and under special circumstances.

In an attempt to stress the pivotal role played by open-ended salaried employment, the document of the reform states that “full-time open-ended subordinate employment is the standard form of employment”. In the aftermath of the reform, this contractual arrangement was widely used, whereas fixed-terms contracts were once again seen as being entered into only in certain circumstances, while still regulated by Law No. 230/1962 and, before that, the Civil Code of 1942.

With a view to moving beyond this hard-and-fast distinction, the Monti-Fornero Reform opens the possibility of two additional forms of temporary employment.

In the first case, fixed-term contracts without indicating the justifying reason can be issued, that is irrespective of the temporary nature of the assignment or the organisational needs of the employer. This employment contract can be concluded between an employer (or a user-company) and a jobseeker who is hired for the first time and for a limited time up to a period of twelve months, in order to perform any kind of task. Unlike the past, an employment relationship of this kind can thus be established for the first time regardless of the tasks to be carried out by the employee and without the obligation upon the employer to provide technical and organisational reasons, even in cases of substitute work. The only requirement is that the employment relationship lasts for less than twelve months.

Alternatively, the reform specifies that workers can be hired under fixed-terms contracts for an indefinite period without the need on the part of the employer to give details about the reasons for hiring, provided that the following conditions are met:

- this clause must be agreed upon in collective agreements;
- it must involve not less than 6% of the workers of each production unit;
- it must be carried out in certain organisational processes (start-ups, the launch of new products, technological changes, further stages of a research project, renewal or extension of a job assignment).

It must be said that this route can be pursued only if agreed upon during collective bargaining, with the opportunity to resort to this flexible form of work in the relevant industry that might be taken into account.

As far as the first option is concerned, the Legislator appears to run into a contradiction. This is because after reasserting the major role played by full-time open-ended subordinate employment, a major exception is

introduced to this proposition that impinges on the logic of national labour law, although limited to the first employment contract that is entered into.

In the second case, and save for a few exceptions, employers' associations will be loath to enter into agreements of this kind, as employers are now allowed to wait twelve months before recruiting a worker for the first time, also taking account of limitations posed by collective bargaining. In addition, the reform reveals a tendency to move away from a decentralised industrial relations system which marked earlier provisions at a national level. This is because only company-wide and interconfederal (national multi-industry) agreements are regarded as valid in this case, with decentralisation that takes place in the presence of delegation from national collective bargaining.

The unwillingness to make use of regulated forms of temporary employment is further exhibited by another aspect. Starting from 2013, the employer who decides to recruit a worker on a fixed-term contract will be required to pay an additional contribution amounting to 1.4% of pension-qualifying income, in order to finance an occupational fund (*Assicurazione Sociale per l'Impiego*, see par. 5). Employers will be reimbursed this contribution – up to a maximum of the last six months' pay – provided that the employment relationship will be converted into full-time open-ended employment, or that the worker will be hired within six months of the termination of the limited-term employment relationship. Due to the particular nature of this form of employment, this additional contribution is not to be paid in the event of workers taken on under fixed-term contracts for seasonal and substitute work.

Still on limited-term employment contracts, further interventions concern the continuation of the employment relationship after the expiration of the terms, the procedures to dispute its validity, and the forms of compensation in the event of transformation into salaried employment.

With reference to the first point, employees can provide their service for the employers up to a maximum of 30 days – and not 20 days as previously set – from the date of the expiration of the employment contract, if the employment relationship has a duration of less than six months. For employment contracts lasting more than six months, this threshold has been raised from 30 to 50 days. Contracts which are extended longer than these terms will be converted into an open-ended employment relationship.

The Legislator also regulates the interval between fixed-term contracts to re-employ the same worker. If the previous employment relationship had a duration of less than six months, the lapse of time between the two

employment contracts should be of 60 days, and not 10 days, as in the past. However, 90 days rather than 20 days should have elapsed between one employment contract and the other in cases in which the first employment contract lasted more than six months. Nevertheless, collective agreements concluded by the most representative trade unions and employers' associations at a national level, are allowed to reduce these intervals. More specifically:

- up to 20 days if the first employment contract has a duration of less than six months;
- up to 30 days if the first employment contract has a duration exceeding six months, particularly in the event of hiring resulting from certain organisational processes (start-ups, the launch of new products, technological changes, further stages of research projects, renewal or extension of a job assignment).

The scaling back of the minimum period between the two employment contracts applies for seasonal work and in all cases laid down in collective agreements concluded at a national level by the most representative trade unions.

The reform also introduces a statute of limitations for disputing the termination of the fixed-term contracts. Workers can appeal against the termination that is null and void for reasons related to the date of expiry after appraising the employers, also by means of out-of-court procedures, within 120 days of the termination of employment, thus raising the previous 60-day time limit. After lodging the complaint, workers should initiate legal proceedings within the following 180 days and not 270 days as originally set down.

As for employment cases, the law now reviews compensation to be paid by the employer in the event of a ruling in favour of the worker and the resulting conversion of the fixed-term employment contract into an open-ended one. Statutorily, the sum to be paid by the employer amounts to 2.5 to 12 months' pay, considering the last salary. The novelty lies in the fact that this sum of money is now regarded as full compensation for any loss suffered by the worker, thus including entitlement in terms of pay and social contributions from the termination of the employment contract and the decision made by the tribunal. Therefore, following the ruling on the part of the courts, the employer – whether or not fulfilling the obligation to re-engage the worker – is required to provide arrears of pay and relevant contributions.

2.2. Temporary Agency Work

The intentions on the part of the Legislator to stress the pivotal role played by full-time and open-ended subordinate employment as the most widespread form of employment in Italy is patent if one looks at the interventions made to the provisions regulating temporary agency work.

At the outset it should be noted that the proposals laid down seem to be insufficient. Most importantly, they show a tendency away from the efforts made since 2003 – and in line with international experience – to single out agency work as a form of work facilitating the matching of supply and demand for labour, especially if compared to atypical and temporary employment.

Within the Italian legal system, agency work was originally regarded as particularly useful in organisational and managerial terms, benefitting labour flexibility and contributing to the modernisation of the productive system. This is also because certain mechanisms of contractual integration between undertakings and certain processes – namely staff-leasing, and in-sourcing, co-sourcing, net-sourcing, selective sourcing, multi-sourcing, back-sourcing, co-specialisation and value added outsourcing – to be overseen by high-qualified operators within the labour market, as is (presumably) the case of work agencies.

However, the Monti-Fornero Reform puts fixed-term employment on the same footing as agency work, thus taking a step back in time of at least ten years, as the proposals detailed in the reform programme scale back the scope of application of this form of employment. Further, according to the reform, the recourse to agency work is possible by providing a justifying reason, save for two cases.

In the first case, the employer and the agency worker can conclude an employment contract for the first time and with a maximum duration of 12 months, without specifying technical, productive, organizational reasons, nor whether the worker will be engaged in substitution work, which, as a rule, should be included in the particulars of the employment contract. It seems worth pointing out that the wording “the very first employment relationship between the employer/the user company and the employee” used in the text of the reform attempts implicitly, yet in an ambiguous manner, to confine this exception to the first employment contract entered into, and not to the relationship between the employment agency and the worker.

Alternatively, the conclusion of the employment contract between the employer and the agency worker does not require any justification, nor do

the contracts have limitations in terms of number and duration, whereas the following conditions are met:

- a) this exception is agreed upon during collective bargaining;
- b) it must involve at most 6% of the workers of each production unit;
- c) in the event of hiring resulting from certain organisational processes (start-ups, the launch of new products, technological changes, further stages of research projects, renewal or extension of a job assignment).

None of the exceptions allows for an extension of the employment contract, once ended.

In the author's view, the recourse to agency work devoid of a justifying reason might on first approximation facilitate the task of temporary work agencies and reduce the rate of employment disputes, particularly if compared to that of the previous years. However, in the long- and medium-time frame this state of play will debase the role of temporary work agencies as qualified operators in the labour market in terms of improvement of human capital and specialization of production, limiting their function to the mere provision of workers on the basis of the employer's needs.

The reform also specifies that, for the purposes of calculating the maximum duration of fixed-term contracts – in any case not exceeding 36 months – it is necessary to count towards the time needed to perform the same task – e.g. with the same job description – carried out by workers with the same qualification. Agency work is thus once again likened to fixed-term employment, with this provision that is far from securing stable employment. In addition, it acts as a disincentive for the work agency, which is therefore loath to provide training and special skills for agency workers. As already discussed above, this aspect is further confirmation of the marginal role allocated to this form of employment.

In addition to this, the reform regulates employment agency apprenticeships. Employers are still prohibited to hire apprentices on a temporary basis. However, it is possible to utilise the services of apprentices who are employed by an agency work for an unlimited period (staff leasing) in all the productive sectors, that is when a commercial contract of an indefinite term between the user company and the employment agency is concluded. An obstacle to the implementation of this provision might arise from the fact that the reform repealed certain norms laid down by the Biagi Reform in 2003. In particular, in compliance with European Directive No. 2008/104/CE, the Biagi Law set forth a derogation from the principle of equal treatment between agency workers and other employees, if the recourse to agency work is made for training purposes or aims at easing access to labour market. This aspect might

affect the procedures to determine remuneration for apprentices hired by the employment agency, as it usually equal to pay for employees of a lower grade, or to a certain percentage of remuneration provided to more trained and qualified workers.

Distinct from what was laid down in previous interventions, the Monti-Fornero Reform also makes provisions for a longer interval between fixed-term employment contracts at the time of rehiring the same workers. In this connection, the lapse of time to issue a new limited-term contract should be of 60 days if the previous employment contract has a duration of less than six months, or 90 days for fixed-term contracts lasting longer than six months. A literal interpretation of the norm suggests that the relationship between the work agency and the worker falls outside the scope of application of the provision, while doubts arise in reference to the relation between the work agency and the user company. Perhaps this can be explained by the attempt on the part of the Legislator to prevent the abuse or the repetitive use of fixed-term contractual arrangements (“chains” of contracts). Should this be, the work agency is either allowed to send the same worker to different user-companies on a permanent basis, or to the last user-company the worker provided his/her services to, for the latter upon compliance with terms of renewal statutorily laid down.

After an inspection of the reform, one might also note a shrinking of the funding allocated to employment agencies to promote active labour market policies, training, and retraining of temporary workers. In this sense, the law provides that starting from 1 January 2013, employers have to pay an additional contribution corresponding to 1.4% of pension-qualifying income for salaried workers hired on a temporary basis. As for the employment agencies, this sum is partly offset by a reduction in the contribution paid to a training fund for agency workers, that is equal to 4% of aggregate salary.

2.3. Apprenticeship, Access-to-Work Contracts, and Placements

The Monti-Fornero Reform sets much store by the apprenticeship contracts, regarded as a privileged channel for helping young people to enter the labour market. In the context of this paper, it might be useful to point out that a comprehensive reform of apprenticeship already took place in September 2011, which included a number of agreements

concluded over the two years prior to the reform between the Government, the Regions, and the social partners¹³.

The reform reasserts the pivotal role carried out by apprenticeship as the main contractual arrangement for first-time entrants to the labour market. This approach stands in line with the proposal of many academics – particularly economists – for a “single employment contract” for people starting their first job. One might note, however, that some critical aspects of apprenticeship – e.g. the training content – still remain unsolved. Accordingly, the widespread use of apprenticeship for first-time entrants into the labour market is to be attributed mainly to provisions which scaled back the recourse to other contractual schemes for this category of workers. This is particularly the case of access-to-work contracts – introduced by the Biagi Law in 2003 and now repealed – project work and placements.

In consequence, although welcomed in principle, the proposal of apprenticeship as the main contractual scheme to enter the labour market is, in general terms, far from being realistic. In fact, nearly one year after the enforcement of legislation regulating apprenticeship, the devising of a system which considers the needs of productive sectors and the differences at regional level has not yet been fully envisaged. The setting-up of a national system of vocational standards to validate and certify one’s vocational skills as laid down by the relevant provisions in 2011 has never been implemented either. Therefore, only in formal terms can the apprenticeship contracts be classified as full-time open-ended subordinate employment and be freely terminated at its end. In practice, it is to be considered a fixed-term contract devoid of the training content and not in line with the German dual model system to which the Legislator claimed to have referred to¹⁴.

Of significance is the innovation concerning the increase of the number of apprentices that can be recruited by the employer, which is determined by the number of qualified workers in employment. Starting from 1 January 2013, the ratio of apprentices – to be hired either directly or through open-ended employment agency contracts – to qualified employees will be 2 to 3. Notwithstanding specific more favourable conditions laid down for the artisan sector, the ratio is set at 1 to 1 for employers with less than ten workers, while employers with no qualified

¹³ See M. Tiraboschi (ed.) *Il Testo Unico dell'apprendistato e la nuova disciplina dei tirocini formativi*, Giuffrè, Milan, 2011.

¹⁴ *Supra*, par. 3.

staff or with less than three specialized workers will be allowed to take on up to three apprentices.

In addition, for the purposes of the reform, employers with at least ten employees are allowed to hire apprentices on the condition that they had recruited at least 50% of apprentices whose contract ended in the past 36 months. This percentage has been reduced to 30% in relation to the 36 months subsequent to the enforcement of the reform. As the provision expressly laid down, the employment relationships terminated over the probationary period, or due to resignation or just cause dismissal are not to be included in the foregoing calculation. Apprentices recruited in violation of these conditions are to be considered salaried employees hired on open-ended contracts entered into force since the employment relationship was established. In the event of non-compliance with this ceiling, it is possible to recruit another apprentice who adds to those already employed. The same goes in cases in which no apprentice has already been hired upon termination of the apprenticeship contract. The statutory 50% is a minimum threshold and applies to all productive sectors. For this reason, it might be amended upward, depending on the applicable collective agreements.

In order to ensure adequate training, the reform also sets forth that apprenticeship contracts should have a minimum duration of 6 months, with the sole exception of seasonal work, for which it is only possible to issue vocational apprenticeship contracts.

Also in consideration of the widespread recourse to apprenticeship, the Monti-Fornero Reform provides a delegation of certain tasks to the Government, also with a view to narrow down the recourse to placements and prevent their improper use. This can be done only upon an agreement concluded between the parties involved (the State and the Regions) which sets down guidelines on training and placements for career guidance purposes, to be implemented at regional level. In this connection, the reform programme also lays down a number of criteria that foresee more stringent rules to regulate this contractual scheme. An example is the obligation on the part of employer to provide remuneration to the trainees for the work performed.

2.4. Part-time and On-call Work

The reform introduces a number of major changes to part-time work which concern certain clauses (*clausole flessibili ed elastiche*) allowing the

employer to either modify the time and increase the hours agreed upon in the employment contract to perform a given task.

The conditions and the specifics to carry out the working activity are not determined by the employer and the employee directly, but they should be set down during collective bargaining.

In order to encourage the proper use of part-time work as a flexible form of employment, the Monti-Fornero Reform specified that it is for collective agreements to envisage the procedures enabling workers to repeal or amend these clauses. Therefore collective agreements will detail the cases in which workers might opt for a review of the employment contract in relation to the foregoing clauses.

Furthermore, the reform also provides the opportunity for some categories of workers who already agreed on these clauses to reverse their position, most notably working students, workers with oncological conditions, and the category of workers listed in collective agreements.

More radical changes have been made to on-call work (zero-hours contracts), that is the employment relationship – either of a definite or indefinite duration – in which the workers agree to provide their services to the employers, who in turn make use of their performance on the basis of what has been laid down by the law or collective agreements.

The reform made provisions particularly in relation to its scope of application. In this sense, it sets forth that – without prejudice to the cases specified in the collective agreement – work on an intermittent basis can be performed by workers over the age of 55 – thus raising the 44-year-old threshold set by the Biagi Law in 2003 – and by workers up to the age of 24, provided that the tasks are carried out before attaining the age of 25.

The reform also repeals the clause allowing the carrying out of on-call work in certain times of the week, month or year agreed in advance in collective bargaining, and sets down some measures to raise the levels of transparency.

More specifically, it places an obligation upon the employer to notify relevant authorities (*Direzione Territoriale del Lavoro*) before the embarking on a job task – or a series of job tasks totalling less than 30 days – on the part of on-call workers. The notification can be made by text (Short Message System), fax, or simply by email. Upon fulfilment of this obligation, the employment relationship can be concluded, with the employer who is required to notify the relevant authority every time the worker is called out to work.

2.5. Coordinated and Continuous Collaborations (Quasi-subordinate Employment)

The Monti-Fornero Reform made profound amendments to quasi-subordinate employment. This is particularly the case with regards to project work, that can be loosely defined as an employment relationship between the employer and the employee which takes place on a coordinated and continuous basis, characterised by an absence of subordination relating to the completion of project.

Unlike what was laid down by the Biagi Law in 2003, the employer is relieved from the obligation to provide a work schedule of the project – or project phases – to be implemented. As a result, the existence of an employment relationship of this kind will only be determined for specific projects.

The project to be carried out needs to be related to a given end result, which cannot consist in the mere employer's company purpose and cannot include repetitive tasks.

The reform clarifies the meaning of the provision laid down in the Biagi Law in 2003 according to which professions for which enrolment in special registers (*albo professionale*) is required are excluded for the scope of application of project work. It seems important to point out that this exception is limited to quasi-salaried employment in the form of intellectual work, the nature of which is the same as that performed by professionals who need to comply with registration procedures.

In consequence, professionals who are enrolled in these special registers, operate for one client and carry out tasks which are not related to their trade will be regarded as engaged in project work. This applies also in cases in which professionals operate simultaneously for more than one client.

However, whereas the employment tribunal ascertains that there exists a relationship between the work performed and the trade carried out, the employment relationship is converted into salaried employment, as a project justifying the recourse to project work has not been provided.

These measures are intended to prevent the fraudulent use of project work, particularly to mask salaried employment. One might note, however, that this goal has not been achieved through a set of repressive measures to combat fraudulent practices, but rather because of the unwillingness on the part of employers to make use of project work. This is exhibited by an increase in the labour costs for project work – that will be the same as that for salaried employment by 2018 – and by the provision of more stringent regulations to assess whether project workers are hired on salaried employment contracts.

The reform also posits that there is a legal presumption in favour of the existence of salaried employment without the opportunity to provide rebuttal evidence in cases in which the lack of the project to be implemented on either formal and substantial levels has been ascertained by the courts.

On the contrary, there shall be a presumption of salaried employment with the opportunity to supply rebuttal evidence in cases in which the working activity is performed along the same lines of that carried out by salaried employees, thus not taken into account tasks which require high levels of skills on an exclusive basis.

As for the termination of the employment relationship, it is still possible to discontinue the contract for just cause before it ends, yet pursuant to the reform the parties are not allowed to freely terminate the employment relationship. The employment contract can be brought to an end by the employer only when there is an objective lack of fitness of workers which endangers the fulfilment of the project. For their part, workers hired on project work contracts can discontinue the employment relationship by giving notice, only if this clause is expressly laid down in the contract.

The reform introduced major amendments also with regard to remuneration. Notwithstanding that the amount paid should be proportional to the quality and quantity of the work performed, it also specified that workers should be remunerated at a rate which is not less than the minimum wage set on a sectoral basis. Further, the system of remuneration should also consider the employment grading methods set up for each sector and taking account minimum wage levels set down for similar tasks for salaried employees. Wage setting is agreed upon in collective agreements concluded by the most representative trade unions and employers' associations at national, inter-sectoral, and sectoral levels, also by means of decentralisation by way of derogation clauses. In the absence of specific collective agreements, reference should be made to the minimum wage provisions specified in the national collective agreements for workers operating in the same sector and with the same employment grade as project workers.

2.6. Self-employment

The Monti-Fornero Reform narrows down the scope of application of self-employment in a considerable manner. This is due to the prevailing legal presumption that autonomous workers are hired on salaried employment contracts, to be applied in the cases provided by the law.

There are three criteria to establish whether an individual claiming to be self-employed is actually presumed to perform salaried employment on an open-ended contract. For the sake of clarity, it should be noted that the provision makes use of the wording “continuous and coordinated collaboration”. Nonetheless, pursuant to Italian labour law, a contractual arrangement of this kind lacking a specific project is reclassified as open-ended salaried employment. For an individual to be regarded as a salaried employee on an open-ended contract, at least two out of three of the criteria listed below must be met.

The criteria laid down by the law are factual situations pertinent to the running of the employment relationship which, besides its classification at a formal level, help determine the coordinating and continuing nature of the work performed. The criteria laid down by the Legislator are:

- 1) the duration of the employment relationship, whereas lasting for more than eight months for two consecutive years;
- 2) the provision of services to one client on an exclusive basis, provided that the turnover of the self-employed earned while operating for the same client – or for a permanent business establishment – over a period of two consecutive years amounts to 80% of his/her total earnings.
- 3) the presence of a fixed workstation at the client’s premises, where “fixed” means that it is non-movable or temporary.

The legal presumption of open-ended salaried employment does not apply in cases in which the tasks to be performed require high skill levels or “practical skills acquired through experience”. This is conditional on the fact that the average annual earnings of autonomous workers are equal to or higher than a certain sum statutorily determined. Another exception – which works as an alternative to the foregoing – concerns, for instance, a professional self-employed individual performing his/her job upon membership to professional association (special registers, professional bodies, and so forth).

2.7. Special Forms of Joint Ventures

The reform also makes provisions for special forms of joint ventures, whereby an associating party grants an associated party a share in the profits of his/her business or of one or more transactions on the basis of an agreed upon contribution. This is known in Italy as *associazione in partecipazione* (literally a sharing-profit agreement with contribution of labour). Over the years, an increase in the misuse of this contractual

scheme has been reported, particularly in clerical work or manual labour in the building industry.

The Monti-Fornero Reform amends previous legislation governing this contractual arrangement, and specifies that it is possible to have up to a maximum of three associated parties engaged in the same activity if the contribution provided also includes work performance. This applies regardless of the number of associating parties, with the sole exception of an associated party being a spouse, a family member up to the third-degree of kinship or a second-degree ascendant. In the event of non-compliance with this clause, the associated parties who provide a contribution in the form of work performance will be considered as salaried employees on an open-ended contract. The legal presumption in favour of salaried employment thus does not allow for rebuttal evidence to demonstrate the genuine nature of the employment relationship. Prior to the enforcement of the reform, the setting-up of a number of joint ventures to deal with the same business or transaction did not impinge on the validity of the contract, save for cases in which at least one of them is established at a later stage (unlike otherwise agreed, the associating party cannot grant other individuals a share in the profits of a business or a transaction without the consent of the former associated parties).

As already pointed out, the reform tightens up the regulation for this special form of joint venture. For the contract to be valid, it is possible to have up to a maximum of three associated parties engaged in the same activity, except in cases of family members or ascendants. The reform also sets down certain cases of legal presumptions of salaried employment, against which evidence can however be provided. A contractual arrangement concluded to set up a joint venture is presumed to be salaried employment in the following cases:

- if the associated party does not have a share in the profits of the business run by the associating party;
- in the event of failing to report the associated party on the activity carried out (by way of a report on the annual management if the activity has been performed for more than 12 months);
- in the event that the agreed upon contribution on the part of the associated party corresponds to “unqualified” labour, that is neither characterized by theoretical knowledge acquired by specific training nor by practical skills acquired on the same job.

In addition, in order to restrain the recourse to this form of joint venture, the reform sets forth an increase in the social contributions for the associated parties. In this sense, the cost of labour will rise at 1% every

year until 2018, totalling a contribution rate of 33% for those who are not covered by any other form of public retirement schemes.

2.8. Occasional Work of an Accessory Nature

The reform foresees a thorough review of regulations governing occasional work, that is work provided without concluding and employment contract and by means of a particular payment system, namely vouchers for an amount of 10 euro per hour.

Already in 2003, the Biagi Law made provisions for workers on this contractual arrangements on the basis of remuneration. In this sense, the Biagi Law also detailed the category of workers who can engage in occasional work (young people, housewives, and retired people) as well as its scope of application (domestic and agricultural work, and light housework).

Contrary to what was laid down in 2003, the Monti-Fornero Reform now specifies that occasional work only includes work performed on an occasional basis which generates a total income of €5,000 in a calendar year. Significantly, this sum corresponds to the sum earned from the services provided to all the client firms, marking an important difference with the past. Occasional workers can still carry out working activities up to a maximum of 2,000 Euros per annum to be paid by different client firms, provided that their services are rendered to entrepreneurs and professionals.

Another relevant measure – which will certainly facilitate the recourse to ancillary work without any consequence in legal terms – is that the resort to this form of employment is allowed for all working activities and irrespective of the workers' personal characteristics.

Some special regulations have been laid down which scale back the recourse to occasional work in the agricultural sector to the following cases:

- agricultural work of an occasional nature performed by retired people and by young people who are less than 25;
- agricultural work provided to farmers which generates a turnover of 7,000 Euros per annum, with the exception of farmers enrolled in special registers for the previous year.

Public bodies are still allowed to make use of occasional work, as long as they comply with regulations to contain personnel costs and, whereas in force, budgetary stability pacts. In the same vein, recipients of social security benefits who are entitled to a maximum of 3,000 Euros for the

year 2013, can perform occasional work in both private and public bodies and in all productive sectors to supplement their monthly wage or any other form of social aid.

3. Flexibility in Dismissals. Remedies for Unfair Dismissals and New Rules on Collective Dismissals

In the Italian legal system, the termination of open-ended and salaried employment contracts can only take place for just cause – thus not allowing for the continuation of the employment relationship – or for justified reasons. If the latter, the employment contract can be discontinued because of a serious violation of the worker’s contractual obligations (that is for “subjective reasons”) or justified by needs related to production and its functioning, or organizational choices made by the employer (that is for objective reasons). In the event of unjustified dismissal, Italian legislation provides a set of remedial measures traditionally consisting in the worker’s reinstatement – in the event of large and medium-sized companies – or a compensation award – if concerning small-sized companies.

Reinstatement takes place in cases of unfair dismissals, in businesses employing more than 15 employees in the productive unit where the unfair dismissal occurred – or more than 5 for employers who run a farm – or in businesses with more than 60 workers altogether, whether operating in the same productive unit or not. By virtue of this remedy the employment contract is not regarded as interrupted, thus the employee can ask to return to the same job and to demand unpaid salary. With regard to remedies in the form of compensation, it concerns the productive units and the employers not falling within the foregoing cases. It does not invalidate the effects of unfair dismissal, but places an obligation upon the employer to choose between re-hiring the workers and granting them a sum of money ranging from 2.5 and 6 months’ pay. By regarding as unfair the dismissal delivered without a reason, the reform amends the Italian remedial framework, seen as “anomalous” if compared to that of other countries, as producing discouraging effects on foreign investors in our country and penalising local employers at an international level.

As a result, extant legislation now regulates unfair dismissals taking account of the underlying reasons and the employers’ liability. In this sense, there are different employment safeguards that apply in accordance with the reasons and depending of the type of dismissal, viz.

discriminatory dismissals, disciplinary dismissals and dismissals for justified objective reasons.

3.1. Discriminatory Dismissals. Remedies including Reinstatement and Compensation

Discriminatory dismissals take place when employees are removed from their position – irrespective of the employer’s will – on the grounds of religion, political, and personal belief, age, disability, gender, sexual orientation, race, language, and trade union affiliation. The reform does not make significant changes to the regulation of discriminatory dismissals. Regardless of the reasons provided and the number of workers employed, the ruling handed down by the employment tribunal making the dismissal of employees or executives null and void places an obligation upon the employer to re-hire the workers.

This remedy now also includes dismissals nullified because in violation of the rule which prohibits one to discharge workers who are on maternity or parental leave or on the grounds of marriage. In addition, dismissals that are statutorily regarded as null and void are also considered discriminatory dismissals. By way of example, this includes workers who are removed from their position after being given training leave, or leave for particular circumstances. The same holds for dismissal resulting from illegal practice, such as the so-called “retaliatory” termination, that is illegal and arbitrary action taken against an employee who did not commit any misconduct.

Workers are entitled to reinstatement also in the event of a dismissal that is null and void because notified orally and not in writing, regardless of the number of employees.

As a result of the order of reinstatement ruled by the tribunal, the employee should return to work within 30 days from the employer’s communication. Alternatively, and without prejudice to the employee’s right to compensation for any loss suffered, the dismissed workers might ask for payment of up to 15 months’ pay, considering their last salary.

The judge might also order the employer to pay compensation for the damage suffered from unfair loss of job, the amount of which is arrived at by calculating the last salary paid to the worker – e.g. to which he would have been entitled if not discharged – from the date of dismissal up to the date of effective reinstatement. The earnings resulting from working activities performed during the dismissal period should be deducted (*aliunde perceptum*).

Under any circumstances compensation for unfair dismissal can be less than 5 months' pay, with the employer also obliged to pay social contributions and compulsory insurance for the entire period the worker has been away, including premiums for occupational injuries and diseases. It is also implied – the law remained silent on this point – that the employer is obligated to pay a fine for non-payment or delayed payment of social contributions.

3.2. Dismissal for Disciplinary Reasons

The reform also makes provisions for dismissals for disciplinary reasons, that is termination of employment due to a breach of contractual duties or serious violations on the part of the worker. These specifics are also grounds for dismissal for justified “subjective” reasons and just-cause dismissal, respectively. There are three remedies following a finding of unfair dismissals and they depend on the seriousness of the circumstances.

The first case occurs when the employment tribunal ascertains that the dismissal is null and void for a lack of a justified “subjective” reason or just cause, because there is no case to answer, or because the violation falls within those for which measures short of dismissal can be imposed on the employee, in line with what is laid down by collective agreements or codes of conduct.

In this case, the judge nullifies the unfair dismissal, ruling that the employer should reinstate the employee – or alternatively and on the employee's request, pay a compensation award amounting to 15 months' pay. The judge also specifies that the employment contract is terminated whereas the workers fail to return to work within 30 days from the employer's communication, or they do not claim for compensation.

It is also implied – the law kept silent on this point, too – that the employer is obligated to pay a fine for non-payment or delayed payment of social contributions.

The employee is also entitled to the payment of compensation which is equal to remuneration accrued from the date of dismissal to the date of effective reinstatement - which cannot exceed 12 months' pay – from which earnings resulting from working activities performed during the dismissal period should be deducted (*aliunde perceptum*), as well as potential wages earned if he had found a new occupation. The ruling that the dismissal is unfair also places an obligation upon the employer to pay social contributions and compulsory insurance for the period the worker

has been away, including premiums for occupational injuries and diseases. Distinct from what happens in the event of discriminatory dismissal, social contributions must include the interests legally accrued without taking into account sanctions for non-payment or a delay in the payment on the part of the employer.

The second case concerns the event when the employer tribunal rules in favour of a lack of the justified “subjective” reasons or just cause put forward by the employer. Under these circumstances, the dismissal, if unjustified, is not regarded as null and void and the judge orders the termination of the employment contract from the date of dismissal. If this is the case, the worker is entitled to full compensation – in the sense that it also includes social security contributions – ranging from 12 to 24 months’ pay considering the last salary, and some other criteria (length of service, number of employees, the size of the business – as well as the conduct and the conditions laid down by the parties, the latter requiring a written statement explaining the reasons for such conduct). The last case refers to the discriminatory dismissal that is null and void because of a violation of the requirement to provide justification or because of a procedural defect, which is typical of disciplinary dismissal. Under these circumstances, the dismissal is null and void and the employer is bound to pay full compensation – including social security contributions – ranging from 12 to 24 months’ pay considering the last salary, depending on the seriousness of the violation of the employer, with a duty to provide motivation in writing.

3.3. Dismissal for Justified Objective Reasons

The other case of dismissal is that taking place for justified objective reasons. In this respect, a review of extant legislation redesigned the remedial framework and introduced two new measures in procedural terms.

The reform specifies that in notifying the worker of the dismissal, the employer must also provide the reasons causing the decision. This requirement marks a difference with the past, as previous legislation only specifies that such justification could be provided upon the ex-worker’s request within 15 days from being given notice.

A further innovation concerns the discontinuation of the employment relationship for economic reasons. More specifically, the requirement to attempt conciliation has been introduced as a pre-requisite to further action to be taken with regard to the dismissal. This initiative, which is of

an experimental nature, does not apply to small-sized enterprises as previously defined.

The notification to be filed by the employer must specify the intention to terminate the employment contract for objective reasons, the justification for the dismissal and the measures to be taken to help the dismissed worker find alternative work. Once notification has been handed in, a special body appointed by the Ministry of Labour (*Direzione Territoriale del lavoro* – Provincial Labour Direction), summons the employer and the dismissed worker to a hearing before the local conciliation board within 7 days from the delivery of the communication. If members of a union, both parties can appoint or mandate a union delegate, a lawyer or an employment consultant to represent them at the hearing, which can be postponed for a maximum of 15 days only in the event of a serious and certified impediment.

The aim of conciliation is to find an alternative route to the termination of the employment contract. However, this procedure cannot last more than 20 days from the date the parties were called on to meet, unless they agree to further discuss the issue until a settlement is achieved. Whereas the recourse to conciliation is not effective, or the Provincial Labour Direction fails to convene a meeting with the parties within 7 days of the delivery of the communication, the employer can dismiss the worker by giving notice. Conversely, if the attempt at conciliation is successful and the contract of employment comes to an end by mutual agreement, the law provides for the implementation of safety-net measures, as will be seen further on. It could also be the case that employment agencies are in charge of helping the worker re-enter the labour market.

In order to encourage conciliation, it is also specified that in the event of a further appeal, the attitude of the parties will be taken into account – as resulting from the minutes of the hearing – as well as the proposal put forward by the local conciliation board to settle the issue. On the basis of these elements, the judge will rule in favour of the prevailing party to be awarded the court costs, and decide the amount of compensation resulting from the dismissal that is null and void as devoid of an economic or productive reason claimed by the employer.

There are four circumstances which, in turn, give rise to four types of remedies. The forms of compensation laid down are thus related to the seriousness of the flaws at the time of terminating an employment contract.

3.3.1. Remedies including Reinstatement and Compensation

This remedy concerns the situations in which the dismissal for objective reasons is unfair as justified on the grounds of physical or mental unfitness of the workers. This case also refers to an employment contract that is discontinued before expiration of the time granted to workers on sick or parental leave to maintain their post, or when the organizational and productive reasons claimed by employer are not grounded.

In all these cases the dismissal is null and void and the employer is obliged to reinstate the dismissed worker, who is also entitled to a sum of money corresponding to a maximum of twelve months' pay considering the last salary, deduced from what was earned from the workers when they were dismissed and what should hypothetically be paid to them if still in employment in that period, including social contributions and interests. In essence, remedies are the same as those laid down in the event of disciplinary dismissals that are held unfair.

3.3.2. Reinstatement in the form of Compensation without Reintegration

This remedy refers to all those cases not falling under the label of dismissal for justified objective reasons. Like the previous case, the reason justifying the dismissal is not grounded, or not in a patent manner. Accordingly, the dismissed worker is not entitled to reinstatement, but simply to a sum of money amounting to 12 to 24 months' pay considering the last salary and arrived at by taking into account a number of factors (length of service, number of employees, size of the business, the attitude and the conditions set by the parties). The judge here acts as if they had to deal with unfair dismissal for just cause or justified objective reasons.

3.3.3. Dismissals for Justified Objective Reasons. The Case of Discriminatory and Disciplinary Dismissals

Another case is when the dismissed employee claims that the dismissal for justified objective reasons is the result of discrimination or unfair disciplinary action. If the employment tribunal find the complaint well founded, remedies for unfair discriminatory or disciplinary dismissals apply.

3.3.4. Dismissals for Justified Objective Reasons and Non-Compliance with Formal Requirements

Dismissals for justified objective reasons must be initiated in accordance with certain formal requirements. Failing to provide justification for the dismissal or to comply with the obligation to seek conciliation will make the dismissal null and void. Being characterized by a procedural defect, they stand upon an equal footing with unfair dismissals resulting from disciplinary action. Accordingly, relevant legislation provides for termination of the employment contract, along with the supplying of an award amounting to six to twelve months' pay to be granted to the dismissed workers, depending on the seriousness of the procedural defect.

3.4. New Rules on Collective Dismissals

Besides making amendments to existing rules on individual dismissals, the Legislator also put forward some new legislative measures concerning the regulation of collective redundancy.

One aspect concerns the obligation to give early notice placed upon the employer who decides to dismiss employees for reasons of redundancy. The innovation lies in the opportunity to overcome the non-compliance of this requirement by signing an agreement concluded with trade unions during the redundancy procedures.

Amendments have also been made to the obligation to communicate to relevant authorities or trade unions the list of workers made redundant or on mobility schemes. Information for each worker should include personal details, employment grade, as well as a detailed explanation of the criteria adopted to identify the workers to be made redundant. As for the time requirements, such communication should take place within 7 days from – and no longer concurrently to – the notice of dismissal delivered to the employees. With regard to remedies in the event of collective dismissals that took place in breach of agreed procedures, they rest upon the seriousness of the breach, which might give rise to the inefficacy of collective dismissals (in the event of failing to notify in writing or to comply to statutorily procedures) – or make them void – in cases of violations of the eligibility criteria to dismiss the workers.

3.4.1. Remedies in the form of Compensation and Reinstatement

In the event of collective dismissals not notified in writing, the worker is entitled to reinstatement and to a compensation award. The employment tribunal nullifies the dismissal and, concurrently, orders that the employees return to the same job, entitling them to a sum of money for the damage suffered. The amount of money to be paid is arrived at by calculating the wages and the social contributions from the date of the dismissal to the ruling of the courts – in any case not less than 5 months' pay – which should be reduced by what has been earned by the employer whereas performing another working activity over the same period.

3.4.2. Remedies in the form of Compensation without Reinstatement

If collective dismissals have been found to be unfair because of a violation of collective agreements, the tribunal orders the discontinuation of the employment contract, that is effective from the date of the dismissal. It also entitles the employee to a sum of money amounting to 12 to 24 months' pay considering the last salary and arrived at by taking into account the worker's length of service, the number of employees and the size of the business, the attitude and the conditions set by the parties, with an obligation to specify the reasons in this connection.

3.4.3. Remedies including Reinstatement and Special Forms of Compensation

In the event of non-compliance with the criteria laid down to identify the workers to be made redundant, the most comprehensive forms of remedy apply. In other words, the employment tribunal nullifies the unfair dismissal and the employer is obliged to reinstate the dismissed workers and to grant them a sum of money amounting to a maximum of twelve months' pay considering the last salary from the date of dismissal to the date of reinstatement. The total sum should be reduced by the earnings resulting from other working activities performed by the workers while dismissed, as well as what was earned if they had been committed to seeking a new occupation. The employer is also under the obligation to pay social contributions for the same period, increased by the interests accrued until the date of reinstatement and without including penalties from non-payment or delayed payment of the amount due. This sum – yet lower than what entitled to the worker if not dismissed – is equal to the

difference between contributions accrued following the dismissal and those paid to the employer as a result of other working activities performed by the workers during the time they were dismissed.

4. Undated Letter of Resignation and Termination by Mutual Consent

The reform makes provision also with regard to the dismissal procedures. More specifically, special sanctions have been put in place for employers who ask workers to sign an undated letter of resignation and use them at a later stage, further dismissing the workers but claiming that they have resigned or freely terminated the employment contract.

To combat this illegal practice, the law provides that resignation handed in by some categories of workers has to be validated by special bodies. This concerns women workers during pregnancy or workers who are fathers of children – by birth, custody, or national or international adoption – up to three years of age, thus extending the previous age limit of one year.

Another innovation lies in the requirement to assess whether the resignation was really intended, which now applies to cases of voluntary resignation in a strict sense and to all cases of consensual termination other than those resulting from maternity or paternity. The genuine nature of both voluntary resignation and termination by mutual consent will be assessed through two distinct procedures, and their validity is thus conditional upon the outcome of this review process.

Validation of resignation is not required in cases in which the discontinuation of the employment contract is the result of a reduction of staffing levels agreed upon by unions or relevant bodies, which are assumed to take all necessary steps to assess whether the workers consented to the discontinuation of the employment relationship.

Procedures for validating workers' resignation or termination of the employment contract can be carried out by the Provincial Labour Direction (*Direzione Territoriale del lavoro*), the local employment services, or by any other body listed in collective agreements and agreed upon by the most representative trade unions at a national level.

Alternatively, the parties might issue a written statement to be appended to the notification of the termination of the employment relationship that has been sent to the employment services. Simplified criteria to ascertain the accuracy of the date and workers' statement are to be detailed in a Ministerial Decree.

There are also certain obligations placed upon the employer in the event of non-compliance with the requirement of validation or the issuing of the foregoing statement. The employer has to send the worker a formal request to report to the evaluating bodies or produce a statement to be added to the notification sent to the employment services that the employment relationship has been brought to an end. This must be done within 30 days of the date of resignation or termination by mutual consent.

Within seven days from the request and in the event of failing to satisfy these two conditions, the employment contract is dissolved in cases in which workers:

- did not report to the Provincial Labour Direction or the local employment services in charge of ascertaining the voluntary nature of resignation;
- did not produce the foregoing statement in writing;
- did not revoke their resignation or intention to end the employment contract.

The last aspect concerns the tightening up of the sanctioning mechanism and the devising of administrative fines – ranging from 5,000 to 30,000 Euros – that apply in the event of employers making use of undated letters of resignation, without prejudice to their criminal liability, if any. It is the Provincial Labour Direction that has to determine the employers' liability and the statutory amount to be paid.

5. Reforming the System of Safety-Net Measures

A key aspect of the Monti-Fornero Reform concerns the safeguards provided to workers in cases of loss of employment, as a means to strike a more effective balance between flexibility in hiring and flexibility in dismissals. Although the ambitious proposals originally put forward by the Minister of Labour, the reform does not impact on the system of safety-net measures, which does not distance itself from the protection supplied to the worker in cases of partial or total unemployment.

In the event of partial unemployment, that is suspension or reduction of the working time, workers might rely on certain forms of income support, with the reform that has widened their scope of application also by means

of the setting-up of bilateral funds, which might also include ad-hoc funds for lifelong learning for employees of small-sized companies not covered by income support schemes. This money is made available by sectoral employers' associations and unions with the purpose of promoting workers' further education, and is usually used to devise training schemes organized by the employers subsidising the fund. At present, income support measures only cover workers operating in the manufacturing sector, or those in some other industries with a certain number of employees. By way of example, in the commercial sector only businesses with more than 50 employees can apply to such funds.

A wide-ranging reform was put forward in relation to the employment safeguards in case of total unemployment. In this connection, provisions have been introduced to supply protection to workers in a more thoughtful manner by means of Social Insurance for Employment (*Assicurazione Sociale per l'Impiego*, ASpI) – now regarded as the only form of income support in the event of loss of unemployment. The Social Insurance for Employment will be implemented in place of the unemployment benefits – granted to workers at the end of the employment contract, in cases of dismissal and special instances of resignation – and mobility allowances – income support provided to workers who have been made redundant or are registered as unemployed in special lists – previously supplied. Finally, the scope of application of traditional forms of income support measures has been widened, with the sole exception of those allocated to workers in the agricultural sector who are enrolled in special registers.

In the event of total and involuntary unemployment, income support measures are envisioned through the Social Insurance for Employment starting from 1 January 2013 to all those eligible after that date. The eligibility criteria are similar to those laid down to access the unemployment benefits currently in place. Most notably, only workers who lose their occupation are entitled to these benefits, with inactive people or those who want to re-enter the labour market following a period of inactivity excluded from them.

This aspect is noteworthy as it shows that this set of safety-net measures is not universal in scope, pointing out that long-overdue equality in the provision of welfare is not yet ensured.

The system will be fully implemented starting from 2016, subsequent to a round of consultation between the Government and the social partners to assess its sustainability in relation to public expenditure and the transition period between the old and the new system. From 1 January 2014 and throughout the transitional phase, unemployment benefits will gradually

increase in duration, whereas redundancy schemes will decrease until their depletion, yet not later than 31 December 2016. In order to fund the Social Insurance for Employment, the reform imposes an obligation upon the employer to pay a certain amount of money in cases of termination of the employment relationship other than resignation (Article 2, par. 31 of Law No. 92/2012). Payment to the fund in the event of the foregoing conditions will take effect from 1 January 2013 and the sum is arrived at by calculating 50% of the monthly unemployment benefits for each 12 months' seniority over the last three years.

Besides the Social Insurance for Employment, the reform also introduces another type of unemployment benefit, addressing those workers who meet only some of the social security requirements to fully enjoy these forms of income support, which is known as partial unemployment benefits (*Mini ASpl*).

Similarly to the redundancy schemes previously in place for this category of workers, in order to be entitled to partial unemployment benefits, workers must have paid social contributions amounting to only 13 weeks (78 days) in the 12 months preceding redundancy. However, the difference lies in the fact one of the eligibility criteria – e.g. 2 years' seniority – has been removed, fulfilling the goal of further widening the number of prospective recipients of the employment safeguards. Partial unemployment benefits are supplied for a time frame amounting to half the number of weeks for which contributions have been paid in the last year, deduced by previous benefits, if any.

5.1. The Conditionality of the Unemployment Benefits

With a view to help jobless people to adequately re-enter the labour market – most notably those who are in receipt of unemployment benefits – the Legislator has long since laid down a number of conditions that need to be satisfied in order to gain or maintain the status of unemployed, and thus being granted unemployment entitlements. These conditions mainly concern the attitude of recipients of benefits in relation to active labour policies – taking part in interviews, training, active job-search – or their status at the time of accepting an offer of work. In reality, this system has never been implemented, nor have there been any reported cases in which unemployment benefits have been suspended or terminated.

An attempt to make this conditionality more effective is that of raising the eligibility requirements. In this sense, recipients of unemployment benefits lose such entitlement if they perform a working activity resulting in annual earnings that are higher than the individual minimum income excluded from taxation. In a similar vein, the duration of contracts in salaried employment causing the termination of the unemployment benefits has been reduced to 6 to 8 months. Furthermore, unemployment benefits might be terminated on the grounds of a refusal to respond to an offer of work, either open-ended or fixed-term and irrespective of the duration of the employment contract.

Along the same lines, with a view to encourage benefit recipients to actively seek work, help them to re-enter the labour market and make the conditions to supply income support more stringent, unemployment benefits – provided to both unemployed and inactive people – are terminated as a result of an unjustified refusal to take part in initiatives in the area of social policies or those promoted by relevant services. The same applies in cases of individuals occasionally taking part in such initiatives, or job-seekers who forgo job offers for which they are paid at least 20% of the gross amount of the benefit granted.

If still in employment, the provision of unemployment benefits is terminated in the event of a refusal to attend training or retraining courses or even to taking part in them on an irregular basis without a justified reason. In this sense, only working activities, training and retraining courses carried out within 50 Km of the individual's residence – or that can be reached in at most 80 minutes by means of public transport – pertain.

5.2. Lump Sum Benefits for Workers in Quasi-Salaried Employment

The government has committed to provide income support to workers in quasi-salaried employment (continuous and coordinated collaborators). This category of workers is regarded as distinct from autonomous workers – as they operate in absence of financial risks and without making use of site machinery and equipment – and salaried employees – for differences arising in terms of organisational autonomy, and no rights to exercise managerial and disciplinary power on the part of the user-company. This move is intended to supply forms of income protection to all economically dependent workers, irrespective of the degree of autonomy or subordination.

Indeed, the Legislator of 2008 moved along the same lines – although on an experimental basis – envisioning a lump-sum allowance for workers on quasi-salaried employment who operate for one client in the event of a shortage of work.

The reform programme is intended to safeguard this category of workers as they do not fall within the scope of application of Social Insurance for Employment, which only addresses salaried employees. Accordingly, starting from 2013, a lump-sum allowance will be granted to workers on quasi-salaried employment who have only operated for one employer in the previous year, provided that they pay contributions to the National Social Insurance Fund on an exclusive basis and in accordance to a special scheme (*Gestione Separata*).

In order to be eligible, workers on quasi-salaried employment contracts must meet certain conditions in terms of income and contributions. The lump sum benefit amounts to 5% of the minimum taxable income paid for social security purposes, multiplied by the lowest remuneration received on a monthly basis in the previous year – at least four months' pay – and remuneration not subject to contributions. The lump sum allowance is granted in a single payment whereas lower than 1,000 Euros, or in monthly rates amounting to 1000 Euros or less if lower than 1,000 Euros.

6. A Preliminary Assessment of the Reform. The Omnipotence of the Law, the Demise of Concertation, and the Debased Role of Collective Bargaining

Reviewing the legal framework of the employment relationship has never been an easy task, in Italy more so than elsewhere. This is exhibited by the wave of terrorist attacks against drafters and practitioners who have engaged in the reform of labour law in our country. Accordingly, the efforts of those who undertake this task which is as complex as crucial for the Italian labour market should be acknowledged. All the more so as this is done in an awareness of the delicacy of the matter and the political, economic, and social implications that entail. Indeed, innovative and forward-looking ideas have never been lacking in Italy. As recalled by Prof Marco Biagi ten years ago – the last victim of terroristic attacks linked to labour issues – there is a need to move beyond ideological blinkers and social tensions that prevent the devising of reforms necessary to keep up with the changes currently underway. His teachings are still relevant today, and the passing of Law No. 92 of 2012 on the part of the Monti's

Government demonstrates for the first time that it is possible to overcome legal constraints and limitations that for long have penalized Italy in the international and comparative context. On close examination, this is the most relevant aspect the Government and Elsa Fornero – the tenacious Minister of Labour – should be credited for this.

Nevertheless, the reform came under heavy criticism for a number of reasons, even prior to the amendments made by the Government and the Parliament approval. This might be ascribed also to the fact that Italy is lacking of an *ex ante* evaluation system that foresees the economic and social impact of newly-issued provisions. This state of affairs of course acts as a hindrance to the reform process and gives rise to a number of objections devoid of solid grounds.

Indubitably, the reform drafted by the technocrats currently in office does not appeal to labour lawyers nor to operators in the labour market. The few proponents of the reform programme are mainly experts in the field who perform a dual role – they are both academics and members of the Parliament – and contributed to issue and approve the reform. Employers' associations and trade unions are likewise discontent, albeit for opposite reasons. From where the employers stand, the narrowing down in the use of atypical and fixed-term contracts is unacceptable, especially for small-sized enterprises which, unlike large and medium-sized companies, did not benefit from provisions concerning flexibility in dismissals¹⁵.

Trade unions for their part oppose the deregulation of provisions on dismissals for economic reasons in open-ended employment. The remedy of reinstatement in the event of unfair dismissal, (rightly or wrongly) perceived as peculiar to Italy within the international context, has been limited only to certain cases (see par. 3.4.3.). As for compensation, it has been extended also to large-sized enterprises, yet the relevant procedures remain unclear.

Trade unions leaders, yet this view is also shared by most academics, signal that the shift from property rule to liability rule with regard to dismissals will undermine the position of workers who, primarily during an economic crisis, will be forced to take jobs with low levels of protection and remuneration.

Academics also maintain that the reform is inadequate in technical terms and much groundwork is needed. Nevertheless, there is a need to avoid the tendency, which is peculiar to Italy, to reject any attempt to change a

¹⁵ Supra, note 7.

priori, that is without carefully entering into the merits of the proposals that are put forward. Arguing against the mechanics and the underlying principles of a proposal – as is the case of the Italian reform – is often done in support of ideologies and lines of thought arguing in favour of the relationship between capital and labour.

Indeed, the Treu and the Biagi Reforms¹⁶ have shown that substantial pieces of legislation can be appreciated only after a relatively long time frame, that is after an implementation period and an harmonisation process with the extant legal framework¹⁷. As a result, Mr Monti is absolutely right in telling the *Wall Street Journal* that the reform deserves “a serious analysis rather than snap judgments”¹⁸.

However, the lack of an adequate evaluation system in Italy that helps to predict the impact of the provisions put in place questions the unfaltering assertion made by the Italian Prime Minister and reported by the same newspaper, according to which the reform “will have a major and positive impact on the Italian economy”.

The major problem of the Italian labour market is not the (vast) amount of provisions enacted nor their technical content, but their full implementation and effectiveness.

Past experience clearly indicates that many legislative measures remain only on paper. This is the case of a number of proposals envisioned in the reform of the labour market of 2003 (the Biagi Reform), among others the national employment information service, the access-to-work contracts addressing women living in the South of Italy, the apprenticeship contracts providing an alternation between school and work and modelled after the German system, forms of cooperation between public and private operators, the accreditation system of employment agencies, the suspension of the unemployment benefit for those who refuse training or an adequate offer of work underpinning an innovative system of safety-net measures.

These institutions have gained momentum, or have been amended by the newly-issued reform, yet they are bound to remain unenforced without

¹⁶ See M. Tiraboschi, *The Italian Labour Market after the Biagi Reform*, *The International Journal of Comparative Labour Law and Industrial Relations*, 21, No. 2, 2005, 149-192.

¹⁷ In a similar vein, see M. Tiraboschi, *The Reform of the Italian Labor Market over the Past Ten Years: a Process of Liberalization?*, *Comparative Labor Law and Policy Journal*, 29 No. 4, 2008, 427-458.

¹⁸ M. Monti, *Italy's Labor Reforms Are Serious and Will Be Effective*, in *The Wall Street Journal*, April 7, 2012, A14. See also in Adapt International Bulletin, No. 14, 2012, in www.adaptbulletin.eu, (Last accessed 13 October 2012).

the involvement of social and political parties, operators of the labour market and actors of industrial relations.

Accordingly, if one considers the two principles underpinning the reform – higher flexibility in dismissals and lower flexibility in hiring – the amendments made to the contractual arrangements appear to be inappropriate (*supra* par. 2). Paradoxically, unfulfilled promises of stable employment and the limitations placed upon project and temporary work come to penalise not only compliant employers, but also precarious workers who are not offered stable occupations at the end of the 36-month period until which fixed-term contracts can be extended. This aspect contributes to raise the rate of undeclared work, which is another major problem of the Italian labour market which, in turn, might bring about a tightening up of the sanctioning system, as well as an increase in the cost of labour and bureaucracy. This state of play will jeopardise the successful effort made in the last twenty years with the Biagi and Treu Reforms to regulate jobs performed in the hidden economy, restoring the recourse to undeclared work, and encouraging precarious employment and processes of delocalisation.

Neither telling are the arguments put forward to modify Article 18 of the Workers' Statute (Law No. 300/1970), a cornerstone of Italian labour law. According to this provision, employers with less than 15 employees are under the obligation to reinstate workers who are found to be unfairly dismissed. The issue has attracted wide media coverage at both national and international level but produced a result that goes in the opposite direction to that expected by those who argued in favour of its repeal or a narrowing down of its scope of application. Once again, it would have been sufficient to refer to the teachings of Marco Biagi, who always argued for the need to resort to common sense in envisaging interventions that would not affect the modernisation of the labour market or jeopardize the dialogue between law-makers and social partners. He used to say "Why didn't I make reference to Article No. 18? The reason is quite simple. The White Paper made a passing reference to Article 18, but it was not regarded as a key aspect, even though it shows a bias towards its amendments. I think that re-instatement is no longer applicable. It is just a sort of symbol, a deterrent measure with no power of discouraging dismissals. Indeed, its deterrent nature lies in the fact that it promotes fraudulent practices. Worldwide, unfairly dismissed workers are entitled to compensation. This is done under civil law, pursuant to which the only way to deal with the damage suffered by workers is to grant them the payment of a compensation award – regardless of the amount and the waiting time. Notwithstanding its marginal role, one

might ask why we still discuss Article 18. Actually, I do not think that this topic should be discussed. We had better focus on some other, and far more relevant, issues”¹⁹. The struggle over Article 18 of the Workers’ Statute allowed the Government to repeatedly (and naively?) assert the effectiveness of the reform, on the assumption that, if the reform is criticized by everyone, it means that a balance has been stricken between different interests. This is the position of the Minister of Labour Elsa Fornero prior to the passing of the reform, while from the *Wall Street Journal* a rather confident Prime Minister Mario Monti maintained that “the fact that it has been attacked by both the main employers association and the metalworkers union, part of the leading trade union confederation, indicates that we have got the balance right”. In the author’s view, this is the heart of the problem. The idea that a reform is balanced because it makes everyone unhappy is paradoxical.

The assumption that changes to the existing legal framework are necessary to keep up with “new needs arising from a different context” – as reported in the report accompanying the legislative text – was not followed up with a careful reading of the new conditions, leading the reform to promote once again the same pattern of open-ended employment relationships which characterized Taylorism and Fordism over the last century²⁰.

The peripheral role allocated to the consultation process with social partners on the part of the Government led some to talk of the demise of concertation. However, there is more than meets the eye. Aside from the marginal role carried out by employers’ associations, and above all trade unions, in devising the reform, it is beyond dispute that mandatory provisions play a major role whereas limited room to manoeuvre is left to collective bargaining and social partners.

Accordingly, rather than the method of concertation, it is the principle of subsidiarity and the role of decentralized collective bargaining that are penalised the most, along with the trust placed in an autonomous model of industrial relations and a bilateral approach, so far the privileged channel for the regulation of the labour market.

¹⁹ M. Biagi, *Non fissiamoci sul 18*, intervention made to CNEL, November 2001, in *L’Espresso* del 18 April 2002, p 56.

²⁰ Some critical remarks on the central role of open-ended salaried employment in relation to the transposition of the 1999 Directive on fixed-term work, of a more general nature, can be found in M. Tiraboschi, *Glancing at the Past: an Agreement for the Markets of XXI Century*, *The International Journal of Comparative Labour Law and Industrial Relations*, 15, No. 2, 1999, 105-120.

The truth is that the Monti-Fornero Reform is not poorly made or technically inadequate, as maintained by some labour law scholars, but simply conceptually wrong because it draws on the assumption that it is possible to deal with diversified production and work processes by way of a single (or prevailing) and open-ended employment relationship, which for Mr. Monti himself no longer exists and is labelled as “boring”.

In practical terms, this will act as a hindrance to the recourse of quasi-salaried employment (coordinated and continuative work) or autonomous work. In addition, temporary work is limited to exceptional cases and to temporary needs, and incentives for access-to-work contracts for disadvantaged workers will be repealed. Further, the use of part-time work and other forms of employment relationships (including the use of the voucher system and on-call work) will also be limited, although over the years, they contributed to legalize undeclared work.

On reflection, however, the ongoing change of the economic context provides for a major overhaul of flexible, quasi-salaried, and temporary employment only on the condition that flexibility in dismissals is increased, and if accompanied by a review of the safety-net measures.

A half-way solution, as the one put forward in the reform would end up penalizing employers, but above all workers. Younger workers and those currently forced out of the labour market will bear the brunt of the reform and, accordingly, they will no longer be pushed towards precarious employment but rather towards illegal and undeclared work.

For the most part, workers feel more insecure and precarious than in the past. Employers believe that the regulatory framework is unsuitable to face the challenges posed by globalisation and new markets.

There is profound dissatisfaction with a very complex body of law, that does not provide workers with the necessary protection, hampering the dynamism of production processes and labour organization. Against this background, it would be foolish to push for a radical reform of the labour market that will probably just remain on paper.

Overindulging in reforms is certainly a lesser evil than partisanship and ideological blinkers that marked the last ten years in Italy, yet at the end of the day it is perhaps just as damaging and counterproductive. Today workers and businesses need a very simple regulatory framework, with effective rather than formal rules, to be complied with by everyone as contributing to foster mutual trust and active collaboration at the workplaces. A competitive economy must rely on highly-motivated workers that give their best, invest in their skills and adaptability, rather than on a overly-rigid protection system. This is what stability of

employment really means, a kind of stability based on mutual advantage rather than on norms that are statutorily imposed.

The fact that the reform of the labour market leaves everyone unsatisfied should not be regarded as a positive feedback, rather as a serious weakness of a provision imposed by the Government which reduces the role of the social partners and moves away from an autonomous system of industrial relations to regulate employment relationships at all levels.

The attempt to strike a balance between flexibility and security caused this reform to be incomplete, a half-way reform that oscillates between a dangerous past and a future that is still to be planned.

The risk that “growth” would only be a word in the title of the legislative text is thus far from being unlikely.

Vulnerable Workers, Precarious Work and Justifications for Labour Law: a Comparative Study

Lisa Rodgers *

1. Introduction

Traditionally, justification for labour law centres on either (economic) efficiency or social justice arguments. Labour law based on economic efficiency attempts to address market failures, to tackle the problems of the governance of the contract of employment and to create a “well co-ordinated flexible division of labour”¹. Intervention here tends to promote “good faith” dealing between the employer and the employee and, more lately, to encourage investment in innovation and skills. By contrast, labour law based on social justice arguments aims towards a fairer distribution of wealth, power or other goods in society². As a rule, social justice arguments have been associated with the promotion of collective bargaining to boost labour power, or the imposition of basic labour standards. More recently, there has been a focus on the notion of work quality: that through work, workers should be able to gain the satisfaction of their wants and needs (so far as these are not outweighed by the wants of others). This is a development of the idea that labour is more than (or is not) a “commodity” that can be bought and sold on the labour market;

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¹ H. Collins, *Theories of Rights as Justifications for Labour Law*, in G. Davidov, B. Langille (eds.), *The Idea of Labour Law*, Oxford University Press, Oxford, 2011, 137.

² H. Collins *op. cit.*, 137.

social justice demands that each person should be able to gain a sense of dignity and personal well-being through work³.

To these two justificatory elements must now be added arguments based on human rights. Here it is argued that labour rights are “fundamental rights” and that they therefore should have a “trumping” effect over other efficiency or welfare considerations⁴. These kinds of arguments have been made in particular in relation to anti-discrimination rights on the basis that they are analogous to “civil” and “political” rights, which tend to have high standing in the human rights regime⁵. They are more problematic in relation to labour rights which look more like “social rights” (the right to work or the right to just and favourable conditions at work for example). Social rights have a much lower status in human rights theory, and some authors argue that these rights are not “human” rights at all⁶. Problems arise over how to reconcile the redistributive role of the state required by the demands of social rights with the liberal foundations of human rights theory, and also where social rights stand in terms of the law⁷. However, the case is increasingly being made that the position of labour rights as “social rights” should be improved, on the basis that social rights share the same foundations as human rights and/or that the hierarchy between civil and political and economic and social rights is artificial and cannot be sustained⁸.

There are certainly complementarities between these three approaches to labour law regulation and all three justificatory elements can be discerned in the academic literature and in political discussion concerning the regulation of workers at the “bottom of the labour market”⁹. To a certain extent, this is a reflection of the global hegemony of liberal democratic thinking: all justificatory elements must show compatibility with liberalism

³ Theories of social justice have an extremely long history and have been used in support of a wide range of different policies. A good discussion of the origins of the idea of social justice is presented in R. Pound, *Social Justice and Legal Justice*, *Central Law Journal* 75, 1912, 455-463.

⁴ R. Dworkin, *Taking Rights Seriously*, *New Impression with Reply to Critics*, G Duckworth and Co. Limited, 2009, 191.

⁵ A.C.L. Davies, *Perspectives on Labour Law*, Cambridge University Press, Cambridge, 2009, 42.

⁶ G. Letsas, *A Theory of the Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, 2007, 130.

⁷ J. Fudge, *The New Discourse of Labor Rights: from Social to Fundamental Rights?*, *Comparative Labour Law and Policy Journal*, 2007-2008, 29, 35.

⁸ C. Gearty, V. Mantouvalou, *Debating Social Rights*, Hart Publishing, Oxford, 2011, 98.

⁹ J. Fudge, *Beyond Vulnerable Workers: towards a New Standard Employment Relationship*, in *Canadian Labour and Employment Law Journal* 12, 2005, 151-176.

in order to gain legitimacy. However, on closer scrutiny, there are contradictions which run through and between the three justificatory positions, meaning that in reality, human rights are poor mechanisms for achieving social justice, economic efficiency creates rather than reduces the inequalities which social justice tries to tackle, and finally, any expansive version of human rights (including social rights) presents a major challenge to efficiency arguments. As a result, there has necessarily developed a split between attempts to regulate for “precarious work” which concerns the demand side of the employment relationship and focuses on human rights and social justice in the context of economic efficiency, and regulation for “vulnerable workers” which focuses on workers’ characteristics and status and tends to start from the human rights position.

This is not to suggest that the approach towards precarious work as opposed to vulnerable workers is always consistent either in theory or in practice. Theoretically, the terms “vulnerable” and “precarious” have been used interchangeably. Theory on precarious work has considered the vulnerability of the workers involved, and the consideration of vulnerable workers has made recourse to the difficult economic conditions in which these workers find themselves¹⁰. Theoretical inconsistency is inevitable given the inherent contradictions in the justificatory approaches. There is also the problem that none of the different justifications mentioned above represent a perfect fit for labour law, and can be used in order to dismantle as well as to enhance specific rules relating to employment. Furthermore, different approaches have been taken at different geographical levels. Although “vulnerable workers” have been mentioned in specific national contexts (the UK and Canada being prominent examples), the term “vulnerable workers” has not been used at EU level (the focus here has been on precarious work). At international level, there is a concern both with vulnerable workers and with precarious work, most consistently expressed through the concept of “decent work”. This inconsistency in practice only serves to reinforce the theoretical inconsistencies and uncertainties identified above.

¹⁰ In particular the work of G. Rodgers straddles a consideration of both precarious work and vulnerable workers by looking not only at employment forms, but also the “dimensions of precariousness” which expose any worker to employment instability. G. Rodgers, *Precarious Work in Western Europe: the State of the Debate* in G. Rodgers, J. Rodgers (eds.), *Precarious Jobs in Labour Market Regulation: the Growth of Atypical Employment in Western Europe*, Geneva, ILO, 1989, 3.

The aim of this article then, is not to argue that the regulation of the labour market on the basis of “vulnerable workers” and “precarious work” represents a consistent and final solution. Rather, it is to identify that this separation makes some sense in theoretical terms, but that each concept has its own flaws and reveals weaknesses in each of the different theoretical justifications, particularly in their application to labour law. It reveals that neither of these concepts has truly transformative power, because both are wedded to the global hegemony of liberalism, but nevertheless represent an interesting moment in the theorisation and justification for labour law.

2. Precarious Work

2.1. *Economic Foundation*

In both the academic and political literature concerning precarious work, the starting point appears to be economic change brought about by “globalisation”. The argument is that the process of globalisation has led to the disintegration of the old industrial model of employment based on the “standard employment relationship” (full time year-round employment for a single employer)¹¹. This standard employment relationship along with a number of other key institutions – the “vertically integrated enterprise, the industrial union, the male breadwinner family and the state and employer as provider of services”¹² – provided a basis for a coherent set of social policies which “incorporated a degree of regularity and durability in employment relationships, protected workers from socially unacceptable practices and working conditions, established rights and obligations, and provided a core of social stability and economic growth” in the West around the middle of the last century¹³. However, these institutions have been undermined by economic processes associated with globalisation. The manufacturing sector in developed industrial economies has declined, and the “vertically integrated enterprise” has given way to the decentralisation of production and vertical disintegration. At the same time, the rise of information

¹¹ J. Fudge, *op. cit.*, 169.

¹² S. Deakin, *Renewing Labour Market Institutions*, International Labour Office, Geneva, 2004, 1-2.

¹³ G. Rodgers, *op. cit.*, 1.

technologies has given birth to a new “knowledge” economy which emphasises flexibility in the labour market and new employment norms¹⁴. On the one hand, this flexibility has been presented as a new basis for economic efficiency and social compromise¹⁵. It is argued that flexibility delivers benefits for employers because they are able to “adapt their workforce to changes in economic conditions, and are able to “recruit staff with a better skills match, who will be more productive and adaptable leading to greater innovation and competitiveness”¹⁶. At the same time, employees benefit from the ability to better manage their work-life balance and to move easily from one job to another¹⁷. On the other hand, it has been argued that “flexibility”, in certain forms, can be damaging to employees. A distinction is made here between functional flexibility, which allows employers to require employees to change their skills to match changes in technology or workload and “numerical” flexibility which involves “adjusting labour inputs to meet fluctuations in employers needs”¹⁸. The latter type of flexibility is associated with the use of part-time, temporary, and agency workers and also altering the working-time patterns of shift or full time workers, or contracting out¹⁹. It has been suggested that it is this numerical flexibility which leads to precarious work, which is “characterised by low pay, low status, and little by way of job security, training, or promotion prospects”²⁰.

The challenge presented by precarious work therefore, is how to provide support to those workers displaced by the economic forces of globalisation, whilst still maintaining economic efficiency and growth. Three main ways of achieving this balance have been suggested in the (academic and political) literature. The first is to bring “precarious work” within the scope of traditional labour law rights. This involves either a reaffirmation of “core” rights which should apply to all labour contracts (which has been evident at ILO level) and/or an expansion of labour law

¹⁴ J. Fudge, *op. cit.*, 169.

¹⁵ H. Collins, *Regulating the Employment Relation for Competitiveness*, in *Industrial Law Journal* 30, No. 1, 2001, 17-32.

¹⁶ European Commission, *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security*, Office for the Official Publications of the European Communities, Luxembourg, 2007, 4.

¹⁷ European Commission, *op. cit.*, 4.

¹⁸ S. Fredman, *Precarious Norms for Precarious Workers*, in J. Fudge and R Owens, (eds.), *Precarious Work, Women and the New Economy: the Challenge to Legal Norms*, Hart, Oxford, 2006, 177.

¹⁹ *Ibid.*, 177.

²⁰ *Ibid.*, 177.

concepts in order to include work traditionally outside its scope. The second is to create new rights covering work which is viewed as precarious. This has been the position adopted in the EU, with the creation of the Directives on part-time²¹, fixed term²² and temporary work²³. The third category, which is aspirational rather than factual, suggests tying labour law more closely to economic processes to achieve “regulation for competitiveness”. The idea here is that companies are given incentives to reduce precarious work by investment in training and skills and other “supply-side” features of the employment relationship. This tends to follow the new institutional economic perspective, that “smart” regulation can achieve the most efficient economic outcomes²⁴.

In this section, the focus will be on the first two of these positions. The EU’s position will be presented first, as it is the most distinct and contained of the three categories in dealing with “precarious work”. It demonstrates quite clearly a number of issues arising from the attempt to wed economic efficiency and human rights approaches, and also makes reference to social justice by the inclusion of “quality” elements into its legislative provisions. The ILO’s perspective will then be introduced, an approach which suggests that economic, human rights and social justice justifications can be used in concert to produce the best outcome for the elimination of precarious work. The third approach, which suggests that regulation should be tailored more closely to economic processes, will not be considered here. This is because the development of this approach has been in the direction of the designation of worker “capabilities” as the key to a well functioning economy. This fits most closely with the “social rights” positions adopted within the theorisations of vulnerable workers rather than precarious work. These positions are considered later in this article.

²¹ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time work concluded by UNICE, CEEP and the ETUC, OJ [1999] L14/9.

²² Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on Fixed-term work concluded by ETUC, UNICE and CEEP, OJ [1999] L 175/43.

²³ Directive 2008/14/EC of the European Parliament and the Council of 19 November 2008 on temporary agency work OJ [2008] L327/9.

²⁴ A. C. L. Davies, *op. cit.*, 29.

2.2. *Precarious Work in the EU*

Arguably, the idea that economic efficiency and “rights” are mutually reinforcing and can be developed together is central to the ethos of the EU. Article 2 of the EU Treaty states that the Union is founded on the “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”, whilst Article 3 expresses the commitment of the EU to a “highly competitive social market economy” arising from “balanced economic growth and price stability”. In the context of labour law, the combination of economic efficiency and “rights” initially proceeded on the basis that regulation for (sex) equality would promote economic integration by creating a level playing field for actors and prevent unfair business competition²⁵. This integrationist logic is clearly stated in the early equality Directives: the primary objectives of both Directives 75/117 on equal pay²⁶ and Directive 76/207 on equal treatment²⁷ were stated as the “harmonization of living and working conditions while maintaining their improvement”²⁸. Arguably, there has now been a shift away from this integrationist logic and towards the idea that it is in the “balance” between worker protection and economic freedom that lies the most efficient functioning of the EU (i.e. worker protection is valuable in its own right)²⁹. But there remains a belief in the mutually reinforcing nature of economic efficiency and rights.

The atypical work Directives³⁰ are a good example of this attempt to marry economic efficiency and rights. On the one hand, the Directives are designed to further the principles of “flexicurity”, a major element of EU employment policy which attempts to combine “flexibility” for businesses with “security” for workers³¹. The flexibility element of this concept

²⁵ M. Bell, *Between flexicurity and fundamental social rights: the EU Directives on atypical work*, *European Law Review*, 37 No. 1, 2012, 31-48.

²⁶ OJ [1975] L45/19.

²⁷ OJ [1976] L39/40.

²⁸ This quotation appears in the Preamble to Directive 76/207 on equal treatment. The wording in the Preamble to Directive 75/117 on equal pay is slightly different but of the same effect: the Directive is “aimed at making it possible to harmonize living and working conditions while the improvement is being made”. For further information see L. Rodgers, *Labour Law and the Public Interest: Discrimination and Beyond*, *European Labour Law Journal*, 2, No. 4, 2011, 302-322.

²⁹ M. Bell, *op. cit.*, 31.

³⁰ The Part-time Work Directive, the Fixed-Term Work Directive and the Temporary Agency Work Directive: see footnotes 21-23.

³¹ European Commission, *op. cit.*, 5.

speaks directly to the furtherance of economic efficiency. The idea is that the promotion of the flexible organisation of work in the EU (by the encouragement of atypical work) increases competitiveness by allowing businesses to respond to the pressures brought by the globalisation of production. At the same time, workers benefit from “new” kinds of “security” which are compatible with and enhance this kind of flexibility. The notion of “job” security (ability to stay in one job) is abandoned and replaced with the notion of “employment” security (the “protection” of workers from the difficulties of job transitions that flow from a flexible economy)³². This “employment security” is achieved through providing workers with the training they need to keep their skills up to date, and providing them with adequate unemployment benefits for periods of unemployment. The result is a win-win situation in which both workers and businesses can take the benefits flowing from a well functioning global and flexible economy³³.

In fact, the effectiveness of “flexicurity” as a means to enhance worker protection has been brought into question, as it has tended to be used as a tool to further economic efficiency at the expense of worker rights³⁴. Of course, the atypical work Directives include specific rights (the right to equal treatment) which should provide a boost to worker protection and neutralise some of the negative effects of the flexicurity agenda. The extent of this “boost” however, depends on the status that these “rights” have in the EU legal order. On the one hand, these rights can be seen as simply improving the weight of the security elements in the balance between flexibility for businesses and security for workers. On the other hand, if the right to equal treatment in the atypical work Directives achieves “human rights” status (as a fundamental social right which is at the same standing as other human rights) then this implies that these rights have a “trumping” effect over other efficiency considerations. On this basis, the question is not one of balance between competing interests, but of the absolute status of equal treatment as a fundamental right³⁵.

There is also the question of the aim of the atypical work Directives to increase the “quality” of atypical work. All three of the atypical work Directives cite improving the quality of atypical work as an aim alongside the principle of non-discrimination. The Fixed-Term Work Directive

³² European Commission, *op. cit.*, 6.

³³ European Commission, *op. cit.*, 38.

³⁴ R Huiskamp, K. J. Vos, *Flexibilization, Modernization and the Lisbon Strategy*, *International Journal of Comparative Labour Law and Industrial Relations*, 23, No. 4, 2007, 587- 599, 593.

³⁵ M. Bell, *op. cit.*, 32.

(FTWD) sees the application of the principle of non-discrimination as the major way to achieve this aim, as well as establishing a framework for the prevention of abuse arising from the use of successive fixed-term contracts³⁶. The Part-Time Work Directive (PTWD) also cites quality alongside the non-discrimination aim³⁷, whilst the Temporary Agency Work Directive (TAWD) sees the quality of this kind of precarious work as improved not only through the principle of non discrimination but also “by recognising temporary work agencies as employers”, and hence allowing these workers to fall within domestic definitions of “employees” or “workers” and qualify for wider employment rights³⁸. As has been mentioned, the promotion of work quality can be seen as an attempt to further social justice; the introduction of the requirement that work quality should proceed alongside the promotion of atypical work contracts, can be seen as an attempt to ensure a fair social distribution of costs and benefits amongst workers. The question is whether this social justice aim is compatible with the other stated (and arguably dominant) aims of the Directives, namely to ensure the protection of anti-discrimination rights for atypical workers, as well as maintaining economic efficiency and growth for the countries of the European Union.

How far the principle of non discrimination can improve work quality will depend on the strength of the *application* of this principle. The weak application of this principle implies that anti-discrimination provisions are subject to wide derogation, resulting from a wide margin of appreciation granted to member states in the application of flexicurity principles (employment policy being deemed outside EU competence and a matter for member states). This inevitably means that (economic) efficiency arguments tend to defeat the anti-discrimination provisions, putting work quality at risk. By contrast, the “strong” application of these rights will mean that they have a “trumping” effect over other efficiency considerations and will therefore be able to have a greater role in maintaining work quality. Furthermore, it is worth noting that in terms of the relationship between economic efficiency and social justice (work quality), economic and social justice do not necessarily proceed hand in hand³⁹. In fact, economic efficiency as represented by the principles of flexicurity, is potentially detrimental to work quality. This is because, as an

³⁶ Clause 1 FTWD.

³⁷ Clause 1 PTWD.

³⁸ Art. 2 TAWD.

³⁹ G. Rodgers, E. Lee, L. Swepston, J. van Daele, *The ILO and the Quest for Social Justice 1919-2009*, International Labour Office, Geneva, 2009, 95.

element of EU employment policy, job creation tends to be promoted at the expense of job quality, meaning that recourse to atypical work can equate with more “bad” jobs⁴⁰.

An investigation of the case law at EU level gives some insight into how these conflicts are currently resolved. A number of different positions have been presented. The weak application of the non-discrimination provisions is evidenced by the case of *Mangold v Helm*⁴¹. In this case, the Claimant challenged a German law⁴² which provided that the rules requiring “objective justification” for the conclusion of fixed-term contracts did not apply if, when starting the fixed-term work the employee had reached a certain age (52 for the purposes of the case), unless there was a close connection between that contract and a previous permanent contract with the same employer⁴³. The Claimant argued that the reduction in protection resulting from these provisions breached the non-regression clause (Clause 8 (3) FTWD) which provides that the FTWD “shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of the agreement”. The Court of Justice came to the bizarre conclusion that although the German law did constitute a reduction in protection for a group of workers, it was not contrary to the non-regression clause because the law was not connected to the “implementation” of the FTWD. Rather, the German government had decided “autonomously to reduce the protection in this area afforded to older workers” even before the implementation of the Directive⁴⁴. Furthermore, this reduction in protection was on the basis of the need to encourage the employment of older workers, which was a valid aim outside the scope of the FTWD because it was an element of employment policy (and so could override the anti-discrimination provisions)⁴⁵.

On the other hand, there is evidence that the Court of Justice has restricted the margin of appreciation granted to member states, on the basis that the EU should promote “strong” anti-discrimination rights. In *Del Cerro Alonso*⁴⁶ the Court stated that as the FTWD concerned non-discrimination, then as a “principle of Community social law” the

⁴⁰ European Parliament, *Report on Common Principles of Flexicurity*, 2007/2209(INI), 6.

⁴¹ [2006] 1 CMLR 43.

⁴² Par. 14 (3) Gesetz über Teilzeitarbeit und befristete Arbeitsverträge und zur Änderung und Aufhebung arbeitsrechtlicher Bestimmungen December 2000 (as amended).

⁴³ Initially this age was set at 58 but was later amended to 52, thereby bringing the Claimant, who was 56 within its scope.

⁴⁴ *Mangold*, *op. cit.*, [2006] 1 CMLR 43 par. AG76.

⁴⁵ *Ibid.*, par. 53.

⁴⁶ C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 54.

derogations had to be interpreted restrictively (and the discrimination provision given wide scope). Indeed, the test that the court used, first stated in the case of *Adeneler*⁴⁷, was that applied in indirect discrimination cases: namely that the objective reasons used (by member states) to derogate from anti-discrimination provisions must respond to a genuine need, be appropriate for pursuing the objective pursued and necessary for achieving that purpose⁴⁸. Furthermore, those objective reasons must refer to precise and concrete circumstances, and be capable in a particular context of justifying recourse to successive fixed-term contracts. They must not be general and abstract provisions⁴⁹. In *Del Cerro Alonso*, this was interpreted to mean that the Spanish government could not rely on a statute which restricted a set of “length-of-service allowances” to permanent staff. This was a “general and abstract” provision which could not justify the difference in treatment in this case.

This “strong” approach to the anti-discrimination provision of the atypical work Directives was also adopted in *Bruno and Pettini*⁵⁰ where the Court found that this provision was “simply a specific expression of one of the fundamental principles of EU law, namely the general principle of equality”⁵¹. Moreover, in the case of *Bruno and Pettini*, the Court of Justice found that not only were the anti-discrimination provisions of the atypical work Directives fundamental, the quality objectives of the atypical work Directives were also “fundamental” because they concerned the “improvement in living and working conditions” and “proper social protection” for workers⁵². Indeed, not only were the provisions on anti-discrimination and work quality (social justice) given similar weight, they were also presented as mutually reinforcing and the one necessary for the achievement of the other. Specifically, the Court found that Italian statutory rules that qualification for pension rights depended on length of service constituted both discriminatory practice and also created obstacles to part-time work, because the rules made part-time work less attractive. The arguments of the Italian government, that part-time workers and full-time workers were not in comparative situations in relation to pensions,

⁴⁷ C-212/04 *Adeneler v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057.

⁴⁸ C-307/05 *Del Cerro Alonso v Osakidetza-Servicio Vasco De Salud* [2007] 3 CMLR, 55.

⁴⁹ *Ibid.*, 54.

⁵⁰ Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Mattencchi* [2010] 3 CMLR, 45.

⁵¹ *Ibid.*, 58.

⁵² *Ibid.*, 30.

and the difference in treatment could be objectively justified were given short shrift by the Court⁵³.

At EU level therefore, the Court of Justice has found ways of presenting human rights and social justice (in terms of work quality) as essentially compatible. However, there are a number of points to make at this juncture. Firstly of all, the decision in *Bruno and Pettini* could be limited quite easily to its facts, given the wide margin of appreciation usually granted to member states. It seems a step too far to suggest that relating human rights and social justice in this way is the “new” position of the Court of Justice. Secondly, the mutually reinforcing nature of human rights and social justice relies on a very narrow reading of the latter’s scope, and there are a number of ways in which these two elements could conflict. The relationship is not too controversial when social justice is related to civil rights (such as anti-discrimination). The difficulty is maintaining this relationship when other areas of work quality are considered which go beyond civil rights and inch into the realm of “social rights” (the right to work, the right to minimum income and so forth). Some commentators argue that to extend human rights theory and practice in this way disrupts the whole human rights regime⁵⁴. Thirdly, the presentation of human rights and social justice as mutually reinforcing can be seen merely as a political tool which serves to take power away from the most at risk in society. It operates by creating a narrative which because it is essentially “legal” is beyond reproach, but which misunderstands the need for those most at risk to build social justice themselves (through collective action for example)⁵⁵.

Finally, it is worth noting that the compatibility of human rights and social justice relies on a particular reading of economic efficiency and flexicurity which may not necessarily be reproduced. Essentially encouraging atypical work and quality work can be seen as compatible with flexicurity, in so far as a reduction in the quality of atypical work would hinder employment security and therefore make it less easy for workers to move in and out of those jobs. On the other hand, such an interpretation of the atypical work Directives could be seen as hindering the processes of flexicurity by privileging security over flexibility. A commitment to quality jobs necessarily involves investment in jobs (at the bottom end of the market)

⁵³ Cases C-395/08 and C396/08 *INPS v Bruno and Pettini*, *INPS v Lotti and Matteucci* [2010] 3 CMLR, par. 71.

⁵⁴ Letsas, *op. cit.*, 130.

⁵⁵ A. C. Hutchinson, P. J. Monahan, *Law, Politics and the Critical Legal Scholars: the Unfolding Drama of American Legal Thought*, *Stanford Law Review*, 36, 1984, 199-246, 209.

which may not meet the expectations of employers, or allow them to respond adequately to changing business needs or conditions.

2.3. *The ILO and Precarious Work*

The notion of social justice lies at the very heart of the ILO Constitution. The Preamble to the Constitution states that many labour conditions involve “such injustice, hardship and privation” that social justice (and lasting peace) will only be achieved if there is an improvement in global labour conditions⁵⁶. According to the original text of the Constitution, the achievement of this social justice must be based on the “guiding principle” that “labour should not be regarded merely as a commodity or article of commerce”⁵⁷. This is a reference to the Marxian notion that, under capitalism, labour becomes a commodity. However, it is the conviction of the ILO that this connection is not inevitable and that “all forms of work can, if they are adequately regulated and organized, be a source of personal well being and social integration”⁵⁸. Thus there is no inherent contradiction between economic efficiency and work quality; social justice and globalisation processes are essentially compatible. Increasingly, human rights at work are also being promoted as essential to the achievement of social justice (and not incompatible with economic efficiency). This is evident in the Decent Work agenda (the ILO’s major work on how to tackle precarious work) and in the attempts to restate the guiding principles of the ILO in the modern era⁵⁹.

Prior to the Decent Work agenda, the ILO did attempt to address the issue of precarious work in a similar way to the EU: by the introduction of specific standards relating to atypical work. In 1994, the ILO introduced the Part Time Work Convention⁶⁰ followed by the Convention on Home Work⁶¹ and the Private Employment Agencies Convention in 1997⁶². However, the ILO’s Constituents disagreed on the value of these

⁵⁶ The text of the ILO Constitution is available at www.ilo.org (Last accessed 13 July 2012).

⁵⁷ Art. 427 Treaty of Versailles. Part XIII of the Treaty of Versailles was the original location of the Constitution and is available at www.ilo.org (Last accessed 13 July 2012).

⁵⁸ G. Rodgers, *op. cit.*, note 39, 7.

⁵⁹ F. Maupain, *New foundation or new facade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalisation*, in *European Journal of International Law*, 20, No. 3, 2009, 823-852.

⁶⁰ Convention 175, June 24, 1994.

⁶¹ Convention 177, June 20, 1996.

⁶² Convention 181, June 19, 1997.

Conventions. Whilst they were largely well received by worker groups and some governments, they were considered a restraint on economic efficiency, growth and employment creation by many other government and employer organisations. By 2008, the Part Time Work Convention had received only 11 ratifications, and the Convention on Home Work just 5. The Private Employment Agencies Convention was also poorly ratified⁶³. As a result, these concerns have been incorporated and subsumed within the broader Decent Work agenda, for which there is much wider political consensus and agreement.

The starting point of the Decent Work agenda, introduced at the turn of the century, was the need to respond to the “transformation of the economic and social environment brought about by the global economy”⁶⁴. There was a concern that the social dimension of globalisation should be given particular attention, and that there should be a “human face” to the global economy⁶⁵. In promoting “decent work”, the ILO stated that globalisation should not just mean the creation of jobs, but “the creation of jobs of acceptable quality”⁶⁶. In this context, the form of work was important (work should not be precarious), conditions of work should be improved and workers should be able to gain “feelings of value and satisfaction” from work⁶⁷. This is not to say that security should be promoted above economic efficiency, but rather that the two should proceed in tandem: “The need today is to devise social and economic systems which ensure basic security and employment whilst remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market”⁶⁸.

The human rights element of the Decent work agenda was to be delivered by the ILO *Declaration on Fundamental Principles and Rights at Work*⁶⁹ (the “Declaration”). This Declaration introduced a set of Core Labour Standards, consisting of freedom of association, freedom from forced labour, freedom from child labour and non-discrimination in

⁶³ ILO, *Decent Work*, Report of the Director General, International Labour Conference, 87th session, Geneva, 1999. Available at www.ilo.org (Last accessed 10 July 2012), 4.

⁶⁴ *Ibid.*, 4.

⁶⁵ ILO, *op. cit.*, 5.

⁶⁶ *Ibid.*, 7.

⁶⁷ *Ibid.*, 7.

⁶⁸ *Ibid.*, 7.

⁶⁹ ILO, *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up*. International Labour Office, Geneva, 1998.

employment⁷⁰. The idea was that concentration on a “small and eminently manageable set of standards” would elevate the status of these rights and create a new impetus and focus for the ILO, whilst the procedural nature of these standards would maintain the ILO’s commitment to worker empowerment and social justice (the “*de facto* privileging of the right to freedom of association”)⁷¹. It was hoped that the association of these standards with human rights norms would help to establish them as “fundamental international norms” which would promote both the ILO and worker protection worldwide. At the same time, the Core Labour Standards were not “rights” which meant that they could be introduced outside of the ILO’s traditional supervisory machinery. This meant that they were “much more palatable to many governments and many employers in a world of ever increasing capital mobility”⁷².

In fact, the Core Labour Standards have been criticised on the basis that they weaken the idea of (all) labour rights as human rights. First of all, the Declaration selects only civil and political labour rights, and excludes social and economic rights from consideration. This is compatible with (liberal) human rights discourse, but does not present the fairest outcome for workers⁷³. It is also unfaithful to the commitment to social justice in the ILO constitution which contains reference to a whole range of social and economic rights⁷⁴, and it suggests that job quality is fulfilled if human rights abuses are avoided, as “bad jobs” are only those which include some element of forced labour, child labour etc⁷⁵. This demonstrates a very restrictive view of social justice for workers. Secondly, it has been argued that the Declaration takes value away from other elements of the Decent Work agenda.⁷⁶ In terms of other work rights, it is argued that

⁷⁰ P. Alston, *Core Labour Standards and the Transformation of the International Labour Rights Regime*, in *European Journal of International Law*, 15, No. 3, 2004, 457-521, 458.

⁷¹ *Ibid.*, 460.

⁷² Alston, *op. cit.*, 458.

⁷³ *Ibid.*, 460.

⁷⁴ The Preamble to the Constitution states that social justice requires “the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, 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, the organisation of vocational and technical education and other measures”.

⁷⁵ L. Vosko, *Decent Work: the Shifting Role of the ILO and the Struggle for Global Social Justice*, in *Global Social Policy*, 2002, 2 No. 1, 19-46, 30.

⁷⁶ P. Alston, *op. cit.*, 489.

they “were inevitably relegated to second-class status”, and also that the other aims of the Decent Work agenda were watered down (for example those regarding social protection and social dialogue)⁷⁷. This concern is reflected in the provisions of the recent “Declaration on Social Justice for a Fair Globalisation” produced by the ILO⁷⁸. This 2008 Declaration applies a mechanism of cyclical reviews of worker rights outside the “fundamental” rights with the aim of reassuring the international community of the ILO’s commitment to those rights beyond the Core Labour Standards⁷⁹.

In one sense the question which arises from the renewed commitment in the 2008 Declaration to all work rights in the name of social justice, is how that promotion aligns itself to the promotion of economic efficiency (as well as human rights). It is possible to argue that social justice and economic efficiency go hand in hand and that “the very sustainability and survival of the global economy may be imperilled [...] if the ILO perspective in globalisation is not promoted”⁸⁰. However, there are many conflicts between economic efficiency and a concept of social justice which goes beyond the promotion of the very basic “unfreedoms”. From experience, it is clear that improvements in productivity do not necessarily lead to improvements in work quality; economic pressures can serve to create and drive down the quality of (atypical) work. Furthermore, the decline in the extent of trade union coverage and the power of trade unions has often stemmed from economic arguments about promoting efficiency⁸¹.

3. Vulnerable Workers

3.1. Personal Starting Points

The first starting point as far as the literature on vulnerable workers is concerned, is that not all non-standard workers are vulnerable. This is

⁷⁷ *Ibid.*, 488.

⁷⁸ ILO, *Declaration on Social Justice for a Fair Globalisation*, available at www.ilo.org (Last accessed 10 July 2012).

⁷⁹ F. Maupain, *op. cit.*, 842.

⁸⁰ F. Maupain, *op. cit.*, 833.

⁸¹ A. Pollert, *The Unorganised Worker: the Decline in Collectivism and New Hurdles to Individual Employment Rights*, in *Industrial Law Journal*, 34, No. 3, 2005, 217-238, 142.

perhaps best demonstrated by the worker profiles of those engaged in agency work. On the one hand, agency workers may be engaged in poorly paid, low skilled jobs associated with strategies of cost-saving and numerical flexibility. On the other hand, certain workers are able to exploit non-standard work practices for their own benefit. These “gold-collar” workers are able to attract high salaries for their specialist skills and could not be considered vulnerable given their labour market power⁸². The point is that the experience of each worker is individual; the focus is on the vulnerable *worker* rather than precarious work. The second point to make about the focus on vulnerable workers, is that the personal characteristics of those workers become particularly important. At international level, the ILO identifies a number of categories of vulnerable workers: women, older workers and disabled workers⁸³. In the same way, national studies point to the concentration of worker vulnerability amongst certain groups. For example, a Canadian study conducted in 2005 concluded that women, less-educated and young workers were more likely to be vulnerable than men, those that were highly educated or older workers⁸⁴. Finally, the focus on vulnerable workers tends to emphasise the extreme experience (or extremely bad experience) of certain actors in the labour market. This is evident in the UK’s policy on vulnerable workers which referred to the actions of employers as “abuse”⁸⁵, and the vilification of “rogue” employers in “dark corners” of the labour market⁸⁶. All of these features of vulnerable workers accord well with a human rights approach. The human rights approach is by necessity focused on individual circumstances rather than collective experience. Indeed, the individualised nature of the human rights approach is central to its legitimacy⁸⁷. The human rights approach is also distinctly compatible with the consideration of individual personal characteristics, and protection from discrimination based on certain characteristics is an established human right which has been recognised in the labour law context. This is

⁸² P. Leighton, M. Syrett, R. Hecker, P. Holland, *Out of the Shadows: Managing Self-employed, Agency and Outsourced Workers*, Butterworth-Heinemann, 2007, 19.

⁸³ ILO, *op. cit.*, 33.

⁸⁴ R. Chaykowski, *Non-standard Work and Economic Vulnerability*, Vulnerable Worker Series – No 3, CPRN, Ottawa, 2005, www.cprn.org (Last accessed 13 July 2012).

⁸⁵ DTI, *Protecting Vulnerable Workers, Supporting Good Employers*, March 2006, www.bis.gov.uk, 17 (Last accessed 16 July 2012).

⁸⁶ BERR, *Vulnerable Worker Enforcement Forum – Final Report and Government Conclusions*, August 2008, www.bis.gov.uk, 28 (Last accessed 18 July 2012).

⁸⁷ C. H. Wellman, *Liberalism, Communitarianism, and Group Rights*, *Law and Philosophy* 18, No. 1, 1999, 13-40, 13.

well demonstrated at EU level by the design and wording of Directive 2000/78/EC⁸⁸, which outlaws discrimination in employment on the grounds of religion or belief, disability, age and sexual orientation. The Preamble refers to such protection from discrimination as a “universal right” and cites the inclusion of protection from discrimination in a number of international human rights instruments⁸⁹. Moreover, the human rights approach is particularly useful when the extremes of worker treatment are being considered. This is because at these margins, the treatment of workers enters into the abuse of personhood or humanity, which is the classic area of human rights concern. An example of the enactment of human rights principles for extreme worker abuse is evident in cases at EU level concerning the “slavery” of domestic workers. Here, a number of cases have considered whether the treatment of domestic workers amounts to slavery or forced labour under Article 4 of the European Convention on Human Rights⁹⁰.

However, there are limitations to the human rights approach in the context of vulnerable workers. Perhaps the most severe of these limitations is that the human rights approach obscures any argument that labour market and regulatory failure may be systemic. Modern human rights are both a product of and implicated in the globalisation project, and cannot be separated from it⁹¹. It would therefore be theoretically inconsistent to challenge globalisation through recourse to human rights. However, as we have seen, globalisation has been a factor in contributing to increased earnings inequality and the *production* of vulnerable workers. It has also been associated with labour market deregulation with the result that “[T]he rising tide of economic prosperity has lifted only the few people who are fortunate enough to have found a safe berth in yachts”⁹². Furthermore, the human rights project is extremely sceptical of the value of collective action. Human rights are presented as individual rights, because this accords with the foundational liberal values of individual self-determination and justice⁹³. This conflicts with the traditional understanding of *social* justice in labour law, that the best way to

⁸⁸ OJ [2000] L 303/16.

⁸⁹ Directive 2000/78/EC, *op. cit.*, Preamble, par. 4.

⁹⁰ See *Siliadin v France* (73316/01) (2006) 43 EHRR 16 (ECHR); *R v K* (S) [2011] EWCA Crim 1691.

⁹¹ M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, 2001, p. 7.

⁹² J. Fudge, *op. cit.*, 172.

⁹³ C. H. Wellman, *op. cit.*, 13.

counteract vulnerability is to allow workers to join forces to boost their labour market power⁹⁴.

3.2 *Vulnerable Workers and the UK*

One of the potential benefits of the focus on vulnerable workers is the opportunity for the production of targeted initiatives which actually reach those particularly at risk in the labour market. The UK policy on vulnerable workers, which was introduced in 2006 by the then Labour government, is a good example⁹⁵. It consisted of three main elements. The first was a crackdown on “bad” employers who were failing to comply with existing legal rights⁹⁶. The second involved a strengthening of the legislative provision and enforcement mechanisms for agency workers, who were identified as particularly vulnerable in the labour market⁹⁷. Finally, there were a number of pilot projects set up to try to mobilise local authorities, trade unions, employers, voluntary and community agencies to come together to support vulnerable workers. For example, there was the Vulnerable Workers Project in London which focused on the building services sector in the City of London and Tower Hamlets. This project introduced an employment rights advice centre to enable workers to access information and advice on employment law matters. It also promoted trade union membership and established an independent worker group which functioned to provide support and advice to these vulnerable workers⁹⁸.

However, the legacy of the vulnerable worker policy was much more modest than might have been hoped. In the UK, trade union membership continues to decline⁹⁹, and there remain many gaps in the enforcement of

⁹⁴ O. Kahn-Freund in P. Davies and M. Freedland, (eds.), *Kahn-Freund's Labour and the Law*, Stevens and Sons, 1983, 19.

⁹⁵ DTI, *op. cit.*, 1.

⁹⁶ BERR, *op. cit.*, 3.

⁹⁷ *Ibid.*, 4.

⁹⁸ Details of this project are available in TUC, *Vulnerable Workers Project Final Report. Informing Strategies for Vulnerable Workers*, April 2009, www.vulnerableworkersproject.org.uk (Last accessed 12 July 2012).

⁹⁹ A report for the Department of Business, Innovation and Skills in 2011, found that trade union density had declined in the period of 1995 to 2011, from 32.4 percent in 1995 to 29.8 percent in 2000 and 26.0 percent in 2011. BIS, *Trade Union Membership 2011*, 2011, 7 www.bis.gov.uk (Last accessed 10 July 2012).

existing worker rights¹⁰⁰. The legislation on agency workers introduced in 2010 (Agency Worker Regulations)¹⁰¹ does provide for equal treatment between agency workers and comparative full time workers, and so does provide a new level of legal protection for one group of “vulnerable workers”. However, as one of the only lasting policies emerging from the vulnerable worker agenda, it has significant limitations. The first limitation of this legislation is of course that it applies only to agency workers. Although agency workers may be vulnerable, there are many other vulnerable groups or individuals who have not received any legislative attention. Indeed, it could be argued that if the focus of the vulnerable worker policy is extreme worker abuse, there are other individuals or groups more deserving of protection (for example domestic workers). The second limitation of this legislation is its focus on discrimination and the equal treatment principle. The legislation does not deal with the issue of employment status which severely restricts the ability of agency workers to access legal rights, and does not address the problems of low union density amongst agency workers¹⁰². Finally, there are many limitations within the legislation which will restrict its effectiveness as a means to boost the rights of agency workers. A clear example is the limitation of the principle of equal treatment to “basic working conditions”, which in any event is subject to a qualification period which will exclude many agency workers from its scope¹⁰³.

Interestingly, the Conservative/Liberal government, elected to power in the UK in 2010, has argued that the existence of anti-discrimination legislation based on protected characteristics (such as age, race, sex) means that all vulnerable workers are adequately protected in UK law (irrespective of the AWR). Indeed, the existence of “human” rights to non-discrimination on the grounds of certain protected characteristics has been used to support deregulatory measures in other areas of labour law, on the basis that the former legislation adequately prevents personal abuse. Such an approach of course avoids discussion about the difficulties involved with the enforcement of discrimination law for vulnerable

¹⁰⁰ A Pollert, 217.

¹⁰¹ SI 2010/93.

¹⁰² See BIS, *op. cit.*, p. 15. This states that the trade union density for permanent employees is almost twice that of agency workers (26.7 percent and 14.2 percent, respectively).

¹⁰³ For a full commentary see A. Davies, *The Implementation of the Directive on Temporary Agency Work in the UK: a Missed Opportunity?*, *European Labour Law Journal* 1, No. 3, 2010, 307-331.

workers, and about whether human rights (and economic efficiency) should be the dominant mechanism for delivering social justice (rather than for example collective bargaining mechanisms). It also unravels some of the work of the previous government in attempting to provide targeted support to those particularly at risk in the labour market.

As part of its Parliament long Employment Law review, the Conservative/Liberal government committed to deregulation in the area of unfair dismissal, by increasing the qualification period from one to two years. In relation to these changes, the government carried out an Equality Impact Assessment in order to ascertain whether these changes would have a disproportionate effect on certain vulnerable groups of workers. The results suggested a “degree of disparity of impact” between workers¹⁰⁴. In particular, the government found that a higher proportion of black and ethnic minority workers had continuous service of between one and two years than workers in general, and so would be disproportionately affected by the extension of the qualification period from one to two years¹⁰⁵. This was also true for younger workers, who would also be disproportionately affected by this change.¹⁰⁶ However, the government was keen to stress that the disparate impact was not “considerable”, in the sense of being statistically significant, and that in any event, claims on the grounds of discrimination would be “completely unaffected by this measure”¹⁰⁷. Therefore any “vulnerable” workers affected by this extension could rely on their human rights if they were aggrieved at work.

Paradoxically, the government also stated that although they believed that the disparate impact between different groups would not be “considerable”, extending the qualification period for unfair dismissal was a “proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff”¹⁰⁸. This is a reference to the possibility of derogation from anti-discrimination provision (at EU level) on the basis of legitimate employment policy measures. Indeed, when a similar measure introduced by the previous Conservative government was challenged on the ground of (sex) discrimination, the

¹⁰⁴ BIS, *Resolving Workplace Disputes: Government Response to Consultation*, November 2011, www.bis.gov.uk, 34 (Last accessed 10 July 2012).

¹⁰⁵ BIS, *Resolving Workplace Disputes: Final Impact Assessment*, November 2011, www.bis.gov.uk, 125 (Last accessed 10 July 2012).

¹⁰⁶ BIS, *Resolving Workplace Disputes: Final Impact Assessment*, *op. cit.*, 124.

¹⁰⁷ *Ibid.*, 122.

¹⁰⁸ BIS, *Resolving Workplace Disputes: Government Response*, *op. cit.*, 34.

government was able to objectively justify any discriminatory effect¹⁰⁹. Thus, at the same time as removing unfair dismissal protection on the basis that the (human) rights of vulnerable workers remain adequately protected, the government exposed the weaknesses of this approach in providing protection to these workers.

3.3. *Universal Human Rights and the Capabilities Approach*

It is evident from the above discussion that there are potential weaknesses in the “human rights” approach to the protection of vulnerable workers. One suggestion to boost the potential of human rights approaches for the protection of those at the “bottom of the labour market” is the integration of social rights into the human rights regime, through a “holistic” view of human rights¹¹⁰. This view rejects the traditional hierarchical separation between civil and political rights on the one hand and social rights on the other. It suggests that both civil and political and social rights have the same claims to “universality” and have the same moral status (both are “paramount”)¹¹¹. Authors proclaiming this “holistic” view have pointed to the Universal Declaration of Human Rights which presents both civil and political rights alongside social rights, and which, in its opening line refers to the “equal and inalienable rights of all members of the human family”¹¹². The holistic view also asserts that all human rights are interrelated, which gives further weight to the suggestion that civil and political and social rights should be considered together. The “holistic” approach to human rights has been used to suggest a way forward for the decent work agenda. The argument is that this approach

¹⁰⁹ See *R v Secretary of State for Employment ex p Seymour-Smith* C-167/97 [1999] ECR I-623 ECJ. In this case the ECJ held that the statistics did not appear to show that a “considerably smaller proportion of women than men” could comply with the rule and so the rule on unfair dismissal qualification and so it did not amount to indirect discrimination. The ECJ also agreed with the government’s position that the aim of the long qualification period in encouraging recruitment was “legitimate” (unfair dismissal proceedings commenced by employees early in employment would discourage hiring) and could objectively justify and discriminatory effect. The question of whether the “legitimate” aim was proportionate was remitted to the national court for consideration.

¹¹⁰ S. Marks, *The Past and Future of the Separation of Human Rights into Categories*, *Maryland Journal of International Law* 24, 2009, 209-243, 238.

¹¹¹ J. Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edition, Cornell University Press, Ithaca, 2003, 28.

¹¹² G. MacNaughton, D. F. Frey, *Decent Work for All: a Holistic Human Rights Approach*, *American University International Law Review* 26, 2010-11, 441-483, 468.

has the potential to move the Decent Work agenda beyond Core Labour Standards to consider “whole jobs, whole people, and whole families”¹¹³. It is argued that the expansion of the concept of rights in this way uses the social justice elements of the ILO’s foundations and principles, in that the concern is for “poverty, inequality and human dignity”¹¹⁴, but it moves beyond that approach to encompass all individuals and groups (rather than certain oppressed groups). It is also argued that this approach allows consideration of a greater number of “life concerns” which may usually be thought of as outside the direct scope of the regulation of work. For example, the right to work can be viewed as intimately connected to the right to health, because it bolsters the realisation of such rights as the right to food and to housing¹¹⁵. Finally, the “holistic” approach, may also allow the consideration of a greater number of interests, beyond those of workers. The example given by Scott is that a court deciding whether to grant injunctive relief to prevent the dismissal of a group of workers for seeking to organise might consider the rights of the children and dependents¹¹⁶. This is a further development of the interdependency arguments used by those arguing for a holistic approach to human rights: interdependence can be understood not only in terms of the relationship between rights, but also as the relationship between people.

Of course, there is room for scepticism about the “holistic” approach to the human rights in the context of work. Criticisms of this approach can be formulated in a number of ways. First of all, there is the argument that work rights *should* be privileged over other forms of rights. Not only are work rights at the core of both decent work and personhood, they are a prerequisite to the achievement of other rights (economic and social rights to fair wages can only be achieved if there is the right to freedom of association and union membership). Secondly, there is the argument that the holistic approach to human rights takes away the power of human rights as legal instruments. Strategies for promoting a holistic approach to human rights are necessarily “soft”, and involve “rights-based instruments, budget analysis and risk assessment”¹¹⁷. Whilst these

¹¹³ G. MacNaughton, D. F. Frey, *op. cit.*, 450-451.

¹¹⁴ *Ibid.*, 458.

¹¹⁵ WHO Committee on Social Determinants of Health, *Closing the Gap in a Generation: Health Equity Through Action on the Social Determinants on Health*, 2008, http://whqlibdoc.who.int/publications/2008/9789241563703_eng.pdf, 5 (Last accessed 10 July 2012).

¹¹⁶ C. Scott, *Reaching Beyond (Without Abandoning) the Category of Economic Social and Cultural Rights*, in *Human Rights Quarterly* 21, 1999, 633-660, 645.

¹¹⁷ G. MacNaughton, D. F. Frey, *op. cit.*, 471.

methods may raise the awareness of rights, and provide a framework for data collection and the generation of “legal” policy, they depend on political commitment and transparency. Where that political will exists, policies can be successful, and social groups have been able to mobilise these methods to further work rights¹¹⁸. But without that political will, policies can have little impact or fail to reach the heart of the problems facing vulnerable workers. Finally, the holistic approach is not explicit about the relationship between rights and economics. This means that the uptake of this approach may be severely restricted.

By contrast, the “capabilities approach” first suggested by Deakin and Wilkinson¹¹⁹ attempts to reconcile social rights with civil and political rights, whilst still taking into account market-oriented goals. The idea is that vulnerable workers are those who do not achieve their (economic) potential either because of a lack of endowments (genetic capacity), resources, or functionings (the “various things that a person may value doing or being”). This lack of endowments, resources or functionings results in a lack of “capability”: the freedom to make effective choices¹²⁰. This is a personal problem for these workers, but it is also an economic problem, because it implies a lack of those institutions which can further economic development. The argument runs therefore, that certain social rights, rather than being a drain on economic functioning, are necessary for both economic and social progress. Furthermore, this link between economic functioning and social progress is only heightened with globalisation and the development of the knowledge economy. The knowledge economy relies on mobilising the economic potential of individuals, and so it is even more important that institutional structures have to be examined in order to assess how far they facilitate or constrain individuals to meet their “desired economic functionings”¹²¹.

The capabilities approach is used to explain that employment law can be viewed as part of the institutional structure which maintains the knowledge economy (as well as protecting vulnerable workers). Thus, law preventing pregnancy discrimination, rather than being viewed as an economic cost on enterprises, can be viewed as having a number of

¹¹⁸ G. MacNaughton, D. F. Frey, 480.

¹¹⁹ S. Deakin, F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005.

¹²⁰ C. Barnard, S. Deakin, R. Hobbs, *Capabilities and Rights: an Emerging Agenda for Social Policy?*, *Industrial Relations Journal* 32, No. 5, 464-479, 465.

¹²¹ *Ibid.*, 466.

positive personal and economic effects¹²². From a personal point of view, protection against dismissal for pregnant employees remedies an injustice (and a breach of human rights). From an economic perspective, law of this kind alters incentive structures so that employers are encouraged to invest in training and skills development of their employees. There is also a “demonstration effect” by which employers are discouraged from dismissal by the threat of damages for unfair dismissal. Furthermore, there may also be wider social changes which stem from the introduction of law prohibiting dismissal for pregnancy “a ‘destabilising effect’ on the set of conventions which together make up the traditional household division of labour”¹²³. The capabilities approach is also demonstrated well by disability discrimination law which requires (in the provision for reasonable adjustments) that “employment practices be adapted to the circumstances of the individual”¹²⁴ and thus move beyond the guarantee of “formal” freedom, to some level of “substantive” freedom for workers. However, the assertion made by the capabilities approach, that legal structures are fundamental to the furtherance of both social and economic goals, has in fact never been controversial. This assertion fits with both the neo-liberal structure of the economy and the focus of human rights on the law. Furthermore, using discrimination protection as the main example of the achievement of the capabilities approach means avoiding the conflicts which might arise through the introduction of wider social rights into the human rights scheme (discrimination can be considered a human right), or the introduction of labour rights which do not sit well with the “human rights” approach. The capabilities approach is also fundamentally individualistic, like Sen’s capability theory that preceded it. This means that it has its limitations, particularly in the context of labour rights, which can rely on opportunities for collective action. These limitations are recognised by Sen himself: “although the idea of capability has considerable merit in the assessment of the opportunity aspect of freedom, it cannot deal adequately with the process aspect of freedom, since capabilities are characteristics of individual advantages, and they fall short of telling us about fairness or equity in the processes involved, or

¹²² C. Barnard, S. Deakin, R. Hobbs, *op. cit.*, 466.

¹²³ *Ibid.*, 466.

¹²⁴ S. Deakin, *Contracts and Capabilities: an Evolutionary Perspective on the Autonomy-Paternalism Debate*, in *Erasmus Law Review* 3, No. 2, 2010, 141-153, 152.

about the freedom of citizens to invoke and utilize procedures that are equitable”¹²⁵.

4. Conclusion

At the beginning of this article, a distinction was made between attempts to regulate for precarious work and attempts to regulate for vulnerable workers. The argument was that regulation for precarious work focuses on how to achieve economic growth whilst achieving some level of human rights protection and social justice for workers. By contrast, attempts to regulate for vulnerable workers start from the protection of the human rights of workers against employer abuse, on the understanding that this provides a baseline through which social justice (and perhaps economic efficiency) can be achieved.

However, it has become clear that neither of these positions is presented consistently, and that both are severely hampered by the conflicts between the justificatory arguments that support them. In relation to the regulation of precarious work, the interpretation of human rights and social justice arguments in line with economic efficiency has severely limited their scope. At EU level, the right to equal treatment for atypical workers tends to be “balanced” with economic efficiency arguments, which has reduced its effectiveness. At ILO level, there has been a tendency to take a narrow approach to those labour rights deserving of protection in order that the economic processes of globalisation are not unduly restricted. In relation to vulnerable workers, a focus on human rights in the UK has supported economic efficiency, but, particularly latterly, has neglected social justice for workers. Both the “holistic” approach to human rights and the “capabilities approach” attempt to improve social justice for workers, but the practicality of the holistic approach can be questioned, and the capabilities approach is very much wedded to an individualistic and economic approach to social rights, which, in the context of labour law, may not provide any radical solution to the problems faced by vulnerable workers.

It may perhaps be suggested that a way forward exists in the *combination* of law and policies on precarious work with those concerning vulnerable workers. In some sense, this is the approach taken by the recent ILO

¹²⁵ A. Sen, *Elements of a Theory of Human Rights* in *Philosophy and Public Affairs* 32, No. 4, 2004, 315–356, 336.

Convention on Domestic Work (and associated Recommendation)¹²⁶. On the one hand, these instruments recognise that domestic work is “work like no other”; there are particular features of this work which make it precarious and in need of specific regulation¹²⁷. On the other hand, it is recognised that domestic work is “work like any other”. This work involves (vulnerable) workers who are deserving of “human dignity” and respect¹²⁸. The benefit of this approach is that it reaffirms the basic labour rights to which domestic workers should be entitled not only from a “rights” perspective, but also from a social justice perspective. Thus the Convention presents rights to non-discrimination alongside rights to freedom of association and rights to “fair terms of employment as well as decent working conditions”¹²⁹. At the same time, the Recommendation sets out provision to target the specific problems faced by domestic workers at the “bottom of the labour market”, and the need to mobilise representative groups to enable workers to achieve not only individual but also social justice¹³⁰.

¹²⁶ Convention 189 and Recommendation 201, 16 June 2011 (not yet in force).

¹²⁷ ILO, *Decent Work for Domestic Workers*, Report IV (I) at the International Labour Conference, 99th session, 2010, Fourth Item on the Agenda, International Labour Office, 2010, 12.

¹²⁸ ILO, *op. cit.* 13.

¹²⁹ Art. 3(a), 3(d) and 5 Convention 189.

¹³⁰ For example, it identifies the particular problems of “live-in” domestic workers and provides that they should be given a private room with suitable sanitary provisions and lighting (Art. 16). It also identifies a number of additional measures to ensure the effective protection of migrant domestic workers (Art. 19-22).

Who Can Help Britain's Vulnerable Workforce?

Brenda Barrett *

1. Introduction

Research undertaken in Britain by the Trade Union Congress (TUC) identified members of the workforce who it regarded as vulnerable. Vulnerability was interpreted as liable to physical injury or ill-health as a result of exploitation by an employer. The TUC's report, *Hard Work, Hidden Lives*¹ defined vulnerable employment as

[...] precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship.

The focus was on what might be described as an under-class, poorly qualified, under paid, over-worked and possibly dependent on the employer for both work and accommodation and unable to offer services to another employer. Such workers were often migrants, perhaps in the power of a gang master or domestic servants brought into the country by their employers².

In this paper vulnerability is defined as liability to suffer injury or more especially ill-health. The questions raised are whether vulnerability is now much more widespread in the workforce than these reports suggest, and

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¹ TUC Commission on Vulnerable Employment, 2007, (Last accessed 13 October 2012).

² Kalayaan, an organisation which provides advice, advocacy and support for migrant domestic workers, has also produced a report *The New Bonded Labour*. (See V. Wittenburg *et al.*, 2008, www.kalayaan.org.uk), (Last accessed 13 October 2012).

whether the TUC's concept of a two tier labour market makes a greater distinction between the people it identifies in its case studies and the workforce more generally. Further, in many of the situations considered here employers would be likely, with some justification, to deny both that they were exploitative or that they were the cause of the vulnerability of those in or seeking employment. If employers are not to be deemed entirely responsible who can help?

2. Who are the Vulnerable in 2012?

The TUC's report was published in 2007, while the economy was still in the "boom years". The recession, following the financial crisis of 2008 has been described as "the worst recession since the 19th century"³. While Britain is not suffering to the extent of many other countries, there is increased unemployment; many having been made redundant⁴, and there is insecurity among those who have managed to remain in employment. The Labour Market Statistics for the second quarter of 2012 showed:

- The employment rate for those aged from 16 to 64 was 70.3%.
- The unemployment rate was 8.2% of the economically active population.
- There were 2.61 million unemployed people.
- The inactivity rate for those aged from 16 to 64 was 23%.
- There were 9.3 million economically inactive people aged between 16 and 64.

A more recent news item suggests women over 50 are the hardest hit as their unemployment has risen faster than any other group⁵.

Total pay (including bonuses) rose by 1.4% during the year.

Regular pay (excluding bonuses) rose by 1.7% during the year.

Inflation towards the end of 2011 was over 5%⁶.

³ W. Hutton criticising the Government wrote similarly on 25th March 2012, 38 of The Observer under the title *This Disgraceful Budget Smacks of Incompetence and Cowardice*.

⁴ The Chartered Institute for Personnel Development reported in March 2012 that 2.7 million had been made redundant since the financial crisis of 2008 www.cipd.co.uk. (Last accessed 13 October 2012).

⁵ *The Daily Mail*, 29 September 2012 www.dailymail.co.uk (Last accessed 13 October 2012).

⁶ The Office for National Statistics.

A Report by the Joseph Rowntree Foundation states that families need to earn 33 percent more post-recession to maintain their standard of living⁷. The employment rate may be misleading as many of the employed are in part time employment because they cannot find full time employment⁸, though some hold a portfolio of part-time jobs and work longer hours than those specified in the Working Time Regulations 1998⁹. Many of those aged 16-24 classified as “economically inactive” are in full time education, but excluding those in full-time education, there were 731,000 unemployed 16 to 24 year olds; 20.8% of the economically active population for 16 to 24 year olds.

The Chartered Institute of Personnel Development’s press release based on its own Work Audit Report, *Counting the Cost of the Jobs Recession*¹⁰ states:

- Two-thirds of people made redundant are paid less in the next job they find. On average the pay penalty is 28%.
- High and rising unemployment has put downward pressure on pay increases since 2008. In cash terms the average worker is £3000 a year worse off than if pay had increased at the pre-recession rate.
- Higher inflation has resulted in a real pay squeeze. Private sector workers are on average earning 7% less in real terms than in 2008 and public sector workers 4% less.

Other statistics show that since the recession began in 2008, 46,931 companies have closed, which in itself must clearly have an impact on unemployment¹¹. In addition the government is attempting to reduce the number employed in the public service, though when this is achieved by contracting out the provision of services this will not necessarily increase the number of unemployed¹² because compliance with EU law usually requires the new service provider to employ those whose work is

⁷ www.jrf.org.uk (Last accessed 13 October 2012).

⁸ The Office for National Statistics said that in January 2012, 1.38 million worked part-time, (a record) and 1.3 million of these wanted full-time employment. The Times, 15 March 2012, 45.

⁹ SI 1998/1833.

¹⁰ March 2012 www.cipd.co.uk. (Last accessed 13 October 2012).

¹¹ www.businessandleadership.com. (Last accessed 13 October 2012). The same site indicates that closures are outnumbered by new start-ups which stand at 55,539, but it is unlikely that the number employed in the new enterprises will compensate for the number of job losses by company failures.

¹² In March 2012, 6 million were employed in the public sector www.civilservant.org.uk, (Last accessed 13 October 2012).

transferred¹³; in fact statistics show that the number employed in the private sector is increasing while the number employed in the public sector is falling¹⁴.

In the light of these statistics the TUC's definition of "vulnerability" appears too narrow. It may not be too far-fetched to say that the majority of those classified as "economically active" are "vulnerable" whether or not they are currently in employment, bearing in mind that the Government's own report, *Improving Health and Work: Changing Lives*¹⁵ found unemployment had an adverse impact on health.

The position of the young is of special concern. Richard Scase, writing in 2000, in a paper produced through the Economic & Social Research Council, and published by the Department of Trade and Industry¹⁶, asserted "University qualifications are recognised to improve employability, earnings and career development"¹⁷. This is no longer entirely true: graduates are no longer assured of employment, nor if they are employed can they be confident that their career prospects are good enough to enable them to pay off the large debts with which they leave university¹⁸.

While he did not foresee the recession, Scase nevertheless rightly predicted that by 2010:

Individuals, in a more unstructured and rootless society, will feel more insecure. They will experience greater uncertainties and perceive society as high risk and often threatening¹⁹.

The recession hit a society that was already undergoing considerable change. By 2000, as Richard Scase's work demonstrated, the nature of work, the life style of the population and individual expectations had changed greatly from that of earlier generations. There was an expectation that work would be available for those able to work, welfare to support those who could not and credit facilities to enable purchases that would not have to be paid for immediately. Yet even then individuals were

¹³ Transfer of Undertakings (Protection of Employment) Regulations SI 2006/246 broadly terms and conditions of employment cannot be changed by the transferee.

¹⁴ National Labour Survey.

¹⁵ www.dwp.gov.uk, 2008.

¹⁶ Foresight *Britain Towards 2010: the Changing Business Environment*, DTI, London, 1999.

¹⁷ *Ibid.*, 006

¹⁸ See The Observer, 30 September 2012, 4 *Half of Graduates Face Long Hunt for Work as Regional Divide Grows*.

¹⁹ *Ibid.*, 36

insecure and predicted to feel more so by 2010. They were not prepared for the shock of the recession, not least because the practice of “buy now, pay later” had encouraged them to incur large debts which in the changed times they were unable to honour.

The questions are therefore: “How can the lot of the workforce be improved?” “What can be done to help those at work?” and “What can be done to improve the employability of job seekers?”

3. Caring for the Workforce

3.1 *The Role of Trade Unions*

In 2007, in its report on vulnerable workers, one of the recommendations of the TUC was:

Unions must act to ensure they represent the interests of vulnerable workers. Unions should organise all workers in workplaces where there is a union presence, whoever employs them and whether their employment is direct or temporary. Unions should also focus on areas of the economy where exploitation is rife and where trade union membership is low. Trade unions should commit to a TUC co-ordinated drive to boost membership among vulnerable workers²⁰.

This aspiration will be hard to achieve. Changes in the labour market have seen trade union membership fall. Richard Scase commented that even in 2000:

More people work in Indian restaurants than in shipbuilding, steel manufacture and in coal mining combined. There are three times as many public relations consultants as coal miners²¹.

²⁰ TUC *Commission on Vulnerable Employment*, 2007, 5.

²¹ *The Times*, 4 June 2012, 29 provided the following percentage changes in industry structure between 1977 and 2011 Employment in Public Administration rose 9%, in Banking rose 10%, Manufacturing fell 18%; statistics apparently taken from a report by J. Cribb, P. Johnson, Z. Oldfield, *Jubilees Compared: Incomes, Spending and Work in the Late 1970s and Early 2010s*, Briefing Note 128, Institute for Fiscal Studies. www.publicfinance.co.uk. (Last accessed 13 October 2012).

In 1979, union density was 55.4%; there were 13 million union members²². A major government annual survey updated in 2011²³ provided that in the UK:

Around 6.4 million employees were trade union members;

Trade union density for employees was 26.0%.

Union density was highest in professional occupations at 45.4% whilst managers, directors and senior officials had the lowest at 13.8%.

Employees of a UK nationality had a higher union density than non UK nationals whose union density was 11.8%.

It is notable that these percentages relate only to employees while a large part of the labour force is made up of workers rather than employees. For example agency workers are not usually employed either by the agency or the end user of their services. It is also misleading to include professional associations which in some cases may operate a “closed shop” so that only those who are professional trained, are entitled to practice. On the other hand most members of the teaching profession are members of a trade union, though membership is not essential to employment. Where there is a union strong enough to be recognised by an employer working conditions can be negotiated with the fall back of strike action, but this possibility does not necessarily produce a healthy, risk free profession. Teachers are among the most stressed employees. The medical profession is also highly unionised but nurses are likely to suffer physical attack, or personal injury in the form of musculoskeletal disorders. At the other end of the spectrum Unite has a strong presence among the low paid, especially in the public sector, but it is not clear that it can assist its members to improve their terms and conditions of employment with better job security. Unions may help their members to obtain compensation if they become unemployed, or suffer injury or ill-health as a result of their work, but compensation is a poor substitute for

²² www.unionhistory.info. (Last accessed 13 October 2012).

²³ www.bis.gov.uk (Last accessed 13 October 2012).

prevention.

3.1. The Role of Employers

There are unlikely to be many employers who intend to exploit workers but in times of recession their priority is to maintain the organisation as a going concern. Demand for goods and services falls and many businesses entered this recession with large loans outstanding, and became unable to incur further debt when financiers were reluctant to grant loans in even the most promising situations. In such circumstances re-structuring the business may be necessary with a reduction or a painful redeployment of the workforce. However one commentator has recently suggested that unemployment has been contained because so many “zombie” employers have not taken the drastic steps the situation needed and their reluctance is hindering economic recovery²⁴.

3.2. The Role of Government Agencies

There are a number of Government agencies concerned with employment issues. The Health and Safety Executive (HSE) is, as its title suggests, the agency most directly concerned with the health, safety and welfare of those in employment, but other Government Departments have a role particularly when considering the unemployed. The Department for Business Innovation and Skills (BIS) offers a range of services to help businesses. The Department for Education (DfE) is responsible for education from infancy up to school leaving. The Department for Work and Pensions (DWP) provides assistance to job seekers, and controls the system of benefits and pension for those who are not in employment. The Department of Health (DH) is responsible for public health issues. The Bank of England, the Serious Fraud Office and the Financial Services Agency have important responsibilities for regulation of national finances.

²⁴ D. Wighton., *Help ... Zombies are Attacking the Recovery*, The Times, 19 September 2012, 27.

4. Vulnerability of those at Work

The Report of the Robens Committee²⁵ led to the Health and Safety at Work Act 1974 which remains the principal legislation addressing the health and safety of workers. HSE is the body whose duty it is to see that the intentions of the Act are achieved, it can propose to Parliament regulations either to implement the Act or to comply with EC directives; it appoints inspectors, draws up codes of practice and publishes guidance. The Act imposes on employers general duties intended “to ensure that they do all that is reasonably practicable” so that their activities do not put anyone at risk of personal injury. Employers first duty is “to ensure the health, safety and welfare at work’ of their employees”²⁶, but there is a similar duty to ensure that persons not in their employment who may be affected by the conduct of their undertaking “are not thereby exposed to risks to their health or safety”²⁷. This duty protects both those workers who are employed by another organisation and the self-employed, though incidentally the general public are covered. However, there is no general duty specifically directed at the safety of workers who are neither employees nor self-employed, and many regulations protect only employees²⁸.

Duties may be broken wherever there is a risk of injury. The intention is to manage risks so that injury is not suffered. The full significance of this was apparent when the Management of Health and Safety at Work Regulations 1999²⁹ placed on the employer a duty to carry out assessments of the risks of personal injury arising out of the conduct of its organisation in order to identify, and put in place, the measures necessary to comply with the law. Employees are required to take care for their own safety and the safety of others³⁰. The Act empowers inspectors to enter workplaces to find out whether they are conducted in compliance with the

²⁵ *Safety and Health at Work* Report of the Committee 1970-1972 London HMSO CMND 5034.

²⁶ S.2(1).

²⁷ S.3(1).

²⁸ The changing nature of the workforce and EEC directives has caused “workers” to be given statutory recognition. For a definition of worker see Working Time Regulations, SI 1988/1833 regulation 2; similarly s.54(3) of the Minimum Wage Act 1998.

²⁹ SI 1999/3442. These regulations, followed the EEC Framework Directive on Improvement in the Health and Safety of Workers at Work (89/391/EEC).

³⁰ S.7; the self-employed have a similar duty s.3(2).

law and to prosecute where the law is broken³¹. Inspectors are also empowered to issue notices: improvement notices, require that faults be rectified; prohibition notices require dangerous operations be discontinued. The failure to comply with a notice is a criminal offence. In 1977 regulations were made enabling trade unions to appoint safety representatives at workplaces where the union was recognised for negotiating terms and conditions of employment³². At this time, when trade unions were commonly recognised by employers, there was a strong take up of this entitlement. The European Union has subsequently laid stress on the importance of the social partnership and as a result regulations in 1996 extended similar rights to employees who had no trade union representative³³. Since the *Strategy Statement June 2000*³⁴ HSE has emphasised the importance of worker involvement and its web site indicates its commitment to employer and worker co-operation³⁵ but employee safety representation has fallen with the decline in workplace recognition of unions.

4.1. The Incidence of Work-related Injury and Ill-health

In the 1970s about 1,000 workers were killed every year. In 2011/12 only 173 workers were killed³⁶. This improvement owes much to the loss of dangerous heavy industries. Nevertheless an estimated 603,000 workers had an accident at work in 2010/11. Slips, trips and falls made up more than half of all reported major injuries but there were an estimated 341,000 physical assaults on workers.

³¹ For many categories of workplace HSE has delegated power to inspect and prosecute to local authority inspectors. Inspectors cannot enter domestic premises; so they are not able to assist exploited domestic workers or check the living accommodation of migrant workers.

³² Safety Representatives and Safety Committees Regulations 1977 SI 1977/500 made under S.2(4) of the 1974 Act.

³³ Health and Safety (Consultation with Employees) Regulations 1996 SI 1996/1513. Deemed necessary to comply with the EU Framework Directive(89/391/EEC).

³⁴ This statement was actually published by the Health and Safety Commission (at that time a body created by the 1974 Act) and the Department for the Environment Transport and the Regions.

³⁵ See also *Improving worker involvement –Improving health and safety* Consultative Document, 2006 (CD207 C10 04/06) and more recently advice to worker representatives, www.hse.gov.uk, (Last accessed 13 October 2012).

³⁶ www.hse.gov.uk, (Last accessed 13 October 2012).

These figures do not include work-related ill-health. In 2010/11 there were over 4,000 deaths from asbestos related diseases, due to exposure to asbestos many years ago. Reflecting current conditions, there were 1,152,000 cases of work-related illnesses in 2010/2011. The most prevalent cause was musculoskeletal diseases (MSD) with 158,000 new cases in 2010/11. The next highest cause of work-related illness is stress; there were 211,000 new cases in 2010/11³⁷.

4.2. *Areas of Special Vulnerability*

This account has mentioned at least five aspects of worker vulnerability and these will now be considered more fully.

Stress: The problem of psychological stress was identified in the second half of the twentieth century³⁸. Its presence at the workplace was recognised as early as the 1980s and HSE commissioned research, the first fruits of which were published by HSE Books in 1993³⁹ and a guide for employers “on the nature and causes of work-related stress” was published shortly afterwards⁴⁰. The problem was not necessarily a new phenomenon but once recognised its prevalence became apparent⁴¹. From that time onwards HSE has directed considerable resources to this matter. In 1999 it published a Discussion Document which concluded that the causes of stress were so diverse and individual responses to situations were so varied that it was not feasible to draw up regulations imposing duties on employers to reduce the level of stress at their workplaces⁴². Since that time HSE has continued to provide advice and guidance as its web site demonstrates⁴³. Currently its guidance, *Management Standards for Work Related Stress*, identifies the characteristics, or culture, of an

³⁷ HSE Annual Statistics Report 2010/2011 <http://www.hse.gov.uk/>. (Last accessed 13 October 2012).

³⁸ *American Diagnostic and Statistical Manual of Mental Disorders DSM-III*. At first the concern was with post-traumatic stress disorders.

³⁹ E.g. T. Cox, *Stress Research and Stress Management: Putting Theory to Work*, HSE Books, 1993, CRR 61/1999, ISBN 0 7176 0684 8 (England).

⁴⁰ HSE, *Stress at Work A guide for employers* C100 5/95.

⁴¹ The first case for compensation for “slow burn” stress due to work overload was *Walker v Northumberland CC* [1995] 1 All E.R. 737.

⁴² In theory enforcement action could be taken relying on the general duty in s.2 of the 1974 Act.

⁴³ www.hse.gov.uk/stress. (Last accessed 13 October 2012).

organisation where the risks from work related stress are being effectively managed and controlled.

In 2004, as part of the EU strategy to improve working conditions by “soft law”⁴⁴, the social partners entered a framework agreement on work-related stress. The UK responded by publishing “*Work-related stress: A Guide*”. This document bore the signatures of the major national social partners⁴⁵ and representatives of two government bodies, the DTI⁴⁶ and HSE⁴⁷. Unsurprisingly HSE takes the lead in this document. It is arguable that the UK did not properly respond to the autonomous agreement given the national weakness of the social partnership but it is not clear what more could have been achieved given HSE’s argument that regulations would be difficult to compose and even more difficult to enforce. However, HSE’s guidance has no standing in a court and compensation cases deal only with employees, taking no account of workers.

Notably reports of claims for compensation for allegedly work-related stress often fail because evidence shows that employees who succumb while in employment are often stressed by factors in their private lives, such as divorce⁴⁸. Arguably stress is as much a life-style problem as a work-related problem. The conclusion has to be that while employers must strive to prevent their workers being stressed by their work, it is likely to be beyond the power of either employers or HSE to eliminate stress from the workplace. Nevertheless, where an employee shows signs of stress it is in the interest of the employer to address it, because whatever its cause stress is not conducive to a productive workforce. Interestingly HSE statistics suggest that the number of cases of absence from work due to stress has fallen slightly in recent years, but this may be due to employees being unwilling to take sick leave. Academic research suggests, as might be expected, stress at the workplace has increased since 2008⁴⁹.

⁴⁴ Consolidated Version of Foundation Treaty Art 136-140.

⁴⁵ CBI, TUC, CEEP, FPB.

⁴⁶ Department of Trade and Industry, now BIS.

⁴⁷ www.hse.gov.uk/stress. (Last accessed 13 October 2012).

⁴⁸ E.g. *Sutherland v Hatton* [2002] EWCA Civ 76; *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 06. Both these leading cases were consolidated actions each included 6 cases and in both only the minority of claimants were successful.

⁴⁹ Ulster and Nottingham Universities, *Psychosocial Factors and Economic Recession: the Stormont Study, Occupational Medicine*, No. 62, 98–104, 2012. This report revealed a significant rise in the number of workers suffered from work stress during an economic

Violence: the EU social partners entered an agreement to address this problem and it was implemented in the UK as guidance. Again HSE was a signatory⁵⁰. This guidance states:

The sectors identified as most at risk in the UK are those where third party harassment and violence are more likely. According to the 2006/7 British Crime Survey (BCS), respondents in the protective service occupations (for example police officers) were most at risk of violence at work. But high rates were also shown, for example, for workers in the transport, health, retail and leisure (e.g. pubs) sectors.

The guidance lists the considerable amount of legislation directed to the problem, including offences embedded in the general criminal law. HSE has long been aware of the potential for employees to suffer assault during the course of their employment⁵¹. It defines violence broadly to include verbal as well as physical attacks in the following words:

Any incident in which a person is abused, threatened or assaulted in circumstances relating to their work

HSE has provided a tool kit to assist employers to carry out risk assessments, take measures to control the incidence of violence and to provide support after an incident. Recognising that the potential for violence is considerable in the health and social care services where the perpetrators are patients, particular attention is given to this. Nevertheless the most recent statistics show that the incidence of workplace violence remains unacceptably high. Findings from the BCS and RIDDOR⁵² data show that in 2010/11:

downturn.. See also The Times, 11 May 2012, 23 reported *Slump Brings Surge for Sleeping Pills* and cited the Chief Executive of the Mental Health Foundation as saying: “Our research last year indicated that money and work were by far the most common causes of stress in Britain and the strains being put on our mental wellbeing by the current economic situation could well be the cause of rising sleep problems in the UK”.

⁵⁰ <http://www.hse.gov.uk/violence>, (Last accessed 13 October 2012).

⁵¹ <http://www.hse.gov.uk/violence>, (Last accessed 13 October 2012).

⁵² Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (SI 1985/2023): a system by which employers (and others) are required to report to HSE.

There were an estimated 313,000 threats of violence to British workers.

There were an estimated 341,000 physical assaults on British workers.

An estimated 43% of all people assaulted or threatened at work were repeat victims.

There were 6,078 reportable injuries to employees caused by violence at work⁵³.

Again the extent to which either employers or the HSE can do more to avoid the potential for workers to be subjected to violence is questionable. Training of workers to recognise situations in which violence can occur and to take measures which reduce the likelihood of their provoking violence is very important but the risk of violence is likely to remain and knowledge of this may be stressful.

Musculoskeletal diseases: these are the largest cause of work-related injury and subsequent ill-health. Some categories of workers are particularly susceptible to repetitive strain injuries, for example supermarket cashiers⁵⁴ and keyboard operators.

The Manual Handling Operations Regulations 1992⁵⁵ require employers to avoid expecting their employees to undertake manual handling wherever this is reasonably practicable and where this is not possible to “make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, take appropriate steps to reduce the risk of injury to employees undertaking manual handling and provide information about the weight of loads”. The duty of the employer extends only to employees and the employee is under a duty to follow any system put in place by the employer. Guidance notes provide comprehensive advice about lifting loads but there is no express instruction in the regulations that employers should provide training (though in practice

⁵³ www.hse.gov.uk/statistics, (Last accessed 13 October 2012).

⁵⁴ See HSE guidance books.hse.gov.uk, (Last accessed 13 October 2012). A major problem was lifting purchases from the point where the customer deposits them to be scanned by the computer, but better design of check outs has largely eliminated this. However cashiers are normally employed to cover 4 hour shifts and for 3 hours they have no rest break. At busy periods this can be stressful.

⁵⁵ SI 1992/2793, implementing 90/269/EEC.

training is likely to be necessary to comply with the duty to reduce the risk of injury⁵⁶).

The enforcement of the regulations is within the remit of HSE. HSE's web site records only one instance of prosecution of an employer (in 2004) for failure to undertake the risk assessment the regulations require and this prosecution apparently occurred as a result of a coincidental site inspection. However it is a relatively rare instance of HSE prosecuting to prevent an injury occurring⁵⁷. Nevertheless guidance issued to inspectors states tackling musculoskeletal disorders is a priority saying, "Strong enforcement action is encouraged"⁵⁸. Claims against employers for compensation allegedly due to breach of the regulations often involve "one off" situations where the employee is away from the workplace and not under supervision. In these circumstances, if the employer can provide evidence of appropriate training it may not be liable because there is an expectation that the employee will use "common sense"⁵⁹. Compensation claims, being founded on breach of the regulations, can deal only with employees.

The Health and Safety (Display Screen Equipment) Regulations 1992⁶⁰ have also been the subject of guidance by HSE to inspectors⁶¹. This guidance states:

The main health risks associated with DSE are musculoskeletal disorders, stress and visual fatigue. While the risks to individual users are often low, they can still be significant if good practice is not followed. DSE workers are also so numerous that the amount of ill-health associated with such work is significant, and tackling it is important.

The guidance continues that HSE recognises that securing compliance with these Regulations has potential to make a significant contribution towards hitting the targets for ill health reduction in the Priority Programme on Musculoskeletal Disorders. However there is no evidence

⁵⁶ However HSE states training alone is not very effective as it is not carried out in practice and the real answer is better systems. Paper OC 313/5 – guidance to inspectors

⁵⁷ www.hse.gov.uk, (Last accessed 13 October 2012).

⁵⁸ OC 313/5. www.hse.gov.uk, (Last accessed 13 October 2012).

⁵⁹ E. *Koonjul v Thames Link Health Services* [2000] P.I.Q.R 123 and *King v Sussex Ambulance NHS Trust*, *The Times*, July 27, 2002, the employer was not liable for injury suffered by an ambulance worker when carrying an elderly man downstairs.

⁶⁰ SI 1992/2792 implementing Directive 90/270/EEC.

⁶¹ OC 202/1 www.hse.gov.uk, (Last accessed 13 October 2012).

of prosecutions and indeed, as with manual handling, much depends on the individual employee to ensure that the work station is appropriate and procedures are observed.

Agency workers: In January 2010 in an assessment of the EU's Temporary Agency Workers Directive⁶² the Government admitted that it had no clear idea of how many agency workers there were in the UK. It referred to three governmental estimates which differed significantly, so it chose 1.3 million, to take account of the seasonal nature of a proportion of the work⁶³. Others have said that one in twenty workers may be an agency worker⁶⁴. It is estimated that there are more agency workers in the UK than any other member state of the EU with one in eight of all agency workers in the EU working in Britain⁶⁵.

The TUC's report *Hard Work Hidden Lives* identified some agency workers as vulnerable but agency work covers a wide spectrum of occupations. Agency workers may be cleaners or seasonal workers brought to the end user through gangmasters or they may be highly qualified professional workers, who perhaps could be classified as self-employed. Between these two extremes are many categories of workers, for example temporary cover for peak periods or for sickness or maternity leave. The EU directive was intended to improve the lot of the whole spectrum. The UK was reluctant to implement the Directive, the industry feared that it would be detrimental to the economy, suggesting "Agency work helps maintaining employment, facilitates job creation and enhances mobility in the labour market"⁶⁶.

The UK Regulations⁶⁷ took advantage of the derogation which permitted postponing the granting of the rights intended by the Directive until the worker had been assigned to the end user for 12 weeks, thereby disenfranchising those on short term assignments, but it is doubtful

⁶²2008/104/EC.

⁶³ Department of Business Innovation and Skills, *European Parliament and Council Directive on Working Conditions for Temporary Agency Workers*, January 2010. www.bis.gov.uk, (Last accessed 13 October 2012).

⁶⁴ O. Boycott, D. Hencke, *Fear for Deal on Agency Workers Payoffs*, The Guardian 21 February 2009, cited in Chapter 3 of E. Renton, *Struck Out*, Pluto Press, London, 2012

⁶⁵ European Confederation of Private Employment Agencies Position Paper, 5 May 2009 cited in E. Renton, *op. cit.*

⁶⁶ European Confederation of Private Employment Agencies, *Position Paper*, 5 May 2009 cited in E. Renton, *op. cit.* The best match found for this citation is www.eurociett.eu, (Last accessed 13 October 2012).

⁶⁷ SI 2010/93, came into effect in 1st October 2011.

whether those on longer assignments will obtain much benefit from the Regulations. The Directive assumes that agency workers will have a contract of employment with the agency which will have some responsibility for ensuring the wellbeing of the worker while on the assignment⁶⁸. However, the normal situation in the UK is that the arrangement between the worker and the agency expressly states that it is not a contract of employment and the worker has no contractual relationship with the hirer who is the end user of the worker's services.

The Regulations state that the worker will, after 12 weeks, have in most respects (as the Directive intends) the same terms and conditions of employment as the employees of the hirer and will have the right to lodge a complaint to an employment tribunal if s/he does not receive the terms and conditions to which s/he is entitled. However, as the regulations fail to rectify the most serious problem of the previous law, the worker has no contract of employment and therefore no entitlement to claim for unfair dismissal; so the hirer can at will terminate its relationship with the agency worker. Further the right to the same terms and conditions as other workers of the hirer will be meaningless if its workforce consists entirely of agency workers. It is true that some statutory rights, such as minimum hourly pay, are not limited to employees so that workers may claim these; but again with no security of tenure these may be of little value⁶⁹.

Agency work will undoubtedly continue to be valuable to people such as professionally qualified workers many of whom fall back on this kind of employment while building up a private practice, but the Directive will be of little help both to the vulnerable whom the TUC identified, and many others. The courts may wish to find that those workers, typically cleaners, who have been arbitrarily dismissed after working for the same organisation for more than two years (the current qualifying period for claiming unfair dismissal) have by implication a contract of employment, but case law shows the facts of these cases usually make it hard for courts to do this⁷⁰.

Working time: it was with reluctance that the UK government implemented the EC Working Time Directive⁷¹, alleging that it had been wrongly

⁶⁸ Article 1.2.

⁶⁹ The National Minimum Wages Act 1998, s.31 makes it a criminal offence for an employer to pay less than the statutory minimum wage but the enforcement of this which rests with HMRC (the tax authorities) is weak.

⁷⁰ E.g. *James v London Borough of Greenwich* [2008] ICR 545.

⁷¹ 93/104/EC.

adopted under Article 118A of the Treaty of Rome as it had nothing to do with health and safety. The Working Time Regulations 1998⁷² were not introduced till after the European Court of Justice had rejected this challenge⁷³. The Directive requires employers to limit the working week to 48 hours and to ensure that workers get a minimum of 11 hours rest every 24 hours, one day's rest per week, and four weeks paid annual leave. However, the UK secured an opt out to the 48 hour maximum working week, so that employees aged 18 and over may "opt out" of this agreement by way of a written and signed request. Such opt out clauses are frequently written into contracts of employment which employees are required by their employer to sign. There is evidence that workers in the UK work longer hours, take shorter lunch breaks, and have fewer holidays than most of their European counterparts⁷⁴. Research suggests that:

Even though legislative measures have been introduced as a way of protecting employees, average working hours have only marginally decreased over the last decade in the UK generally. Moreover, closer scrutiny of the data highlights variations, with some regions of the UK actually experiencing increasing working hours. Only a third of the working population are aware of Working Time Regulations.

Approximately a quarter of the UK working population work more than 48 hours a week on average, and approximately 9% of workers report working over 60 hours a week.

According to 2003 figures, approximately two out of three people who reported working 48 hours a week on a regular basis, did so without having "opted out" of the Working Time Regulations. One in four employees who have signed an "opt-out" within the Working Time Regulations said they were given little or no choice about signing away their rights.

The majority of employees who work more than 48 hours a week suggest they would like the opportunity to work fewer hours. Managers and professionals are most likely to work long hours.

⁷² SI 98/1833.

⁷³ *UK v EU Council* [1996] All ER (EC) 877.

⁷⁴ J. White, J. Beswick, 2003; ILO, 2007; TUC, 2007. Cited by S.I. Giga, A.K. Jain, C. L. Cooper, in a Foresight research paper *Mental Capital and Wellbeing: Making the Most of Ourselves in the 21st Century*, *State-of-Science Review*, SR-C7 Working Longer: Hours of Work and Health, published by the Government Office for Science, London, 2008.

Two-thirds of female employees who work longer hours are in managerial and professional occupations.

The report continues that data suggest that less than half of the workforce actually use up their full annual leave entitlement and less than two-thirds of employees use up their full entitlement to lunch breaks, highlighting workload pressures and demanding managers as the reason for this. In addition, some employees work more than their contracted hours due to the incessant pressure of their work, which prevents them from completing it within contracted working hours, citing organisational culture, management style and high levels of personal standards as their main reasons.

While this report was published before the financial crisis which led to the present recession and high levels of unemployment there is no reason to suppose that the situation is much different for those who remain in employment. Indeed their plight may be worse if workplace re-structuring causes the allocation of tasks among a smaller workforce. The problem of those who feel they need to work beyond their official working hours in order to cope with their workload is likely to have increased. It is also possible that many who appear to have part time employment are actually holding down more than one job and are in total working long hours.

Meanwhile neither the enforcement agency nor the courts have shown much sympathy with the regulations. Although the regulations were not made under the Health and Safety at Work Act 1974 the HSE has been charged with their enforcement⁷⁵. HSE has published guidelines on enforcement by inspectors⁷⁶ and they purport to have been updated in the light of enforcement experience, but if HSE has actually secured convictions for breaches of these regulations they are hidden in the statistics. Research commissioned by HSE itself suggests that long working hours may cause fatigue and lead to accidents but provides no hard evidence of this⁷⁷.

Recent cases suggest that employment tribunals are not sympathetic to workers. In one case the Court of Appeal noted that it was common practice for three man teams to undertake 24 hour security guard duties. The length of the working week was not actually an issue before the court, so their Lordships expressed no surprise that this regime would mean each guard worked more than 48 hours a week, and nor were they

⁷⁵ Regulations 28 and 29.

⁷⁶ www.hse.gov.uk, (Last accessed 13 October 2012).

⁷⁷ HSL, *Working Long Hours*, No. 2, 2003.

concerned that the arrangements in the particular case meant that guards could not be guaranteed the 20 minute uninterrupted rest break the regulations stipulate⁷⁸. In another case care workers who were dismissed when found asleep were unsuccessful in their claim that their dismissal was unfair because they had not been given statutory rest breaks; the tribunal considered the employees ought to have complained to the employer. 'The claimants' refusal by conduct to accept their employer's failure was not sufficient'⁷⁹.

The evidence appears to suggest that workers are willing, if not happy, to work long hours. In some cases this may be to earn more money in order to support their life-style, in others it may be to cover their workload. In time of high unemployment protesting the workload is too heavy for the time available may suggest incompetence, and indeed there are occasions when the work overload stems from failing to accept the systems changes which the employer wishes to introduce.

5. Vulnerability of the Unemployed

Vulnerability in the workforce is interpreted to include difficulty in obtaining employment. The high percentage of the unemployed has been noted and especially the large number of the young. Other vulnerable groups are older workers and the disabled. On March 2010 the European Social Partners adopted an autonomous framework agreement on inclusive labour markets⁸⁰. The signatories admit that the fulfilment of this ambitious agreement:

Entails various measures, actions and/or negotiations at all levels, which can be taken by employers, workers, their representatives, jobseekers and third parties. These should promote the creation of jobs and the employability of workers and jobseekers with a view to integrating all individuals in the labour market.

It suggests actions which the partners should take, for example organising awareness campaigns. The agreement invites the social partners in member states to implement it by March 2013. In Britain DWP published

⁷⁸ *Hughes v Corps of Commissionaires Management LTD* [2011] EWCA Civ. 1061.

⁷⁹ *Ajayi & Anor v Aitch Care Homes (London) Ltd* [2012] UKEAT/0464/11.

⁸⁰ www.etuc.org, (Last accessed 13 October 2012).

in 2005 a strategy statement on *Opportunity and Security throughout Life*⁸¹. Seven years later it seems unhelpful because, being written before the recession, it is based on the assumption that:

Today, Britain is working again. The welfare state is being transformed from a passive one-size fits-all model to an active system that delivers both rights and responsibilities, tailoring help to the individual and providing the skills people need to move from welfare and into work.

The BIS web site does respond to inclusive labour markets with a feature on the requirement to comply with the Equality Act 2010 and avoid discrimination in employment⁸². The rights set out in this Act, in relation to discrimination in, or in selection for employment, are enforceable by individual complaint to an employment tribunal and age, disability, race and sex are among the nine protected characteristics regarding which there must be no discrimination. The right to complain to an employment tribunal is of limited benefit to anyone who applies for a job and is not offered it. Searches of the TUC and the CBI web sites have failed to show any response to the EU Framework Agreement. The Government's announcement that it intends to withdraw funding from Remploy, an organisation which employs the disabled⁸³ and redirect the funding to providing support for employment of the disabled within the general workforce may be a well-intentioned attempt to address inclusivity but whether it will succeed is controversial when jobs are in short supply⁸⁴.

It can be regarded as inappropriate that, when there are so many unemployed among those who are domiciled in Britain, there are many migrant workers from abroad. Freedom of Movement within the EU prevents Britain from denying entry for the purposes of employment from those who are domiciled in other Member States⁸⁵. It is also questionable whether the unemployed British labour force has the skills, stamina or motivation to undertake the heavy manual work performed by

⁸¹ CM 6447.

⁸² www.bis.gov.uk, (Last accessed 13 October 2012).

⁸³ www.remploy.co.uk, (Last accessed 13 October 2012).

⁸⁴ union-news.co.uk, (Last accessed 13 October 2012).

⁸⁵ Foundation Treaty Articles 39-40.

migrant workers from Eastern Europe⁸⁶. It is worrying however that these migrants may work where the conditions of employment, including rates of pay, are below those required by British law. Neither the Home Office's Border Agency nor the BIS's Gangmaster Authority has been successful in controlling illegal immigration or exploitation of workers.

The problem of youth unemployment has attracted particular attention. It is controversial that increased longevity and the demands that makes on income provision for the elderly, especially stresses on pension schemes, are encouraging the elderly to remain longer in employment at a time⁸⁷ when the young are unable to obtain employment but there is no reason to suppose that if the elderly were discouraged from working the vacancies thus created would be taken up by the young.

The problem of youth unemployment is partly one of motivation and employability. This in turn reflects on social attitudes and education⁸⁸.

The current government is attempting to address these problems, reforming the welfare system⁸⁹ and emphasising the need for employability to feature in all levels of education⁹⁰. But even if these measures are moves in the right direction they will not produce an immediate improvement in the employment prospects of the young. During his successful campaign for his re-election as Mayor of London Boris Johnson pledged he would:

Directly create more than 200,000 jobs for those seeking work, and continue to improve skills by creating on average 1,000 new

⁸⁶ At one time the BBC broadcast a documentary in which the youth of the Wisbech, Cambridgeshire area proved unable to undertake manual agricultural tasks and not motivated to work in catering.

⁸⁷ *Business Briefing*, The Times, 14 June 2012, 44, drawing on the Office of National Statistics states there were 1.4 million older workers above state pension age at the end of 2011.

⁸⁸ The system of comprehensive education which currently exists retains in schools many young people who are not suited to academic learning. This is now being addressed by introducing university technical colleges which bear a considerable resemblance to the technical colleges of former times, which were condemned for limiting the opportunities of teenagers. K. Baker, *At Last, Schools for Getting your Hands Dirty*, The Times, 29 May 2012, www.utcolleges.org (Last accessed 13 October 2012).

⁸⁹ It is proposing to deny housing benefit to those under 25 years of age.

⁹⁰ The Education Act 2011 imposes a duty on schools to secure independent and impartial careers guidance.

apprenticeships every week and ensure they benefit from the same travel discounts as full-time students⁹¹.

It can only be hoped that he succeeds, though, as he also stated, London has been more resilient during the recession than the rest of the country. There has been a growth in the provision of voluntary employment with many organisations offering opportunities for the unemployed to work without pay in order to improve their employability. This development is very controversial because there is no guarantee that such work will lead to employment⁹² and volunteering may affect the right to claim job seekers allowance since eligibility for this depends on availability for employment⁹³, but it is advertised on the DWP web site⁹⁴.

The Welfare Reform Act 2012 is intended to make it more difficult to get welfare benefits but being deprived of benefits cannot be expected immediately to reduce unemployment: similarly if the emphasis on educating for employability is the correct path to take, it will take time to feed through to the labour market. Neither strategy will assist those who have completed their education and emerged as hard to employ. The focus on apprenticeship schemes⁹⁵ is unlikely to introduce to employment those who failed to benefit from the schooling they were required to undergo up to the statutory school leaving age.

*Improving health and work: changing lives*⁹⁶ was the Government's response to Dame Carol Black's review of the health of Britain's working age population; it asserts:

We want to create a society where the positive links between work and health are recognised by all, where everyone aspires to a healthy and fulfilling working life and where health conditions and disabilities are not a bar to enjoying the benefits of work.

⁹¹ www.backboris2012.com. The Conservative London Borough of Barnet has pledged £1 million to support businesses in the borough to take on apprentices reported in The Hendon and Finchley Press, Thursday, 7 June 2012 12 edition.pagesuite-professional.co.uk, (Last accessed 13 October 2012).

⁹² E.g. www.bis.gov.uk.

⁹³ www.jobseekers-allowance.com, (Last accessed 13 October 2012).

⁹⁴ www.direct.gov.uk, (Last accessed 13 October 2012).

⁹⁵ www.jobseekers-allowance.com, see website of Department of Work and Pensions search2.openobjects.com, (Last accessed 13 October 2012).

⁹⁶ Executive summary, 2008, 9. www.dwp.gov.uk, (Last accessed 13 October 2012).

6. Concluding Comments

This account has posited that the whole British workforce is more vulnerable than before the current recession, but that this vulnerability stems from work and life style changes which had occurred before 2000. It asks who can help the workforce and considers the roles of Government, employers and trade unions and implies that most reliance is being placed on Government.

In a time of recession and unemployment it is easy to believe that those in employment are fortunate, but the above account demonstrates that much employment exposes workers to risks of physical and psychological injury. It indicates that many more of the employed can be vulnerable than the TUC report suggests. Life is not risk free, but the employer has a statutory duty to carry out risk assessments in order to comply with the law. In some cases the law requires a risk to be avoided entirely, and in all other cases the employer's duty is to control it as far as is reasonably practicable. The risks identified here existed before the recession, but may well be exacerbated by it. Moreover it is of concern that so many of these risks can be attributed to behavioural patterns and persist in spite of regulation and HSE advice and guidance and in some cases in spite of employers best efforts. HSE campaigns on health and safety myths based on the assumption that we live in a society that is averse to taking responsibility for risk; such aversion is arguably a consequence of the readiness of accident victims to blame someone else if accidents occur and resort to litigation for compensation and/or expect that welfare benefits will be available to provide basic income maintenance. Personal training in and acceptance of responsibility for following safe procedures might go a considerable way to enabling the reduction of risk at the workplace. The extent of unemployment continues to be of concern; although some reports suggests more workers are being hired, the situation cannot be expected to improve substantially until the economy recovers⁹⁷. The Government is accused of hindering recovery by focussing too much on reducing the national debt. The system of "quantitative easing"⁹⁸ operated by the Bank of England has assisted the Government⁹⁹, but impacted on

⁹⁷ E.g. *UK Economy Perks up as Pressure Eases on Income*, The Times, 28 September 2012, 7 and C. Cavendish, *Green Shoots for Jobs, but not for Growth*, The Times, 20 September 2012, 29.

⁹⁸ Printing money.

⁹⁹ See D. Wighton, *Osborne Has at Least one Friend in King*, The Times, 22 September 2012, 55.

the value of the pay packet and further held back consumer spending already restricted by the difficulty of paying off personal debts. Most importantly, overseas markets will not improve while the Euro zone crisis continues and other economies, east and west of Europe remain fragile.

The steps being taken by various Government Departments to increase employability will take time to impact and will in any case only bear fruit when the demand for workers increases. The difficulty of achieving an inclusive society in which the whole population of those of employable age is employable and motivated to work is an even bigger challenge for government departments and society as a whole, but is a problem to be tackled in the interests of the health of the nation.

There are many problems which are only now receiving attention, but need to be addressed to achieve a fair society with a stable economy. For example there are many wealthy people who avoid paying taxes, the better enforcement of the minimum wage legislation to make it less attractive for employers to rely on migrant workers, and the reform of the financial sector to prevent the cycle of “boom and bust” which caused the current recession. The Governor of the Bank of England has predicted that the consequences of the financial crisis of 2008 will be with Britain for many years to come¹⁰⁰.

There are so many uncertainties that it is not possible to attempt a firm conclusion as to what the future will hold but it may be suggested that the workforce will have to accept more responsibility, adjusting to changed economic and social conditions; controlling personal debt, resisting the temptation to buy now and pay later, embracing lifelong learning and taking more care when at work.

¹⁰⁰ www.egovmonitor.com, (Last accessed 13 October 2012).

Underpaid, Overworked, but Happy? Ambiguous Experiences and Processes of Vulnerabilisation in Domiciliary Elderly Care¹

Karin Sardadvar, Pernille Hohnen, Angelika Kuemmerling, Charlotte McClelland, Rasa Naujaniene, Claudia Villosio *

1. Introductory Remarks

In many European countries, the workforce in domiciliary care for the elderly is characterised by a high share of female, migrant, ethnic minority and middle-aged workers. Labour studies often refer to these and other categories of workers who face increased risks of inequality, discrimination, precarious employment and poverty as “vulnerable groups”. Indeed, this can be a useful label in order to be able to list and analyse social inequality. However, speaking about “vulnerable groups” may convey an unintended essentialist or deterministic conception of categories such as gender or ethnicity. Therefore, we regard it as

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¹ The title is taken from: A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, Internal report for WP7 of the Walqing project, SSH-CT-2009-244597, 2012a. While it was originally used within the German context, we find that it accurately captures the main ambiguity in domiciliary care work that was found in all five countries investigated.

important to move the main focus away from groups and traits and otherwise adopt a multi-dimensional and process-oriented perspective on vulnerability. We suggest using the term “vulnerabilisation” in order to highlight this process-oriented perspective.

In this paper, we apply such a multi-dimensional and process-oriented perspective in investigating vulnerabilities in domiciliary care for the elderly. These services support elderly people who live in private households but need assistance with self-care (e.g. washing, dressing, eating, taking medication) or domestic tasks such as cleaning and cooking².

We argue that it is important to consider not only structural and externally observable characteristics of work in the sector, but to investigate individual experiences, agency and sense-making. As we will show, such a perspective offers some insight into vulnerability that would not be discovered otherwise. In domiciliary elderly care specifically, we identify a main ambiguity between disadvantageous working conditions on the one hand and high appreciation for the job by care workers themselves on the other hand. As such, we conclude that the experiences of meaningful work and close social relations with elderly clients prevent care workers from leaving the sector or advocate better working conditions in spite of low wages, precarious contracts and lack of recognition.

Building on a comparative international research project, we present findings from five EU countries: Denmark, Germany, Italy, Lithuania, and the United Kingdom. In doing so, we aim to single out typical key features of care work, discuss how these imply vulnerabilisation tendencies, reflect upon how trends in vulnerabilisation built into work are experienced by workers, and consider the implications of vulnerabilisation for different groups of employees. In order to contextualise this research focus, we begin by outlining the main theoretical and analytical approaches before turning to data and the results.

²D. Anxo, C. Fagan, *The Family, the State and Now the Market: the Organisation of Employment and Working Time in the Home Care Services for the Elderly*, in G. Bosch, S. Lehndorff (eds.), *Working in the Service Sector*, Routledge, London, 2005, 337.

2. Analytical Framework: the Actor-in-society and Vulnerability as a Process

The findings presented in this paper are embedded in two theoretical frameworks. First, we adopt an agency-based, interpretive approach that considers interactions between structure and agency. Second, we build on the concept of vulnerability and empirical evidence for it placing a strong focus on its dynamic aspects. Hence, we combine existing definitions of vulnerable employment as precarious work that places people at risk of continuous poverty and injustice resulting in an imbalance of power in the employer-worker relationship³ with an emphasis on individual agency. In the following, we outline these two approaches characterising both the empirical research conducted and the findings presented in this paper.

The empirical material used here prioritises an individual perspective on quality of work and life by focusing on how “the actor-in-society”⁴ experiences and constructs meaning in her or his work. Such an analytical framework implies an interpretive study of everyday working conditions where the aim is to connect action to its sense rather than behaviour to its determinants⁵. In other words, the aim of this research study is to reveal and understand how individuals – as social actors – make sense of their current work and life situation, and how their orientation and agency can be understood as a response to the specific social and cultural context in which they operate.

While we thus take employees’ experience as the empirical basis, we still link it to the broader and more structural conditions they are embedded in. Accordingly, we make use of an agency-focused approach that considers agency as interrelated with structure. Specifically in the case of elderly care, it is clear that structural and organisational, micro and meso processes are of vital importance as a context for agency. At the same

³ TUC Commission on Vulnerable Employment, *Hard Work, Hidden Lives, The Full Report of the Commission on Vulnerable Employment*, 2008, www.vulnerableworkers.org.uk (Last Accessed 29 July 2012). B. Barrett, M. Sargeant, *The Health, Safety and Well-being of Vulnerable Workers*, in M. Sargeant, B. Barrett (eds.), *Vulnerable Workers. Health, Safety and Well-being*, Gower, Surrey, 2011, 1-21.

⁴ A. Giddens, *Social Theory and Modern Sociology*, Stanford University Press, Stanford, 1987, 310. N. J. Smelser, R. Swedberg, *The Sociological Perspective on the Economy*, in N. J. Smelser, R. Swedberg (eds.), *The Handbook of Economic Sociology*, Princeton University Press, Princeton, 1994, 3-26.

⁵ C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, Basic Books, New York, 1983, 244. S. Singh, *Marriage Money: the Social Shaping of Money in Marriage and Banking*, Studies in Society Series, Allen & Unwin, 1997.

time, taking agency seriously means that even within these shaping and limiting contexts, components of the life world are not a given, but interpreted and acted upon by the social actor. As we explain in the following, this focus on individual perspectives has some important implications for studying vulnerability.

Understanding individual perspectives and agency is significant for the study of the social and cultural dynamics involved in the construction of vulnerability and vulnerable groups for several reasons. First, organisational and managerial forms are not simply imposed from above, but are also influenced by workers' job crafting and orientation⁶. Work is not only a product of managerial decisions, but also a result of workers agency, albeit constrained by the options available.

Second, the social and economic consequences of specific work arrangements in terms of quality of work and quality of life are not the same for all social groups, and are influenced by their life situations, perspectives and capabilities. Indeed, differences in job orientation and life aspirations may result in different responses to and different experiences of the same work arrangements. Consequently, quality of work and quality of life acquire different meaning and value for different social groups⁷. For example, Valenduc *et al.* have shown that the career biographies of low-skilled front-line workers are characterised by discontinuity and "accidental" employment⁸. This contributes to their job orientation, which is focused on creating "stability" rather than "progression" or advancement.

Previous research on vulnerable work and vulnerable groups has documented the existence of poor working conditions as well as highlighted specific groups at risk. The groups that, according to these studies, occupy the most vulnerable positions in the labour market are women, migrants and employees from ethnic minority groups (i.e., non-

⁶ A. Wrzesniewski, J. Dutton, *Crafting a Job, Revisioning Employees as Active Crafters of their Work*, *Academy of Management Review*, No. 2, 2011, 179-201. E. E. Kossek, S. J. Lambert (eds.), *Work and Life Integration*, Lawrence Erlbaum Associates Publishers, Mahwah, New Jersey, 2005. S. P. Vallas, *Empowerment Redux: Structure, Agency and the Remaking of Managerial Authority*, *American Journal of Sociology* 111, No. 6, 2006, 1677-1717.

⁷ K. Rowlingson, *Fate, Hope and Insecurity: Future Orientation and Forward Planning*, Policy Studies Institute, London, 2000, 43. P. Hohnen, T. Hjort, "Citizens as Consumers": a Discussion of New Emergent Forms of Marginalisation in the Nordic Welfare States, *European Journal of Social Security* 11, No. 3, 2009, 271-291.

⁸ G. Valenduc, P. Vendramin, B.-J. Krings, L. Nierling, *Occupational Case Studies – Synthesis Report and Comparative Analysis*. Final report of WP 11, December 2007, HIVA, Leuven.

EU nationals), and people with disabilities⁹. Ethnic minority groups and migrants appear to be particularly overrepresented at the bottom levels¹⁰. Other categories of employees who may be at risk are young employees, old employees as well as other groups in low-skilled employment. However, this research tends to categorise “bad jobs” and “vulnerable groups” at a general level. In order to gain knowledge on synergies between specific types of work organisation and how these may influence work and life for different groups of employees, it is necessary to be more precise about the processes involved. We need to investigate how organisational changes and structural inequalities may influence quality of work and life of employees, and to bear in mind that there may be differences between the categories of employees.

Within social policy research, “vulnerability”, viewed as a dynamic concept, has increasingly become the key concept in identifying social marginalisation. “Vulnerability” refers to a potentially problematic social situation in the intermediate zone between “normal” and “excluded”¹¹. Micheli furthermore uses the concept of “critical normality”, indicating a position in which occupants are at risk of being negatively affected by external changes¹². The term “downdrift” identifies processes transforming the position from that of critical normality to social exclusion or poverty. Since we are concerned with identifying work-related vulnerability, we focus on vulnerability understood as work-related processes characterised by uncertainty or weakness “which expose a person (or a family) to suffering particularly negative or damaging consequences if a problematic situation arises”¹³.

We argue that these processes take place on several levels, and that these levels interlink in producing vulnerabilities. In the case of elderly care, the macro level of social policies, the meso level of work organisation, and the micro level of agency and sense-making interact in shaping care workers’ vulnerabilities. In order to highlight this process-oriented understanding of vulnerability, we suggest using the term “vulnerabilisation”. Processes of vulnerabilisation include objective conditions as well as individual

⁹ G. Valenduc *et al.*, *op. cit.*

¹⁰ *Ibid.*

¹¹ G. A. Micheli, *Downdrift: Provoking Agents and Symptom-Formation Factors in the Process of Impoverishment*, in E. Mingione (ed.), *Urban Poverty and the Underclass: a Reader*, Blackwell Publishers, Oxford, 2008, 41-63.

¹² *Ibid.*

¹³ C. Ranci, *Social Vulnerability in Europe*, in C. Ranci (ed.), *Social Vulnerability in Europe: the New Configuration of Social Risk*, Palgrave Macmillan, Basingstoke, 2010, 3-24, 16.

resources and capacities. Consequently, vulnerability is considered a multidimensional concept involving not only precarious work and labour market related risks, but also welfare related risks (e.g. changing access to welfare provision) and social participation¹⁴. In other words, we may find processes that vulnerabilise workers at the macro level, the meso level and the micro level, and the interrelations of these levels. Additionally, different groups of the workforce who are known to be at risk of vulnerability may face and handle these processes of vulnerabilisation in different ways.

In this article we will look at vulnerabilisation in domiciliary elderly care on the basis of qualitative empirical research. In the next section, we describe the data that provides the basis for our findings.

3. Data Material, Research Methods and the Walqing Project

The article considers data from the European research project “Walqing”¹⁵. The project was carried out by 12 European research institutions, was funded by the 7th framework programme of the European Commission, and ran from 2009 to 2012. Walqing investigated growing jobs in Europe which have been characterised by problematic working conditions, precarious employment, low wages, and a lack of social integration.

The project was based on mixed methods. It began with quantitative data analyses of employment growth and quality of work and life in the EU. Based on these results, five sub-sectors were selected for in-depth qualitative investigation: commercial office cleaning, contract catering, “green” construction, waste collection, and domiciliary elderly care. In these subsectors the project provided a total of 22 sector reports, 55 organisational case studies and more than 400 individual interviews.

In the current contribution, we focus on the analysis of vulnerabilisation in one of these sub-sectors, namely domiciliary elderly care. This sub-sector was investigated in five of the eleven countries involved in the

¹⁴ A. Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in V. Rao, M. Walton (eds.), *Culture and Public Action*, Stanford Social Sciences, Stanford, California, 2004, 59-84. A. Sen, *Development as Freedom*, Alfred A. Knopf, New York, 1999, 366. R. Sennett, *The Corrosion of Character: the Personal Consequences of Work in the new Capitalism*, Norton, New York, 1998, 176. K. Rowlingson, *op. cit.*, C. Ranci, *op. cit.*

¹⁵ See previous description. For details of the Work and Life Quality in New and Growing Jobs (Walqing) project see www.walqing.eu. (Last accessed 29 July 2012).

Walqing project: Denmark, Germany, Italy, Lithuania, and the United Kingdom. The research carried out on elderly care in these countries comprised of 11 case studies and 88 individual interviews. While the case studies shed light on structural conditions and changes, and on how elderly care is organised, the individual interviews revealed how workers experience these conditions, and are used to analyse how prevailing structures and workplace realities create vulnerabilities. The interviews were semi-structured, open-ended and qualitative. They were conducted with workers employed at the organisations where the case studies were carried out.

The cases were selected in various ways. In Denmark, case studies and employee interviews were carried out in the public as well as in the private sector, resulting in one “traditional” and one “innovative” case. In Germany, cases were taken both from West and East Germany, including non-profit and private, large and small organisations. The Italian cases considered private and public dimensions as well as regional variety. In Lithuania, case studies were carried out in two different organisations offering care services: a public agency and a non-governmental organisation. Finally, in the UK, case studies and employee interviews were undertaken with the public, private and third sector in order to obtain accounts from the range of domiciliary care providing organisations available in that country.

4. Findings: Key Features of Domiciliary Care Work and Processes of Vulnerabilisation

In the following sections we present the findings of our empirical research by identifying key characteristics of care work and discussing in what ways they contribute to workers’ vulnerabilisation. The presentation of findings follows the theoretical idea that macro, meso and micro level work together in producing and shaping vulnerabilities. We present seven partly interrelated findings.

We start by (1) outlining frameworks and trends on the level of policies and regulation and (2) discussing the dominant care work characteristic of time pressure. We then proceed to the issue of (3) precarious contracts and wages before turning to (4) the physical and emotional demands that characterise work in domiciliary elderly care. Next, we present (5) a core finding of the research, which we refer to as the central ambiguity of care work, followed by a discussion of (6) the implications of domiciliary elderly care being undertaken in the private home of clients. Finally, we

look at (7) the implications of the sector being female-dominated for both female and male workers.

The results take the following format. First, we present characteristics of domiciliary elderly care that we identify as typical key features of the work. Second, we ask how these key features contribute to the vulnerabilisation of workers and what kinds of vulnerabilities they shape. Third, where relevant, we discuss how different vulnerable groups are concerned by these features in specific ways.

4.1. Policies and Regulation: Frameworks and Trends on the Macro Level

We begin by positioning the countries investigated within their policy contexts, and by describing new and ongoing trends in the field of policy and regulation. Some of these can be found at a cross-country level, while others are more state-specific. The five countries investigated represent different care regimes in Europe. Drawing on the work of Simonazzi, the following table provides an overview of care regimes in Europe and positions the countries involved in the research within this typology¹⁶:

Table No. 1 – Elderly Care Regimes in the Investigated Countries

Country groups	Northern Europe	Continental Europe	Mediterranean Europe	Central-Eastern Europe
Countries investigated	Denmark United Kingdom	Germany	Italy	Lithuania
Basic characteristics of care regime in country group	State responsibility for dependency financed through general taxation	Dependency covered through insurance or universal cover	Family based and principle of social assistance	Families legally or implicitly bound to care

Source: A. Simonazzi, *Care Regimes and National Employment Models*, *Cambridge Journal of Economics* 33, No. 2, 2008, 211-232. P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low*

¹⁶ A. Simonazzi, *Care Regimes and National Employment Models*, *Cambridge Journal of Economics* 33, No. 2, 2008, 211-232.

Wage Jobs, Synthesis report on employees' experience and work trajectories for work package 7 of the Walqing project (preliminary version), SSH-CT-2009-244597, 2012a.

In addition to this basic classification, there are some important specifications and trends which shape the context in which care work is being provided. Domiciliary elderly care in Denmark is publicly financed. Care is traditionally provided by municipalities and only recently have private providers arrived in the care market. While the outsourcing of care provision thus has been limited so far in Denmark, in the United Kingdom there has been a far more prominent trend towards public sector outsourcing in recent decades. As such, domiciliary care in the UK is provided through public, private and third sector organisations as well as through private individual arrangements. In Germany, long-term care is only part-covered by insurance and, as such, relies on family involvement to a high extent. In Italy, too, the main care provider has traditionally been the family, in particular, women. While the availability of publicly funded home care services is very low, there is a tendency towards outsourcing from local authorities to private care organisations by means of a “contracting-out” model. In Lithuania, the unpaid provision of care is dominant, and the prevailing attitude is that care is a family duty. Domiciliary care in Lithuania is provided through public and third sector organisations, the first one being dominant. Access to such services is far from universal and based on a strict evaluation of needs as well as the economic situation of municipalities. On the whole, we can observe two widespread tendencies in European care that shape the working lives of employees: standardisation and privatisation.

In Denmark, Germany and the UK, domiciliary elderly care has become standardised to a large extent. For example, care tasks and the time allocated to these tasks are being increasingly regulated. For workers, this leads to time pressure (see section 4.2). Apart from exposing workers to constant stress, time pressure also results in some workers extending their working hours into their leisure time. Workers thus try to solve structural problems through individual efforts.

Privatisation is another dominant trend, which we find in most countries, though with differences in intensity and pace. The research conducted points out the vulnerabilising effects of privatisation. We find that private care providers are, as a rule, more reluctant to offer permanent contracts. What this implies for individual lives will be of interest in section 4.3.

Indeed, in our research, we found publicly employed care workers were in general more satisfied than privately employed ones.¹⁷ Policies and regulations, we conclude, build frames within which care work is undertaken, and decisions made on the macro level can have a very concrete influence on work organisation and everyday work and life. We will repeatedly come back to this thought in the following sections. On the whole, we identify regulation to make an ambivalent impact. On the one hand, a low degree of regulation, as is prevalent in Lithuania and Italy, is linked to a lack of protection and support of workers. On the other hand, regulation can have adverse outcomes such as providing employees with less autonomy, there being mismatches between rules and practice, and increasing time pressure. The latter problem, resulting from rigid, top-down time allocations to tasks, will be looked at in the next section. Thus, in the next step we move from the macro level of policies to the meso and micro level of organisations and individual workers' perceptions and agency.

4.2. Three Minutes for Making Breakfast: Downsizing and Time Pressure

In the qualitative interviews, care workers in all countries were invited to talk in detail about their everyday working lives. In all countries investigated, carers report considerable time pressure:

You get 16 minutes for the morning wash and in that time I have to prepare the bathroom, bring the customer to the bathroom, undress him, wash him, dress him again, brush his teeth [...]. Then I'm paid another three minutes to make breakfast. How's that supposed to work?
Care service manager, Germany¹⁸

¹⁷ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, Synthesis report on employees' experience and work trajectories for work package 7 of the Walqing project (preliminary version), SSH-CT-2009-244597, 2012a.

¹⁸ Quoted in A. Kuemmerling, *High Autonomy, High Workload – Working in a Small Private Company: PRIVATECARE – an Elderly Care Case Study from Germany*, Internal report for WP6 of the Walqing project, SSH-CT-2009-244597, 2012b, 15.

So it's not like you can sit down and talk to the citizen. 12 minutes – what is that when you need to prepare breakfast, lunch and do the dishes
Care helper, Denmark¹⁹

Increased time pressure is in part due to the regulation of time allocated to tasks, as mentioned in the previous section, as well as downsizing tendencies. As Hohnen summarises on the basis of a comparative analysis, employees' critique regarding the issue of time can be differentiated into two types of problems²⁰. One refers to a general feeling of having insufficient time for doing work properly; the other regards the problems linked to repeated or continual decreases in the amount of the time allocated which results in a continuous decrease in the care work delivered and the kind of care tasks that can be provided.

The first aspect is illustratively captured in the quotations above. Other ways in which it is described in workers' narratives include the choices they have to make between tasks because they cannot be undertaken in the scheduled time slot, or having to replace colleagues during vacation time and trying to continue caring both for one's own as well as one's colleagues' clients. Further cases in point are not being able to have even small conversations with the client, regularly getting behind schedule, or having to extend working hours into what was supposed to be leisure time because time calculations both for care tasks and transportation between work sites were unrealistic. Moreover, this kind of time pressure can be linked to the commonness of unforeseen events in domiciliary care as well as to care workers feeling obliged to their clients, their own work ethos and personal quality standards:

I have one [citizen] and she is really nice...and she just needed me to sit down and talk to her, but I didn't have the time. I did it anyway and got late for the next one...but it irritates me that I had to look at the watch all the time and all the time say: well, I really have to go now"
Care helper, Denmark²¹

¹⁹ Quoted in J. Z. Ajslev, J. Møller, P. Hohnen, *Between Precarious Employment, Paced Work and Customer Orientation: PRIVATECARE – an Elderly Care Case Study from Denmark*, Internal report for WP6 of the Walqing project, SSH-CT-2009-244597, 2011, 17 ff.

²⁰ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

²¹ Quoted in J. Z. Ajslev, J. Møller, P. Hohnen, *op. cit.*, 16.

The second aspect concerns the continuous cuts in time and support that clients receive, as in this example from Lithuania:

For instance, she must clean the room where the customer lives, but the hall is not her area anymore; or if she has the task to cook, she must wash the dishes, but not the kitchen floor.

Care worker, Lithuania²²

In particular, these changes lead to the problem of having to explain changes to the client every time an adaptation occurs. Confronted with this difficulty, some carer workers decide to do extra work in order to avoid other stressful situations:

If you start arguing with that elderly man, the conflict arises; in order to avoid this – you simply sweep the floor [of the hall]

Care worker, Lithuania²³

In this situation, workers thus have the problematic choice between putting a strain on the relationship with their client and investing additional emotional labour, or doing the extra work implying that they will have to work faster or stay after working hours²⁴.

The point we are making here is that regulations such as the definition of exact times for tasks in elderly care are felt clearly in everyday work situations. At the same time, individuals act towards these regulations and their consequences at work-place level. These actions vulnerabilise them when they risk conflicts with their clients, but also when they decide it is still easier to do extra work. They are under stress, face conflicts between their internal quality standards and external restrictions, have longer workdays when they get behind schedule and sometimes consciously prolong their workdays into their leisure time.

Another structural tendency we have mentioned is the increase of privatisation in the sector. We find that privatisation is linked to fixed-term contracts becoming more common. Fixed-term contracts are one of

²² Quoted in R. Naujaniene, *Elderly Care at Home in Lithuania: Individual Perspectives and Agency of Care Workers in Lithuania*, Internal report for WP7 of the Walqing project, SSH-CT-2009-244597, 2012, 4.

²³ *Ibid.*, 4.

²⁴ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

several problems in the area of working conditions that we discuss in the following section.

4.3. Working Hours and Part-time Wages: Between Zero-hour Contracts and 80-hour Weeks

Working conditions in elderly care are generally characterised by a high prevalence of part-time contracts and by working times that are concentrated within mornings and evenings. Wages, as a rule, are low, and naturally they get even lower when they are part-time based. Linked to the macro-level trend towards privatisation, further aspects of precarious employment appear to spread. Precariousness, albeit to varying degrees, characterises care work in all investigated countries.

Talking about “low wages” in elderly care does not only refer to low wages in the sense of inadequacy or unfairness. Rather, and in many cases, particularly in Lithuania and Italy, it is about veritable poverty. Many care workers consider themselves as poor, although are reluctant to talk about it²⁵. Nevertheless, in the interview material there are some instances that allow insights into the extent of financial precariousness care workers face. For example, Naujaniene, in summarizing all 13 interviews with workers conducted in the Lithuanian context, states that not one of them reported having enough money²⁶. Workers’ quotes from Italy, Denmark and the UK provide further details:

At the end of the month I get 300 Euros of net salary. I don’t get anywhere with that amount. But I always say better 300 Euros than nothing. We always need to rely on social welfare and fortunately in this city we have it.

Personal assistant, Italy²⁷

I have asked if I can get some extra work. It is difficult for me to make ends meet with only one salary.

Care worker, single mother, Denmark²⁸

²⁵ A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.* R. Naujaniene, *op. cit.*

²⁶ R. Naujaniene, *op. cit.*, 21.

²⁷ Quoted in G. Bizzotto, C. Villosio, *Workers in the Home Elderly Care Sector in Italy: a Dead-end Employment Opportunity?* Internal report for WP7 of the Walqing project, SSH-CT-2009-244597, 2012, 19.

I need to work more...because I need to pay bills. And I'm not bringing in enough money at the moment to [meet] my basic needs.
Care worker, UK²⁹

In the UK, a consequence of cases like the one quoted here is that out of financial need workers violate working time directives and extend their working hours up to 80 hours per week³⁰. Taken together, the evidence for low pay, so low that it locates carers at poverty risk or actual poverty, is experienced and resolved at the individual level, but its reasons are situated at the structural level. For one thing, the low remuneration for care work, which can be observed as cross-cutting sectors as well as countries, has to be understood in the context of the “historical undervaluation” of care work based on its similarities to unpaid work done by women and an underrating of skills connected to what is perceived to be “natural” female skills³¹. For another, care work was frequently organised as part-time work by employers in all investigated countries, for managerial and organisational reasons. Moreover, an increased use of fixed-term contracts which only guarantee few or even zero hours can be observed, particularly in private companies³².

The lack of a secured amount of working hours leads to constant unpredictability and considerable variations in actual wages. Even with the less precarious contracts, where care is organised as “normal” part-time work with a fixed amount of hours, wages are low. In cases where the hourly wage is above the minimum wage and job security is comparatively high, as in one German organisation studied, actual wages can be low

²⁸ Quoted in P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, Internal report for WP7 of the Walqing project, SSH-CT-2009-244597, 11.

²⁹ Quoted in C. McClelland, D. Holman, *Individual Perspectives and Agency Amongst Domiciliary Elderly Care Workers in the UK*, Internal report for WP7 of the Walqing project, SSH-CT-2009-244597, 2012, 18.

³⁰ *Ibid.*, *op.cit.*, 21.

³¹ C. Briar, A. Junor, *Inequality and Low Paid Women Workers. Care, Skill and Value in Social and Community Work*, Paper presented at the Gender, Work and Organisation Conference, Keele, UK, June 2012.

³² P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

when they are part-time because these allegedly fit better in the organisations' needs – and so pensions will be, too³³.

To conclude, low pay in its specific shape in domiciliary elderly care – cross-cutting national particularities – is a specifically obvious illustration of how structural contexts such as the undervaluation of work perceived as “female” and the privatisation- and organisation-driven tendency to offer zero-hour and part-time contracts, locate individuals in contexts of vulnerability. Solutions are looked for at the individual level, for example by raising working hours up to bizarre and illegal amounts. Hence, even regardless of biographies and social background, structural, societal and organisational characteristics of care work contribute to vulnerabilise workers.

While wages are low, the demands in care work are diverse and high. In the next part, we will take a look at the general demands in the job and at how – and for whom in particular – these contribute to workers' vulnerability.

4.4. *Carrying, Lifting, Feeling: Physical and Emotional Demands of Care Work*

Skills required and work tasks carried out in domiciliary elderly care are numerous and diverse. They include specialist skills, communicative, emotional and physical labour as well as an ability to organise and improvise³⁴. Strains and demands are just as manifold. Krajic *et al.* differentiate three categories of strains: those which result from the character of the work (physical and emotional demands), those which are due to organisational frameworks of work, and those which are located in the societal environment (scarcity of resources, lack of valuation)³⁵. Among specific strains that have been identified there are the increasing

³³ A. Kuemmerling, *Making a Living? Work and Working in a Non-profit Organisation: WELFARE CARE – an Elderly Care Case Study from Germany*, Internal report for WP6 of the Walqing project, SSH-CT-2009-244597, 2012c.

³⁴ M. Krenn, *Mobile Pflege und Betreuung als interaktive Arbeit: Anforderungen und Belastungen*, Qualitative Studie im Auftrag des Forschungsinstituts des Wiener Roten Kreuzes, unter Mitarbeit von U. Papouschek, FORBA-Forschungsbericht, Vienna, 2003, No. 3. A. Büssing, J. Glaser, *Interaktionsarbeit: Konzept und Methoden der Erfassung im Krankenhaus*, *Zeitschrift für Arbeitswissenschaft*, Themenheft: Personenbezogene Dienstleistung – Arbeit der Zukunft, No. 53, 1999. C. Briar, A. Junor, *op. cit.*

³⁵ K. Krajic, P. Nowak, E. Rappold, *Pflegenotstand in der mobilen Pflege? Diagnosen und Lösungsmöglichkeiten*, Endbericht, Ludwig Boltzmann Institut für Medizin- und Gesundheitssoziologie, Wien, 2005.

demands of documenting work, high responsibilities and the need to make decisions³⁶. Building on the empirical research presented here, we should add and highlight another demand: a strong and increasing tension between strict and scarce time resources on the one hand and a working reality characterised by high unpredictability and the need to flexibly adapt to upcoming situations on the other³⁷.

As our own research confirms and emphasises, care workers are very concerned about potential damage to their health and question whether they will be able to continue working in elderly care until retirement age. Lifting patients, carrying heavy groceries, doing cleaning and having to bend when walking with patients; these are every-day demands of the work which put workers' musculoskeletal system at risk. The physical dimension of work is emphasised particularly in countries where care work is less regulated, like in Italy and Lithuania³⁸.

At the same time, the effectiveness of regulations and technologies aiming to relieve or restrict physical strain in care work is limited. A case in point is a directive implemented by local authorities in Lithuania allowing care workers to lift no more than five kilograms. Due to time limits and reductions made in the frequency of visits, requiring workers to buy groceries that will be enough for several days, care workers find the limit ridiculous, as it is simply not applicable in the reality of their working life³⁹. Meanwhile, the case of Germany shows that while lifting equipment is supposed to relieve the strain of moving or lifting clients, some care workers do not have access to these devices or cannot use them because clients refuse⁴⁰.

In addition to the physical demands, work in elderly care is emotionally exhausting. Workers feel to a high extent emotionally responsible for their

³⁶ M. Krenn, *op. cit.* E. Seidl, *Defizite im Gesundheitswesen aus der Perspektive der Pflege*, in O. Meggeneder (ed.), *Unter-, Über- und Fehlversorgung, Misuse*, Frankfurt/Main, 2003, 33-52. K. Krajic *et al.*, *op. cit.*

³⁷ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.* A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*, 19. M. Krenn, *op. cit.* M. Brater, A. Maurus, *Das schlanke Heim. Lean Management in der stationären Altenpflege*, Vincentz Network, Hannover, 1999.

³⁸ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

³⁹ R. Naujaniene, *op. cit.*

⁴⁰ A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*

clients, having to cheer them up, listen and talk to them⁴¹. They thus provide emotional labour, which can be highly demanding. Additionally, they are confronted with disease and death, feeling a tension between closeness to the clients and the necessity to draw boundaries and keep a distance in order to protect themselves⁴². Workers in all five countries reported that they felt physically tired and emotionally exhausted after a work day⁴³.

The demands for care work concern all workers. They are built into the work as it is currently understood and organised. Nevertheless, physical demands are also a feature of care work where vulnerable groups come into the picture. The average age of care workers in the countries investigated is high, above 40 years. This is reflected in care workers' concerns about their possibilities, as older workers, in the labour market. The physical demand of care work, especially in those contexts where it is less structured and formalised, like in Italy, poses potentially serious problems for workers as they age.

After just 10 years of care work a care-giver has some limitation in her activities due to musculoskeletal injuries, which can reduce her ability to work and lead to layoff and unemployment.

Trade union secretary of the care sector, Italy⁴⁴

No one has worked here until they're 65, and [there's] only one who made it to 63. They all go before then

Care worker, Germany⁴⁵

Moreover, according to the empirical findings, older care workers also have fewer career aspirations than younger ones, with those in the UK, for instance, sometimes choosing to accept their current status and to continue in it for as long as possible because they feel "too old" to do

⁴¹ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

⁴² *Ibid.*, *op. cit.*

⁴³ *Ibid.*, *op. cit.*

⁴⁴ Quoted in G. Bizzotto, C. Villosio, *Once There Were Wives and Daughters, Now There are Badanti: Working in Home Elderly Care in Italy is still an Informal, Unqualified and Unrecognised Occupation*, Walqing social partnership series 2011.14, A report for WP5 of the WALQING project, SSH-CT-2009-244597, Moncalieri, September 2011b, 12, www.walqing.eu (Last accessed 29 July 2012).

⁴⁵ Quoted in A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*, 15.

anything else. Many of these care workers who are not able to stay in the job until the ordinary retirement age find themselves forced to choose an early retirement with a lower pension.

As becomes obvious from these examples, the physical and emotional strain linked to care work poses a serious health risk for workers and influences their aspirations and future perspectives. Working realities and pension systems do not appear to be well-concerted with regard to care workers. Having the option to choose early retirement, as in Germany, implies the reduction of pensions. This adds to a situation in which, in many countries, women, who often have had interrupted careers, doing unpaid care work, working part-time and earning lower wages than men, have comparatively low pensions anyway. The situation is further complicated by the lack of alternative positions inside as well as outside care for the typical care workers and their skills.

In summary, the physical demands, perceived as a typical feature of domiciliary care, are not always successfully restricted by regulation, as we have seen. With elderly care having a comparatively old workforce, many workers belong to the group of middle-aged or older workers, and it is these workers in particular who are both worried and are also most at risk with regard to work-related health problems and the need to stop working. Their vulnerabilisation may be prolonged when it comes to pensions, which are likely to be low especially for women. Moreover, we find that it is particularly elderly workers who are less likely to try and change their working situation, but rather adapt to the prevailing conditions as long as they can.

Meanwhile, the high demands in elderly care work are accompanied by a general lack of recognition, which we will discuss in the following. From there, we proceed to a core finding of our research, demonstrating the importance of looking not only at externally visible characteristics of work but also at workers' own interpretations. We find that workers find meaning and satisfaction in their jobs – despite the precariousness and demands that have been illustrated. We refer to this as the central ambiguity of care work and will discuss it in the next section, reflecting upon its paradoxical outcomes for vulnerability.

4.5. “Then I think about how happy I am that I have chosen this kind of work”: The Central Ambiguity of Care Work

While demands are high, recognition for care work is perceived as low. Workers interpret the low wages they are confronted with as a lack of

societal recognition for their work⁴⁶. Material and symbolic dimensions of recognition are interlinked, or in other words: the lack of recognition is reflected in low material remuneration as well as symbolic undervaluation. Care workers perceive symbolic recognition as lacking from society as a whole as well as from their personal surroundings. Being, at the same time, very aware of the demands and the value of their work which they themselves perceive as high, the inconsistencies between demands and significance on the one hand, and wages and recognition on the other hand, leave workers with an irresolvable and permanent contradiction. The following quotes by carers highlight this contradiction:

I don't think it is appreciated what we do. And it's not by the citizens I mean it. It is the whole understanding of it, in terms of wages in particular. What we do is of great value!
Care helper, Denmark⁴⁷

I earn a pittance, just 6 Euros per hour. But the responsibilities we have in our job are huge. We need to have one hundred eyes [to look after the elderly people]
Personal assistant, Italy⁴⁸

Even old people who we go to say we're worth our weight in gold. Without us, they wouldn't live at home and we don't get paid enough for what we do
Care worker, UK⁴⁹

How do workers cope with this contradiction? On the one hand, we find a tendency towards resignation by care workers, with many of them having no expectations of future improvements either with regard to wages or general social recognition⁵⁰. On the other hand, workers

⁴⁶ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

⁴⁷ Quoted in P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, *op. cit.*, 10.

⁴⁸ Quoted in G. Bizzotto, C. Villosio *Once There Were Wives and Daughters, Now There are Badanti: Working in Home Elderly Care in Italy is still an Informal, Unqualified and Unrecognised Occupation*, *op. cit.*, 10.

⁴⁹ Quoted in C. McClelland, D. Holman, *Individual Perspectives and Agency Amongst Domiciliary Elderly Care Workers in the UK*, *op. cit.*, 8.

⁵⁰ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

somewhat compensate for this lack of recognition by attributing considerable meaning to their work themselves.

The central ambiguity of elderly care work, prevalent in all five countries, takes the following shape. Despite the unfavourable combination of high physical and emotional demands, worries about negative health outcomes, low pay, a tendency towards part-time or precarious contracts, and the contradiction between the perceived value of the work and its recognition, workers in all countries investigated liked their jobs. Almost all care workers interviewed expressed a high degree of satisfaction with their work and were surprisingly positive about the value, usefulness and significance of it⁵¹. They reported being proud of their work, receiving acknowledgement and gratitude from clients, enjoying the contact with clients, and feeling that what they did was meaningful.

It is striking how these perceptions of work exist in parallel to the aspects of frustration, unfairness and strain discussed above. The overall pattern is not that some carers are more or less satisfied, but that almost all are unsatisfied and satisfied at the same time. The following quotes illustrate how rewards and the meaning of care work are presented by carers:

I like the work...because I feel good, when I arrive at Mrs. Jensen to see if she has remembered her pills. You can see it immediately how happy she is to see you...then I think about how happy I am that I have chosen this kind of work...

Care helper, Denmark⁵²

You get so much back, sometimes, it is just the smile...

Care worker, Germany⁵³

Yeah, you get satisfaction out of it I think...getting them sorted out and stuff, and making their lives better.

Care worker, UK⁵⁴

⁵¹ *Ibid.*, *op. cit.*

⁵² Quoted in P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, *op. cit.*, 9.

⁵³ Quoted in A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*, 13.

⁵⁴ Quoted in C. McClelland, D. Holman, *Caring for the Right Reasons and Surviving against the Odds in the Third Sector. COOPERATIVE COMMUNITY CARE – a Third Sector Elderly Care Case Study from the UK*, Internal report for WP6 of the Walqing project, SSH-CT-2009-244597, 2011, 18.

Perhaps most impressively, the ambiguity between unfavourable working conditions and the intrinsic benefits of the job is illustrated in the following quote by a German care assistant:

There's a real state of emergency in care work now. We need lots more people even though I would no longer advise anyone to go into care work. I wouldn't do it again. Or maybe I would. I don't know. I love this job. You need to be born to this job. I like working with people.
Care assistant, Germany⁵⁵

How does this ambiguity, involving considerable satisfaction with work in spite of – or rather parallel to – unfavourable working conditions (in many respects), contribute to vulnerabilising workers? It can be argued that it is precisely the meaning derived from work regardless of all prevailing problems that makes workers vulnerable, namely in the sense that they are more willing to accept bad working conditions if they are “compensated” for it by other means. Following this argument, workers in elderly care will be less likely to complain, to organise, to leave or to make demands. This is also indicated by their tendency to feel resigned, as mentioned above. In this sense, paradoxically, workers are made additionally vulnerable in that they have some motivation to stay in a vulnerabilising job.

The idea of care work as a “vocation”, something often referred to by carers throughout the countries investigated, and the emotional labour involved in the social relationships that are part of carers' work, can indeed work as an obstacle for them to move on to potentially better careers, as in the following example:

I would like to continue my university course, but I have too many things to do [...] I take care of an old lady of 98 years. I'm sorry if I have to put her aside to study. When I'm substituted by someone else she misses me
Personal assistant, Italy⁵⁶

⁵⁵ Quoted in A. Kuemmerling, *Trying to Expand the Services without Exploiting the Employees – Does it Work? BIGPRIVATECARE – an Elderly Care Case Study From Germany*, Internal report for WP6 of the Walqing project, SSH-CT-2009-244597, 2012d.

⁵⁶ Quoted in G. Bizzotto, C. Villosio, *Once There Were Wives and Daughters, Now There are Badanti: Working in Home Elderly Care in Italy is still an Informal, Unqualified and Unrecognised Occupation*, *op. cit.*, 21.

Another case in point is that the meaning derived from work and the emotional labour involved in it, implying feeling responsible for clients, may hamper workers from striving for better working conditions. On an individual level, and in accordance with the high relevance of the relationship to the client and the moral and emotional obligation linked to their work by carers themselves, workers have difficulties to advocate improvements: they are afraid that by getting organised they would risk their clients' wellbeing.

For instance, in the German context, Kuemmerling states that the "carers cannot imagine demonstrating or going on strike for their own interests, knowing that no one is caring for their patients"⁵⁷.

Likewise, an Italian employee explains:

I wonder what power we have. What types of action can unions pursue? We can strike but strike harms vulnerable people, thus we strike reluctantly. On the other hand social services of the municipality look unfavourably on strike action and thus may decide to choose another cooperative to run the service, or may decide to use only personal assistants [unskilled care workers] for elderly home care

Social care operator, Italy⁵⁸

The above quotations highlight the lack of influence and "voice" that many care workers' stories explicitly or implicitly convey.⁵⁹ This does not mean that care workers are not aware of the adverse working conditions they are facing, but they find it difficult to voice their opinions. This is, as the quotes above suggest, related to the fact that they are afraid that doing this will harm their clients. It can be concluded thus that the responsibility workers perceive for their clients as a central feature of their job aggravates their vulnerability by building a barrier towards expressing their demands. This, then, is another example for the ways in which characteristics of work contribute to producing vulnerability.

⁵⁷ A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*, 22.

⁵⁸ Quoted in G. Bizzotto, C. Villosio, *Once There Were Wives and Daughters, Now There are Badanti: Working in Home Elderly Care in Italy is still an Informal, Unqualified and Unrecognised Occupation*, *op. cit.*, 16.

⁵⁹ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

In this context, migrants and ethnic minorities appear to be particularly vulnerable. Insufficient language skills are considered as a problem by migrants and ethnic minorities, both in terms of being reluctant to “speak up” for themselves because they are afraid of not being able to express themselves clearly, and because the lack of language skills “traps” them in a low skilled position by preventing them from pursuing further education⁶⁰.

Another way in which care work produces vulnerabilities, which some vulnerable groups are specifically exposed to, is the feature of care work being done in the home of the client. We will discuss this general characteristic of care work in the next section and will then continue to look at its specific relevance for migrants and ethnic minorities.

4.6. *Working in the Homes of Clients*

As a rule, employees in domiciliary elderly care work on their own and in the private homes of the elderly to care for, being alone with him or her. This crucial feature of domiciliary care work gives it a distinctive character. It has been previously described that this feature of care work results in a number of problems. It tends to render both the work and the risks linked to it as invisible, to stand in the way of the recognition of work by employers, and to hamper employees’ direct participation in the organisation⁶¹. Additionally, we find that it implies that workers’ relationships with their clients may decide their quality of work and can be a source of vulnerability⁶². In the Lithuanian context, Naujaniene arrives at the following clear conclusion:

From the interviews with care workers it became evident that the relationship with customers becomes crucial for care workers. If these relationships are defined as ‘good’, working conditions are also seen as good. And, on the contrary, ‘bad’ relations relate [...] to displeasure at work⁶³.

⁶⁰ *Ibid.*

⁶¹ M. Krenn, *op. cit.*, 1, 30 ff.

⁶² P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

⁶³ R. Naujaniene, *op. cit.*, 6.

Therefore, it becomes an important factor in care work to maintain a good relationship with clients. However, clients generally have considerable “bargaining power” in this relationship that may substantially influence carers’ work situation in several ways⁶⁴. Cases in point are clients refusing the use of lifting devices because they do not trust them⁶⁵, clients rejecting ethnic minorities, and clients not allowing the carer to arrive before a certain time thus making carers adapt their lunch breaks and finishing times⁶⁶. The comparative analysis further indicates that clients have most power in the least regulated care systems, as in Lithuania and Italy. There, we find instances of carers being accused of having stolen as “no-one is defending them”, or being exposed to bad treatment, personal offences and threats⁶⁷. But even in strongly regulated contexts, workers are sometimes confronted with clients’ moods and mistreatment, manifested as violence and harassment⁶⁸.

Being exposed to bad treatment by the clients is thus a generic feature of domiciliary care work undertaken alone in clients’ private homes. It does, however, put certain groups in society at particular risk. Generally, migrant and ethnic minority workers are potentially disadvantaged at work with the main problem being their exposure to racism that is directed from the customers.⁶⁹ They are thus specifically vulnerable with regard to racist offense as well as rejection. Migrant and ethnic minority care workers in Italy, the UK and Denmark reported issues of discrimination

⁶⁴ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

⁶⁵ A. Kuemmerling, *Care Workers in Germany: Underpaid, Overworked but Happy? Individual Perspectives and Agency in the German Elderly Care Sector*, *op. cit.*, 14.

⁶⁶ G. Bizzotto, C. Villosio, *Once There Were Wives and Daughters, Now There are Badanti: Working in Home Elderly Care in Italy is still an Informal, Unqualified and Unrecognised Occupation*, *op. cit.*, 16.

⁶⁷ R. Naujaniene, *op. cit.*, 21.

⁶⁸ P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, *op. cit.*, p. 18. It should be noted that incidences of violence and abuse are a major concern with regard to clients as well. See, for example: M. Cohen, S. H. Levin, R. Gagin, G. Friedman, *Elder Abuse: Disparities Between Older People's Disclosure of Abuse, Evident Signs of Abuse, and High Risk of Abuse*, in *Journal of the American Geriatrics Society* 55, No. 8, 2007, 1224–1230; C. Cooper, A. Selwood, M. Blanchard, Z. Walker, R. Blizzard, G. Livingston, *Abuse of People with Dementia by Family Carers: Representative Cross Sectional Survey*, in *BMJ*, 2009, v. 338, b155, <http://www.bmj.com/content/338/bmj.b155.full>, (Last accessed 29 July 2012).

⁶⁹ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

or racism at the workplace. Several stories revealed incidents of physical violent attacks as well as abusive language:

He told me that I should learn to speak properly on the phone...then he called me black pig and then I say 'same to you' and then he hit me with a stick and when I tried to take it he hit me with his fist and I grabbed his arm...that is something that goes with the job [...]
Care helper, Denmark⁷⁰

Like we've got one customer, she's not nice... well in the beginning she wasn't nice to me, but maybe now, because since I stopped going there. But in the beginning I was asking myself, is it because I'm black?
Care worker, UK⁷¹

McClelland and Holman state that although such situations were partially resolved by relocating affected care workers to other clients, these initiatives did not remove the risk of future problems⁷². Clearly, the importance of the relationship to the client can work in two directions: it can contribute to satisfaction and perceived meaningfulness of work and it can expose workers to serious risks, with migrants and ethnic minorities being specifically vulnerable in the context of this generally vulnerabilising character of domestic care work.

Interestingly, men, too, face rejection by clients and are, in this, sense, a vulnerable group in care work. However, the relevance of gender in this generally female-dominated sector is more complicated than this. In the next and final section of the presentation of findings, we will look at the implications of care being a "female" sector. As we will see, this characteristic leads to well-known adverse outcomes for women, while having ambivalent effects with regard to the male workforce.

⁷⁰ Quoted in P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, *op. cit.*, 18.

⁷¹ Quoted in C. McClelland, D. Holman, *Caring for the Right Reasons and Surviving against the Odds in the Third Sector*, *op. cit.*, 13.

⁷² C. McClelland, D. Holman, *Individual Perspectives and Agency Amongst Domiciliary Elderly Care Workers in the UK*, *op. cit.*

4.7. *Ambivalent Implications of the Sector's "Femininity"*

The fact that care work is traditionally as well as ideologically perceived as “female” work is highly relevant to many of the vulnerabilities the sector is producing. The prevalence of part-time work as well as low wages can be explained by women’s socially attributed responsibility to take over unpaid care work and work in part-time jobs. Furthermore, female-dominated sectors, and care specifically because of its connotation with being “naturally female” work (which in other contexts remains unpaid), are characterised by an undervaluation of skills and, as one consequence, low wages⁷³.

As their narrations on their biographical career trajectories reveal, women often appear to choose care work because it presents an option to reconcile work and life responsibilities in spite of the often atypical working hours. However, this concern for the family also involves extensive household and family responsibilities, with female care workers often having to resolve balancing paid work with family and household commitments that might include a hefty responsibility for completing domestic and private care tasks in addition to their professional care work⁷⁴. In this sense, women, particularly working mothers, can be said to face a “double care burden”, consisting of care work done as paid job and care work done unpaid in the “private” sphere.

Meanwhile, the very few male care workers in the sector are perceived as “extraordinary” workers and sometimes face rejection from clients, both males and females⁷⁵. In some cases, social stigma and doubts about skills are attached to being a male care worker in what is thought of as “women’s work”:

Like I say, the girls [female care workers] are like, are alright. And they’ve no qualms about working with me now, you know, because... they used to think ‘Oh well, we’ll see... when he’s

⁷³ C. Briar, Celia, A. Junor, *op. cit.*

⁷⁴ P. Hohnen, *Capacities and Vulnerabilities in Precarious Work. The Perspective of Employees in European Low Wage Jobs*, *op. cit.*

⁷⁵ However, even if less often reported, women can meet gender-related rejection as well. In this case the problems are usually caused by wives who have cared for their partners themselves for years and are no longer able to, feeling jealous towards the care worker. A. Kuemmerling, *Trying to Expand the Services without Exploiting the Employees – Does it Work?*, *op. cit.*

messed up'...It's mainly a woman what does this job like, you know.
Male care worker, UK⁷⁶

What is indicated here are gendered constructions of care work, and of genders being constructed as “naturally” skilled or non-skilled for care provision. However, men also appear to get career opportunities that women do not have. Thus, even in female-dominated sectors, we can observe the well-known discriminations of women. There was comparatively much evidence for unequal opportunities in the German cases. As Kuemmerling reports, care managers were disproportionately male in spite of the overall majority of care workers being women. At the same time there is evidence from at least one German case study that promotion selection does not follow objective criteria. That the selection criteria used are to some extent arbitrary or biased becomes clear in the following statement made by a male qualified carer:

And as a man you have promotion aspects, that's clear. I can say for myself that I was lucky to get a chance. And men, in percentage terms, are dominant at management level. That's just the way it is. I don't know why. It just is.
Male qualified elderly carer, Germany⁷⁷

On the other hand, women with respective qualifications and high aspirations are rather discouraged in this organisation. This was, however, not the case in the UK case studies, where males were given neutral roles and had less horizontal and upward mobility than females. In the UK case studies, there is also evidence to suggest that those women with children tend to achieve more favourable fixed-shift patterns than their childless colleagues.

To resume, it can be argued that work in the sector is perceived as “women's work” and that this plays a part for the low level of social recognition⁷⁸. Not least, this is reflected in low material remuneration. As we have seen, the presence of men in the sector is ambivalent: men are on the one hand constructed as less capable carers and tend to be rejected by

⁷⁶ Quoted in C. McClelland, D. Holman, *Individual Perspectives and Agency Amongst Domiciliary Elderly Care Workers in the UK*, *op. cit.*, 17.

⁷⁷ Quoted in A. Kuemmerling, *Trying to Expand the Services without Exploiting the Employees – Does it Work?*, *op. cit.*, 14.

⁷⁸ C. Briar, A. Junor, *op. cit.*

clients, and on the other appear to find better career options and are thus overrepresented in higher positions, at least in some countries and cases. Hohnen concludes:

Male employees are another vulnerable group – although in a different sense. Although they too experience resistance from the elderly, they are also respected and are sometimes strategically used in difficult homes. Male workers therefore seem to some extent to occupy both positions – both highly valued and discriminated against⁷⁹.

However, this ambivalent position of men, implying some gender-related vulnerability, does not change the general vulnerability of women, who are the main workforce in this sector and face particular difficulties with regard to child care and inequality with regard to career perspectives.

5. Conclusion

Vulnerability is not simply a static trait of particular groups of society. As we have argued and have aimed to illustrate, vulnerability is rather produced in a process of vulnerabilisation of workers. This tendency for vulnerabilisation can be inscribed in the work itself, as in the macro level of policies or in the meso level of work organisation. And it can be negotiated, worsened or balanced in its interactions with the micro level on which individuals with their life stories and social backgrounds face vulnerabilising working conditions and organisations, make sense of them and act upon them.

Summarizing, the main ideas we have been following in this article are that vulnerability is not a static trait but a dynamic process, that macro, meso and micro level can be involved but are also interlinked in this process of vulnerabilisation, that vulnerabilisation can be embedded in typical characteristics of the work itself, and that vulnerabilising characteristics of work may have specific consequences for different social groups and actors in society.

In the course of this article, we have outlined dominant trends on the macro level of policies and regulations, and argued that these are reflected

⁷⁹ P. Hohnen, *Meaningful and Unrecognized. Perceptions of Work in Danish Domiciliary Elderly Care Work*, *op. cit.*, 18.

at the level of organisations and individual working-life. One trend identified was towards standardisation, resulting in rigid time allocations for tasks. This vulnerabilises workers not only in producing stressful everyday work, but also in forcing them to risk conflicts with their clients or extend their working days into their leisure time. Another case in point is the macro trend towards privatisation, which, as we have found, is linked to an increase of precarious work contracts. This process shapes vulnerabilities in that it is linked to high unpredictability with regard to the monthly income. Furthermore, it is connected to the paradoxical parallel existence of zero-hour contracts that guarantee no working hours at all, and workers being prepared to work up to 80 hours per week in order to make ends meet.

A key finding of our research is what we call the central ambiguity of care work. This refers to the fact that although care work is characterised by high demands combined with low material and symbolic recognition, the majority of workers in all five countries investigated reported liking their jobs, seeing them as highly relevant, meaningful and rewarding. Paradoxically, the inclination to like the job in spite of disadvantageous working conditions can contribute to workers' vulnerability when it stops them leaving the job for better career opportunities or to take part in strike initiatives out of worry that this will harm their clients. This point makes particularly obvious why it is important to look not only at the external or objective characteristics of a job, but also at how it is perceived and experienced at the individual level. Without researching workers' perspectives, the ambiguity between working conditions perceived as bad and workers being "happy" with their jobs, a word used in several of the interviews, would go unnoticed.

As for the high physical demands of care work, we have seen that these are a characteristic of the job that puts certain groups of the work-force at particular risk of vulnerability: namely older workers. Meanwhile, we have argued that migrants and ethnic minorities are specifically at risk of vulnerabilisation in the frame of another crucial feature of care work: working on one's own in the private home of the client.

Finally, we have discussed the characteristic of work in the sector being perceived as "female". Here, general societal attitudes and social constructions of gender play a part in that they are responsible for the widespread link of female work to low wages and low recognition of work. We have shown how men in the sector occupy an ambivalent position in that they may be subject to rejection by clients or doubts exist regarding their care skills by colleagues, while at the same time, at least in

some contexts, having better career perspectives than women – just like in the labour market in general.

Vulnerabilities, we conclude, do not simply “exist”, but they are produced in complex webs of policy conditions, societal attitudes, structural inequalities, organisational practices, individual life-stories, and personal experiences. Being produced and shaped by interrelated social realities, however, they may be actively addressed through efforts towards changing these realities.

Agency Work: a Comparative Analysis

Silvia Spattini *

1. Agency Work: an Overview

A thorough overview of agency work¹ ought necessarily to start with an analysis of the penetration rate, which measures the ratio between the number of agency workers and the total workforce².

In 2009, the average penetration rate of agency work in Europe amounted to 1.5% of the total workforce, down from 1.7% in the previous year and from 2% in 2007, as a consequence of the recent economic crisis. Apart from these general trends, agency work is not equally distributed among countries, with a peak in the United Kingdom (3.6%) and a low point in Greece (0.1%).

Besides the United Kingdom, the Netherlands (2.9%), France (1.7%), Belgium (1.7%) and Germany³ (1.6%) report above-the-average

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¹ The most recent comparative analysis on the regulation of agency work in several European countries was conducted by Eurofound (European Foundation for the improvement of living and working conditions): J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, 2008. Previous research on the subject carried out by Eurofound focus on the new EU Member States: J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, 2006 or on the EU-15: D. Storrie, *Temporary Agency Work in the European Union*, 2002. See also R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, in *Bulletin of Comparative Labour Relations*, No. 50, 2004.

² The point of reference is the rate calculated by CIETT (International Confederation of Private Employment Agencies), which is specific for agency workers. For the purposes of the calculation, the number of agency workers (full-time equivalents) usually taken is provided by the national associations representing agency firms and members of CIETT, and the total workforce, according to the ILO. The data available at the time of writing refer to 2009. See Ciett, *The Agency Work Industry Around the World*, 2011.

penetration rates too, whereas Austria and Switzerland are just below the average with a penetration rate of 1.4%. Except for Sweden, where agency workers account for 1% of the total workforce, in all the other countries the rate is below 1%: Portugal, 0.9%, Norway and Finland, 0.8%, the Czech Republic and Italy, 0.7 %, Denmark, Slovakia, Hungary, 0.6%, Poland 0.4%, Slovenia and Romania, 0.3%, Greece 0.1%.

Gender differences among agency workers reflect the structure as well as the social and economic situation of the country. More service-oriented markets account for a larger percentage of female workers (Finland 66%, Denmark 61%, Sweden 60%, the UK 58%), whereas in manufacturing-based economies there is a prevalence of male workers (Austria 80%, Switzerland 75%, France 71%, Germany 70%). Virtually, such a disparity does not exist in Italy, with 52% of men and 48% of women, and in the Netherlands, with 53% of men and 47% of women engaged in agency work.

With regard to age distribution, it must be noted, for instance, that in France agency workers are equally distributed between those over and under 30 years old. Whereas in Italy the share of agency workers under the age of 30 is nearly 60%, under-30 agency workers in Germany make up 40% of the total labour force, with 38% of them ranging between 31 and 45 years. In the Netherlands, workers under the age of 30 account for almost 45%, but the largest cohort is represented by workers between 21 and 25 years old (32%).

Of particular interest is also the examination of data concerning the duration of the assignments, which provides an insight into how agency work is used in different countries. Leaving aside what can be observed in terms of duration of contracts concluded between the agencies and the users and those concluded between the agencies and workers⁴, one might note that they are mainly short assignments. Available data focus specifically on tasks with a duration of less than one month, from one to three months, and over three months. In Italy, 66% of contracts concern assignments lasting less than a month and only 12% tasks lasting more than three months. The reverse is true for Germany, due to a different evolution of agency work over the years, with only 7% of contracts that have a duration of less than one month, 29% of them from one to three months and 64% of the employment contracts issued for over three months. In the Netherlands, the distribution between the three groups is

³ With reference to the development of agency work in Germany, see A. Spemann, *The New Role of Temporary Agency Work in Germany*, IZA DP No. 6180, 2011.

⁴ See below par. 7.

rather even, with the majority of the contracts (43%) that last more than three months. In France, where agency work is traditionally related to tasks of a temporary nature, 45% of the contracts have a duration of less than a month, and 25% of them last one to three months, with those concluded for over three months amounting to 30%.

2. The Definition of Agency Work

After some statistical information, the next question to be addressed regards the definition of agency work. Since this paper aims at presenting a comparative analysis, providing a shared definition of agency work is pivotal in order to determine the scope of the investigation.

Prior to the entry into force of the European Directive 2008/104/EC of 19 November 2008, there was no standard definition at international or Community level to describe the triangular relationship between an intermediary/agent, a worker and a user firm, while international literature referred to is as “temporary work in the strict sense or *travail intérimaire*”⁵. The essential feature of this relationship, as is well known, is that of allowing the recourse to other-directed labour without resorting to the arrangements laid down under labour law (i.e. the contract of employment), but rather by means of a contract of services under commercial law.

In the past, both the academia and the provisions set down at a Community level made use of the expression “temporary work” and “temporary worker”⁶. Subsequently, the enforcement of the above-mentioned Directive provided a common definition, at least at EU level. Indeed, the wording “temporary work” and “temporary worker” used in

⁵ “Temporary work in the strict sense” i.e. “temporary work in the sense of *travail intérimaire*”. See R. Blanpain, *Comparative Report*, in R. Blanpain, (ed.), *Temporary Work and Labour Law of the European Community and Member States*, Kluwer, Deventer-Boston, 1993, 3, 5. In the North-American literature “temporary work through agency” or “temporary work in the strict sense” is defined as “temporary help service”. For an overview of the terminology issue, see K. D. Henson, *Just a Temp*, Temple University Press, Philadelphia, 1996, 5-8, 26-28. See also, R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, and J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*

⁶ European Commission, *Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers*, COM(2002)149, Brussels, 20 March 2002, – European Commission – *Amended Proposal for a Directive of the European Parliament and the Council on Working Conditions for Temporary Workers*, COM(2002)701, 28 November.

the Directive proposals which stress the temporary nature of the employment relationship were removed from the final version of the European Directive.

In the English version of the document, the definition of “temporary worker” has been changed into “*temporary agency* workers”. This label does not identify workers by considering the temporary nature of the employment relationship, but rather the relationship with the agency. Yet the notion of “temporariness” has not disappeared. The agency itself is defined as a temporary-work agency, that is temporary employment agency, and the definitions⁷ emphasise the temporary nature of assignments performed by workers sent by the agency to the user undertaking. On close inspection, however, regarding an assignment – rather than an employment relationship or a worker – as temporary can make a significant difference. This is also consistent with national regulations, where employment relationships between workers and agencies are not necessarily temporary, but could well be permanent, and agency employees must not be necessarily temporary workers. For these reasons, it seems more appropriate to resort to “agency work” and “agency worker” to determine this relationship⁸.

The brief – though conceptually precise – definition of agency work should contribute to describe a relationship marked by a complex structure more properly, as being based on a combination of two types of contracts: the commercial contract between the agency and the user firm, on the one hand, and the employment contract or employment relationship between the worker and the agency, on the other hand. This formulation makes it possible to point out the mediated nature of the work carried out by workers assigned to various user firms, but in particular the special contractual interdependence lying at the basis of a tripartite employment relationship that is made possible only by the presence of an “agency” supplying workers to the user undertakings⁹.

⁷ See Directive 2008/104/EC of 19 November 2008, Art. 3, par. 1.

⁸ See Department of Business Innovation & Skills, *Agency workers Regulations*, 2011, 6-7.

⁹ The use of the term “agency” to refer to the firm providing temporary labour is purely conventional, since, in its everyday meaning, this term would merely indicate the task of recruiting workers, whereas in this case the agency formally becomes to all intents and purposes an employer. In addition, the agency, as specified in the European Directive (Art. 3, par. 1, letter. b), can be both a legal or a natural person.

3. Community Regulation: the European Directive on Agency Work

At the international level, the adoption of the ILO Convention No. 181 of 1997¹⁰ and Recommendation No. 188 of 1997¹¹ allowed to overcome the stringent regulation on employment agencies laid down by Convention No. 96, 1949 and introduced some minimum forms of protection for workers.

The Directive on agency work¹² was adopted only in 2008 as a result of a lively debate at the Community level¹³, which began in the 1980s but then stalled, for, unlike the ILO Convention, concerned issues on which Member States had a very different stand.

Negotiations among the Member States were locked in stalemate until a turning point was reached through the joint statements of Eurociett and Uni-Europa¹⁴ and an agreement between the TUC (Trades Union Congress) and CBI (Confederation of British Industry) in May 2008, with the British Government that finally forewent opposing the Directive¹⁵.

The Directive takes into account all the different approaches adopted by European as well as British social partners in pursuing the protection of

¹⁰ See ILO, *Private Employment Agencies, Temporary Agency Workers and their Contribution to the Labour Market*, Geneva, 2009, paper prepared as a basis for discussions at the Tripartite Workshop to Promote Ratification of the Private Employment Agencies Convention, 1997 (No. 181).

¹¹ On the relevant literature, see E. Salsi, *Pubblico e privato nella gestione del collocamento: la convenzione OIL n. 181/97*, in *Diritto delle Relazioni Industriali*, 1998, No. 2, 161-167. See, also, J. Nakayama, A. Samorodov, *Public and Private Employment Services: from Co-existence to Co-operation*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 26-28.

¹² For an analysis see N. Countouris, R. Horton, *The Temporary Agency Work Directive: Another Broken Promise*, in *Industrial Law Journal*, 2009, 329; B. Waas, *Die Richtlinie des Europäischen Parlaments und des Rates über Leiharbeit*, in *Zeitschrift für Europäisches Sozial- und Arbeitsrecht*, 2009, 207 and T. Vaes, T. Vandenbrance, *Implementing the New Temporary Agency Work Directive*, 2009.

¹³ On the various Directive proposals and on the ensuing long-standing debate, see L. Zappalà, *The Temporary Agency Workers' Directive: an Impossibile Political Agreement?*, in *Industrial Law Journal*, 2003, 18; R. Blanpain, *Introductory Remarks: the Evolving Attitude Towards Temporary Agency Work*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, No. 50.

¹⁴ See Eurociett, Uni-Europa, *Joint Declaration within the Framework of the Flexicurity Debate*, 27 February 2007, and Eurociett, Uni-Europa, *Joint Declaration on the Draft Directive on Working Conditions for Temporary Agency Workers*, 29 May 2008.

¹⁵ N. Countouris, R. Horton, *The Temporary Agency Work Directive: Another Broken Promise*, in *Industrial Law Journal*, 2009, 329.

agency workers and in safeguarding the reliability of this category of workers, in particular by applying the principle of equal treatment and considering agencies as employers.

3.1. Regulatory Approach and Scope of Application

The Directive particularly emphasises the working and employment conditions of agency workers. Its scope is limited to agency work, with special reference to the protection of workers¹⁶.

The Directive does not set down specific rules in terms of market structure, i.e. there are no provisions indicating the special administrative procedures to obtain a license and operate as an employment agency. However, attempts have been made also in terms of structural regulation of the market, in particular by means of Art. 4, which requires the Member States to review bans and restrictions on the use of agency work and to assess whether its use is justified on the grounds of specific circumstances.

The Directive introduces minimum requirements for agency work (Art. 9), and Member States retain the right to apply or introduce legislative provisions or conclude collective agreements which are more favourable to agency workers. The Directive does not justify a reduction in the level of protection of workers in the different Member States.

Art. 1 of the Directive narrows down the scope of application to workers employed by an agency (as defined in Art. 3) and sent *temporarily* to perform an assignment to user undertakings under the supervision and direction of the latter. However, no limitations are placed on the maximum duration and extension of single assignments.

3.2. Equal Treatment

The debate on the principle of equal treatment constituted a hindrance to the approval of the Directive. Some European countries, particularly Ireland and the UK, opposed the idea of introducing this principle into their national legal systems, as regarded as moving away from the flexible nature of agency work, and potentially leading to a deterioration of the

¹⁶ See W. Warneck, *Temporary Agency Work – Guide for Transposition at National Level*, Etui, Report 117, 2011, 9.

market in the employment agencies' sector.

On the contrary, many Member States have already conformed with this principle, especially in relation to pay, training, living and working conditions. In some cases, these provisions were laid down in national legislation, whereas in other cases they were envisaged in collective agreements.

The principle was eventually included in the Directive¹⁷, even if exceptions are possible under special circumstances and provided that they are agreed upon by social partners, or included in national collective agreements (Art. 5, par. 3 and 4). With reference to remuneration, it is possible to derogate from the principle of equal treatment in case agency workers hired on an open-ended contract of employment with an agency and are paid also for the time between two different assignments. (Art. 5, par. 2).

The principle of equal treatment has a wide scope and is not limited to economic aspects, as it refers to "the basic working and employment conditions" which should be "at least those which would apply to such workers if they were recruited by the user undertaking to occupy the same job"¹⁸. The Directive also includes two specific clauses on the rules in force in user undertakings to protect pregnant or nursing mothers, children or young people (Art. 5, par. 1, letter a) and on the rules intended to ensure equal treatment between men and women and to tackle "all forms of discrimination based on sex, race, ethnic origin, religion or beliefs, disabilities, age or sexual orientation" (Art. 5, par. 1, letter b). User companies must comply with these obligations and in accordance with relevant legislation, regulations and administrative provisions, collective agreements and/or some other general provisions.

Accordingly, it can be assumed that the principle of equal treatment is also applicable to the right of agency workers to have access to amenities or collective facilities (Art. 6, par. 4). The Directive specifically refers "to canteens, child-care facilities and transport services". Agency workers should be given access to these services under the same conditions as workers employed directly by the undertaking, unless "the difference in treatment is justified by objective reasons".

The principle of equal treatment is particularly important in that it contributes to guaranteeing the reliability of agencies, for competition

¹⁷ See T. Vaes, T. Vandenbrance, *Implementing the New Temporary Agency Work Directive*, HIVA-K.U. Leuven, 2009, 23-26.

¹⁸ See W. Nienhäuser, W. Matiske, *Effects of the "Principle of non Discrimination" on Temporary Agency Work: Compensation and Working Conditions of Temporary Agency Work in 15 European Countries*, *Industrial Relations Journal*, 2006, 64.

based on differences at economic or regulatory level – viz. on lower labour costs – is not allowed. Given equal labour costs, competition should be based on the quality of services and on the ability of agencies to meet the needs of the user companies.

3.3. Employability of Agency Workers

To ensure agency workers' protection, the European Directive adopted a promotional approach, as it does not limit itself to merely supplying equal income and adequate working conditions, but it is also intended to improve access to employment and fostering employability.

Agency work can serve as a stepping stone towards stable employment, and the Directive thus provides that agency workers should be informed on the vacancies available at the user undertaking (Art. 6, par. 1), also encouraging the direct hiring of workers by the user enterprises. In a similar vein, Member States shall take the necessary step to ensure that any clause “prohibiting or having the effect of preventing the conclusion of a contract of employment or an employment relationship between the user undertaking and the temporary agency worker after his assignment” is null and void or may be ruled null and void (Art. 6, par. 2).

With a view to further protecting workers as well as promoting permanent employment, agencies are not allowed to charge workers any fees in exchange for arranging for them to be recruited by a user undertaking, or for concluding a contract of employment or entering into an employment relationship with a user undertaking after an assignment.

Since training is seen as the most effective tool to strengthen the position of agency workers in the labour market and increase their levels of employability, the Directive promotes access to education and training. In particular, Member States shall implement appropriate measures to ensure the same access to training offered to the employees of the user enterprise (Art. 6, par. 5, letter *b*), as well as to facilitate access to training for agency workers even in the intervals of time between assignments, in order to enhance their career development (Article 6, paragraph 5, letter. *a*).

3.4. Restrictions and Bans on the Use of Agency Work

Besides the principle of equal treatment, equally controversial was the idea to repeal restrictions and bans on the use of agency work. Belgium, France, Luxembourg and Finland opposed the stance of most market-

oriented countries as they considered the Directive proposal too unbalanced on the side of a market opening approach, which might be detrimental to workers.

There are profound differences in the Member States' legislation in terms of restrictions or bans on the use of agency work, chiefly if one looks at specific work activities and sectors, at the percentage of agency workers allowed to be hired by the user undertaking, duration and number of assignments permitted, reasons or conditions required to resort to agency work, provisions on replacement of workers on strike and compliance with health and safety rules.

For this reason, policy-makers could not completely remove all the limitations on the use of agency work, and opted for a win-win solution as laid down in Art. 4. Certain restrictions apply only if justified as a result of some common interests and "regarding, in particular the protection of workers, the requirements of safety and health at work and the need to ensure that the labour market functions properly and that abuses are prevented". However, in order to repeal at least some of the major restrictions, the Directive provides for a review of all bans and restrictions in the different countries. By 5 December 2011, Member States had to communicate to the Commission the results of the review (Art. 4, par. 5) conducted also in consultation with the social partners (Art. 4, par. 2) or carried out directly by the social partners in case such limitations were established by collective agreements (Art. 4, par. 3).

It should also be noted that the such a review is not related to the access of agencies to the agency work sector, as it is explained that the review is without prejudice to national requirements related to registration, licensing, certification, financial safeguards or monitoring of temporary work agencies.

3.5. Collective Rights

The Directive also deals with collective rights of agency workers with particular reference to bodies representing workers (Art. 7) in both work agencies and user companies, and provides for the right to information of workers' representatives (Art. 8).

Agency workers shall be included "for the purposes of calculating the threshold above which bodies representing workers provided for under Community and national law and collective agreements are to be formed at the temporary-work agency" (Art. 7, par.1). Furthermore, Member States may provide that agency workers be counted when calculating the

threshold above which bodies representing workers are to be set up in the user undertaking, in the same way as if they were employed directly by the user undertaking.

Concurrently, the Directive lays down provisions concerning (Art. 8) information obligations the user undertakings on the use of agency workers. The user company must supply information to workers' representatives at the time of presenting data on the employment situation within the firm.

4. National Regulations and Varied Regulatory Models

Even before the enforcement of the Directive, agency work in almost all Member States was governed by special provisions or by a more general regulation on private employment agencies (both temporary-work agencies as well as recruitment agencies)¹⁹. The only exceptions in this sense were Bulgaria and Lithuania.

However, these regulations on agency work have been introduced at different times at an international level. Some Member States have laid down a first set of rules on agency work during the 1960s and 1970s. This is particularly the case of the Netherlands (1965), Denmark (1968)²⁰, Ireland (1971), France and Germany (1972), the United Kingdom (1973), Belgium (1976), and Norway (1977). Other countries have regulated agency work between the end of the 1980s and the end of the 1990s: Austria (1988), Portugal (1989), Sweden (1993), Luxembourg and Spain (1994), Italy²¹ (1997), with Cyprus (1997) and Malta (1990) which envisaged specific legislation on private employment agencies. Other countries regulated agency work only after 2000: Finland, Greece and Hungary (2001), Poland, Romania and Slovenia (2003), the Czech Republic and Slovakia (2004), and also Estonia (2000) and Latvia (2002) laid down provisions on private employment agencies. Lithuania passed a law on agency work in May 2011, that entered into force on 1 December

¹⁹ See S. Clauwaert, *Survey of Legislation on Temporary Agency Work*, ETUI, Brussels, 2000.

²⁰ Denmark has abolished the relevant legislation in 1990, leaving the regulation of the sector to collective bargaining, see J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*

²¹ For an evolution of agency work and its legalisation in a comparative perspective, see M. Tiraboschi, *Lavoro temporaneo e somministrazione di manodopera*, Giappichelli, Torino, 1999.

2011²², and so did Bulgaria and Estonia in January 2012. Furthermore, all countries have revised their legislation during the 2000s, especially in most recent years, in order to ensure the transposition of the European Directive.

In a number of legal systems agency work is extensively governed through collective agreements (Denmark, the Netherlands, Sweden), as well as through codes of conduct and even mechanisms of self-regulation²³ (Finland, Norway, Ireland, the United Kingdom, Sweden, but also Australia and the United States).

Agency work regulations can be more or less stringent depending on whether certain criteria are counted, such as the type of license required to agencies, the obligation for agencies to have an exclusive business purpose, the ban on the use of agency workers to replace workers on strike or in some specific industries, the scope to resort to agency work solely in the case of temporary or occasional tasks, or in specific cases laid down in legislation, limitations to the duration of contracts of employment or assignments at a user undertaking, compliance with the principle of equal treatment, obligation to inform the relevant authorities.

On the basis of these criteria, countries are classed as “liberal” if they do not have any (or only a few) of the above mentioned restrictions and prohibitions, and if no extensive regulation has been set down on the subject, which means resting more on collective bargaining and/or self-regulation codes. This category includes Ireland and the United Kingdom²⁴, as here no State intervention in the labour market is supplied, the Nordic countries²⁵ (Denmark, Finland²⁶, Sweden²⁷, and, outside the EU, Norway), and the Netherlands²⁸, which, despite being traditionally

²² See T. Bagdanskis, *Implementation of EC Directive on Temporary Agency Work into Lithuania Legislation*, in *Jurisprudence*, 18, No. 3, 2011, 1035–1053.

²³ As for the of codes of practice and other self-regulation, see ILO, *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement*, Geneva, 2007, 39 ff.

²⁴ See C. Forde, G. Slater, *Agency Working in Britain: Character, Consequences and Regulation*, *British Journal of Labour Relations*, 2005, 249.

²⁵ As for the origins and development of agency work in Nordic countries, see R. Eklund, *Temporary Employment Agencies in the Nordic Countries*, in *Scandinavian Studies in Law*, 2002, Vol. 43, 311–333.

²⁶ See Ministry of Employment and the Economy, *Guidebook for Temporary Agency Work*, Helsinki, 2011.

²⁷ See B. Nyström, *Sweden*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 191–223.

²⁸ See D. Visser, W. Plessen, A. Jacobs, *The Netherlands*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 225–245.

oriented towards market intervention, have not introduced specific legal constraints, leaving social partners free to regulate the subject.

The majority of regulations in continental and Southern Europe, including Austria, Belgium²⁹, Bulgaria, Cyprus, Czech Republic, Estonia, France³⁰, Germany³¹, Greece, Hungary, Italy³², Latvia, Luxembourg, Malta, Poland³³, Portugal³⁴, Romania, Slovakia, Slovenia, and Spain³⁵, can be classified as being restrictive or of a rather restrictive character, for they introduced a certain number of the foregoing limitations to the use of agency work.

²⁹ See F. Hendrickx, *A General Overview*, in R. Blanpain, R. Graham (eds.), *Temporary Agency Work in the Information Society*, *op. cit.*, 47-62.

³⁰ See C. Vigneau, *Temporary Agency Work in France*, *Comparative Labor Law and Policy Journal*, 2002, 45; S. Smith-Vidal, *France*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 115-125.

³¹ See P. Schüren, *Employee Leasing in Germany: the Hiring Out of an Employee as a Temporary Worker*, *Comparative Labor Law and Policy Journal*, 2002, 67; B. Waas, *Temporary Agency Work in Germany: Reflections on Recent developments*, *Journal of Comparative Labour Law and Industrial Relations*, 2003, 387; M. Weiss, *Germany*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 127-142. P. Schüren, *Leiharbeit in Deutschland*, in *Recht der Arbeit*, 2007, 231;

³² See M.T. Carinci, *Agency Work in Italy*, WP C.S.D.L.E. "Massimo D'Antona".IT – 136, 2011; R. Del Punta, *La nuova disciplina degli appalti e della somministrazione di lavoro*, in Various Authors, *Come cambia il mercato del lavoro*, Ipsoa, Milano, 2004; M. Magnani, *Le esternalizzazioni e il nuovo diritto del lavoro*, in M. Magnani, P. A. Varesi (eds.), *Organizzazione del mercato del lavoro e tipologie contrattuali*, Giappichelli, Torino, 2005; P. Chieco, *Somministrazione, comando, appalto. Le nuove forme di prestazione di lavoro a favore del terzo*, in P. Curzio (eds.), *Lavoro e diritti dopo il decreto legislativo 276/2003*, Cacucci, Bari, 2004; See V. Speziale, *Somministrazione di lavoro*, in E. Gragnoli, A. Perulli (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Cedam, Padova, 2004.

³³ K. Håkansson, T. Isidorsson, R. Pond, E. Sol, C. Teissier, J. Unterschütz, F. Warneck, *Representation of Agency Workers*, Department for Work Science, University of Gothenburg, Sweden, 2009, 53-67.

³⁴ See R. Boheim, A. Cardoso, *Temporary Agency Work in Portugal 1995-2000*, IZA Discussion Papers, No. 3144, 2007.

³⁵ See M. C. Rodriguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 171-190.

5. Restrictions on Market Entry: the Licensing Systems

5.1. *The Licensing Systems*

Agencies are granted authorisation following an administrative procedure consisting of a preliminary control which assesses compliance with the statutory requirements.

This authorisation represents a barrier to market entry, as it places a limit to the number of firms that can operate in the sector. In those countries where an authorisation is required, the labour supply is generally prohibited unless agencies have obtained the relevant license³⁶.

The presence of a licensing system is one of the indices typical of restrictive jurisdictions.

The majority of the European countries envisage a licensing system. These include Austria, Belgium, Cyprus, Czech Republic, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. They have all carried out controls on agencies before issuing the foregoing authorisation. However, the licensing systems vary in strictness, as different countries have set different requirements that agencies must comply with.

A special case is France, where no authorisation is required, yet agencies must submit a special statement to the labour inspector³⁷. The same holds true for Lithuania. In Bulgaria, agencies must notify the local Directorate of the National Revenue Agency of their activities.

In more liberal countries (Denmark, Finland, the Netherlands, Sweden, the United Kingdom) and Estonia no authorisation is required, the only exception being Ireland, where agencies must register to the relevant authority for administrative and tax purposes, and not because there are special procedures they have to comply with in terms of monitoring.

Drawing on the results of the analysis of the different licensing systems, it emerges that agencies are often required to:

- provide financial guarantees to ensure solvency;
- have acquired expertise in the field;
- hold a secondary education qualification;

³⁶ With reference to registration and licensing, see ILO, *Guide to Private Employment Agencies - Regulation, Monitoring and Enforcement*, *op. cit.*, 13-15.

³⁷ See below par. 4.2.

- have adequate equipment and premises, show evidence of good repute of owners and/or managers³⁸.

In the case of France, for instance, a half-way solution was adopted. No authorisation is required to agencies, yet the sector has not been completely liberalised. Agencies must provide a “statement on the commencement of activities” to the relevant authority (the Labour Inspectorate)³⁹, which however does not carry out any control that is preventative in nature⁴⁰. Agencies can start operating in the sector only after having received confirmation from the Labour Inspectorate. The same procedure is required to agencies willing to open, move or close a branch.

Alongside this statement, agencies must provide financial guarantees⁴¹ to ensure their solvency, which is arrived at as a percentage of their annual revenues, on the basis of a specific rate which is contained in a special decree issued every year.

Agencies must also submit a report to the employment service (now *Pôle-emploi*) providing information on the employment contracts concluded with agency workers⁴².

In Germany, agencies must apply for authorisation to the Federal Employment Agency (*Bundesagentur für Arbeit*), which is in charge of issuing licenses and carrying out controls. The fee that agencies pay for administrative procedures cannot exceed 2,500 Euros.

Licences are first granted for one year on a provisional basis and subsequently renewed⁴³. A permanent licence is provided after three years of continued activity.

Agencies do not have to meet special requirements to be granted authorisation, yet there are a number of cases which are statutorily singled out in which authorisation is denied or revoked, viz. violation of social security laws, safety in the workplace and non-compliance with the obligations laid down in labour legislation.

Agencies are also required to inform the Federal Labour Agency on each assignment, notify name, address, place and date of birth of the employee sent to a user undertaking, list the tasks performed, and the beginning and

³⁸ See ILO, *Guide to Private Employment Agencies - Regulation, Monitoring and Enforcement*, *op. cit.*, p. 16-20.

³⁹ See S. Smith-Vidal, *France*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 117.

⁴⁰ Art. L1251-45, c. trav.

⁴¹ Art. L1251-49, c. trav.

⁴² Art. L1251-46, c. trav.

⁴³ par. 2, *AÜG*.

duration of the assignment. Moreover, they must also deliver a biennial report on the number of workers, types of jobs, assignments and user undertakings.

In the Netherlands, the licensing system was repealed in 1998 in the attempt to liberalise the sector⁴⁴, with a view to promoting and increasing workers' opportunities to access the labour market.

In a similar vein, in the UK, the authorisation procedure introduced in 1973 was repealed in 1995⁴⁵. At present, agencies must simply notify the tax authority and enter the Register of Companies. No control of a preventative nature as in the traditional licensing systems are conducted here, but the Employment Agency Standards Inspectorate supervises the activities of employment agencies.

On the contrary, in Spain, authorisation⁴⁶ is granted upon compliance with specific requirements concerning organisation, financial guarantees, exclusive business purpose, wages and social security contributions. The authorisation is issued for one year and subsequently renewed, and becomes permanent after three years⁴⁷.

Agencies must also inform the relevant authority on the contracts concluded with agencies and the reasons for resorting to agency work⁴⁸.

6. Conditions and Restrictions on the Use of Agency Work

6.1. Conditions on the Use of Agency Work

The recognition of the legal status of agency work has not resulted in a complete liberalisation of the sector⁴⁹. In many countries, the law expressly specifies activities, geographical areas, sectors, types of jobs and/or tasks, and reasons for which agency work is allowed⁵⁰.

⁴⁴ See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *Temporary Agency Work in The Netherlands*, Amsterdam Institute for Advanced Labour Studie, Working Paper No. 54, 2006, 3.

⁴⁵ See G. Morris, *England*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 106.

⁴⁶ See M. C. Rodríguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 186.

⁴⁷ Art. 2, Ley 14/1994.

⁴⁸ Art. 5, Ley 14/1994.

⁴⁹ See Policy Department Economic and Scientific Policy, *The Impact of New Forms of Labour on Industrial Relations and the Evolution of Labour Law in the European Union*, European Parliament, Brussels, 2008, 44-46.

⁵⁰ See J. Arrowsmith, *Temporary Agency Work in an Enlarged European Union*, *op. cit.*, 20-21.

An example is provided by the criteria adopted to evaluate the nature of liberalisation. As a rule, liberal or quite liberal countries do not provide the cases in which agency work is permitted, but only the special circumstances under which it is not, in particular to replace workers on strike. Less liberalised countries, instead, tend to list the cases agency work is allowed. These include in particular France, Italy, Poland, Romania, and Spain, where restrictions on the use of agency work include the following:

- Replacing one or more workers in the user undertaking when absent;
- Performing jobs, which, by their own nature, have a limited duration;
- Facing a temporary peak in the working activity;
- Carrying out tasks of a special or urgent nature that cannot be performed by employees operating in the employer's premises;
- Filling a permanent position for the time necessary to select a suitable candidate;
- Performing seasonal work for which, in some sectors, no open-ended contract is provided due to the nature of the activity.

A case in point is Italy where national legislation combines two different approaches. In the case of assignments of an indefinite duration, the Italian law provides an exhaustive list of cases which can be further detailed in collective agreements. For assignments of a definite duration, the law merely requires the indication in the employment contract of a technical, production, or organisational reason that justifies the recourse to agency work, which is also admitted for substitute work.

In France, the use of agency work is only possible to perform a “specific and temporary task defined as an ‘assignment’ ”⁵¹, and is limited to the cases specified in the Labour Code. Most notably:

- Replacement of a worker in the event of: absence, temporary shift to part-time work, suspension of the employment relationship, departure of a worker before the removal of his/her position, or during the recruitment procedures of a permanent worker;
- Temporary peaks in workload;
- Seasonal jobs or activities in certain sectors for which the recourse to permanent workers is not widespread;
- Performing jobs which are considered urgent because of safety reasons⁵²;
- Replacement of the management in a craft business, industrial or commercial undertaking, of a chartered professional or a relative who effectively participated in the business activity on a regular and

⁵¹ Art. L1251-6, c. trav.

⁵² Art. L1251-11, c. trav.

professional basis or of an associate of a professional company;

- Replacement of the head of a farm, a sea-fish farm, of family helpers, a partner of the company or of a family member who participates in agricultural or other activities of the enterprise.

In addition, agency work is permitted when it allows for:

- The inclusion in the labour market of unemployed people facing difficulty in social and occupational terms;
- The completion of vocational training on the part of a worker;
- Vocational training within the framework of an apprenticeship scheme leading to a degree or vocational qualification (included in the national directory of vocational certifications).

Unlike France, German law does not narrow down the use of agency work to specific situations or reasons, although a number of cases in which agency work is prohibited are singled out⁵³.

Also in the Netherlands there are no indications concerning limitations on the recourse to agency work, but there are cases in which agency work is not permitted⁵⁴.

The same holds true for the United Kingdom, which has maintained a liberal approach, not providing specific limitations to the use of agency work. Restrictions can however be laid down in collective agreements, for the most part concluded at the local level.

As for Spain, in the past agency work was permitted only in the cases specifically envisaged in legislation, as is typical of restrictive systems⁵⁵. More recently, legislation was amended and agency work is now permitted in the same cases for which fixed-term work is allowed⁵⁶, according to Article 15 of the Workers' Statute (*Estatuto de los Trabajadores*), i.e. manufacturing of special goods or provision of specific services; temporary needs (increase in workload and orders), replacement of absent workers who have the right to retain the job. These cases, however, are in practice the same as those previously detailed for agency work. In addition, following the recent changes introduced by Law No. 3/2012 to reform the labour market, it is also possible to resort to agency work in the cases laid down in collective bargaining, also at a company-level.

⁵³ AÜG.

⁵⁴ WAADI.

⁵⁵ See M. C. Rodríguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 174.

⁵⁶ Art. 6, Ley 14/1994.

6.2. Bans on the Use of Agency Work

Statutory restrictions and bans on the use of agency workers are due to the persistence of a certain mistrust towards this form of employment, even though over time the significant increase in the recourse to agency work improved the general feeling towards this type of employment, and produced a winding down of such restrictions.

In the past, bans mainly concerned the recourse to agency work in specific industries. These limitations have progressively been removed and now exist only in a few countries. Restrictions regard the construction sector (Germany), the maritime sector (Belgium, Portugal) and the transport sector (Belgium).

Limitations are also provided in the case of particularly dangerous jobs or occupations requiring special medical surveillance (Belgium, France, Poland, Portugal, Slovenia, Spain), or in the event of employers that have not complied with the legislative provisions on health and safety (Italy).

Some other limitations might be placed for reasons related to public order or to the protection of workers. These include bans on the use of agency workers in the months following dismissals for economic reasons (Belgium, France, Greece, Italy, Luxembourg, Poland, Portugal, Slovenia, Spain, Sweden) in the event that the positions that have been suppressed are the same to which agency workers would be assigned (France, Italy) or if agency workers have to perform tasks for which employees are temporarily suspended or experience a reduction in working hours or are entitled to some forms of income support (France, Italy).

The recourse to agency work to replace workers on strike is usually prohibited also in more liberal legal systems. In those countries where this is not allowed by law, the ban is generally established in collective agreements or self-regulation codes (the Czech Republic, Finland, the United Kingdom).

Only in a few countries can agency workers replace workers on strike. In some cases, this is the result of some very liberal policies (Ireland), or of the lack of an ad-hoc regulation (Cyprus, Estonia, Malta, where the existing regulation refers to employment and recruitment agencies of all types).

In France, a number of restrictions on the use of agency work are statutorily laid down, and almost all the above-mentioned limitations are included. In this sense, the labour code prohibits the recourse to agency work to replace workers on strike, and further prohibitions concern particularly dangerous jobs or jobs requiring special medical controls. It is

also forbidden to resort to agency work to replace medical practitioners who are in charge of carrying out the medical surveillance of workers⁵⁷.

A further ban on the use of agency work is placed during the six months following layoffs for economic reasons, in the case of temporary peaks in workload, including occasional orders of a defined duration which do not fall within the ordinary business activities. However, the use of agency work is possible if the assignment does not last more than three months and cannot be extended, or in the case of an exceptional export order that requires a special effort both in qualitative and quantitative terms on the part of the employer. If the latter, the recourse to agency work is subject to information and consultation of works councils⁵⁸.

In the case of Germany, although the law on agency work is restrictive, no particulars are provided to indicate the cases in which agency work is permitted or prohibited. Restrictions on the use of agency work are limited to the construction sector. Apart from that, it is not even forbidden to resort to agency workers to replace workers on strike, although agency workers may refuse to work in a user undertaking where collective action is taking place⁵⁹. Whereas in the Netherlands, pursuant to Dutch legislation, the use of agency workers is prohibited only to replace workers on strike⁶⁰.

In the UK, there are no particular restrictions on agency work. It is only forbidden to resort to agency workers to replace workers on strike and when a worker has been directly employed for the previous six months by the user undertaking, unless the worker gives his consent in writing⁶¹.

Spanish legislation prohibits agency workers to replace workers on strike or to carry out activities that can be particularly dangerous in terms of health and safety. Agency work is also prohibited in the 12 months following the dismissal of employees in equivalent positions, in the case of unfair dismissals or dismissals taken place pursuant to Art. No. 50, 51 and 52, letter. c, of the Workers' Statute. It is also forbidden to provide agency workers to other agencies⁶².

⁵⁷ Prohibitions are indicated in Art. L1251-10 c. trav.

⁵⁸ See Art. L1251-9 c. trav.

⁵⁹ Art. 11, par. 5, AÜG.

⁶⁰ Art. 10, WAADI. See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *op. cit.*, 28.

⁶¹ Regulation 7, S.I. 2003/3319.

⁶² Art. 8, Ley 14/1994.

7. Contractual Arrangements in Agency Work

In regulating agency work, the contractual form to be implemented constitutes a contentious issue. This is particularly true at the time of conducting labour inspections, as a tool to monitor and verify compliance with the restrictions imposed by law, and not only as a means to protect workers and their contractual freedom.

7.1. *The Contract between the Agency and the User and its Duration*

As a rule, more restrictive countries often require the contract to be in writing, whereas in liberal countries, as well as in those in which agency work is not regulated by special provisions, the law kept silent on the matter. With regard to the commercial contract between the agencies and the users⁶³, the written form is mandatory in Belgium, the Czech Republic, France, Germany, Greece, Hungary, Italy⁶⁴, Luxembourg, Poland, Romania, and Spain.

The same considerations hold true with reference to the duration of the contract. Indubitably, it is the most restrictive countries which require assignments to be exclusively on a fixed-term basis (Belgium, Brazil, the Czech Republic, France, Greece, Japan, Luxembourg, Poland, Portugal, Romania, Slovenia, and Spain). This approach is once again illustrative of the mistrust characterising this form of employment. A shift towards open-ended contracts would contribute to overcoming the idea that agency work can merely respond to the temporary needs of the employers, gradually becoming an effective tool of work organisation through in-sourcing.

In France, the contract concluded between the agency and user (*Contrat de mise à disposition*) must be in writing and signed up to two working days after the agency worker has started working at the user undertaking⁶⁵. The contract must include: the reason to resort to agency work, worker's name and qualifications who is being replaced, the duration of the assignment, the express provision of the scope to change the initial date of the assignment, the job description, terms and conditions (qualifications, working hours, place of work), type of personal protective equipment,

⁶³ See S. Clauwaert, *op. cit.*, 9-10.

⁶⁴ See L. Zappalà, *La forma nel contratto di somministrazione*, WP C.S.D.L.E. Massimo D'Antona, No. 77, 2005.

⁶⁵ Art. L1251-42 c. trav.

total remuneration considering the wage that a worker with the same qualifications and directly employed at the user undertaking would be entitled to⁶⁶.

The Labour Code specifies that the assignment can last up to a maximum of 18 months (including extensions), save for two cases. The duration is limited to nine months in the case the employer is waiting for an employee hired on a permanent basis to start working, or in the case of urgent work for safety reasons. The maximum duration is thus extended to 24 months in the case of replacement of a worker who left the company because of his/her position being suppressed, assignments carried out in a foreign country and for exceptional export orders that require special efforts both in quantitative and qualitative terms⁶⁷. Furthermore, the duration of the contract can be 36 months for apprenticeships, so that the contract has the same duration of the training period.

The replacement of an employee on leave constitutes one of the situations under which establishing a definite term is not required. In this case the termination of the contract can be postponed until the person on leave returns to work, still within the time limit set by the Civil Code.

According to the German regulation, the contract concluded between the agency and the user undertaking must be in writing⁶⁸. The agency must specify in the contract its authorisation number, the tasks that agency workers will have to perform for the user company and the qualifications required, as well as the working conditions and pay that would be in place if workers were hired directly by the user undertaking.

In the past, agency work was allowed only on a temporary basis. Over the years, the maximum duration has progressively increased from 3 to 24 months (since 1 January 2002) until a complete removal of the time-limit (since 1 January 2003), allowing for the conclusion of contracts of indefinite duration.

Unlike Germany, in the Netherlands, no written form is required for the contract concluded between the agency and the user enterprise, and no limit is provided to the duration of the assignments.

In the same vein, the UK legislation does not require the written form for the contract between the agency and the user, in line with the approach adopted by most liberal countries.

⁶⁶ Art. L1251-43 c. trav.

⁶⁷ Art. L1251-12 c. trav.

⁶⁸ Art. 12, par. 1, AÜG.

There are also no statutory limits to the duration of the contracts, but restrictions are sometimes set by collective agreements mainly concluded at a local level.

In Spain, instead, the contract between the agency and the user company (*Contrato de puesta a disposición*) must be made in writing⁶⁹ and include some basic information, such as details on the agency and on the user enterprise, the reason for resorting to agency work, the job descriptions, specific risks, the estimated duration of the contract, place and time of work, and pay.

Assignments must necessarily be of a fixed-term, and their maximum duration depends on the reasons justifying the recourse to agency work on the basis of legislation on fixed-term work. If agency workers are employed for the manufacturing of goods or the provision of specific services, the maximum duration is set at three years, extendable for a further twelve months through collective agreements, and limited to six months in the event of temporary production needs⁷⁰.

Whereas agency workers are employed to replace workers who have the right to retain their job, the assignment will terminate when the employee returns to work, and in no case will it exceed the maximum period for which employees have the right to retain their position.

7.2. *The Employment Contract in Agency Work*

From the analysis of the various legal systems, it emerges that in the case of employment contracts between agency and workers the written form is not as frequently required as in the case of contracts between agencies and users. This may depend on the fact that this contract is a traditional employment contract – usually fixed-termed – regulated by national labour legislation whereas no further specified. Consequently, the need to provide the written form rests on the type of contract concluded between workers and the agency. In many jurisdictions, only fixed-term employment contracts must be in writing, whereas open-ended contracts do not require the written form⁷¹.

A written contract of employment is explicitly required in Belgium, the Czech Republic, France, Germany (if provided by the relevant sectoral collective agreement), Greece, Japan, Luxembourg, Romania, Slovakia,

⁶⁹ Art. 6, Ley 14/1994.

⁷⁰ Art. 7, Ley 14/1994.

⁷¹ See S. Clauwaert, *op. cit.*, 7.

and Spain. In other jurisdictions, such as Italy, the written form is required, as mentioned above, only for some contracts and pursuant to labour laws.

If no written form is required, in some countries (Austria and Germany), the agency must produce a document containing its name and address, license number; amount of availability pay, name, address and date of birth of the worker; job; starting date and duration of the employment contract, period of notice for terminating the contract, pay levels and amount of remuneration; obligations on the part of the employer (agency) in the event of sickness, holidays or in periods between assignments, date and place in which the contract is concluded, and duration of holidays during the year.

With regard to the type of contract concluded between the agency and workers, in almost all jurisdictions it is a contract of employment. This aspect is further from being taken for granted, as in the United Kingdom, for example, the contract between the worker and the agency can also be a contract for services on a self-employed basis⁷².

Since the contract of employment falls under contractual law and ad-hoc agency work contracts do not exist, its duration, as well as its form, depend on the contractual arrangement agreed upon by the parties. The employment contract can be temporary or permanent. Unlike the past, when, for example in France it was specifically used for very short-term employment assignments, while in Germany it was mainly used for permanent positions, opting for one rather than another is a matter of preference. Today, in a few countries (Belgium, France, Poland, Romania), agency work is allowed only on a fixed-term basis.

In France, for instance, the employment contract between the agency and workers must be made in writing⁷³ and given to the employee within two days from the start of the assignment⁷⁴. The Labour Code also specifies that some information must be detailed in the contract, namely terms and conditions of the contract, qualifications, remuneration and a special allowance provided to workers at the end of their assignment, the duration of the probation period and a clause of repatriation in the event of tasks carried out abroad – the latter does not apply in the case of

⁷² See *The Agency Workers Regulations 2010* (S.I. 2010/93), that specifies that the contract between the agency worker and the agency can be “(i) a contract of employment with the agency, or (ii) any other contract with the agency to perform work or services personally”.

⁷³ Art. L1251-16 c. trav.

⁷⁴ Art. L1251-17 c. trav.

resignation handed in by the agency worker – as well as the name of the relevant supplementary pension fund and of the welfare fund.

With a view to promoting stable employment in the labour market, it is possible to expressly indicate in the contract of employment the scope of the user undertaking to directly hire agency workers at the end of the assignment.

The employment contract may indicate a probation period considering sectoral or company-level collective agreements. In the absence of any agreement, the statutory probation period is 2 days for contracts up to one month, three days for contracts lasting one to two months, 5 days for contracts concluded for more than 2 months⁷⁵.

The employment contract may be renewed only once for a specified period, without exceeding the maximum legal duration⁷⁶.

The duration of the contract can be extended to 36 months in the case of apprenticeships.

As for Germany, the law does not provide any formal obligation regarding employment contracts between the agency and workers. However, the Law on Notification of Conditions Governing an Employment Relationship requires employers to produce a document containing the name and the address of the contracting parties, date of beginning and duration of the employment relationship, place of work, job description, total amount of the remuneration, working hours, holidays, and notice, indication of applicable national or company-level collective agreements⁷⁷ to be delivered to agency workers by the end of the first working month. The contract of employment must also include: the name and the address of the agency, the date and the place of issuing of the authorisation, the name of the granting institution, and the amount of availability pay.

In years gone-by, the employment contract had to be of indefinite duration, although the first contract concluded between the agency and the worker could also be of fixed-term and renewable. Since 1 January 2003, these limits have been removed and workers can be hired also for a fixed-term period according to the duration of the assignments at the user undertaking.

The employment contract between agency and workers is considered a standard contract of employment in the Netherlands, and the written form is therefore not compulsory. Usually agency work contracts are temporary, but the Civil Code establishes that after three years or after

⁷⁵ Art. L1251-14 c. trav.

⁷⁶ Art. L1251-35 c. trav.

⁷⁷ Art. 2, NachwG.

three consecutive fixed-term contracts, these are transformed into permanent contracts⁷⁸. In addition, contract law provides that after 18 months spent at the service of the same user undertaking, or after 36 months operating for different user companies, the contract becomes open-ended⁷⁹.

According to the UK regulation, Agency and workers can conclude a contract of employment or establishing other contractual arrangements, including agreements to work on a self-employed basis, in order to perform work and services personally for the agency⁸⁰. Contracts by virtue of which the agency or the user undertaking acquire the status of a client or customer of a profession or business are excluded⁸¹.

The contract of employment does not require the written form, although the worker must be informed in writing of the terms and conditions of the contract, minimum wage, the qualifications, the job to be performed, and must also be apprised of the activities carried out by the user undertaking and working hours.

In Spain, the employment contract between the agency and the worker may be of a permanent or a temporary nature, for a period equal to the duration of the task. It must be made in writing and sent to the Employment Office within 10 days after its conclusion⁸².

It is also expressly prohibited to conclude a contract of apprenticeship with an agency worker.

8. Rights and Obligations of Agencies and User Undertakings

The main difficulties in ensuring effective protection to agency workers arise not so much from the temporary or intermittent nature of the assignments carried out in various user enterprises, but from the breakdown of the figure of the employer into two subjects, thus making it difficult to determine the exact allocation of rights, duties, powers and responsibilities⁸³. This situation necessarily requires special legislative

⁷⁸ Art. 7: 668a, Dutch Civil Code.

⁷⁹ See K. Tijdens, M. van Klaveren, H. Houwing, M. van der Meer, M. van Essen, *op. cit.*, 28.

⁸⁰ Regulation 3(1), S.I. 2010/93.

⁸¹ Regulation 3(2), S.I. 2010/93.

⁸² Art. 10, Ley 14/1994.

⁸³ For an overview of the issue, see G. Davidov, *Joint Employer Status in Triangular Employment Relationships*, in *British Journal of Industrial Relations*, 2004, 727-746, who

action or case law, with a view to understanding how responsibilities are distributed, often as a joint and several liability, among “employers” (the agency and the user company), in order to establish the so-called “co-employment” situation⁸⁴.

In almost every country, the agency is considered as the employer in charge of social security contributions and wages, often under joint and several forms of liability with the user undertaking. With regard to health and safety in the workplace, again it is the agency that bears liability, with the user undertaking that becomes liable for health and safety measures only in relation to specific activities (Austria, France, Italy).

In addition to these obligations in terms of safety, wages and social security, the user undertaking always exerts control over agency workers as well as has the powers to direct and to organise work.

French agencies, for instance, are regarded as the employer and therefore pays wages and social security contributions. It is also responsible for damages caused to third parties by the worker, as well as for his/her health and safety protection in the workplace.

The user undertaking bears responsibility for compliance with legislation, regulations and collective agreements in terms of working conditions, with particular reference to: working time, night work, weekly rest, vacations, health and safety at work, work of women and children⁸⁵. In addition, even though a general obligation to protect workers is placed on the agency, the host company must provide individual protection equipment⁸⁶, and it is liable in the case where agency workers carry out tasks requiring special medical surveillance⁸⁷.

The user company is liable jointly and severally with the agency for the payment of wages due to workers as well as of contributions to the social security system.

In Germany, the agency is under the obligation to inform the user undertaking of the expiry date of its license and of the main contractual terms and requirements laid down in relevant legislation, as well as of its right to refuse to provide workers in the case union action is taking place

addresses the question of who should be considered the employer: the agency or the user undertaking.

⁸⁴ See G. Davidov, *Joint Employer Status in the Triangular Employment Relationships*, *op. cit.*; L. Ratti, *Agency Work and the Idea of Dual Employership: a Comparative Perspective*, *Comparative Labor Law and Policy Journal*, 2009, 835.

⁸⁵ Art. L1251-21 c. trav.

⁸⁶ Art. L1251-23 c. trav.

⁸⁷ Art. L1251-22 c. trav.

at the user undertaking.

The user undertaking is required to notify the agency of any task carried out by workers during assignments, of qualifications that may be necessary, of the main working conditions, including remuneration. It is also responsible for workers' protection in terms of health and safety at work and must inform workers of job-related hazards as well as of all the preventive measures taken by the company, including personal protection devices.

Agencies and user undertakings are jointly and severally liable for the payment of wages due to workers as well as of contributions to the social security system.

Dutch agencies are considered employers and are therefore obliged to pay wages as well as social security contributions and taxes.

The user company has the power to direct the work of agency workers and bears liability for health and safety in the workplace. It must also inform workers of risks as well as safety regulations in force at the user undertaking. It is also jointly and severally liable with the agency for the payment of social security contributions and taxes.

In this respect, British legislation is very different from almost all those of other countries. Workers can enter an employment relationship with the agency not only through a contract of employment, but also as self-employed. In the past, this made it particularly difficult to allocate liability between agency and user company. The entry into force of The Agency Workers Regulations 2010 (SI 2010/93), following the European Directive, has significantly reduced the levels of uncertainty in terms of agency workers' rights and, consequently, in terms of obligations on the part of the agency and the user undertaking.

The agency is in charge of remuneration and social security contributions, while the user enterprise has the power to direct the work of agency workers and deals with health and safety in the workplace.

In particular, agencies and user undertakings are liable in the case of a breach of the law on minimum contractual conditions proportionally to the violation committed⁸⁸. The user must ensure equal treatment and is responsible for any breach of this obligation, as the agency cannot verify workers' access to facilities during their assignment.

In Spain, agencies are considered to be employers pursuant to Art. 1, par. 2 of the Workers' Statute that specifically includes among "employers" those who hire workers to make them available to user companies. The

⁸⁸ Regulation 14, S.I. 2010/93.

agency is directly responsible for the obligations established by labour legislation. The user undertaking is held liable only in the cases expressly laid down by law. It is also required to comply with social security obligations and to pay 1% of workers' remuneration to a specific fund aimed at financing training.

The user undertaking oversees the work activity of agency workers during assignments. In the case of breach of contractual obligations on the part of the worker, the user undertaking should inform the agency that can impose disciplinary sanctions⁸⁹.

The user company is also responsible for compliance with health and safety obligations. It must inform employees of job-related risks, as well as provide them with the necessary protection equipment⁹⁰.

The agency and the user undertaking are jointly and severally liable for the obligations related to workers' remuneration. Joint and several liability also extends to unlawful termination of employment and unlawful supply of labour: in these cases the law provides that user and agency pay compensations for damages.

9. The Legal Status of Agency Workers

9.1. Remuneration and Equal Treatment

Following the passing of European Directive No. 104 of 2008, pay levels of agency workers, a very controversial issue in the past, are now set according to the principle of equal treatment laid down in the Directive. Securing equality in terms of basic working and employment conditions between agency workers and employees directly hired by user undertakings represents a fundamental step towards increasing social recognition of agency work, thus enhancing its role in the labour market⁹¹. With particular reference to equal pay, the implementation of the principle of equal treatment makes it possible to prevent competition to be based on the exploitation of workers.

⁸⁹ Art. 15, Ley 14/1994.

⁹⁰ Art. 16, Ley 14/1994.

⁹¹ See E. Jahn, *The Structure of the Temp Wage Gap in Slack Labor Markets*, Aarhus University, 2009; E. Jahn, *Reassessing the Wage Penalty for Temps in Germany*, IZA Discussion Papers, No. 3663, 2008.

Most Member States have introduced this principle through legislative provisions, but in some cases compliance is ensured by collective agreements. The countries that have laid down the principle of equal treatment in national legislation include Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. Also the UK conformed to the EU Directive, although equal treatment entitlement comes into effect only after a 12-week qualifying period in the same job and with the same employer on the part of the agency workers.

In Denmark and Sweden⁹², the principle is not provided by law but rather by virtue of collective agreements for agency workers are employed under the same collective agreements applying to direct employees of the user undertaking.

The same holds for those countries that have not yet adopted any regulation on agency work, and that still have to transpose the EU Directive (Cyprus, Malta).

As for France, the standard of reference in terms of agency workers' pay is the remuneration of direct employees of the user undertaking performing the same job. Agency workers are thus treated the same as user companies' employees.

In addition, agency workers are entitled to two different allowances at the end of each assignment. In the first case, severance pay is intended to offset the temporary and precarious nature of their position and corresponds to at least 10% (or more if provided by collective agreements) of the gross salary. In addition, workers receive a sum of money for the holidays accrued but not taken, on the basis of the duration of the assignment and in no case lower than 10% of gross remuneration⁹³.

Equal treatment between agency workers and employees relates not only to pay but to workers' rights in general. Agency workers are therefore entitled to access the same collective facilities of employees, such as public transport, canteen or restaurant tickets, and work clothes.

Also in Germany, subsequent to the adoption of the so-called Hartz Law of 23 December 2003, agency workers must be granted the same pay and working conditions of direct employees. In the past, however, a number of exceptions were introduced. For instance, entitlements to equal pay used to come into effect only after the six-week qualifying period.

⁹² About wage gap see P. Andersson Joona, E. Wadensjö, *A Price for Flexibility? The Temp Agency Wage Gap in Sweden 1998-2008*, IZA DP No. 6587, 2012.

⁹³ Art. L1251-19 c. trav.

Following the enforcement of the European Directive, amendments were made to relevant legislation and equal treatment is now granted since the very beginning of the assignment. There remains, however, the scope for collective bargaining to derogate.

Agency workers are entitled to a availability allowance for the periods between different assignments.

Since 1 January 2012, a national minimum wage has been introduced also for agency work. In addition, user undertakings must make sure that agency workers have access to collective facilities, such as canteens, childcare facilities and transport services, under the same conditions as those of workers employed directly by the user undertaking.

Dutch law on agency work expressly formulates the principle of equal treatment, although derogations are possible through collective agreements. In particular, a collective agreement signed by the ABU⁹⁴ sets forth that rights in terms of equal pay come into effect after 26 weeks of work with the same employer⁹⁵.

In the UK, the principle of equal treatment was not established statutorily until the Agency Workers Regulations 2010 (SI 2010/93) was approved, following the European Directive on agency work. By virtue of this provision, agency workers are entitled to minimum working conditions (pay, working time, night work, rest periods, breaks and holidays) equal to those they would have received if hired directly by the user undertaking. However, the principle of equal treatment is applied only after a qualifying period, i.e. only after an agency worker completes 12 weeks in the same job with the same employer, within the framework of one or more assignments⁹⁶.

There is also a further exception to the implementation of the principle of equal pay. It relates to the case of workers hired on a permanent employment contract and for which contractual terms (pay, place of work, working hours, minimum and maximum number of hours per week, type of work), as well as the non-implementation of clause 5 of The Agency Workers Regulations 2010 are set out in writing. A further condition for the non-application of the principle of equal pay is the payout on the part of the agency of a minimum amount of the wage (not less than 50%), even during periods between assignments⁹⁷.

⁹⁴ See below par. 10.3.

⁹⁵ E. Sol, S. Engelsman, *The Netherlands: Temporary Agency Work and Collective Bargaining*, EIRO, 2009.

⁹⁶ Regulation 5, S.I. 2010/93.

⁹⁷ Regulation 10, S.I. 2010/93.

Agency workers are also entitled to access collective facilities including those for direct employees, such as canteens, public transports, and childcare facilities⁹⁸. Finally, agency workers are entitled to availability pay in the time between assignments provided they have been working for at least 4 weeks prior to termination of the contract.

Agency workers in Spain enjoy the same basic working and employment conditions (remuneration, working hours, overtime, daily rest periods, night work, and holidays) they would receive if they had been directly recruited by the user company for the same position⁹⁹. Equal treatment is also granted in cases of parental leave and work of minors.

If workers are hired on a fixed-term contract, they are entitled to an allowance at the end of the assignment, corresponding to the remuneration due for twelve days of work for each year of service. It is also expressly provided that agency workers have the right to be protected from gender discrimination in the workplace (in particular, agency workers are also specifically included in the so-called *planes de igualdad* set up by companies).

9.2. Collective Rights and Information of Company Union Representatives

Due to the definite duration of contracts and/or to the poor integration of agency workers in the organisation of the host company as well as to the presence of two employer-like figures, collective rights of workers are difficult to protect and implement¹⁰⁰.

In most national legal systems, agency workers can exercise union rights and freedoms only *vis-à-vis* the employment agency, and if they want to be represented also within the user undertaking they must join trade unions in the company. In some countries, however, in addition to trade union rights granted because of their status of agency workers, certain forms of entitlement are granted to them also within user companies. In some cases, they have the right to vote for works councils and participate in workers' meetings at the user undertaking (Germany) or even run for works councils' elections (the Netherlands).

⁹⁸ Regulation 12(3), S.I. 2010/93.

⁹⁹ Art. 11, par. 1, Ley 14/1994.

¹⁰⁰ See D. van Jaarsveld, *Overcoming the obstacles to worker representation: Insights from the temporary agency workforce*, in *New York Law School Law Review*, 2006, 355 and K. Håkansson, *et. al., op. cit.*, 13.

In a number of jurisdictions, company union representatives in user undertakings have the right to information and/or control over the use of agency workers, and should therefore be informed of the company decision to take on agency workers. Sometimes they may be actively involved in the decision-making. In Austria, for instance, works councils may require the conclusion of a collective agreement regulating the use of agency work in the user undertaking. Generally speaking, however, in countries such as Belgium, Denmark, Finland, France, Germany, Poland, Portugal, Romania, Spain and Sweden, company union representatives must only be made aware of the decision.

In France, within agencies, workers can vote and be elected as union representatives¹⁰¹. They gain the right to vote after 3 months of employment and may be elected after 6 months (if they have worked 1,014 hours in the 18 months prior to the election).

Within user undertakings, agency workers are neither entitled to vote nor to be elected as representatives, but enjoy rights of expression with regard to their working conditions and may be represented for this purpose by the union representatives of the user undertaking.

Union representatives in host companies must be informed and consulted prior to resorting to agency workers in case of replacement of an absent worker, in the event of a peak in workload, for temporary increases in activity requiring workers to occupy positions that had been suppressed on economic grounds during the previous 6 months. They must also be apprised of the total number of agency workers within the company and of the reasons to resort to agency workers, as well as on any extension of the assignment.

In addition, works councils must be informed on health and safety programmes and on the training provided to agency workers carrying out hazardous activities.

In Germany, agency workers have the right to vote and to run for elections of works councils within employment agencies.

Within user undertakings, agency workers have the right to vote for works councils, after a three-month assignment at the same user company. They also have the right to attend union meetings.

As for the right of information of union representatives, German legislation provides that works councils must be informed and consulted on the use of agency workers. The council can exert its veto if the user undertaking has not complied with relevant legislation or if the recourse

¹⁰¹ See K. Håkansson, *et. al., op. cit.*, 22-24.

to agency workers can increase the risk for direct employees to be laid off by the host company.

The user undertaking must provide works councils with all the relevant information regarding the agency.

In the Netherlands, agency workers have the same rights granted to regular employees working at the agency's premises and have the right to information, consultation and representation, as provided by relevant legislation.

Agency workers acquire the right to vote and run for the elections of works councils after 26 weeks and 1 year of assignment at the same user undertaking respectively. Furthermore, after 24 months, provisions on works councils apply also to agency workers as if they were regular employees¹⁰².

Rights to information, consultation and representation of agency workers in the UK are associated with the recognition of trade unions. It can be assumed therefore that agency workers have limited access to information and representation in most agencies as well as in user companies¹⁰³.

Generally speaking, agency workers enjoy the same rights of direct employees in the user undertaking, including the right to join unions. However, they do not have the right to strike.

Finally, works councils have also the right to be informed on the use of agency workers.

In Spain, agency workers have the right to be represented within works councils at the agency firm.

However, they cannot vote or run for elections of company representatives at the user undertaking. Agency workers can be represented by the workers' representatives of the user enterprise.

Company representatives must also be informed on the reasons justifying the recourse to agency workers within 10 days from the beginning of the assignment.

¹⁰² See K. Tijdens, *et. al., op. cit.*, 28.

¹⁰³ Institute for Labour and Family Research, UK, *Temporary Agency Work and Collective Bargaining in the EU*, EIRO, 2008.

9.3. Access to Permanent Employment and Training

Agency work is considered a stepping stone towards permanent employment¹⁰⁴, and therefore many countries have introduced provisions aimed at not smoothing this transition.

For this purpose, many Member States prohibit legal clauses preventing user undertakings from directly hiring agency workers (Denmark, France, Germany, Italy – where, however, in order to take account of agencies' interests and ensuring companies' loyalty, exceptions are allowed in exchange of adequate compensation – Poland, Spain, Sweden the United Kingdom).

In some countries (France, Germany, Poland and Romania), there is, however, an obligation on the part of the user undertaking to inform agency workers of internal vacant positions.

Undoubtedly, the main tool to strengthen the position of agency workers on the labour market is training¹⁰⁵. Improving knowledge and skills is a prerequisite for new employment opportunities and contributes to facilitating workers' access to stable jobs¹⁰⁶. Moreover, only an increased employability, achieved through vocational training, can ensure an effective protection of workers, also by putting into effect the provisions laid down in the contract. Most European countries establish, therefore, that agencies must comply with specific obligations in terms of vocational training provision.

In this field, however, much has been done by bilateral bodies, which have often set up special funds to finance training activities. This is the case of Austria, Belgium, Denmark, France, Italy, Luxembourg, the Netherlands and Spain.

According to French legislation, for instance, contracts are considered null and void if they include clauses preventing workers from being hired by the user undertaking at the end of the assignment¹⁰⁷. The Labour Code also specifies that the user company must inform agency workers of

¹⁰⁴ Ciett, *The Agency Work Industry Around the World*, 2012, 35 and C. Ehlert, J. Kluve, S. Schaff, *Training + Temp Work = Stepping Stone?*, Ruhr Economic Paper, No. 249, 2011.

¹⁰⁵ See A. Peeters, D. Valsamis, D. Sanders, *Temporary Work Agencies' Contribution to Transitions in the Labour Market: the Example of Vocational Training*, 2009; R. Belkacem, *La formation dans le travail temporaire: un bilan succinct*, Actes de Colloque, Sciences Humaines et sociales, 2006; S. Forrier, *Temporary Employment and Employability: Training Opportunities and Efforts of Temporary and Permanent Employees in Belgium*, 2003.

¹⁰⁶ See European Foundation for the Improvement of Living and Working Conditions, *Impact of Training on People's Employability*, Dublin, 2006.

¹⁰⁷ Art. L1251-44 c. trav.

internal vacancies, especially if a similar information procedure is also provided to direct employees¹⁰⁸.

It is also possible to derogate from the general rule establishing that in case of early termination, the worker is liable for damages for breach of contract. Early withdrawal – with due notice – is permitted in the event that the worker is offered a permanent position.

Access to permanent employment is also promoted through training. Collective bargaining ensures access to vocational training funds (*Fonds d'assurance formation du travail temporaire*). Moreover, it is mandatory to provide training to those workers who perform hazardous activities. Training in the field of health and safety ensures workers' effective protection and compliance with the principle of equal treatment.

With the introduction of Decree No. 472-2012 agencies can also conclude apprenticeship contracts with agency workers, and this makes it possible to combine training in the classroom as well as on-the-job training when workers are on assignment.

Also in Germany, agreements between agencies and user undertakings aimed at preventing the hiring of agency workers at the end of assignments are regarded as null and void. In addition, in order to facilitate the transition to permanent employment, agency workers must be informed about job vacancies within the company.

However, there are no specific statutory provisions that ensure vocational training for agency workers¹⁰⁹.

The so-called “clause of the revolving door” (*Drehtürklausel*) has recently been introduced in Germany, which prohibits companies laying off employees to take them on again as temporary workers to perform equivalent jobs but under worse working conditions.

In the Netherlands, access to permanent employment is secured by means of specific legal and contractual provisions regulating the transformation of the employment relationship from a temporary into a permanent contract after a specified period of time (18 months at the same user company or 36 months).

Collective agreements for agency workers provide incentives for training¹¹⁰ as a way to increase, maintain and acquire additional knowledge and skills. They also establish that, after a 7-month assignment, the worker is entitled to a Personal Education Budget (PBE). Funds are set aside

¹⁰⁸Art. L1251-25 c. trav.

¹⁰⁹ See O. Stettes, *Germany: Temporary Agency Work and Collective Bargaining in the EU*, EIRO, 2008.

¹¹⁰ See K. Tjdens, *et. al., op. cit.*, 42 ff.

during the first 26 weeks of work at the agency, and at the end of this period 1% of the total wages paid to workers must be invested in training. In the UK, Regulation No. 10 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319) has introduced a complex mechanism restricting the use of the so-called “transfer fee” by agencies, in the event the agency worker is hired directly by the user company or works for the same user company if being supplied by another agency firm, or is hired by any person other than the user undertaking to whom the user company has introduced him. This system is intended to prevent the agency from limiting workers’ access to stable employment. However, no reference is made to agency workers’ training rights.

With regard to the right to information, from the first day of assignment all agency workers have the right to be informed about any available job with the user. The user company may choose to advertise jobs either through the internet/intranet or through a board located in a common area. In any case, the agency worker has to be aware of where and how to access this information.

Access to job posts by agency workers does not limit the freedom of choice of the user undertaking with respect to specific requirements in terms of qualifications, experience or ability to use specific devices.

This right does not apply in the context of a headcount freeze where jobs are only aimed at reallocating internal employees in order to avoid layoffs as part of corporate restructuring.

With the aim of promoting agency workers’ access to permanent jobs, Spanish legislation provides that any clause prohibiting the user company from hiring workers at the end of assignments is considered null and void¹¹¹. The Community provision on the right of agency workers to be informed by the user of internal vacancies is implemented for the same purpose, to make sure that agency workers can access permanent positions.

Training of agency workers relates in particular to risks prevention and health and safety at work.

Agencies are also required to set aside annually a sum equivalent to 1% of the total wage paid to workers to fund training, in addition to complying with all the other obligations established by law in relation to workers’ training¹¹².

¹¹¹ Art. 7, Ley 14/1994.

¹¹² Art. 12, Ley 14/1994.

10. Collective Bargaining

Moving on to collective bargaining, some of the main differences characterising the national legal systems are not only due to different existing policies, but also to different legal traditions, histories and cultures. While in the new Member States collective bargaining plays no role in the regulation of agency work, in other countries, such as Belgium, Ireland, Poland, Spain, Sweden and the UK, cross-sectoral bargaining and social dialogue at a national level are of fundamental significance. Agreements reached by governments and social partners often have an impact on later stages of legislation.

In a number of countries (Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxembourg, the Netherlands, Spain, Sweden), collective bargaining in the field of agency work takes place at the sectoral level.

In some of these countries (Belgium, Denmark, Finland, France, Germany, Sweden, and the United Kingdom) collective agreements are signed also at the company level especially in larger agency firms¹¹³. In particular, in Denmark, company-level agreements are very common, and together with sectoral-level bargaining, they fully regulate the agency work sector, since, as mentioned above, no statutory provisions are laid down in relevant legislation.

In France, many collective agreements have been concluded which concerns agency work. They focus in particular on social protection, vocational training, health and safety at work, and trade union rights. Moreover, in the past, Governments made use of extension procedures, consisting in the possibility to give legal effect to collective agreements.

A social fund providing guarantees for loans, contributions to finance education of agency workers' children, and a fund for training have been set up jointly by trade unions and employers' associations. Both funds are financed through contribution paid by agencies¹¹⁴.

There are no trade unions specifically set up to protect agency workers who are therefore represented by major trade union confederations in Germany.

Agencies, however, are now represented by a single organisation, the *Bundesarbeitgeberverband der Personaldienstleister* (BPA), originating from the merging of two previously existing associations (BZA – *Bundesverband Zeitarbeit* and AMP- *Arbeitgeberverband Mittelständischer Personaldienstleister*).

¹¹³ J. Arrowsmith, *Temporary Agency Work and Collective Bargaining in the EU*, *op. cit.*, 22.

¹¹⁴ *Ibid.*, 19.

There are two collective agreements concluded by these organisations, one signed by BZA and DGB (*Deutsche Gewerkschaftsbund*), and the other by AMP and CGB (*Christliche Gewerkschaftsbund*) remain in force.

Moreover, the IGZ (*Interessenverband Deutscher Zeitarbeitsunternehmen*) has concluded a further collective agreement at a sectoral level with DGB.

Other sectoral collective agreements have been concluded after the relevant legislation was amended. The last agreement was signed on 22 May 2012 by the *Verhandlungsgemeinschaft Zeitarbeit* (representing agencies) and the metalworkers' union *IG Metall*, which introduced wage increases for agency workers in the electrical and metal working sector.

In the Netherlands, the agency work sector has a well established collective bargaining system¹¹⁵. The ABU (*Algemene Bond Uitzendondernemingen*) is the leading organisation of agencies, whereas the main trade unions representing (not only) agency workers are FNV *Bondgenoten*, CNV *Dienstenbond* and *De Unie*. These associations have signed the so-called “ABU collective agreement”, which was declared generally applicable and therefore covers more than 90% of agency workers. There is also another sectoral collective agreement called the “NBBU collective agreement”.

The above-mentioned contracting parties have set up a “Foundation for the implementation of collective bargaining agreements for agency workers” (SNCU), which, as the name suggests, aims at ensuring the regular enforcement of collective agreements. A mechanism typical of collective bargaining is the so-called “phase system”, according to which workers' rights increase in proportion to their length of service.

Workers are in phase A if they have worked for the user undertaking for 1 to 6 months. In phase A if the end of the assignment corresponds to the end of the employment relationship with the agency. Workers can also terminate the employment relationship in case of sickness. Workers who have worked for 7 to 12 months are in phase B and have acquired the right to training. Workers in phase C have worked for 12 to 18 (36) months and enjoy some additional rights, for example, their sickness benefits amount to 100% of remuneration. Workers in phase D have worked for over 18 months (within the same undertaking) or 36 months and their employment contract becomes open-ended.

In the United Kingdom there are no trade unions specifically set up to protect agency workers, whereas agencies are represented by the

¹¹⁵ See ABU, *A summary of the Collective Labour Agreement for Temporary Agency Workers 2009–2014*, 2011.

Recruitment and Employment Confederation. There is no national sectoral collective agreement, but only company-level agreements in larger agencies.

In Spain, there are three different associations representing agencies: AETT (*Asociación Estatal de Trabajo Temporal*) FEDETT (*Federación de Empresas de Trabajo Temporal*), AGETT (*Asociación de Grandes Empresas de Trabajo Temporal*), all belonging to the Spanish Confederation of Business Organisations (CEOE).

There are no trade unions specifically representing agency workers.

Collective bargaining takes place mainly at the sectoral and national level, even though there are also collective agreements signed at the regional level¹¹⁶. The regulation of agency work at the sectoral level by means of collective agreements ensures equal treatment also for workers performing jobs for which relevant provisions do not expressly require equal treatment.

11. The Sanctioning System

In all national legal systems, the agency work regulation is complemented by a robust sanctioning mechanism¹¹⁷.

Sanctions can be imposed as a consequence of controls aimed at ensuring regular access to the sector. These include provisions intended to punish agencies that do not meet the requirements established by law or that supply workers in sectors or cases in which this is not permitted. Generally speaking, this leads to strict sanctions, either criminal or administrative.

It should be noted that in addition to the legal consequences for non-compliant agencies, this type of infringements might also affect the relationship between the agency, the worker and the user.

The contract between the agency and the user is usually considered null and void as it clashes with the norm of a compulsory character, whereas the employment contract between the worker and the agency is generally converted into a direct employment contract between the worker and the user undertaking.

In France, for instance, failure to comply with the relevant administrative requirements and to provide adequate financial guarantees is sanctioned

¹¹⁶ See M. C. Rodríguez Piñero Royo, *Spain*, in R. Blanpain, R. Graham (eds.), *op. cit.*, 184-185.

¹¹⁷ See S. Clauwaert, *op. cit.*, 7.

with the closing down of the agency. Moreover, the agency owner is banned from performing such an activity for 10 years. Agencies operating without a valid license commit a criminal offense.

Sanction are also imposed on agencies that do not provide adequate financial guarantees, that do not comply with health and safety regulation for workers exposed to ionizing radiations, that issue contracts with incorrect or incomplete information or send workers to user undertakings without a contract.

If agency workers continue working at the user undertaking at the end of their assignments, a permanent employment relationship is established between these workers and the user company¹¹⁸. If, however, the user undertaking makes use of agency workers in cases other than those established by legislation, or does not comply with the provisions on the extension of the employment contract, workers can lodge a complaint and bring a procedure before the courts to claim the conversion of the contract of employment into a direct employment relationship with the user undertaking, with effect from the beginning of the assignment.

Fines up to 3,750 Euros are imposed against user undertakings that have not signed the contract within the legal time-limit, have not indicated in the contract all the details of remuneration, have taken on agency workers for permanent positions, have not complied with relevant legislation in terms of time intervals between subsequent contracts, or have resorted to agency work in cases other than those established by law.

German agencies operating without the necessary authorisation, or companies making use of agency workers supplied by an agency operating without a license can be punished with a fine of up to 30,000 Euros. If agency workers coming from abroad do not have a valid residence permit, fines of up to 500,000 Euros can be imposed on agencies for severe misconduct.

In the case of violations on the part of the agency, its contractual relationship with the worker is converted into a direct employment relationship between the worker and the use with effect from the very beginning of the assignment¹¹⁹. The employment relationship must be regarded as temporary if the assignment had a limited duration and if there are specific reasons justifying the temporary nature of the task. Working time remains the same according to what had been agreed by the

¹¹⁸ Art. L1251-39 c. trav.

¹¹⁹ Art. 10, par. 1, AÜG.

agency and the user. In addition, workers are entitled to at least the same remuneration agreed with the agency.

Workers have also the right to claim damages to the agency.

The UK Employment Agency Standards Inspectorate is in charge of supervising the activity of the work agencies, set up by the Department of Trade and Industry. In the case of misconduct, the courts issue an order that prevents prohibited people to run or be involved in any employment agency or business. The maximum period of any prohibition order is 10 years. Agencies that adhere to requirements of the Recruitment and Employment Confederation and they must also comply with the Code of Practice.

In the Netherlands, the supervisory function is carried out by the labour inspectorate which imposes sanctions in case of non-compliance with regulations on working conditions.

Also the Foundation for compliance with the collective agreement for agency workers (SNCU) monitors the regular enforcement of collective agreements. In case of non-compliance on the part of the agency, the Foundation may take legal steps and the association of agencies can expel non-compliant members.

In Spain, the recent reform has introduced some changes in the sanctioning system. There are three types of *infracciones* according to their severity, and sanctions increase with increasing severity. In particular, Law No. 3/2012 distinguishes between *infracciones* committed by the agency or by the user, which can be minor, serious, or very serious. Minor *infracciones* committed by the agency include: failure to include some particulars in the employment contract which are legally required, failure to indicate the wording *empresa de trabajo temporal* (temporary agency work) in the advertisement of vacancies or the authorisation number, failure to send to the user company a copy of the employment contract, of the letter of assignment or of any other document required by law. Serious offences include: failure to provide a written employment contract, to report to the Ministry of Labour the number of contracts concluded with agency workers and the information required under Art. 5 of Law No. 14/1994, as well as failure to contribute to the training fund. It is also considered a serious offence to charge money to workers for the services rendered and to operate in geographical areas where agency work is not allowed. Very serious *infracciones* include: violation of the provisions on health and safety at work, engagement in unlawful activities, falsification of documents or concealment of information. With regards to *infracciones* committed by users, minor offences include failure to notify the agency of specific information concerning contractual arrangements and remuneration.

Serious *infracciones* include: failure to indicate the reasons to resort to agency work in writing, to carry out a risk assessment, to comply with the principle of equal treatment, to resort to agency work in cases prohibited by law. Very serious offences include violation of health and safety requirements in the workplace.

Sanctions in the case of non-compliance with the regulation include the imposition of fines of various amounts depending on the type of infringement.

Moreover, suspension is provided in the case of repeated misconduct.

Finally, if agency workers continue to work at the same user undertaking at the end of their assignment, they become permanent employees of the user undertaking.

Non-standard Workers: Good Practices of Social Dialogue and Collective Bargaining

Minawa Ebisui *

1. Introduction

The globalization process has intensified competition and the need for enterprise flexibility, bringing about changes in the production system, with much emphasis placed on supply chain and multi-tier contracting. Technological changes and new work processes made it possible for companies to externalize services and parts of production operations, and this state of affairs has made the world of work more diverse, giving rise to an increasing variety of non-standard work arrangements and practices. The significant recourse to existing and new forms of non-standard work on the part of employers brought changes to labour market regulation, while fiercer global competition has driven many countries towards labour market deregulation that allows for more flexible and non-standard work arrangements. On one hand, these structural changes in work organization created greater choice, freedom and opportunities to work, with both workers and employers benefiting from a variety of forms of non-standard work, some of which have facilitated flexibility agreed upon by both parties. On the other hand, however, the increasing use of non-standard work arrangements has heightened uncertainty and precariousness among the growing number of workers who involuntarily

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engage in them. The global financial crisis of 2008 further worsened the work and life prospects of precarious groups in most countries, in particular workers in small and medium-sized enterprises (SMEs), contract and temporary workers, migrant workers, women, young workers and the poor¹. The crisis is widely thought to have had a particularly severe impact on workers engaged in non-standard work.

One major challenge posed by many of these non-standard work arrangements to industrial relations systems and practices is that they do not fit within the traditional model of “standard” employment associated with full-time, open-ended, direct employment, on which legal regulation as well as industrial and employment relations institutions and practices have long focused. Its increasing use has thus questioned the enforcement of regulatory regimes and the effective functioning of industrial relations system. Such structural and technological changes in turn pose challenges to the traditional methods of representation and negotiation for both workers and employers².

Drawing on these considerations, the present paper provides a comparative overview of how collective bargaining and national social dialogue have been implemented to improve the terms and conditions of work as well as the status of non-standard workers. The starting point of this investigation is a number of national studies, which were conducted by the Industrial and Employment Relations Department (DIALOGUE) of the ILO³, and secondary sources. The paper first sets the scope of the research by defining the key terms used, including “non-standard work”, “social dialogue” and “collective bargaining”. It then examines the factors which have resulted in a limited capacity to exercise collective bargaining in addressing the needs and interests of non-standard workers, followed by an analysis of different approaches and strategies whereby collective bargaining has been addressing those needs and interests, and improving

¹ ILO, *World of Work Report 2011: from One Crisis to the Next?* ILO, Geneva, 2011.

² ILO, *Freedom of Association in Practice: Lessons Learned*, Report of the Director-General, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights and Work, ILO, Geneva, 2008.

³ The practices highlighted are mainly drawn from the national studies which were carried out as a pilot project by the ILO and are far from exhaustive in terms of coverage and scope. The author is grateful to Juan Manuel Martínez Chas (Argentina); Andrés Fernando DaCosta Herrera (Colombia); Márk Attila Edelényi (Hungary); K.R. Shyam Sundar (India); Ratih Pratiwi Anwar and Agustinus Supriyanto (Indonesia); Keiichiro Hamaguchi and Noboru Ogino (Japan); and Jan Theron (South Africa) who undertook the national studies. The national studies on India, Japan and South Africa are available as working papers: www.ilo.org (Last accessed 15 July 2012).

non-standard workers' terms and conditions of conditions of work and their status. The paper also briefly looks at how tripartite social dialogue deals with issues regarding non-standard work as well as its attempts to advance more inclusive and equitable social dialogue.

2. The Scope of the Analysis

2.1. *Non-standard Work*

The scope of the analysis is broadly set, and defines non-standard work arrangements as those associated with formal employment relationships – part-time work, temporary agency work, fixed-term work, and so forth – and outside such relationships – informal work, commercial contract work or economically dependent self-employment – including where relationships are either disguised or unclear. In other words, the term “non-standard” is used to distinguish such non-standard work arrangements from the regular or standard model of full-time, permanent and direct employment, with the latter that is no longer being seen as “standard” in many countries and in some cases including those in need of more appropriate protection.

There is no single and universally accepted terminology describing such existing and emerging forms of work and, depending on the country, region and political or socio-economic background or labour market, a variety of terms have been used. The term “non-standard” work is also referred to as “atypical”, “non-regular” or “contingent” work⁴. However,

⁴ There are many variations in the ways standard work and non-standard work are conceptualized and defined in the literature. For example, Tucker discussed how the concept of non-standard worker and non-standard work varied between countries, institutions and labour experts. Some countries define non-standard work based on its defining features (e.g. full-time and permanent work, standard working hours, employers' premises) while other countries refer to the consequences of the defining features (e.g. benefits, social security, promotion, training). Referring to the definitions of standard employment in previous literature, Tucker argues that non-standard work includes all jobs that fall outside the definition of standard employment, if they are in any of the following categories: part-time; casual; irregular hours or on-call work; seasonal, temporary or fixed-term contracts; self-employment; undertaken as “homework”; undertaken in the “black” economy; and any combination of the above. See D. Tucker, *“Precarious” Non-standard Employment: a Review of the Literature*, Labour Market Policy Group of Department of Labour, New Zealand, 2002, www.libertysecurity.org (Last accessed 15 July 2012).

the purpose of the present analysis is not to identify key elements of a possible definition on the basis of which universally accepted terminology could be established. Rather, by setting a wider scope of investigation – it is to capture a wide variety of strategies and approaches that have been taken by the social partners to improve terms and conditions of work for and status of non-standard workers and narrow the gap between standard workers and those in non-standard work arrangements⁵.

A combination of a number of elements stemming from the nature of the contract as well as the characteristics of non-standard work arrangements, alongside the preference of those who engage in non-standard work, determines precariousness and vulnerability. As compared with standard workers, non-standard workers are thought to face the following conditions which make them more insecure, vulnerable and precarious⁶:

- Low employment security and poor employment protection: non-standard jobs can be terminated more easily or with little or no notice by the employer.
- Lower quality of work than standard work (lower wages, irregular or uncertain income, limited occupational safety and health protection, fluctuations in hours of work or workload).
- Little or no access to “standard” non-wage welfare benefits.
- Limited social security and social protection coverage.
- Limited mobility toward better-quality jobs (e.g. regular/permanent job).
- Limited opportunities for promotion.
- Limited access to training opportunities.
- Low or no trade union representation or collective bargaining coverage.
- Low bargaining power.
- Reluctance/unwillingness to engage in non-standard work.

⁵ Some of these initiatives were exhibited at the ILO’s High-level Tripartite Meeting on Collective Bargaining, Geneva, 19-20 November 2009. See the ILO web site: www.ilo.org (Last accessed 15 July 2012).

⁶ The concept of “precarious work” is closely interrelated with that of non-standard work. For example, Fudge and Owens identify “precarious work” as “work that departs from the normative model of the standard employment relationship (which is a full-time and year-round employment relationship for an indefinite duration with a single employer) and is poorly paid and incapable of sustaining a household”. See J. Fudge; R. Owens (eds.), *Precarious Work, Women and the New Economy*, Hart, Oxford, 2006. The ILO notes that “the definitions of ‘precarious’ and ‘atypical’ overlap, but are not synonymous” and that “‘precarious work refers to ‘atypical’ work that is involuntary – the temporary worker without any employment security, the part-time worker without any employment security, the part-time worker without any pro-rated benefits of a full-time job, etc.”. See ILO, *Employment Policies for Social Justice and a Fair Globalization*, Report VI, International Labour Conference, 99th Session, ILO, Geneva, 2010.

- Lack of labour market alternatives.
- Low labour law coverage, in particular for those who hold commercial contracts.

In the 2011 International Workers' Symposium on Policies and Regulations to Combat Precarious Employment, two categories of contractual arrangements were indeed identified as encompassing the majority of the workers most adversely affected by such precarious conditions. The first group comprises those associated with limited duration of contract – fixed-term, short-term, temporary, seasonal, day-labour and casual labour – and the second is related to the nature of the employment relationship (triangular and disguised employment relationships, pseudo self-employment, subcontracting and agency contracts)⁷.

2.2. Social Dialogue and Collective Bargaining

The term “collective bargaining” used in this paper complies with the ILO definition, which extends to all negotiations which take place between an employer, a group of employers or one or more employers' organizations, on one hand, and one or more workers' organizations, on the other, for:

- (a) determining working conditions and terms of employment;
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations (ILO Convention No. 154).

Social dialogue in the ILO definition includes all types of negotiation, consultation or simply exchange of information either among the social partners, or by tripartite partners at the national level, on issues of common interest relating to economic and social policy⁸. Collective bargaining is an important form of social dialogue. Among diverse forms of social dialogue, this paper focuses on the roles that collective bargaining and national tripartite social dialogue play in addressing issues concerning non-standard workers. The paper also limits its scope to

⁷ ILO, *Policies and Regulations to Combat Precarious Employment*, background paper presented at the International Workers' Symposium on Policies and Regulations to Combat Precarious Employment, ILO, Geneva, 2011.

⁸ ILO, *Tripartite Consultation at the National Level on Economic and Social Policy*, Report VI, ILC, 83rd Session, Geneva, 1996.

country-level social dialogue and collective bargaining developments and practices⁹.

3. Obstacles to Effective Social Dialogue and Collective Bargaining for non-standard Workers

Freedom of association and collective bargaining are fundamental to the ILO, which has been acknowledged as a means for improving and regulating terms and conditions of work and advancing social justice since its foundation in 1919¹⁰. The Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), are recognized as fundamental rights and principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The 1998 Declaration recalls that all Member States, from the very fact of their membership in the Organization, have an obligation to respect, promote and realize the principles concerning fundamental rights, whether or not they have ratified the relevant Conventions. The realization of freedom of association is an essential precondition for effective realization of the right to collective bargaining. The ILO Declaration on Social Justice for a Fair Globalization (2008) also underscores the significance of fundamental principles of freedom of association and the right to collective bargaining as both rights and enabling conditions for attaining the ILO's strategic objectives – employment, social protection, social dialogue and rights at work. These fundamental rights apply to all workers – at least at a theoretical level – with the exception of members of the armed forces and the police, and public servants engaged in the administration of the State, irrespective of their work arrangements or employment status¹¹. Growing

⁹ The examination of global responses including the roles of social dialogue at the international level (e.g. International Framework Agreements) or of workplace participation such as enterprise-level information, consultation or co-determination is left for a future research agenda.

¹⁰ ILO, Part XIII of the Treaty of Versailles, Declaration of Philadelphia, and Constitution of the International Labour Organization.

¹¹ The ILO supervisory bodies have affirmed that these fundamental rights apply to all workers. For more details, see C. Rubiano, *Precarious Workers and Access to Collective Bargaining: are There Legal Obstacles?*, Paper circulated at the International Workers' Symposium on Policies and Regulations to Combat Precarious Employment, Geneva, October 2011.

non-standard forms of work, however, pose a number of challenges to their application and practices.

A major hindrance to advancing collective bargaining for non-standard workers is their limited attachment to single workplaces/employers as compared with standard workers¹². When workers are directly employed by a single employer for a long period, their interests are easier to be represented collectively. However, non-standard workers are either:

(a) directly employed, but with non-stable and temporary employment, and thereby association with the single employer is limited (e.g. part-time, fixed-term workers); or

(b) not directly employed by the “principal” or “real” employer (e.g. user enterprises) for which or where they actually work (e.g. temp agency workers, contract workers). In countries where enterprise bargaining is predominant, such limited attachment to workplaces poses a serious challenge to exercising collective bargaining. Even in countries where bargaining at a more centralized level is dominant, in cases where workers move beyond sectors from one job to another, representation at sectoral level and solidarity become difficult¹³.

Moreover, a growing number of workers nowadays engage in work not as employees but through individual commercial services contracts, including independent contractors and freelance workers. In developing countries, the magnitude of the informal economy is such that workers often work without any formal contractual relationships (e.g. street vendors).

Such erosion of the direct employment relationship has also resulted in a decline in trade union membership as well as the fragmentation of collective bargaining¹⁴. Some categories of these workers are not protected by existing labour law or collective bargaining arrangements, because they are not “employees” covered by the law, while the rights of others – who *are* covered by labour law – to organize and bargain collectively are guaranteed in theory, yet it is difficult for them to effectively exercise those rights. The latter group is often excluded from trade unions or the bargaining unit of standard workers – who are characterized by a strong

¹² J. Wills, *Subcontracted Employment and its Challenge to Labour*, *Labour Studies Journal* 34, No. 4, 2009, 443-444.

¹³ G. Bosh, *Low-wage Work in Five European Countries and the United States*, *International Labour Review* 148, No. 4, 2010, 337-356; B. Nissen (ed.), *Unions in a Globalized Environment: Changing Borders, Organizational Boundaries and Social Roles*, M.E. Sharpe, New York, 2001, 172.

¹⁴ ILO, *Promoting Collective Bargaining Convention No. 154*, *op. cit.*

attachment to single employers – creating difficulties in forming a likewise effective bargaining unit¹⁵.

Non-standard workers themselves can also be reluctant to exercise rights to organize and bargain collectively because of fear of job losses, even when they can do so in practice or in theory¹⁶. Moreover, a fragmented workforce implies that there are different groups of workers in the same workplaces with diverse interests and different contractual status, which can trigger and intensify conflicts among the workers themselves instead of labour-management conflict, thereby hindering solidarity among workers. Trade union members in standard employment may regard unorganized workers in non-standard employment as a threat¹⁷.

There are also cases where actual contractual employers are not necessarily the appropriate and influential negotiating parties with the ultimate decision-making power in negotiating terms and conditions of work¹⁸. For example, contracting/sub-contracting firms or temporary work agencies are often small and medium-sized enterprises facing fierce competition and coming under pressure from those with the real power over the contracting process. In such cases, negotiating better terms and conditions of work with contractual employers might end up in job losses due to loss of competition with other SMEs. Meaningful collective bargaining, which brings about tangible outcomes, may not take place unless negotiation involves “principal” employers in power.

Finally, non-standard work arrangements often challenge the traditional parameters for the organization of work, giving rise to uncertainty about workers’ employment status. This happens when such arrangements expose ambiguities and uncertainties in legal frameworks that are intended to offer certain protections to those who are in a legally constituted employment relationship. In other cases, workers in non-standard arrangements are simply beyond the scope of application of labour laws. Thus, legal frameworks are often unable to provide an effective enabling environment for these workers to exercise collective rights¹⁹.

¹⁵ *Ibid.*

¹⁶ R. P. Anwar; A. Supriyanto, *National Study on Indonesia: Non-standard Work, Social Dialogue and Collective Bargaining*, ILO, Geneva, forthcoming.

¹⁷ J. Theron, *Non-standard Workers, Collective Bargaining and Social Dialogue: the case of South Africa*, ILO, Geneva, 2011.

¹⁸ J. Wills, *op.cit.*, 441.

¹⁹ G. Casale, *The Employment Relationship: a Comparative Overview*, ILO/Hart, Geneva, 2011, 1-33; ILO, *The Employment Relationship, Report V(1)*, International Labour Conference, 95th Session, ILO, Geneva, 2006. A particular problem which commonly arises is that the legal structure of the working arrangement does not clearly correspond with the legal

4. Good Practices of Collective Bargaining for Non-standard Workers

Promoting collective bargaining for non-standard workers requires action on a number of fronts. Comparative experience demonstrates that the social partners have indeed explored various ways to overcome obstacles to exercising collective bargaining, and to address a variety of issues in the face of the growth of non-standard work, although limited in terms of the numbers of workers covered and the impact achieved. Such attempts can be categorized largely into approaches that frame the collective bargaining structure to strengthen its functioning for non-standard workers, and regulatory strategies that are used in negotiating terms and conditions of work and employment and work status for non-standard workers. In what follows, this paper first examines commonly adopted collective bargaining approaches in this regard: (a) collective bargaining outside workplaces; (b) enhancing multi-employer bargaining; and (c) extending outcomes negotiated for trade union members to non-unionized workers; and second, regulatory strategies used in bargaining: (a) attaining regularization and employment security; (b) providing equal pay for work of equal value; (c) limiting the period of temporary contracts; (d) addressing specific interests and needs of non-standard workers; and (e) dealing with economically dependent self-employment.

4.1. Collective Bargaining Approaches and Frameworks

4.1.1. Collective Bargaining beyond Workplaces

Promoting collective bargaining outside workplaces is one common approach that can be adopted, where bargaining takes place mainly at workplace level in such a way that some categories of non-standard workers are often excluded. Evidence shows that high trade union density and bargaining coverage, and the centralization and coordination of wage

definition of an employment relationship. In some cases, however, the difficulties stem from deliberate manipulation of the legal structure of the work arrangement, or from the employer treating an individual as other than an employee, in a way that hides the latter's true legal status as an employee. In this sense, particular problems arise from efforts to disguise employment relationships.

bargaining, tend to go hand in hand with lower wage inequality²⁰. Decentralization of bargaining on the other hand might cause a decline in collective bargaining coverage, and has tended to benefit and favour those with bargaining power, while offering little to those who are poorly organized, such as non-standard workers. Moreover, for those whose association with a single workplace is weak, negotiations at workplace level do not often offer favourable, convenient or equitable outcomes²¹. In the Republic of Korea, for example, in response to a dramatic increase in the number of non-standard workers, there have been attempts, albeit very limited in their effect, to promote strengthened sectoral organization, with a view to boosting solidarity among workers by restructuring and centralizing the trade union movement from predominantly enterprise level to sectoral level²².

However, sectoral-level representation also poses a challenge when non-standard workers move from one sector to another. In such cases, local- or community-level, or occupation-based representation are used to conduct negotiation, as sources for organizing workers, by which they can exercise collective rights across multiple employers²³. For instance, in Argentina, different organizations have recently been established for the representation of semi-dependent or independent workers: the Construction Workers' Union of the Argentine Republic (*UOCRA*); the Union of Support Staff at Private Homes (*UPACP*); the Trade Union of Newspapers and Magazines Sales Staff of the Federal District of Buenos Aires (*SIVENDIA*); the Argentine Single Trade Union of Freighters (*SIUNFLETRA*); the Argentine Street Vendors Trade Union (*SIVARA*); the Federation of Taxi Drivers of the Argentine Republic; the Trade Union of Home Garment Workers (*STTAD*); the Argentine Union of Rural Contract Workers of Vineyards and Fruits; the Trade Union of Garden and Park Workers, the Argentine Federation of Press Workers (*FATPREN*); the Trade Union of Workers for Hairdressing (*SUTPEABA*); the Association of Fashion and Image Workers in Advertising (*AMA*); the Single Trade Union of Public Entertainment

²⁰ OECD, *Employment Outlook: Boosting Jobs and Income*, OECD, Paris, 2006.

²¹ E. Heery; B. Abbott, *Trade Unions and the Insecure Workforce* in E. Heery; J. Salmon (eds.), *The Insecure Workforce*, Routledge, London, 2010, 167-168.

²² S. Choi, *Kankoku ni okeru roudoukumiai, jugyoin daihyo seido no sintenkai*, *Japanese Journal of Labour Studies*, No. 555, 2006, 66-77.

²³ A. L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, in *American Sociological Review* 74, No. 1, 2009, 1-22; A. D. Damarin, *Rethinking Occupational structure: the Case of Website Production Work*, *Work and Occupations* 33, No. 4, 2006, 429-463.

Workers (*SUTEP*); and the Single Trade Union of Watchmakers, Jewellers and Related Workers (*SURJA*). Some of them are successful in conducting collective bargaining and improving working conditions, both by incorporating workers into the social security schemes and by securing compliance with the basic regulations provided by the Argentine legislation²⁴.

In Japan, community-based unions²⁵ located in a specific region, organize any individual workers regardless of where/how they work and what forms of work they engage in, including those who work in non-unionized SMEs, independent contractors, dispatched (agency) workers, migrants and unemployed workers. As Japan's enterprise unionism normally confines their membership to regular workers in practice, and large numbers of non-regular workers tend to be excluded from enterprise-level representation, these community unions are successful in organizing different categories of non-regular workers as their members²⁶. Their central role has recently been to provide labour consultation and advisory services, and negotiate and solve disputes through negotiating directly with individual enterprises on behalf of their members. Japan's Trade Union Law provides for an employer's duty to bargain collectively, and an employer's refusal to do so without proper reasons is an unfair labour practice. The rate at which disputes are resolved voluntarily by community unions through negotiation stood at 67.9 percent in 2008, though there remains intensive debate about the way an agreement concluded between an employer and the community union after such negotiation on behalf of a single worker can be interpreted in terms of collective bargaining/representing processes. There has been a growing

²⁴ J. M. Martínez-Chas, *National study on Argentina: Non-standard work, social dialogue and collective bargaining*, unpublished national study commissioned by the ILO, 2011.

²⁵ Although Japanese general unionism has a long history, it is only since the late 1980s – when so-called “community unions” appeared – that workers' organizations have begun operating as unions that are established outside individual enterprises. In addition to traditional general unions of the National Union of General Workers National Council (*Zenkoku-Ippan*), the Japanese Trade Union Confederation (*RENGO*) established regional unions in 1996 and the National Confederation of Trade Unions (*Zenroren*) established local unions in 2002, all of which resulted in strengthening community-based general unionism.

²⁶ H. Oh, *Go-do ro-so no genjou to sonzai igi*, *Japanese Journal of Labour Studies* No. 604, 2010, 47-65.

need addressed in Japan to establish legal institutions to respond to such negotiation processes²⁷.

4.1.2. Multi-employer Bargaining: Involving “Principal Employers” with Bargaining Power

Involving multiple employers that hold real power in negotiating and determining terms and conditions of work is another key approach to promote collective bargaining for non-standard workers with tangible outcomes. This type of bargaining arrangement is useful to mitigate the effects of private contractors competing on lower terms and conditions of work as well as to provide broader coverage for those who engage in similar jobs in different sectors. Multi-employer involvement is also useful in triangular employment relationships when actual contractual employers are not influential negotiating parties. Unless non-standard workers’ direct employers have the ultimate decision-making power in negotiating terms and conditions of work, meaningful bargaining becomes difficult even when these workers are able to exert the right to collective bargaining in theory. Multi-employer bargaining is particularly useful in dealing with non-standard workers who work at subcontractor firms or SMEs, and those who are not directly employed by the “principal” or “real” employer in power (e.g. user enterprises) for which they actually work.

In the United States, the Service Employees International Union (SEIU) developed the “Justice for Janitors” campaigns and enabled the union to win recognition in several major cities, including Miami, Los Angeles, Boston and Houston²⁸. These campaigns are mainly targeted at low-paid precarious workers who are predominantly female. They use public attention, community pressure and political lobbying as strategies to pressure employers. The Houston victory in 2006 was won after janitors at five major cleaning contractors participated in a one-month strike including local, national and international demonstrations²⁹. As a result, the cleaning contractors entered into a collective bargaining agreement with the union, covering about 5,300 janitors, mostly women of Latin American origin. The agreement raised wages from an average of \$5.30

²⁷ T. Michiyuki, Kakekomi, *Uttae Jiken no Shori Sikaku*, *Business Labour Trend*, 11 March 2012.

²⁸ M. Osborn, *Houston Justice for Janitors Campaign Wins!*, 2006, (Last accessed 15 July 2012).

²⁹ *Ibid.*

per hour to \$7.75 per hour as of 1 January 2009 and offered individual and family health insurance cover starting in 2009 for \$20 and \$175 per month, respectively. In addition, the shifts of the janitors were extended to six hours by 2009 as a result of the agreement³⁰. Because the agreement covers the five major building service contractors in the region, employers cannot simply change contractors in order to avoid the costs of improved working conditions for contracted workers. The agreement was renegotiated in 2010 and includes a wage increase from \$7.75 per hour to \$8.35 per hour in 2012 and a 32 percent increase in contributions from employers towards maintaining workers' individual health care coverage³¹. In India, multiple-employer bargaining takes a variety of forms. First, an ad-hoc representative body of contract workers arising out of a spontaneous action negotiates either with the principal employer or the contractors (e.g. Hero Honda). Second, a contract workers' or regular workers' trade union negotiates with the principal employer and reaches a collective agreement or memorandum of understanding, or draws up a letter of exchange to be implemented by the contractors (e.g. public sector units such as Neyveli Lignite Corporation and private sector units such as Sandvik, Reliance Energy or Madras Atomic Power Station in Kalpakkam, Tamil Nadu). It might be the case that a regular workers' union negotiates on behalf of contract workers with the principal employer, and the understanding is legalized in an agreement by the contract workers' representatives and the contractors (e.g. Glaxo in Nabha, Thermax in Pune). There are also cases in which the contract workers' union or the regular workers' union negotiates directly with the contractors and reaches an agreement with the contractors' association (TNPL in Tamil Nadu). The contract workers themselves sometimes form a co-operative service society, which supplies contract labourers to the principal employer and negotiates or plays an important role in determining the conditions of service (e.g. NLC, Kalpakkam Atomic Energy and others, especially in Tamil Nadu)³².

In Indonesia, the Freedom of Association (FOA) Protocol was signed in 2011 by five trade unions (Federation Garteks *KSBSI*, *NES*, *KASBI*, *SPTSK* and *GSBI*), sportswear companies of brand holders and suppliers from the sports apparel industry. To date, Adidas, Nike, Puma, New

³⁰ D. Russakoff, *Houston Janitors Strike Ends with Agreement*, *Washington Post*, 21 November 2006.

³¹ SEIU website: www.seiu1.org (Last accessed 15 July 2012).

³² S.K.R. Sundar, *Non-regular Workers in India: Social dialogue and Innovative Practices*, ILO, Geneva, 2011.

Balance, Pentland, and Asics, as well as a number of their Indonesian suppliers have committed to abide by the agreement. This agreement legally binds the signing parties, but its provisions include the following: (a) all holders of the company brand and/or services in the sports apparel industry supply chain in Indonesia must respect and implement the right to freedom of association; (b) suppliers are required to disseminate the contents of this protocol and encourage its implementation by their subcontractors. The FOA Protocol is implemented in all of the signing companies regardless of whether they already have a collective agreement or not. The FOA Protocol does not set wages and working conditions, but it requires companies to conduct collective bargaining within six months after the enterprise union is established³³.

4.1.3. Extending Negotiated Outcomes to Non-negotiating Parties

One of the traditional approaches to reaching out to non-union members is the extension of all or part of collective agreements concluded between single employers or their representative organizations and the representative organizations of workers, such as trade unions, to workers and employers that are not represented by the social partners signing the agreement. In this way, the negotiated outcomes can be applicable to certain categories of non-standard workers who are not organized.

How negotiated outcomes are extended varies in terms of, for example, whether there are legal mechanisms for extension or that can be implemented by the signatories on a voluntary basis; or whether it requires the demand of one or both negotiating parties, depending on the country. Legal procedures for extending collective agreements exist – for example, in EU Member States – excluding Cyprus, Denmark, Italy, Malta, Sweden and the United Kingdom – South Africa, Japan, Mauritius and Namibia, though the degree and manner of extension differs in terms of whether an extension procedure is initiated only on the demand of one or both of the social partners that signed the collective agreement; or it can be done automatically by the competent government institution, whether there are minimum requirements, and how frequently they are implemented³⁴. The scope of non-standard workers to be covered in extended collective agreements also is dependent upon the nature of the

³³ R. P. Anwar, A. Supriyanto, *op. cit.*

³⁴ Eurofound, *Extension of Collective Bargaining Agreements in the EU*, Background paper, Eurofound, Dublin, 2011.

extension mechanism or whether their right to bargain collectively is legally guaranteed³⁵. If the extension has the effect that its terms cover “all workers” or all persons “engaged in an industry”, it certainly functions as a powerful tool to increase collective bargaining coverage for non-standard workers. However, if terms such as “employees” are used, it rules out non-standard workers who are not in employment relationships. Previous experience of collective agreement extension shows that it is common practice to target “employees”, with some cases including certain categories of non-standard “employees” (e.g. fixed-term or part-time employees) associated with direct employment relationships, or other cases excluding them explicitly³⁶.

Apart from such legal possibilities to extend collective agreements, there are also cases where agreements or provisions thereof are extended (*de facto* extension) by “soft factors” such as informal agreement, habits, customs or other voluntary practices³⁷. In Japan, for instance, a collective agreement applies only to workers who are members of the trade union that is party to the collective agreement, as a general rule³⁸. However, some enterprise unions, which organize both regular and non-regular workers, negotiate better working conditions for them, and extend part of the negotiated outcomes to unorganized non-standard workers. By way of example, in the 2008 *shunto* (annual wage negotiation), in the middle of the economic recession, a trade union at Japan Post Holdings Co. Ltd. (JP), which was privatized in October 2007, decided to defer its demands for pay increases for regular workers and to prioritize the needs of non-regular employees. After long negotiations, the union obtained a 2,000

³⁵ EIROOnline, *Collective Bargaining Coverage and Extension Procedures*, 2002, <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm> (Last accessed 15 July 2012).

³⁶ EIROOnline, *Collective Bargaining Coverage and Extension Procedures*.

³⁷ *Ibid.*

³⁸ The Trade Union Law (TUL) provides for two exceptions to this principle, with coverage of the collective agreement which has been extended at plant (Article 17) and regional level (Article 18), under the majority rule. The TUL provides that “when three-fourths or more of the workers of the same kind regularly employed in a particular factory or other workplace come under application of a particular collective agreement, such agreement shall be regarded as also applying to the remaining workers of the same kind employed in the same factory or workplace”. This provision and its interpretation have led to controversy in terms of a number of aspects. With regard to its applicability to non-standard workers, it is limited to “the remaining workers of the same kind employed” and rules out certain categories of non-regular workers. See Trade Union Law:

www.japaneselawtranslation.go.jp (Last accessed 15 July 2012).

Yen monthly wage increase for fixed-term employees working under a monthly salary system (there are also fixed-term employees under an hourly wage system). In the 2010 *shunto*, the union obtained a 2,000 Yen increase in the basic monthly wages of fixed-term contract employees working under a monthly salary system and the commitment of the JP to regularize 2,000 fixed-term employees. The negotiated outcomes were *de facto* extended to non-unionized fixed-term contract workers under the monthly salary system, as a result of autonomous governance based on mutual trust among labour and management³⁹.

A survey of collective agreements in Japan found that of the 2,597 company-level unions that responded, 91.4% had collective agreements in 2011, of which those saying that the agreements either fully or partially applied to part-time workers or fixed-term workers were 41.9% and 45% respectively. The proportion jumps where such workers were union members (68.4% and 69.2% respectively). The survey reveals that the proportion of company-level unions whose agreements are applicable to these two categories of workers rose from the previous survey in 2006 (33.5% and 42.7% respectively)⁴⁰.

4.2. Regulatory Strategies Through Collective Bargaining

4.2.1. Regularization and Employment Security

Regularizing non-standard workers (shifting to direct and permanent employment) is seen as one of the best examples of “inclusion”. There have been a number of cases, in which regularization was achieved under certain conditions.

In Japan, Aeon, one of the major merchandising companies in the country, concluded an agreement with its trade union to unify the qualification system for regular employees and part-timers in 2004. There were 79,000 part-timers at Aeon, accounting for 80 percent of the entire workforce. The wage system was also changed to be linked to workers’ qualifications, with the pay of highly-competent part-timers approaching that of regular employees, in order to narrow the wage gap between them.

³⁹ K. Hamaguchi, N. Ogino, *Non-regular Workers: Legal Policy, Social Dialogue and Collective Bargaining: the Study of Japan*, ILO, Geneva, 2011.

⁴⁰ The survey targeted 4,086 such trade unions. Ministry of Health, Labour and Welfare: *2011 Collective Agreement Survey*, www.mhlw.go.jp (Last accessed 15 July 2012).

Under the new system, part-timers wishing to advance their positions are evaluated considering the same appointment tests and promotion screenings used for regular employees, and are entitled to the same training opportunities previously limited to standard workers. As a result, a large number of part-timers were appointed to managerial positions at their respective stores, and about 150 of these part-timers were regularized⁴¹. In India, trade union demand for regularization can be justified on four grounds:

(a) workers perform the tasks of regular workers and hence the core activity of the enterprise concerned;

(b) contract workers are working under the supervision and direct control of the “principal employer” and doing work of a permanent nature;

(c) the contract labour system is a sham and in fact contract workers are employees of the “principal employer”; and

(d) long years of service in the same enterprise. India’s public sector employs a large number of contract workers. For example, in the Tamil Nadu Electricity Board, which employs 21,600 contract workers, negotiations started in May 2005 in order to convert their status to permanent employees. An agreement was reached in 2007 to immediately regularize 6,000 workers and the remaining contract workers during 2009⁴². In South Africa, the South African Transport and Allied Workers Union (SATAWU) succeeded in negotiating with Metrorail – a semi-state company – to have workers on fixed-term contracts employed on a permanent basis in 2006. After several talks, in 2009, 1,063 fixed-term workers were employed with a permanent contract. Some of these workers had been employed on a fixed-term basis for as long as ten years⁴³.

However, regularization of non-standard/non-regular workers is not an easy task as it depends on the business circumstances of the company. Where regularization is not possible, social partners have been exploring other ways of securing more stability of employment for non-standard workers. One way is to convert indirect or triangular employment relationships to direct employment relationships. For example, in Colombia, an important agreement was signed between the cement factory Argos and the trade unions Sutimac, Sintrargos and Sintraceargos. In the process of merger of the management of all its cement factories based in Colombia, negotiations among the trade unions and Argos’s

⁴¹ K. Hamaguchi, N. Ogino, *op. cit.*

⁴² S.K.R. Sundar, *op. cit.*

⁴³ J. Theron, *op. cit.*

management proceeded for a long time. Academic experts as well as members of the National School of Trade Unions (*Escuela Nacional Sindical*) were invited to participate. In the end, in exchange for their consent to the merger process, the unions obtained the direct employment of a significant number of workers that were previously employed through temporary agencies. Both the management of the company and the signatory trade unions later presented the Argos example as a successful case of bipartite negotiations⁴⁴.

Another way is to ensure continuity of employment. In India, unions have been pragmatic enough to modify their position and demand “continuity of employment” of contract workers even when the contractors change, by obtaining an assurance from the “principal employers” or sometimes from the contractors themselves. The grounds that unions used in such demands are the same as for regularization⁴⁵.

In Indonesia, the Federation of Indonesian Metal Workers’ Union (FSPMI) and Lomenik (Federation of Metal, Machine and Electronics) have also been successful in organizing contract and outsourced workers in the Export Processing Zones in Batam in Kepulauan Riau Province. According to FSPMI estimates, around 98 percent of all workers in Batam’s EPZs are hired through labour agencies. FSPMI and Lomenik have set out strategies and are making efforts to change the temporary status of contract workers to permanent, as well as negotiate collective agreements that contribute to a decrease in the number of contracted workers⁴⁶.

Some employers in Japan are also adopting innovative ways of providing more job security for non-standard workers through labour-management consultation⁴⁷, when full regularization is unrealistic given the surrounding business situation. They have created new categories of regular employees with restricted tasks or duties, or with specified geographical areas of work without transfer involving relocation (hereafter “restricted regular employees”), as compared with regular employees. Recent research

⁴⁴ A. DaCosta-Herrera, *National study on Colombia: Non-standard work, social dialogue and collective bargaining*, unpublished national study commissioned by the ILO, 2011.

⁴⁵ S.K.R. Sundar, *op. cit.*

⁴⁶ R. P. Anwar, A. Supriyanto, *op. cit.*

⁴⁷ Labour-management consultation in Japan is an informal process in which an employer and a trade union can discuss any issues in a cooperative way, and thus functions to complement the formal collective bargaining process. When the parties reach an agreement through consultation, they do not generally proceed to collective bargaining.

targeting 1,387 establishments reveals that 312 of these had “restricted regular employees” with restricted jobs/duties; 163 had such employees with specified geographical areas of work; and 74 had both categories of “restricted regular employees”.⁴⁸ The research also shows that regular employees with restricted jobs/duties are more frequently used in construction, medical and welfare services, education and educational services or other services, while area-restricted regular employees are more commonly utilized in construction, finance and insurance services, real estate and lease services.⁴⁹ Such schemes seem to be introduced largely through labour-management consultation and agreements⁵⁰, with lower terms and conditions of work than those of regular employees given the relevant “restrictions”, but contribute to provide better employment security.

4.2.2. Providing Equal Pay for Equal Value of Work and Equal Treatment: the Adoption of Non-discriminatory Principles

Advancement of equal pay for equal value of work, or non-discriminatory principles, is a common strategy that has been used to narrow the gap between terms and conditions of work for standard and non-standard workers. In a number of countries, it is addressed in collective bargaining and broader social dialogue, and the developments in collective bargaining in this regard are often associated with legal developments in non-discriminatory principles and equal treatment. Progress has been made particularly in terms of improving the situations facing non-standard workers where comparable standard workers are easily identifiable in prevailing wage-determining machinery and practices.

The European Union (EU) has been advanced in influencing non-standard work regulations in its Member States, adopting the principle of non-discrimination, based on a comparison with a comparable standard, full-time worker who engages in the same or similar work in the same

⁴⁸ K, Takahashi, *Gentei seishain kubun to hiseiki koyo mondai*, JILPT Discussion paper 12-03, Tokyo, 2012.

⁴⁹ *Ibid.*

⁵⁰ K, Takahashi; J, Nishimura, *“Tayo na seishain” no jinji kanri: Hearing survey*, JILPT, Tokyo 2012.

establishment. EU Directives on part-time and fixed-term work⁵¹ ensure the appropriate protection of these categories of workers through application of the principle of equal treatment relating to basic working and employment conditions. In the absence of a clear comparable benchmark, “comparison shall be made by reference to the applicable collective agreement”. If there is no applicable collective agreement, comparison is made according to national laws, collective agreements or practices. The Directive on temporary agency work, adopted in 2008, also ensures that temporary agency workers should be entitled to “equal treatment” with regard to “basic working and employment conditions”, although it also allows for the possibility of derogation by collective agreements concluded by the social partners, while respecting the overall protection of temporary agency workers⁵². The Directives, together with collective agreements, thus form an important means of regulating non-standard workers in many countries in the EU.

In France, on 6 July 2007 the temporary agency work employers’ confederation (*PRISME*) and the five main trade unions signed a diversity and non-discriminatory agreement (*Accord pour la non-discrimination, l’égalité et la diversité dans le cadre des activités de mise à l’emploi des entreprises de travail temporaire*). The agreement set forth guidelines that aim to provide equal treatment against every type of discrimination and apply to both the agency and the user company. Among the most important provisions, the agreement specifies that the user company should set clear and non-discriminatory recruitment standards and favour the diversity of its staff; that the temporary work agency is responsible for treating its employees in the user company equally; and that both the agency and the user companies should promote equal training as a means for equality of opportunities⁵³.

In Germany, the IG Metall trade union reached a new collective agreement for the steel industry in 2010, ensuring that temporary agency workers in the industry are paid the same as direct employees of the

⁵¹ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by ETUC, UNICE and CEEP.

⁵² Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

⁵³ Accord du 6 Juillet 2007 pour la non-discrimination, l’égalité et la diversité dans le cadre des activités de mise à l’emploi des entreprises de travail temporaire, prisme.eu accessed 15 July 2012).

industry⁵⁴. IG Metall also signed a new collective agreement with the two temporary employers' organizations (*BAP* and *iGZ*) for temporary workers in the metal and electrical engineering industries in 2012, which will contribute to closing the pay gap between permanent and temporary workers. Depending on the length of temporary workers' deployment in the company, they will be entitled to a sector-related supplement amounting to between 15 and 50 percent of their wages. The supplement must also be paid in the case of deployment in a company within those industries which is not covered by a collective agreement. The agreement comes into force on 1 November 2012 and will expire on 31 December 2017⁵⁵.

As occurs in some European countries, when wage levels are objectively determined by job/occupation classification, equal pay for work of equal value could be easier to implement by comparing pay levels between comparable standard and non-standard workers. However, where wage disparity is attributed to contractual status involving the clear distinction between human resources management practices applied to those with non-standard and standard employment, indicators for non-discrimination principles are not easily identified.

In Japan, for example, wages for regular employees are determined in the internal labour market, while non-regular workers are outside its scope, and terms and conditions of their work are determined on the basis of external labour market conditions. Since overarching human resources management practices and the way terms and conditions are determined are so different between regular employees with long-term employment security in the internal labour market and non-regular employees in the external labour market, it has been unrealistic to articulate common indicators in determining what is equal treatment. In order to remove this barrier and tackle such persistent wage disparity associated with labour market dualism, the social partners at sectoral and national levels have been seeking ways to identify wage levels by jobs/occupations. The Japanese Electrical, Electronic and Information Union, an affiliate of the IMF-JC, introduced an occupation-based wage demand formula in the 2007 *shunto* bargaining round in order to achieve equal pay for work of equal value in each occupation, while in the 2010 *shunto* the Japanese Trade Union Federation (RENGO) for the first time released wage data

⁵⁴ EIRO, *New Package of Wage Agreements for Steel Industry*, 2010, (Last accessed 17 July 2012).

⁵⁵ IG Metall, *New Collective Agreement in the Metal and Electrical Industries and Agreement for Temporary Agency Workers about Sector-related Supplements*, 2012, (Last accessed 17 July 2012).

concerning a list of major representative jobs/occupations that the sectoral unions had submitted. RENGO intends to enhance this data in order to equalize pay levels for equal jobs/occupations, utilize the data as indicators for equal and balanced treatment among regular and non-regular workers, and ultimately pave the way to achieving equal pay for work of equal value⁵⁶.

In contrast, in Australia, where under the standard job classifications and wage levels set in the awards, a certain level of parity is maintained in enterprise agreements, Fair Work Australia (FWA) – the national workplace relations tribunal – is in charge of making and varying awards in the national workplace relations system. An award is an enforceable document containing minimum terms and conditions of employment in addition to any legislated minimum terms. In general, an award applies to employees in a particular industry or occupation, and is used as the benchmark for assessing enterprise collective agreements before approval. Awards cover a whole industry or occupation, and provide a safety net of minimum pay rates and employment conditions. Although enterprise agreements can be tailored to meet the needs of particular enterprises, they are not allowed to derogate from the dispositions established by the relevant sectoral awards. Each sectoral award presents a wage scale developed according to 14 job classifications, exclusively determined by the employees' skills and training. Minimum wages and wage differentials among job levels differ across industries. Fair Work Australia annually updates wage levels according to productivity increases and inflation rates. The wage scale – i.e. the ratio between wages of different classes of workers – is, however, fixed and cannot be negotiated on a regular basis⁵⁷.

4.2.3. Negotiating Limits on the Period during which a Worker may be Temporarily Employed

The Termination of Employment Convention, 1982 (No. 158), calls for adequate safeguards against recourse to contracts of employment for a specified period of time (Article 2)⁵⁸. The accompanying Recommendation (No. 166) provides that such recourse should be limited to cases in which, due either to the nature of the work to be performed or to the interests of the worker, the employment relationship cannot be of

⁵⁶ JILPT, 2010 *Shunto Report, Monthly Business Labour Trends* 5, 2010, 44-48.

⁵⁷ Fair Work Australia website: www.fwa.gov.au (Last accessed 15 July 2012).

⁵⁸ ILO website: www.ilo.org (Last accessed 15 July 2012).

an indeterminate duration (Article 3)⁵⁹. The ILO has also pointed out that where contracts are concluded for a fixed term or for a specific task and then repeatedly renewed, the worker may not acquire certain rights, and may therefore not obtain the benefits provided for employees by labour legislation, or by collective bargaining⁶⁰.

In countries where there is no limit in the legislation on the period during which a worker may be employed under fixed-term or temporary agency arrangements, collective bargaining often regulates a maximum limit so as to prevent the abuse of such arrangements (e.g. repetitive renewal of short-term contracts for the purpose of avoiding regularization of fixed-term workers or abrupt termination of such contracts). Even when legislation does set a limit on the use of fixed-term employment, collective agreements are often used to amend it⁶¹. Such a limit is often discussed with a view to facilitate shifting temporary employment to permanent status, but the measures aimed at controlling and limiting the use of non-standard employment do not always benefit such workers, and require well-balanced design to avoid situations in which they end up taking more insecure work, or are pushed into unemployment or the informal economy⁶².

In South Africa, for instance, where no limit is set in the legislation on the period during which a worker may be temporarily employed, the Road Freight Bargaining Council's agreement, adopted in 2006 and extended to non-parties in 2007, provided that a worker who was supplied "to one or more clients on a continuous basis for a period in excess of two months shall be deemed to be an ordinary employee"⁶³. In Sweden, regulations for fixed-term employment in the 1982 Employment Protection Act may be derogated from by collective agreements, which are common, thereby confirming the wide scope for regulation by the social partners. Some collective agreements shorten the maximum period allowed for fixed-term employment set forth in the Act, while others specify it more generously,

⁵⁹ ILO website: www.ilo.org (Last accessed 15 July 2012).

⁶⁰ ILO, *The Employment Relationship, Report V(1)*, *op. cit.*, par. 48.

⁶¹ M. Rönmar, *Labour Policy on Fixed-term Employment Contracts in Sweden*, Paper presented at the JILPT Comparative Labour Law Seminar on Fixed-term Employment Contracts, Tokyo, Japan, March 2010, www.jil.go.jp (Last accessed: 15 July 2012); B. Nyström, *Sweden*, in R. Blanpain; C. Grant (eds.), *Fixed-term Employment Contracts: a Comparative Study*, Vanden Broele Publishers, Brugge, 2009, 395.

⁶² R. Gumbrell-McCormick, *European Trade Unions and "Atypical" Workers*, *Industrial Relations Journal* 42, No. 3, 2011, 193-310.

⁶³ J. Theron, *op. cit.*

and sometimes also more restrictively⁶⁴. In Belgium, in the collective agreements for the chemical industry in 2007 and the hairdressing and beauty care sector in the same year, the social partners agreed that if, after successive fixed-term employment contracts, a worker is finally employed under an open-ended contract, in the same position and with an interruption of less than four weeks, there is no need for a new trial period and the seniority already acquired under the fixed-term contract is maintained⁶⁵.

4.2.4. Addressing Specific Interests and Needs of Non-standard Workers: Tailored Bargaining

Social partners also attempt to represent the specific and different needs of non-standard workers, requiring varied treatment and tailored agreements responding to the specific needs of specific categories of non-standard workers. Employers are sometimes loath to invest in human resources development and training or social welfare for non-standard workers, whose attachment to a single employer is weak. Yet such workers need both skills upgrading to remain competitive in the external labour markets, and appropriate social protection and social security provision, which is not offered in the internal labour markets by their employer or workplace. A diversified workforce also means there are conflicting and different interests among workers. For example, some prioritize balancing work and family, while others opt for income security, housing, skills upgrading, and so forth. Such bargaining models are seen as typical of the “occupational” unionism in which the rules specific to internal labour markets, such as seniority, are rejected, but benefits portable in external labour markets are sought⁶⁶. There are good practices for such tailored bargaining.

In Belgium, collective agreements for temporary agency work are concluded through the joint committee structure. In 2007, collective agreements concluded by the joint committee involved improvements to pension benefits for agency workers in several sectors; training; end-of-year bonus; benefits in the case of accident or illness; other allowances;

⁶⁴ B. Nyström, *op. cit.*; M. Rönömar, *op. cit.*

⁶⁵ EIRO, *Belgium: Flexibility and Industrial Relations*, European Industrial Relations Observatory, Dublin, 2009.

⁶⁶ G. P. Cella, *The Representation of Non-standard Workers – Theory and Culture of Collective Bargaining*, *Transfer* 18, No. 2, 2012, 177.

and the creation of a safety fund.⁶⁷ In Denmark, the Danish Business (DE) concluded an agreement in 2007 with the Union of Commercial and Clerical Workers in Denmark (HK) which reduced the qualifying periods for agency workers to be eligible for employment benefits such as maternity entitlements⁶⁸. In France, temporary agency workers are covered by a specific vocational training policy, which is governed by national collective agreements that require compulsory contributions from agencies⁶⁹.

In Italy, an agreement was reached in 2007 between the main journalist employer confederations (FIEG) and the two main trade unions (FNSI and INPGI) under the supervision of the Italian Ministry of Labour, in order to guarantee fair treatment of freelance journalists in quasi-salaried employment⁷⁰. The agreement contained provisions responding to external labour market needs, viz.:

- (a) those on employers' pension contributions, which should have gradually increased within four years to reduce the gap in social protection between standard workers and those in quasi-salaried employment; and
- (b) those for scaling back the use of this form of employment, by means of incentives committed by the Government for the transformation of contracts in quasi-salaried employment into fixed-term salaried employment with a minimum duration of 24 months⁷¹.

In Indonesia, KSPSI (*Konfederasi Serikat Pekerja Seluruh Indonesia*) formed the Building and Public Works Union (*SPBPU*) in the construction sector and the Indonesian Transport Workers Union (*SPTI*) in the transport sector, most of whose members are informal workers. The members of *SPBPU* automatically become members of *SPBPU*'s cooperative and professional associations. As members of the cooperative, informal workers are granted economic protection, while as members of the professional association they can receive occupational protection, such as

⁶⁷ European Foundation for the Improvement of Living and Working Conditions (Eurofound), *Temporary Agency Work and Collective Bargaining in the EU*, 2009, www.eurofound.europa.eu (Last accessed: 15 July 2012).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Collaborazioni coordinate e continuative (co.co.co)* and *Contratti di collaborazione per programma (co.co.pro)* are employment contracts covering so-called employer-coordinated freelance workers (a form of quasi-salaried employment). In legal terms, they are considered autonomous employees but they usually operate within the production cycle of a firm and are subordinated to the needs of the employer.

⁷¹ *Giornalisti – Siglato accordo fra Min. Lavoro e Inpgi, Fiege e Fnsi per stabilizzazione co.co.co.*, 2007, (Last accessed 16 July 2012).

vocational training for the purposes of certification. Currently, *KSPSI* is cooperating with the Public Works Department of Indonesia in the certification programmes for 1 million construction workers. In order to grant them economic protection, *SPBPU*'s cooperative acts as a subcontractor to negotiate tariffs with the employers. By becoming a member of the cooperative, informal workers can get jobs directly from it and accordingly earn higher incomes than when they obtain jobs through supervisors on construction sites⁷².

4.2.5. *Regulating Economically Dependent Self-employment*

As described in section 3, non-standard work arrangements can expose ambiguity or uncertainty in the application of national laws and regulations that are intended to offer certain protections to those who are in a legally constituted employment relationship. In other cases, non-standard workers simply fall outside their scope of application. Without a defined and clear employment relationship being established, it becomes difficult for workers to engage in collective bargaining.

The ILO Employment Relationship Recommendation, 2006 (No. 198), provides that national policy on the employment relationship should at least include measures to provide guidance to the parties on the establishment and identification of employment relationships, measures to combat disguised employment, and the general application of protective standards that make clear which party is responsible for labour protection obligations⁷³. The Recommendation also provides that ILO Member States should apply a national policy to review, and where necessary to clarify and adapt the scope of, relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship⁷⁴. As part of national policy, the Recommendation provides that Member States should promote the role of collective bargaining and social dialogue as a means, among other things, of finding solutions to questions related to the scope of the employment relationship at the national level⁷⁵. Unless an employment relationship has been established, it is often difficult for self-employed workers with commercial contracts to engage in collective bargaining,

⁷² R. P. Anwar, A. Supriyanto, *op. cit.*

⁷³ Recommendation No. 198, Art. 4.

⁷⁴ Recommendation No. 198, Art. 1.

⁷⁵ Recommendation No. 198. Art. 18. For more details, see G. Casale, *op. cit.*, 1-33.

because of competition law which considers agreements on prices or tariffs as anti-competitive practice. There are examples of collective bargaining contributing to clarifying the scope of the employment relationship for certain categories of self-employed workers, or where their terms and conditions of work were negotiated upon clarification of the scope of the employment relationship by the relevant law.

In Argentina, the Argentine Street Vendors Trade Union (*SIVARA*, 17,000 members) represents street vending workers of various kinds, in both the public and private sectors, including street sale of services and health care plans, delivery sale, and direct sales of products. *SIVARA* has developed a strategy to pressure employers (dealers) to recognize these workers' dependent relationship with them and win enterprise collective agreements. So far, 25 agreements have been concluded for vendors who sell food on the streets, on trains and in parks⁷⁶.

In Japan, there have been increasing numbers of cases in which community unions (see Section 3.1.) bargain on behalf of an independent contractor but the employers refuse to bargain collectively on the grounds that these are not “workers” in terms of Article 3 of the Trade Union Act. Since determining criteria are non-existent, there has been a discrepancy between the orders of Labour Relations Commissions and lower court decisions, thereby creating issues in terms of legal stability and predictability. The Ministry of Health, Labour and Welfare therefore set up a Study Group and released a report proposing criteria for determining the “worker relationship”. Administrative notice was given to the Central and Local Labour Relations Commissions concerning the use of the report as a reference, in order to give it wider publicity⁷⁷.

In Germany, self-employed freelance journalists, who are considered “similar to employees” by law if they are economically dependent and either usually work exclusively for one client or more than 50 percent (30 percent in the media sector) of their income is paid by one client, are exempt from the antitrust regulation forbidding the conclusion of agreements on common fees and prices. A number of company-level agreements exist between trade unions and public broadcasting companies which contain agreed rates of pay. In 2009, the national Federation of German Newspaper Publishers (*BDZV*), several regional publisher associations and the two main trade unions of the sector (*DJV* and *ver.di*) signed a collective agreement covering self-employed journalists, who are

⁷⁶ J. M. Martínez-Chas, *op. cit.*

⁷⁷ Ministry of Health, Labour and Welfare (MHLW), 2011, www.mhlw.go.jp (Last access 13 July, 2012).

deemed to be similar to the employees at daily newspapers in western Germany. It includes collectively agreed fees in detail for articles and pictures/images provided by self-employed freelance workers, in order to set common rules “towards legal certainty and transparency”. Self-employed freelance workers are required to demonstrate that their main occupation is journalism, so as to ensure that only economically dependent self-employed workers are covered by the agreements⁷⁸.

5. Good Practices of National Tripartite Social Dialogue for Non-standard Work

The ways in which national tripartite social dialogue deals with issues regarding non-standard work are diverse. It has a critical role to play in advancing more inclusive and equitable social dialogue as well as democratic labour market governance, through designing and agreeing on policies or legislative changes based on mutual consensus. The Committee of Experts on the Application of Conventions and Recommendations of the ILO indeed highlighted the importance of examining in all Member States, within a tripartite framework, the impact of these forms of employment on the exercise of trade union rights⁷⁹. The outcomes of tripartite social dialogue can also take other forms, such as non-binding declarations, guidelines or agreements. This paper does not seek to analyse the wide range of legal or policy changes made through tripartite consensus which are related to various non-standard work arrangements as well as those aiming at promoting equal access to freedom of association and collective bargaining. Rather, it highlights some voluntary tripartite agreements or initiatives which contain tripartite action that has been taken to address issues regarding non-standard work.

In Argentina, the National Agreement for the Promotion of Social Dialogue in the Construction Industry was signed in December 2010 between the Construction Workers' Union of the Argentine Republic (UOCRA), the Argentine Construction Chamber (CAC) and the Ministry

⁷⁸ Eurofound, *Germany: Self-employed Workers*, 2009, www.eurofound.europa.eu (Last accessed: 16 July 2012). See also, *Joint Remuneration Rules for Professional Freelance Journalist Working for Daily Newspapers*, 2009, europe.ifj.org (Last accessed 16 July 2012).

⁷⁹ ILO, *General Survey on the Fundamental Conventions Concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalization*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), ILO, Geneva, 2012.

of Federal Planning, with the participation of other employers' organizations in the value chain of the industry. Among others, the purposes of the agreement were: to mutually commit to social peace, to reach an outline of the consensus concerning prices and wages, to foster registered and decent employment, to set clear and predictable rules in regulations compliance and investment and to promote the widespread construction of social housing for low and middle-income groups⁸⁰. In the agricultural sector, the National Agricultural Work Committee (*CNTA*) was created in 1980 as a tripartite social dialogue institution with the participation of the Inter-cooperative Rural Confederation (*Coninagro*), the Argentine Agrarian Federation (*FAA*), the Argentine Rural Society (*SRA*), the Argentine Rural Confederations (*CRA*) and the Argentine Association of Rural Workers and Dockers (*UATRE*). In 2004, another tripartite institution (*RENATRE*) was created with the aim of promoting social dialogue in the Argentine agricultural sector. This forum deals with informal workers and employers, encouraging their legalization and incorporation into social security schemes. One core element is the granting of benefits through the Comprehensive Unemployment Benefits System. To this end, a pocket job record book is issued to register every change of employer in the case of temporary workers so that they may become eligible for the unemployment protection system⁸¹.

In Singapore, tripartite partnership is used as a way to address issues affecting the increasing number of contract and casual workers, largely related to the expansion in outsourcing services. In 2008, the Tripartite Advisory on Responsible Outsourcing Practices⁸² was issued to encourage end-user companies awarding outsourcing contracts to demand that their service suppliers or contractors help raise employment terms and benefits as well as the Central Provident Fund (*CPF*) status of low-wage contract workers, as required by the law. More specifically, companies are encouraged to consider the following: (a) making compliance with Singapore's employment laws a condition in service contracts with their suppliers; (b) encouraging written employment contracts between service suppliers and their contract workers; (c) monitoring the financial standing of service suppliers; (d) awarding performance-based contracts to service suppliers; (e) retaining experienced workers; and (f) helping workers

⁸⁰ J. M. Martínez-Chas, *op.cit.*

⁸¹ *Ibid.*

⁸² The full text is available at the SNEF website, www.sgemployers.com (Last accessed 16 July 2012).

qualify for employment benefits under the Employment Act. According to a survey in 2010, more than 50 percent of companies that outsourced cleaning, security and landscaping services adopted three or more of the six responsible outsourcing practices listed in the 2008 Advisory⁸³. Taking into account feedback obtained from industry stakeholders, trade unions, workers and the public, the Advisory was updated in 2012 and renamed the Tripartite Advisory on Best Sourcing Practices⁸⁴ to further encourage service buyers to outsource responsibly and adopt best practices. This provides greater clarity on the ways that workers, service buyers and providers can benefit from best sourcing. It encourages service buyers to consider the following: (a) safeguarding the best employment rights of workers in accordance with Singapore's employment laws, such as the Employment Act, Central Provident Fund Act, Employment of Foreign Manpower Act, Workplace Safety and Health Act and Work Injury Compensation Act; (b) specifying service contracts on the basis of service-level requirements rather than headcount; (c) recognizing factors that contribute to service quality (e.g. provision of written employment contracts to workers, grading and accreditation level of the service providers, investment in the training of workers, recognition of experienced workers, and provision of appropriate tools and equipment); (d) checking that service providers are financially sound; and (e) seeking to establish a long-term collaborative partnership with service providers. The tripartite partners have also developed a step-by-step guidebook for service buyers that illustrates the best sourcing cases and gives detailed practical guidance on implementation. It includes examples of clauses that can be used for tender requirements, scoring templates for evaluating proposals from potential service providers and examples of key performance indicators for managing the service provider⁸⁵.

Attempts have also been made in various countries to overcome the lack of representation of the non-standard workforce in national tripartite social dialogue by introducing changes to its structure. For example, in the Netherlands, self-employed workers (9 percent of the total workforce) gained representation in the Social and Economic Council, the Government's national permanent social dialogue advisory body, in

⁸³ Information gathered from the Ministry of Manpower (11 October 2011).

⁸⁴ Ministry of Manpower website, www.mom.gov.sg (Last accessed 16 July 2012). For full text, see www.mom.gov.sg (Last accessed 16 July 2012).

⁸⁵ Ministry of Manpower; National Trades Union Congress; Singapore National Employers Federation, *Best Sourcing: Step by Step Guidebook for Service Buyers*, www.mom.gov.sg (Last accessed 16 July 2012).

March 2010. They are represented by the Chair of the Platform for Self-employed Workers, the largest Netherlands organization of self-employed workers, with more than 20,000 affiliates. In September 2010 the Social and Economic Council issued its first recommendations on self-employment. The main objective was to reduce the gap in labour market legislation between self-employed and dependent employees. The Social and Economic Council proposed that an agreement should be reached on minimum rates for self-employed workers. In principle, self-employed workers conduct their business at their own expense. The proposal aims at avoiding excessive risks for such workers, given that their economic position is substantially different from that of employers. In particular, one of the provisions aims at relaxing the annual working hours regulation with which self-employed workers must comply for tax benefits. At present, they must work at least 1,225 hours per year in order to be eligible for tax breaks. However, especially because of the economic downturn, many self-employed workers are unable to reach this benchmark. The recommendation of the Social and Economic Council is for the tax authorities to adopt a more lenient approach, for instance by counting also the number of hours spent on canvassing customers⁸⁶.

6. Concluding Remarks

Promoting more inclusive social dialogue and collective bargaining is a key means of ensuring equal voice for all workers and advancing a fairer and more equitable society. This paper has attempted to map a wide variety of collective bargaining and national social dialogue practices. Albeit limited in terms of numbers of workers covered and the impact achieved, it shows that multi-faceted strategies and approaches have been adopted to overcome particular challenges to social dialogue and collective bargaining for non-standard workers. Depending on each country's industrial relations institutions and practices, labour market portfolio, or forms of non-standard work, effective approaches and strategies greatly differ. Nevertheless, some specific implications can be drawn from a review of a variety of collective bargaining and national social dialogue practices demonstrated in the paper.

⁸⁶ EIRO, *Self-employed Workers Join Social and Economic Council*, 2010, www.eurofound.europa.eu (Last accessed 16 July 2012).

Some good practices appear to involve attempts to overcome constraints in prevailing collective bargaining settings or practices and give more voice to non-standard workers. In countries where bargaining happens mainly at the enterprise level with a tendency to exclude non-standard workers, as well as in cases where workers' attachment to single workplaces/employers is limited, trade union representation and bargaining which are not bound to workplaces appear to be useful in representing the interests of non-standard workers. Such examples include not only bargaining at higher levels (e.g. sectoral or national level) but negotiation between an employer and a trade union/unions which is/are established at regional, local, or community level, or on an occupational basis. This approach has the potential to contribute to an increase in the proportion of the workforce with access to representation and negotiation, by effectively representing the voices and interests of those whose trade union representation tends to be either low or absent.

However, the growing need for such representation outside workplaces also implies a serious challenge in some countries to realizing equal and inclusive access to collective bargaining at workplace level, as well as workplace democracy. Trade unions in the past followed exclusive policies, and are still doing so in some countries where non-standard workers are often excluded from unions' organizing and bargaining practices. Heery⁸⁷ categorizes trade union responses to non-standard workers in four stages: (i) exclusion; (ii) acceptance but in a subordinate position; (iii) inclusion on the basis of equal treatment with standard workers; and (iv) engagement, characterized by union attempts to represent the specific and differentiated needs of non-standard workers. Such movements in trade union policy away from exclusion, through subordination to inclusion and engagement have also been observed. Examples demonstrate that there are enterprise-level trade unions which seek to organize non-standard workers, include their agenda in bargaining or voluntarily extend the negotiated outcomes to non-standard workers.

In this regard, a complementary role that a variety of workers' participation schemes at enterprise level can play in supporting collective bargaining and promoting more inclusive social dialogue, which is beyond the scope of the present paper, remains a subject of future research.

Those who engage in work associated with supply chains and multi-tier contracting also face difficulty in exercising meaningful bargaining, since

⁸⁷ E. Heery, *Trade Unions and Contingent Labour: Scale and Method*, in *Cambridge Journal of Regions, Economy and Society* 2, No. 3, 2009, 429-442.

their employers are often SMEs, the decision-making power of which in negotiations can be weak. In these cases, multi-employer bargaining seems to be an effective tool for improving bargaining positions for these workers by involving in the negotiations the “principal employer” that has the real power. Multiple-employer agreements also benefit big brand companies, end-user companies and their suppliers, with a view to better supply-chain management and corporate social responsibility (CSR). Singapore’s Tripartite Advisory on Best Sourcing Practices, adopted through tripartite consensus, also shows that engagement of multiple employers is a key to improving terms and conditions of work in outsourcing services.

Extension of collective agreements can be used as an approach to reach out to unorganized non-standard workers, in countries where there is legal machinery for such arrangements. But its applicability to non-standard workers appears to be quite limited and the extent to which it is used to cover non-standard workers requires further examination from both legal and practical perspectives. Examples demonstrate that some categories of non-standard “employees” in direct employment relationships are included in extended agreements, but evidence shows these workers may be explicitly excluded. In contrast, an example in Japan of a collective agreement whose outcomes become applicable and *de facto* extended to non-bargaining parties as a result of mutual consensus between negotiating parties suggests a step toward more solidarity and more inclusive dialogue that has the potential to encourage trade union membership.

Collective bargaining developments in regulating non-standard work are highly linked to labour law and policy developments in relevant areas: different contractual arrangements, termination of employment, equal treatment, social security and social protection, employment relationships and, also, overarching industrial relations laws and regulations which govern social dialogue and collective bargaining. Issues that are the subject of bargaining to address non-standard work vary between countries, depending on the different interests and needs of non-standard workers, or the legal settings dealing with different types of non-standard contracts. But the main issues covered are regularization and employment security; equal pay for equal value of work; limits on the duration of temporary contracts; social protection and social security; skills developments; and clarification of the possibility of exercising collective bargaining for economically dependent self-employed workers.

Regularizing non-standard workers seems to be achieved using different criteria, including years of service, selection through appointment tests or

promotion screenings, and tasks and responsibilities. When full regularization is not possible, social partners are exploring other ways of narrowing the gap between non-standard and standard workers. Attempts to pursue equal pay for equal value of work or limits on the duration of temporary contracts are used as a bridge to facilitate a shift to regularization. In order to provide better employment security, new categories of standard workers also emerge with lower terms and conditions of work than standard workers in return for limited duties and responsibilities.

Legal and collective bargaining developments complement each other in advancing equal pay for work of equal value. The way collective bargaining pursues this principle differs significantly depending on prevailing industrial relations and labour-management practices, as well as wage determination systems and practices. Generally, it appears that it can be easier to achieve where wage levels are objectively determined by job/occupation classification. Where such clear classification does not exist, the social partners are attempting to establish objective indicators. The definitions and indicators that are used to meet this goal, as well as their impact, deserve further comparative analysis.

Collective bargaining can be tailored to respond to the diversified needs of different categories of non-standard workers. Some good examples show that benefits which are portable in external labour markets are favoured for non-standard workers, since their access to benefits available in internal labour markets tends to be limited, due to these workers' limited attachment to a single workplace. Tailored agreements can also facilitate mutually agreed ways of working flexibly to enhance the labour market positions of non-standard workers.

In Europe, more and more collective agreements address issues regarding temporary agency workers (notably since Directive 2008/104/EC on temporary agency work)⁸⁸ or economically dependent self-employed workers. In developing economies, a number of good examples are related to issues concerning people engaged in contract labour or informal work, but their impacts on actual terms or conditions of work do not appear to be as clear as those in developed economies. Generally, regulatory progress through collective bargaining appears more advanced for directly employed non-standard workers (part-time workers and fixed-term workers).

⁸⁸ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work.

Though some good practices exist, collective bargaining is generally still underdeveloped in addressing economically dependent self-employment or work associated with commercial contracts. In most countries, regulating such forms of work outside employment relationships seems to be left largely to national legal and judicial developments in clarifying the scope of the employment relationship. This suggests that deepened analysis is necessary in order to review how collective bargaining interacts with legal and judicial developments in respect of the ILO Employment Relationship Recommendation, 2006 (No. 198).

Many good practices involve attempts by the social partners, in both overcoming existing obstacles to exercising collective bargaining and negotiating issues facing non-standard workers, to re-examine jobs/occupations, qualifications, tasks and responsibilities, as well as the nature of employment and the work relationship, rather than actual contractual status or degree of attachment to a single employer, which often create different “layers” of workers in terms of access to collective bargaining.

It is of the utmost importance to examine the impact of various non-standard forms of work on the exercise of collective bargaining rights, through a tripartite framework, taking into account each national context. The strength of tripartite social dialogue is to enable inclusion of the use of public institutions, such as social security or social protection schemes, in agreements for finding solutions to issues regarding non-standard workers, with commitment by the social partners for implementation. Good practices also exist in modifying the structure of national social dialogue by providing certain categories of unrepresented groups with representative positions in the existing structure.

Freedom of association is an essential precondition for the effective realization of the right to collective bargaining. The impact of collective bargaining is large where trade union density is high. Organizing non-standard workers therefore serves as a prerequisite for strengthening collective bargaining for non-standard workers. Various trade union strategies have been adopted to this end (e.g. organizing efforts, political lobbying, and coalition and network building with other social movements), which require further analysis⁸⁹. Equally, what businesses do as part of their CSR or supply-chain management initiatives, particularly

⁸⁹ Some such trade union strategies are demonstrated in M. Ebisui, *Non-standard Workers: Good Practices of Social Dialogue and Collective Bargaining*, ILO, Geneva, 2012.

those with real bargaining power, to promote more inclusive and equitable social dialogue and collective bargaining is also worth examining.

In sum, the effectiveness of various collective bargaining and social dialogue approaches or strategies in improving the situation of non-standard workers is linked to various other factors, such as relevant labour laws and other regulations, judicial developments, prevalent industrial institutions and practices, as well as economic and labour market conditions. There is no single solution, but there is a growing need for improved coordination between multi-faceted initiatives by the different actors, so that they interact and reinforce each other to move towards a more inclusive and equitable world of work based on solidarity, rather than one that is split into different, often unequal segments.

Associative Discrimination in Britain and in the European Union: a still too Elastic Concept?

Pierre de Gioia-Carabellese, Robert J. Colhoun *

1. Introductory Remarks

Legislation governing the implied – if not the literal – existence of associative discrimination has dwelled within the confines of UK domestic law for a number of years before being dramatically thrust into the spotlight by the “long-running saga” of *Coleman v Attridge Law*¹ which has helped to raise the legal profile of discrimination by association². In Britain, its genesis is the result of a certain amount of incongruity between the Sex Discrimination Act (SDA) of 1975³ and the Race Relations Act of 1976⁴ which was further perpetuated by the Disability Discrimination Act of 1995,⁵ the Employment Equality (Sexual Orientation) Regulations of 2003, the Employment Equality (Religion or Belief) Regulations of 2003 and Employment Equality (Age) Regulations of 2006. Indeed, so discordant and fragmented has the dissemination of these sections of legislation been, that the courts were obliged to rule on the basis of

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¹ *Coleman v Attridge Law* (2010) 1 C.M.L.R., 28.

² D. Christie, *Discrimination by Association and the Equality Act 2010*, 35 Scots Law Times 194, 2010.

³ Henceforth also the SDA 1975.

⁴ Henceforth also the RRA 1976.

⁵ Henceforth also the DDA 1995.

unintended⁶ subtle differences in language until the referral of *Coleman* to the Court of Justice of the European Union (CJEU) for clarification. The set of EU Directives now in place are widely acknowledged as the catalyst for the recent consolidation and extension of domestic anti-discrimination provisions under the Equality Act of 2010⁷. In addition, if set in juxtaposition with UK domestic implementation, they provide fertile ground for exploring any prior discrepancies and assessing to what extent harmony now prevails. For the purposes of integrity, on the one hand a candid evaluation of the likely burden determined by the foregoing developments on employers with regard to recruitment, workplace policies and flexible working arrangement requests will reduce the practical context within which the legislative impact can be placed. On the other hand – and to a certain extent to supply the empirical analysis with higher levels of reliability – a comparative analysis of a general nature shall be drawn, particularly by placing an emphasis on both similarities and differences permeating this area of law in both Britain and Italy, the latter being the comparator employed for the purposes of such a methodology.

2. Discrepancies within UK Domestic Legislation

The doctrine of transferred discrimination, into which associative discrimination became subsumed⁸, came to fruition in light of the subtle differences in wording incorporated within the SDA 1975 and the RRA 1976. The former contains a possessive element in that⁹: “[...] a person discriminates against a woman if – *on the ground of her sex*¹⁰ he treats her less favourably than he treats or would treat a man [...]”.

Accordingly, a literal reading of the this wording lent the courts no room to manoeuvre with regard to discrimination by association and contrasts starkly with that of the RRA 1976 as¹¹: “[...] A person discriminates against another [...] if: (a) *on racial grounds*¹² he treats that other less favourably than he treats or would treat other persons [...]”

⁶ It is maintained that “the difference in language was never considered by Parliament”. See S. Forshaw, M. Pilgerstorfer, *Taking Discrimination Personally? An Analysis of the Doctrine of Transferred Discrimination* King’s Law Journal 19, No. 2, 2008, 266.

⁷ Henceforth also the EA 2010.

⁸ S. Forshaw, M. Pilgerstorfer, *op. cit.*, 265, 292.

⁹ SDA 1975, s 1(1), as subsequently amended.

¹⁰ Emphasis added.

¹¹ RRA 1976, s 1(1), as subsequently amended.

¹² Emphasis added.

As a natural consequence, the absence of a formulation of a possessive character widened the scope within which relevant legislation could be applied, with this aspect which had indeed already been recognised in the case of *Race Relations Board v Applin*¹³, where similar wording under the Race Relations Act 1968 had permitted Stephenson LJ to determine that “A can discriminate against B on the ground of C’s colour, race or ethnic origin”¹⁴. In reality, Stephenson LJ provided a simplified definition of associative discrimination in that “the discrimination is transferred onto another by virtue of the association which a person has with that other”¹⁵. In keeping with the more expansive language of the RRA 1976, the Employment Equality (Sexual Orientation) Regulations of 2003 made use of the expression “on grounds of sexual orientation”¹⁶ while the Employment Equality (Religion or Belief) Regulations of 2003 resorted to the formulation “on the grounds of the religion or belief”¹⁷. However, it is the explanation of the provisions of both sets of regulations laid down by the DTI (2003) which revealed, for the first time, the main reasoning embodied in the foregoing wording¹⁸: “[...]direct discrimination [...] covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay”. Either side of such conclusive assumption mutually reflected in the relevant wording and a lack of consistency emerged with regard to the DDA of 1995 and the Employment Equality (Age) Regulations of 2006. In this sense, more recent legislation attempted at reversing the possessive criterion discussed above, maintaining that¹⁹: “[...] a person (‘A’) discriminates against another person (‘B’) if – (a) on grounds of B’s age²⁰, A treats B less favourably than he treats or would treat other persons [...]”.

In a similar vein, any potential for associative discrimination appeared outside the scope of the DDA 1995 as²¹: “[...] a person discriminates

¹³ *Race Relations Board v Applin* (1973) QB 815.

¹⁴ *Ibid.*, 831.

¹⁵ S. Forshaw, M. Pilgerstorfer, *op. cit.*, 268.

¹⁶ Employment Equality (Sexual Orientation) Regulations of 2003, s 3(1).

¹⁷ Employment Equality (Religion or Belief) Regulations of 2003, s 3(1).

¹⁸ DTI (2003), Explanation of the Provisions of the: Employment Equality (Sexual Orientation) Regulations of 2003 and Employment Equality (Religion or Belief) Regulations of 2003, par. 26.

¹⁹ Employment Equality (Age) Regulations of 2006, s 3(1).

²⁰ Emphasis added.

against a disabled person if – (a) for a reason which relates to *the disabled person's disability*²² he treats him less favourably than he treats or would treat others[...].”

S 3A (5) of the piece of legislation in question accounted for another provision “on the ground of the disabled person’s disability” adding further credence – if any were needed – to the strict interpretation which could be sanctioned by the domestic courts. Indeed, such a narrow reading compelled the Employment Tribunal, with respect to *Coleman*, to refer the case to the CJEU for a preliminary ruling on whether the parameters of the Framework Directive²³ extended to protect against discrimination by association.

3. The European Stance

In stark contrast with the disparities discussed earlier which overarch UK non-discrimination legislation, a number of EU Directives on the matter resonate with unfettered uniformity.

Among them, Directive 2000/78/EC is particularly relevant to the discussion at hand, as it lays down that²⁴: “[...] direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, *on any of the grounds referred to in Article 1*²⁵[...]”.

The protected grounds covered by Directive 2000/78/EC under Article 1 are religion or belief, disability, age and sexual orientation while similar terminology is evident in Directives 76/207/EEC and 2006/54/EC – mainly related to sex discrimination – and in Directive 2000/43/EC dealing with racial or ethnic origin discrimination. Such uniformity then appeared to leave room for a creative reading which empowers the CJEU to acknowledge the existence of discrimination on the grounds of association. This aspect is further evidenced by the emphatic reiteration, under Article 2 (1) of Directive 2000/78/EC, according to which “there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1”. Evidently, the expansive nature of the

²¹ DDA 1995, s 3A(1).

²² Emphasis added.

²³ Hereafter, Directive 2000/78/EC.

²⁴ Directive 2000/78/EC, Art.2(2)(a).

²⁵ Emphasis added.

language enshrined in the Directives is a matter for debate, alongside the terminology originating from the philosophical domain of jurisprudence. In assessing the merits of *Coleman*, the Advocate General concluded that: “[...] if someone is the object of discrimination because of any one of the characteristics listed in Article 1 then she can avail herself of the protection of the Directive even if she does not possess one of them herself. It is not necessary for someone who is the object of discrimination to have been mistreated on account of ‘her disability’. It is enough if she was mistreated on account of ‘disability’”²⁶.

The rationale upon which these concluding remarks were founded was attributed – in more concrete terms – to the demonstrable terminology of Directive 2000/78/EC where “on any of the grounds” indirectly prescribed that liability should have hinged on the act of discrimination, irrespective of whether the employee herself had a disability. At a more philosophical level, the Advocate General referred to Article 13 of the EC Treaty in reasoning that a commitment to the principles of equal treatment and non-discrimination therein laid the foundations for their practical realisation through Directive 2000/78/EC, as evidenced in *Mangold v Helm*²⁷. In relating this train of thought to a yet more fundamental source, equality embodies the values of “human dignity and personal autonomy”²⁸ which are placed in jeopardy not only by discriminating against someone having a protected characteristic directly, but also “by seeing someone else suffer discrimination merely by virtue of being associated with him”²⁹.

The Advocate General reasoned that such subtle means of discrimination, in seeing the employee as a conduit “through which the dignity of the person belonging to a suspect classification is undermined”³⁰, negatively affected the ability of this person to “exercise their autonomy”³¹ by targeting those associated with them and was therefore unlawful per se.

Armed with a veritable amount of philosophical reasoning which paves the way for “a more secure jurisprudential basis from which future applications of the equal treatment principle of the framework Directive

²⁶ AG Para. 23 of *Coleman*.

²⁷ Case C-144/04 *Mangold v Helm* (2005) ECR I-9981, para. 74.

²⁸ Par. 8 of *Coleman*.

²⁹ Par. 13 of *Coleman*.

³⁰ Par. 13 of *Coleman*.

³¹ Par. 14 of *Coleman*.

2000/78/EC could have been made³², the CJEU (strangely) chose to sidestep the issue. Rather, it focused primarily on observing the dual agenda of “combating every form of discrimination” and facilitating the “social and economic integration of disabled people”³³. To this end, it held that Directive 2000/78/EC should not be interpreted strictly³⁴ as this approach would be “liable to deprive that Directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.”³⁵

A cursory overview of the European stance would thus acknowledge the inception of discrimination by association as a matter of European Law. However, on closer inspection, several issues remained unsolved. Firstly, a potentially and unanticipated side effect of *Coleman* arose relating to the prerequisite proximity a carer must demonstrate having to the person carrying a protected characteristic. In other words, would the ambit of associative discrimination extend to cover a carer in cases where the complainant was not the *primary* carer? No elucidation on the subject was provided by the CJEU, as *Coleman* involved a primary carer although any unfavourable answer to this question would undeniably cast doubt on the much vaunted commitment to the principle of equal treatment espoused by the judgment handed down by the Courts. Secondly, the CJEU maintained the stance adopted in *Chacon Navas v Eurest Colectividades SA*³⁶ that “the scope of Directive 2000/78/EC cannot be extended beyond the discrimination based on the grounds listed exhaustively in Article 1 of the Directive”³⁷. In so doing, it deemed long-term sickness to be temporary and thus outside the scope of the Directive, whereas the disability protected therein should have been exclusively that of a permanent nature³⁸. Associative discrimination against a carer of someone suffering from long-term sickness would therefore appear to flounder on such rigorous boundaries leaving a more expansive interpretation of what constitutes a disability as a future recourse whereby the CJEU may better

³² T. Connor, *Case C-303/06 Coleman v. Attridge Law and Steve Law Judgment of the ECJ 17 July 2008; Discrimination by Association: a Step in the Right Direction*, *Journal of Social Welfare and Family Law* 32, No. 1, 2010, 66.

³³ Cited under Recital 6 of Directive 2000/78/EC and referred to in Para. 43 of *Coleman*.

³⁴ Par. 46 of *Coleman*.

³⁵ Par. 51 of *Coleman*.

³⁶ Case C-13/05 *Sonia Chacon Navas v Eurest Colectividades SA* (2006) ECR I-6467.

³⁷ Par. 46 of *Coleman*.

³⁸ Par. 45 of *Coleman*.

amalgamate human rights and equal treatment into EU law³⁹. Finally, *Coleman* failed to address the scope for indirect associative discrimination as the case in hand was direct in nature and the Courts confined their ruling accordingly. It was thus left open to debate whether it was deliberately excluded or latently included⁴⁰. A literal reading of Directive 2000/78/EC Article 2(2)(b) would however appear to exclude this possibility due to the possessive wording restricting indirect discrimination to “persons *having*⁴¹ a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation.” Nevertheless, it is arguable once again that a failure to recognise indirect associative discrimination would contravene the principle of equal treatment.

4. Preamble to the Equality Act 2010

As EU Directives cannot be directly applied to cases involving private persons, *Coleman* was returned to the ET where the principle of indirect effect came into play. In essence “was it really ‘possible’ within the UK’s ‘golden rule’ of statutory interpretation, to interpret the national law to be consistent with the Directive?”⁴². An answer in the affirmative appeared, at least at a theoretical level, to be shackled with inherent complications as, although the DDA 1995 was not consistent with Directive 2000/78/EC, the Government could not have foreseen that this Directive would be interpreted to include discrimination by association eight years later. If it had, this would have been reflected in the wording of the 2003 amendments and/or the Disability Discrimination Act 2005. Nor could the interpretation of the foregoing statutes as excluding associative discrimination be considered to pave the way for an absurd or repugnant result in court. Nevertheless, the ET and – on appeal – the Employment Appeal Tribunal (EAT) inferred that the intention of the 2003

³⁹ L. Waddington, *Protection for Family and Friends: Addressing Discrimination by Association*, *European Anti Discrimination Law Review* 13, No. 5 2007, 21.

⁴⁰ C. O’Brien, *Equality’s False Summits: New Varieties of Disability Discrimination*, “Excessive” *Equal Treatment and Economically Constructed Horizons*, *European Law Review* 36, No. 1, 2011, 26, 50.

⁴¹ Emphasis added.

⁴² T. Hervey, M Reeves, H Rodgers, B Ridings, T Roberts. *Case C-303/06 Coleman v. Attridge Law and Steve Law Judgment of the ECJ 17 July 2008; Judgment of the Employment Tribunal, London, 30 September 2008*, *Journal of Social Welfare and Family Law* 31, No. 3, 2008, 310.

amendments had been to fully implement Directive 2000/78/EC and thus upheld the preliminary ruling of the CJEU by indirect effect on grounds tantamount to those articulated previously by the Advocate General: Employment Judge Stacey reasoned that discrimination by association would “offend the principle of equal treatment, autonomy, human dignity and self-respect”. In protecting these principles, the ET and EAT had, in effect, bypassed the ordinary canons of statutory interpretation to facilitate a direct effect of Directive 2000/78/EC between private parties. Judge Stacey may well have envisaged the end justifying the means from a human rights perspective. However, it was hardly a satisfactory legal means to justify such an end.

Although *Coleman* was concerned solely with disability discrimination and thus introduced associative discrimination into EU and domestic law in regard to that protected characteristic, the proclivities of the foregoing judgments seemed to indicate that the courts would henceforth rule in unison across the spectrum of prohibited grounds⁴³. However, the case of *Kulikaoskas v MacDuff Shellfish*⁴⁴ imparted a telling reminder that such a conclusion was premature at best and presumptuous at worst when the EAT ruled that Directives 92/85/EEC and 2006/54/EC could not be read to deal with associative discrimination as Directive 2000/78/EC had so crucially in the case of *Coleman*. Nevertheless, the tide was shifting in the judicial arena and domestic legislation would have to keep pace⁴⁵. Indeed, the SDA 1975 (Amendment) Regulations of 2008 stood testament to this when – albeit in relation to harassment – s 4A was recast, in response to *Equal Opportunities Commission v Secretary of State for Trade and Industry*⁴⁶, to include harassment by association. With the preamble concluded, the scene was set for a streamlining of domestic equality law in harmony with its EU counterpart under the Equality Act 2010⁴⁷.

⁴³ M. Pilgerstorfer, *Transferred Discrimination in European Law*, *Industrial Law Journal* 37, No. 4, 2008, 384, 393.

⁴⁴ *Kulikaoskas v MacDuff Shellfish* (2011) I.C.R. 48.

⁴⁵ S. Honeyball, *Discrimination by Association* *Web Journal of Current Legal Issues*, 2007, at webjcli.ncl.ac.uk (last accessed 19 June 2012).

⁴⁶ *Equal Opportunities Commission v Secretary of State for Trade and Industry*, 2007, IRLR, 327.

⁴⁷ C. O'Brien, *op. cit.*, *passim*.

5. The Equality Act 2010: from Discord to Harmony?

As for the previous EU Directives, the Equality Act of 2010 makes no explicit reference to associative discrimination *per se*. Rather, in keeping with the Employment Equality (Sexual Orientation) Regulations and the Employment Equality (Religion or Belief) Regulations of 2003, it relies on a set of accompanying explanatory notes to unearth the underlying reasoning⁴⁸. As for the Act itself, direct discrimination would now occur when⁴⁹: “A person (A) discriminates against another (B) if, *because of*⁵⁰ a protected characteristic, A treats B less favourably than A treats or would treat others”.

In a deliberate departure from the prevailing variations of “on grounds of”, the Government cited “accessibility to the ordinary user” as the overriding factor in the above deviation from “because of”.⁵¹ However, despite its insistence that the change in wording would not alter the legal meaning⁵², criticism has arisen⁵³ and “litigation on the meaning of the phrase[...]seems inevitable”⁵⁴. As for indirect discrimination⁵⁵: “A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s”.

Therefore, whereas direct associative discrimination is implicitly subsumed within the Equality Act 2010, any possibility of an indirect form is explicitly excluded. It remains to be seen whether the European Courts will provide more clarity on the issue in future after failing to do so in *Coleman*⁵⁶. Greater transparency is also given by a decidedly more thorough examination of exactly what constitutes a disability in terms of length⁵⁷, ambit⁵⁸, occurrence⁵⁹ and treatment⁶⁰ while prior tribunal rulings

⁴⁸ Direct discrimination “is broad enough to cover cases where the less favourable treatment is because of the victim’s association with someone who has that characteristic” Equality Act 2010, Section 13 Explanatory Notes.

⁴⁹ Equality Act 2010, s 13(1).

⁵⁰ Emphasis added.

⁵¹ Equality Act 2010, s 13 Explanatory Notes.

⁵² *Ibid.*

⁵³ See, for example, the concerns of the *Discrimination Law Association* and the arguments of S. Belgrave, *The Ins and Outs of the Equality Bill* 16 No. 7, *Employment Lawyers Association Briefing*, 2009, 88, 90.

⁵⁴ D. Christie, *op. cit.*, 193, 196.

⁵⁵ Equality Act 2010, s 19(1).

⁵⁶ C. O’Brien, *op. cit.*, *passim*.

⁵⁷ Equality Act 2010, Schedule 1, par. 2(1).

⁵⁸ *Ibid.*, par. 6.

have provided a lengthy list of conditions under which disability might take place (Labour Research Department). However, as with the CJEU in *Coleman*, the prerequisite proximity of a carer to the disabled person is left open to judicial interpretation⁶¹.

The protected characteristics, now harmonised under s 4 of the EA 2010, are age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. Of these, only marriage and civil partnership is not protected from direct discrimination by association⁶² although a small exception applies with regard to the characteristic of age⁶³. As *Kulikaoskas* had been dismissed on the grounds that the SDA 1975 did not cover associative discrimination – and European law did not require it to⁶⁴ – it is interesting to note that such a case could now be successful if brought under the EA 2010⁶⁵.

6. Associative Discrimination across the Channel: the “Elastic” Nature of Italian Discrimination

To further corroborate the specific scope of this analysis, it may be of interest to briefly appreciate how the concept of associative discrimination has been crafted in legal terms, judicially interpreted and doctrinally dissected in one of the other countries belonging to the EU. By way of example, the concept of associative discrimination in Italy has never been formally at threat, due to the implementation of both Directive 2000/43 and Directive 2000/78. In considering the discriminatory nature of the

⁵⁹ *Ibid.*, par. 8 and par. 9.

⁶⁰ *Ibid.*, par. 5.

⁶¹ A. Eriksson, *European Court of Justice: Broadening the Scope of European non-Discrimination Law*, *International Journal of Constitutional Law* 7, No. 4, 2009, 731, 753.

⁶² *Ibid.*, s 13 (4).

⁶³ *Ibid.*, Schedule 9, Part 2, par. 15.

⁶⁴ The SDA 1975 was explicit in prohibiting discrimination against a woman on grounds of *her* pregnancy. Therefore, a literal reading could not incorporate the scope for associative discrimination. Furthermore, in respect to *Kulikaoskas*, relevant European legislation was the Pregnant Workers Directive and the Equal Treatment Directive, as opposed to the Framework Directive relied upon in *Coleman* – a Directive which was drafted in a much broader manner.

⁶⁵ There is a general lack of clarity as to whether a claim for associative pregnancy discrimination would now be successful despite the harmonization of this area of law under the Equality Act 2010. Therefore, the onus will be on future case law to provide direction.

status laid down in Italian law, Legislative Decree No. 216/2003 has never made reference in its wording to personal pronouns such as “his/her”⁶⁶. Therefore, as correctly emphasised by a number of scholars⁶⁷, the *ratio decidendi* in *Coleman* does not find – or rather, has never found – obstacles in the Italian legislative framework. A major risk arising from Italian legislation is that of a rather elastic interpretation of discrimination – hence “elastic” discrimination – where the principle of exclusivity of the protected characteristics, as established by the Court of Justice of the European Union in *Chacon Navas v Eurest Colectividades*⁶⁸, could be affected.

⁶⁶ The text of the Legislative Decree 216/2003 stipulates as follows:

“[...] [P]er principio di parità di trattamento si intende l'assenza di qualsiasi discriminazione diretta o indiretta a causa della religione, delle convinzioni personali, degli handicap, dell'età e dell'orientamento sessuale. Tale principio comporta che non sia praticata alcuna discriminazione diretta o indiretta, così come di seguito definite:

Discriminazione diretta quando, per religione, per convinzioni personali, per handicap, per età o per orientamento sessuale, una persona è trattata meno favorevolmente di quanto sia, sia stata o sarebbe trattata un'altra in una situazione analoga;

Discriminazione indiretta quando una disposizione, un criterio, una prassi, un patto o un comportamento apparentemente neutri possono mettere le persone che professano una determinata religione o ideologia di altra natura, le persone portatrici di handicap, le persone di una particolare età o di un orientamento sessuale in una situazione di particolare svantaggio rispetto ad altre persone”

([...] By principle of equal treatment it shall be meant the lack of any discrimination, either direct or indirect, on the ground of religion, personal believes, disabilities, age and sexual orientation. Such a principle means that no discrimination, either direct or indirect, shall be applied, more specifically as defined below:

Direct discrimination in cases where, on the ground of religion, personal believes, disabilities, age or sexual orientation, a person is treated less favourably than a different person, in a similar circumstance, is treated, has been treated or would be treated in a similar circumstance.

Indirect discrimination in cases where a provision, a criterion, a practice, an agreement or a behaviour ostensibly neutral may cause (i) people who hold a religion or ideology of different nature, (ii) people affected by a disability, or (iii) people belonging to a particular age group or having a specific sexual orientation, to be affected by a condition of disadvantage in comparison to other people)

In Italy a brief analysis relating to discrimination may be found in A. Vallebona, *Istituzioni di Diritto del Lavoro*, 2 *Il Rapporto di Lavoro*, 7th ed., CEDAM, 2011, 309, 318. See also M. Barbera (ed.), *Il Nuovo Diritto Antidiscriminatorio*, Giuffrè, 2007.

⁶⁷ See L. Calafà, *Disabilità, Discriminazione e Molestia “Associate”: il Caso Coleman e l'Estensione Elastica del Campo di Applicazione Soggettivo della Dir. 2000/78*, 4 *Rivista Critica di Diritto del Lavoro*, No. 4, 2008, 1169, 1172. The author stresses *verbatim* as follows: “[...] si può ricordare che il principio di diritto sancito dalla sentenza Coleman non trova ostacoli specifici al suo funzionamento” ([...] it can be reminded that the principle of law introduced by the Coleman case does not encounter any specific obstacles as regards its functioning).

⁶⁸ SA(C-13/05).

However, the answer to this doctrinal question⁶⁹ is that such a *bête noire* – thanks to the Attridge Law *decisum* – has been de facto tamed. This is because, as a result of the acknowledgement of associative discrimination, the protected characteristics remain nonetheless the limited number (*numerus clausus*) legislated under Art.13 of the Treaty of Amsterdam. It is unquestioned though, also in a legal system such as the Italian one, that, as a result of *Coleman*, those who are potentially the victims of an act of discrimination may not be identified in advance, but for the generic and nebulous caveat of the closeness being met. As correctly pointed out by a number of scholars, in interpreting the ruling, the close relationship, such as mother/child but also further relationships, should nonetheless be implicitly consistent with the required criterion.

7. Consequences for Employers

The *Coleman* verdict provided due warning to employers that equal opportunity policies and practices would need to be fully assessed⁷⁰ and purposeful steps taken to educate and train their respective workforces with an increased awareness of associative discrimination in mind⁷¹. If this warning was observed, the enforcement of the EA 2010 would have served as a simple confirmation that their foresight had been justified. However, even in such a scenario, events were not straightforward as “the risk of [...] associative [...] discrimination is not immediately obvious”⁷². Indeed, although the EA 2010 had provided higher levels of clarity for employers in terms of what constitutes a disability along with the exclusion of indirect associative discrimination, confusion surrounded the issue of proximity and with a significant amount of workers combining work with unpaid care it is conceivable that tribunals could face a flood of claims. As any claim for compensation would be uncapped in such circumstances, employers must take reasonable and well documented steps, in order to avoid discrimination by association, with regard to recruitment and promotion policies or face a potentially considerable cost⁷³.

⁶⁹ See particularly L. Calafà, *op. cit.*

⁷⁰ T. Connor, *op. cit.* 59, 69.

⁷¹ J. Amphlett, *A Caring Attitude*, *European Lawyer* 11, No. 82, 2008.

⁷² E. Bartlett, *Legislative Comment: Equal Measures*, *European Lawyer* 45, No. 102, 2011.

⁷³ J. Amphlett, *op. cit.*, *passim*.

Perhaps the most obvious manifestation of the impact arising from recent developments comes in the problems employers may face at the time of considering requests for flexible working arrangements. In Britain, the statutory right was extended to parents of children under six – or under 18 for a disabled child – by the Employment Act of 2002 and to carers of adults by the Work and Families Act of 2006. Burdened with the possibility that a refusal may now amount to discrimination by association, employers must base such decisions on robust business reasons and adequately document these grounds to show that all requests are handled dispassionately and fairly. In addition, any lateness or absence relating to caring responsibilities must be handled carefully to ensure, for example, that cases relating to care for the elderly are not treated less favourably than those for childcare⁷⁴. Similarly in Italy, in looking at the matter of the associative discrimination from a wider perspective, it is also inevitable to come across sections of legislation partly overlapping with the new concept; for instance, the forms of leave specifically allowed to employees – so that they can look after people close to them with disability – has been recently introduced in the national legal system, thanks to Law no. 183/2010, and relevant Legislative Decree No. 119/2011, particularly art. 3 and 4⁷⁵.

In other words, it seems that the expansion of the concept of discrimination – insofar as to encompass the elastic nature of discrimination – enthusiastically promoted at the heart of the EU, is not totally consistent with the acknowledgment, at domestic level⁷⁶ in some European countries, of similar rights recognised to employees/workers, through the several forms of leave. As a result, the matter ultimately needs an immediate and profound rethinking. As present, it is difficult to not recognise that the new area of law – marked by the elastic character of discrimination – carved with generosity by the speculative stances of the European Union legislator, particularly its “judicial arm” (the CJEU), fails to clarify the concept further and certainly leaves the business at a standstill, as they may not be totally aware of the legal consequences of their decisions to so crucial a business matter, such as human resources management. In a time when European institutions should harmonise rules, rather than fragmenting them, the elastic dimension of discrimination, coupled with the additional legal burdens set up at

⁷⁴ J. Amphlett, *op. cit.*, *passim*.

⁷⁵ See O. Bonandi, *I Diritti Dimenticati dei Disabili e dei loro Familiari in seguito alle Recenti Riforme*, *Rivista Giuridica del Lavoro e delle Previdenza Sociale* No. 4, 2011, 779, 818.

⁷⁶ The example of the UK and Italy has been explained in this work.

domestic level in each EU country – devoid of homogeneity and with no limit – might compel more than an isolated observer to raise an eyebrow.

8. Conclusion

In conclusion, over 40 years of fragmented and piecemeal domestic legislation had contributed to several discrepancies with regard to the scope to which it could be applied in prohibiting discrimination in the workplace. The manifestation of such inconsistencies in the wording of these provisions revealed a glaring deviation from the homogeneity of language within EU Directives, an issue brought conclusively to light by *Coleman*. However, although clarity may have prevailed in terms of the language used in the Directives, the CJEU preliminary ruling in *Coleman* was rather less so with ambiguity surrounding the extent to which associative discrimination should be covered; a state of play perpetuated further by *Kulikauskas*. Therefore, in an attempt to both harmonise UK legislation and conform to EU law, the EA 2010 represented a merging of nine protected characteristics, of which eight were now implicitly safeguarded from discrimination by association. As for harmonisation between EU and UK law, it appears that the latter might have gone beyond minimum implementation, although any future vestige from the EU on the possibility of indirect associative discrimination would be cause for reassessment. As for employers, in light of *Coleman* and the EA 2010, reasonable steps must be taken in implementing adequate recruitment, promotion and equal opportunity policies while demand for flexible working arrangements must be fairly assessed and documented to guard against the risk of less favourable treatment. All in all “it seems likely that the road to outlawing discrimination by association will have a few more twists and turns yet”⁷⁷.

In response to a wider European scope of literature⁷⁸ provided on this concept allowing for an alternative country analysis,⁷⁹ *de iure condendo*, therefore in the way the legislation should be reformed, the European Union legislator should better address this matter and clarify, through an amendment of Directive 2000/78, the concept of “associative” – or elastic – discrimination itself. Furthermore, the Directive should offer greater transparency, particularly in respect to the principle of closeness so

⁷⁷ D. Christie, *op. cit.*, 196.

⁷⁸ As regards Italy, see L. Calafà, *op. cit.*

⁷⁹ Particularly the glimpses of comparative analysis provided under Chapter 6 *supra*.

as to eliminate any room for discretion exercisable by both the domestic legislator and/or domestic courts from the outset.

The aspect pointed out in this work is that the terminology used in legislating on associative discrimination act is dissected and interpreted across the different EU jurisdictions – as is the case of the UK and Italy – in totally different ways among courts and still ignored by the local law-makers, albeit somehow tolerated. This may represent a potential issue, in terms of identification of the relevant right bestowed upon the victim as well as measures to be adopted by the employers.

The Impact of the National Minimum Wage on Labour Productivity in Britain

Richard Croucher and Marian Rizov *

1. Introduction

While there is a large body of research examining the impact of national minimum wage (NMW) on employment and (wage) inequality, minimum wage effects on firm and industry performance is a significantly understudied area. A consensus has emerged that the overall effect of NMW on the level of employment in Britain is broadly neutral (see Stewart, 2004 for a survey of the literature). Therefore, the research has shifted to exploring other possible margins of adjustment. Wadsworth¹, following several previous studies, analyses a channel through which the effect of minimum wage could be directed. Firms that employ minimum-wage workers could have passed on any higher labour cost resulting from increases in minimum wage in the form of higher output prices. Further research on the NMW's impact on firm behaviour seems to be a promising area as firms' operations and productivity may also be affected. Galindo-Rueda and Pereira, and Draca *et al.*² are among the few studies that have attempted to analyse the NMW's impact on British firms. They

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¹ J. Wadsworth, *Did the National Minimum Wage Affect UK Prices?* *Fiscal Studies*, 31 No. 1, 2010, 81-120.

² F. Galindo-Rueda, S. Pereira, *The Impact of the National Minimum Wage on British Firms: Report for the Low pay Commission*, 2004, available at www.lowpay.gov.uk/lowpay/research/pdf/t0Z2NTSH.pdf (Last accessed 12 March 2012). M. Draca, S. Machin, J. Van Reenen, *Minimum Wages and Firm Profitability*, *American Economic Journal: Applied Economics*, 3 No. 1, 2011, 129-151.

find that firm profitability has fallen after the NMW introduction; they also find no significant effects on employment and productivity in the short run. These findings suggest that in the medium to long run, productivity might be induced to increase more in firms that are more affected by the NMW. Forth and O'Mahony³ explicitly analyse the NMW's impact on labour productivity but use industry rather than firm level data and their study covers only a very short period (1998-2000) around the introduction of NMW. They decompose their measure of labour productivity growth into capital deepening and total factor productivity (TFP) growth. They find evidence of labour productivity increases in the larger low-paying sectors, retail and hospitality as well as in hairdressing. The labour productivity growth is mostly attributed to capital deepening. The findings call for further research given the fact that previous micro-data studies did not have an explicit focus on firm productivity and all studies only analysed the effects in a short period after the NMW introduction.

In this paper we explore the link between firm labour productivity and the introduction of the NMW over a more than ten-year span covering longer periods before and after the NMW introduction. We use the FAME dataset which contains firm level micro data to calculate firm-specific labour productivity measures and then aggregate them to the level of the low-paying sectors as identified by the Low Pay Commission (LPC). These include several service industries, agriculture and food processing, textiles and clothing manufacturing. The sectors, their overall position in the economy and employers' estimates of the impact of the NMW on them are described in Table No. 1. The low-paying LPC sectors appear to be the part of the economy most affected by the introduction of the NMW.

³ J. Forth, M. O'Mahony, *The Impact of the National Minimum Wage on Labour Productivity and Unit Labour Costs*, National Institute of Economic and Social Research, 2003, (Available at www.lowpay.gov.uk).

Table No. 1 – Characteristics of Low Paying Sectors, 2010.

Industry	Growth since 1998	Proportion of workers paid NMW	Number of employees	Results of NMW
Retail	Continuous growth until the start of the recession	6.8%	3.2M	The ACS reported that differentials continued to be squeezed as a result of increases to the MW
Hospitality and Leisure, Travel and Sport	A substantial fall	18.1% in Hospitality 6.2% in Leisure, Travel and Sport	1.09M in Hospitality 648,000 in Leisure, Travel and Sport	The ALMR said that 82 per cent of members had to let staff go because of increases in the MW
Social care	Continuous growth	5%	1.2M	Care providers told LPC the squeeze they faced resulting from the level of fees paid by public bodies that purchase care services
Childcare	The Government continues to increase the provision of childcare	4.8%	373,000	The White Horse Child Care Ltd. said that increases in the NMW had led to increases in the fees charged to parents, which had reduced the size of the market and excluded many of the parents that most needed high quality childcare
Cleaning and Security	Continuous growth	21.8% in the Cleaning sector	472,000 in Cleaning sector; 178,000 in the Security sector	CSSA reported that clients might accept increases of the MW; however, often shorten hours of contract or lower specification.
Hairdressing		10.3%		The NHF stated any compulsory pressure to increase costs would inevitably result in continued job losses.
Agriculture	Falling employment and income	2.8%	242,000	The NFU claimed that it was harder for the producers to compete with competitors in

				countries with lower MW.
Textiles, Clothing and Food Processing (Manufacturing)	Falling employment and declining output	8.2%	82,000 in textiles and clothing; 348,000 in food processing sector	The FDF said that the industry is tending to pass any increase in wage costs to clients.

Source: National Minimum Wage, Chapter 3, p.p. 54-77, Low Pay Commission Report 2010.

Our results from difference-in-differences analysis show that, with notable exceptions, aggregate LPC sector labour productivity has been significantly positively affected by the NMW in the long run; the effects' magnitudes vary by sector. In most of the sectors the impact is statistically significant and positive with the exception of hairdressing, leisure and agriculture where the impact is positive but not statistically significant. We also analyse labour productivity by firm-size groups, according to the LPC classification and find substantial heterogeneity in responses to the NMW over time as the increases in productivity are more marked in larger firms.

The paper is organised as follows. In Section 2 we introduce a theoretical framework similar to that of Forth and Mahoney⁴, defining labour productivity and decomposing it into capital deepening and TFP. In Section 3 we describe the data and report summary statistics for each of the LPC sectors and our counterfactuals. We also present the relationship between aggregate productivity and the NMW by aggregate LPC sectors and firm-size groups graphically over time. In Section 4 we perform difference-in-differences analysis and verify NMW productivity effects. In Section 5 we discuss the results in the context of relevant literature on the effects of NMW and conclude.

2. Theoretical Framework: Defining Labour Productivity

Increases in the real value of the NMW affect the price of labour and thus the wage distribution, employment and, ultimately, productivity. The effects of minimum wages on wage distribution and employment have been

⁴ J. Forth, M. O'Mahony, *op. cit.*

extensively studied in the U.S.⁵ and in the UK⁶. Most minimum wage models predict that as the minimum wage rises, the distribution of earnings will become more compressed. Findings on employment changes are more mixed but in general, a weak positive or no association of minimum wage and employment is suggested. For the UK NMW, no adverse employment effects have been detected⁷.

Studies of minimum wage effects on the wage distribution and employment provide a basis for hypothesising a positive link between the NMW and productivity. Such a hypothesis is consistent with findings that increases in the NMW are associated with a decline in dispersion of the wage distribution and a non-negative response of employment. Machin and Manning⁸, Card and Krueger⁹, and Dickens *et al.*¹⁰ explain these effects by employing dynamic monopsony models of the labour market. The extent of labour and output markets competition has important implications for prices and thus for productivity¹¹. Under perfect competition, wages equal

⁵ D. Aaronson, *Price Pass-through and the Minimum Wage*, *Review of Economics and Statistics*, No. 83, 2001, 158-169. L. Katz, A. Krueger, *The Effect of Minimum Wage on the Fast Food Industry*, *Industrial and Labor Relations Review*, 1992, 46 No. 1, 6-21. J. DiNardo, N. Fortin, T. Lemieux, *Labor Market Institutions and the Distribution of Wages, 1973-1992: a Semiparametric Approach*, *Econometrica*, 1996, No. 65, 1001-1046. D. Card, A. Krueger, *Myth and Measurement: the New Economics of the Minimum Wage*, Princeton University Press, Princeton, NJ, 1995. R. Croucher, G. White, *Enforcing a National Minimum Wage: The British Case*, *Policy Studies* 28 No. 2, 2007, 145-161. D. Lee, *Wage Inequality in the United States during the 1980s: Rising Dispersion or Falling Minimum Wage?* *Quarterly Journal of Economics*, No. 114, 1999, 977-1023.

⁶ S. Machin, A. Manning, *The Effects of Minimum Wages on Wage Distribution and Employment: Evidence from the U.K. Wages Councils*, *Industrial and Labor Relations Review*, 47 No. 2, 1994, 319-329. R. Dickens, S. Machin, A. Manning, *The Effects of Minimum Wages on Employment: Theory and Evidence from Britain*, *Journal of Labor Economics*, No. 17, 1999, 1-22. D. Metcalf, *The National Minimum Wage: Coverage, Impact and Future*, *Oxford Bulletin of Economics and Statistics*, No. 64, 2002, 567-582. M. Stewart, *Estimating the Impact of the Minimum Wage Using Geographical Wage Variation*, *Oxford Bulletin of Economics and Statistics*, No. 64, 2002, 583-605. S. Machin, A. Manning, L. Rahman, *Where the Minimum Wage Bites Hard: the Introduction of the UK National Minimum Wage to a Low Wage Sector*, *Journal of the European Economic Association*, No. 1, 2003, 154-180. S. Machin, J. Wilson, *Minimum Wages in a Low Wage Labour Market: Care Homes in the UK*, *Economic Journal Conference Volume*, No. 114, 2004, 102-109.

⁷ M. Stewart, *The Employment Effects of National Minimum Wage*, *Economic Journal*, No. 114, 2004, par. C110-C116.

⁸ S. Machin, A. Manning, *The Effects of Minimum Wages on Wage Distribution and Employment: Evidence from the U.K. Wages Councils*, *op. cit.*

⁹ D. Card, A. Krueger, *op. cit.*

¹⁰ Dickens *et al.*, *op. cit.*

¹¹ D. Card, A. Krueger, *op. cit.*

the marginal cost of labour. The rise in wages due to minimum wage regulation results in rise in marginal cost of production. Then the impact of the minimum wage on firm profitability and ultimately productivity will depend on the ability of firms to pass costs on, and increase output prices. Under monopsony, the minimum wage may not increase marginal costs, since the firm no longer has to raise wages to attract marginal workers. Lower marginal cost will lead to a raise in demand for labour and hence an increase in output. Higher output should act to lower output prices and again induce a squeeze on the firm's profit margins which could ultimately lead to an increase in measured (labour and/or total factor) productivity, other things being equal.

To understand better the channels through which a minimum wage may affect labour productivity we formulate a simple production function model where the level of output (real value added, V) of firm j at time t can be expressed as a function of aggregate capital inputs (K), aggregate labour inputs (L) and the production technology (A):

$$V_{jt} = A_{jt} f(K_{jt}, L_{jt}). \quad (1)$$

The values of capital and labour inputs capture both quantity and quality. The production technology refers to the rate at which units of capital and labour are converted into output and is often referred to as total factor productivity (TFP).

The growth in firm output j over the period ($t-1$ to t) will be determined by changes in labour inputs, changes in capital inputs and changes in TFP.¹² The most commonly employed formalisation is based on the assumption of a Translog production function and obtained via the Törnqvist discrete approximation to the Divisia index (e.g., Jorgenson et al., 1987). If with dX_{jt} we denote the proportionate change in a variable X_{jt} (standing for V , L , K , or A) between period $t-1$ and t , i.e. $dX_{jt} = \ln(X_{jt} / X_{jt-1})$, and impose constant returns to scale then the Törnqvist index is given by:

¹² Generally, we do not observe TFP directly. This problem is addressed by the traditional growth accounting method, which has its theoretical underpinnings in the neoclassical growth model. Under the assumption that all markets function perfectly, the growth accounting method permits changes in TFP to be calculated as a residual having subtracted changes in inputs from output growth. There also are econometric methods (e.g., J. Van Biesebroeck, *The Sensitivity of Productivity Estimates: Revisiting three Important Debates*, *Journal of Business and Economics Statistics*, 26 No. 3, 2008, 311-328) that are often employed to estimate TFP.

$$dV_{jt} = a_{jt}dL_{jt} + (1 - a_{jt})dK_{jt} + dA_{jt}, \quad (2)$$

where a_{jt} is the share of labour in value-added, averaged over the two time periods. Under neo-classical assumptions, the shares of labour and capital, a_{jt} and $(1-a_{jt})$ equal the output elasticity of labour and capital respectively and since we imposed constant returns to scale, sum to one. The rate of change in A_{jt} is a catch-all for technological or organizational improvements, such as process innovations and changes in work organization, that increase the level of output for a given amount of input. Changes in the quality of factor inputs, e.g., a greater use of new technology equipment or highly skilled labour, may be incorporated within this framework by weighting each of a number of types of capital or labour by their value added shares¹³. If this adjustment for quality is not carried out directly then the TFP term also includes the impact of input quality changes.

This method of accounting for growth in output can be easily extended to permit a focus on changes in labour productivity¹⁴. Having identified the impact of changes in the quantity of labour input – for example the number of employees – we can subtract this from the changes in output in Equation (2), and using the fact that the input weights sum to one, derive a labour productivity equation of the form:

$$d(V_{jt}/L_{jt}) = (1 - a_{jt}) d(K_{jt} / L_{jt}) + dA_{jt}. \quad (3)$$

Thus changes in labour productivity (V_{jt}/L_{jt}) depend on changes in the capital-labour ratio (K_{jt} / L_{jt}) or capital deepening and TFP¹⁵. This equation provides a framework for better understanding the sources of labour productivity changes after the introduction of the NMW.

In the case of a marginal cost increase due to the introduction of the NMW, all domestic firms producing the same product will experience a degree of cost pressure, which will depend on their exposure to the NMW, usually defined as the share of NMW labour in their production process¹⁶. Firms

¹³ D. Jorgenson, F. Gallup, and B. Fraumeni, *Productivity and US Economic Growth*, Harvard University Press, Cambridge, MA, 1987.

¹⁴ Forth and O'Mahony, *op. cit.*

¹⁵ An alternative approach is to start with gross output (gross value added plus purchases) and include purchases as intermediate inputs in the above formulae. As our goal is to provide a simple framework for understanding the channels through which NMW may impact labour productivity we choose the value added formulation.

¹⁶ If spillover effects occur from the NMW, putting upward pressure on wages further along the wage distribution, as found in some cases by previous UK research (LPC, 2000), then the effects on costs will be magnified. Draca *et al.*, *op. cit.*

operating in competitive industries will be unable to pass on cost increases if substitute products do not face similar cost increases. Then labour-for-capital substitution may be an effective adjustment mechanism if labour is a substitute for capital, thus reducing the number of employees and inducing labour productivity improvements. However, in some industries such as services, the scope of labour-for-capital substitution is typically limited. Thus, service industries should be expected to experience greater upward pressure on costs and by Equation (3) there will be more pressure on increasing TFP.

Further, the more a good competes with potential substitutes produced abroad not affected by the UK NMW, the harder it will be for UK firms to pass on cost increases and maintain market share, other things equal. Thus, firms exposed to international trade may be less able to pass on cost increases and thus harder pressed to either substitute labour-for-capital or improve TFP depending on the nature of production. At the same time many service industries, which typically are not internationally traded may be more able to pass on cost increases.

3. Data and Descriptive Analysis

We calculate labour productivity as defined in Equation 3, while in the next section we carry out our difference-in-differences analysis using the FAME dataset from the Bureau van Dijk. The dataset covers all firms filed at Companies House in the UK and includes information on detailed unconsolidated firm-level financial statements, wage (remuneration) bill, ownership structure, location by post code, activity description, and direct exports. The data used in our analysis contain annual records on more than 360,000 firms over the period 1994-2009. The coverage of the data compared to the aggregate statistics for the industries analysed as reported by the UK Office for National Statistics (ONS) is highly representative, as for sales it is around 80 per cent and for employment around 82 per cent¹⁷. The sectors analysed are identified on the basis of the 2003 UK SIC at the 4-digit level, following the LPC groupings of low-paying industries (see

¹⁷ Harris and Li (R. Harris, R. Q. Li, *Exporting, R&D, and Absorptive Capacity in UK Establishments*, *Oxford Economic Papers*, 61 No.1, 2009, 74-103) argue that FAME is biased towards larger firms, particularly in the non-exporting populations. Even though we size-weight our aggregations over firm labour productivity we note this caveat. However, for the purposes of our analysis, the interest is more in larger firms where the NMW legislation is expected to have more significant effects due to higher compliance.

Table A1 in the Appendix). We also create counterfactuals from both manufacturing and service industries. The counterfactuals are composites of a set of 4-digit industries which have been identified on the basis of limited exposure to the NMW using literature and expert opinions¹⁸. All nominal monetary variables are converted into real values by deflating with the appropriate 4-digit UK SIC industry deflators taken from ONS. We use PPI to deflate value-added and asset price deflators for capital.

The descriptive statistics for the LPC sectors and the counterfactuals are reported in Table No. 2. We compare average firm characteristics across the LPC sectors by starting with the average labour productivity (LPR) measure. The sectors with the highest average labour productivity are food processing, security and retail while social care shows the lowest labour productivity. The average value added is highest in food processing, security and retail while it is lowest in agriculture, hairdressing and social care. The value of fixed capital assets is highest in food processing, retail and hospitality sectors. The largest firms by average number of employees are found in the security and cleaning sectors while the smallest exist in agriculture, hairdressing and leisure. In all sectors except agriculture a large proportion of firms are located in urban areas. The highest share of exporters is in the textile and food processing industries¹⁹. Exits are highest, especially at the end of the period of analysis, in 2008, amongst retail, cleaning and security firms, as the latter are also characterised by the lowest average age.

¹⁸ The industries included in the counterfactual are all 4-digit industry codes comprising the following SIC 2003 2-digit industries: 23, 27, 29, 33, 34, 35, 40 for the manufacturing counterfactual and 64, 65, 66, 67 for the services counterfactual.

¹⁹ Firms are classified by location following the 2004 DEFRA definition of rural and urban areas and an application in Rizov and Walsh (M. Rizov, P. Walsh, *Is there a Rural-urban Divide? Location and Productivity of UK Manufacturing*, *Regional Studies*, 45 No. 5, 2011, 641-656). Exporters are identified as in Rizov and Walsh (M. Rizov, P. Walsh, *Productivity and Trade Orientation of UK Manufacturing*, *Oxford Bulletin of Economics and Statistics*, 71 No. 6, 2009, 821-849).

Table No. 2 – Summary Statistics by LPC Sector 1996-2009.

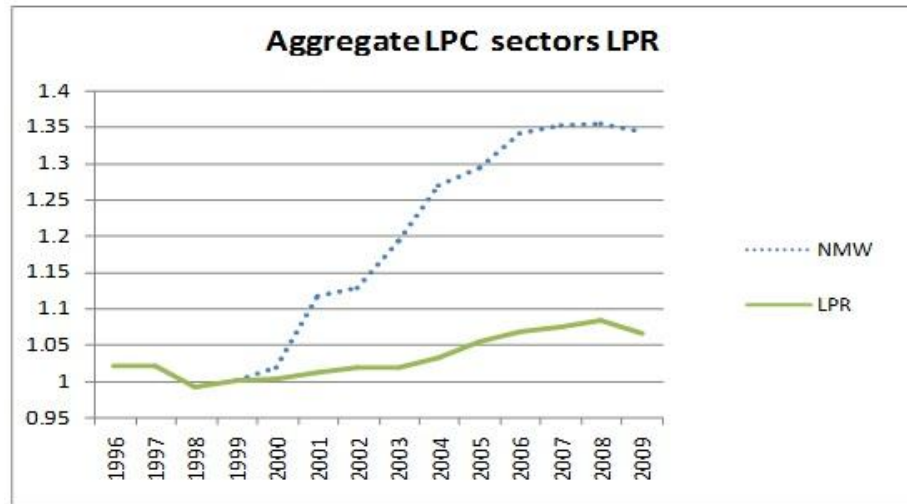
Variables	Social care	Retail	Hospitality	Cleaning	Security	Hair-dressing	Textiles	Agriculture	Food processing	Leisure	Counter M	Counter S
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)
Aggregate LPR	1.60 (0.37)	3.12 (1.17)	2.32 (1.28)	1.98 (1.02)	2.96 (0.74)	2.24 (0.64)	2.81 (0.23)	2.38 (0.60)	3.12 (0.17)	2.25 (0.19)	3.12 (0.31)	3.08 (0.73)
Value added, th £	1615 (7284)	13045 (162869)	4449 (24991)	4971 (36823)	16011 (191088)	1255 (4833)	6052 (30598)	1097 (3957)	18836 (121504)	4583 (25568)	52946 (491646)	13256 (222233)
Fixed assets, th £	4698 (39576)	17303 (278458)	17114 (158836)	11108 (117243)	15711 (172632)	719 (3253)	4597 (31690)	2547 (10899)	26542 (222056)	8398 (71295)	140916 (1729177)	39147 (1302974)
Number of employees	174 (728)	470 (5148)	336 (5030)	1305 (6947)	2872 (34567)	80 (360)	328 (2339)	55 (335)	557 (3057)	121 (694)	659 (3835)	156 (1483)
Age, years	17 (17)	24 (20)	19 (19)	22 (21)	11 (8)	11 (10)	31 (26)	30 (19)	26 (23)	24 (24)	27 (24)	14 (13)
Exporters	0.02	0.12	0.03	0.05	0.18	0.06	0.57	0.11	0.40	0.14	0.50	0.19
Exits 1998	0.02	0.01	0.00	0.01	0.01	0.03	0.01	0.01	0.01	0.01	0.01	0.01
Exits 2008	0.02	0.05	0.02	0.04	0.05	0.02	0.02	0.01	0.02	0.02	0.01	0.03
Urban	0.90	0.90	0.88	0.93	0.96	0.90	0.92	0.44	0.82	0.87	0.89	0.93
Rural less sparse	0.09	0.08	0.10	0.05	0.03	0.09	0.06	0.52	0.15	0.12	0.10	0.07
Rural sparse	0.01	0.02	0.02	0.02	0.01	0.01	0.02	0.04	0.03	0.01	0.01	0.00
Number of observations	5156	70668	22019	3491	935	1864	8232	13408	10169	24665	15325	30681

Note: Unweighted means and standard deviations (s.d.) are reported. Counter M comprises the manufacturing industries counterfactual and Counter S - service industries one.

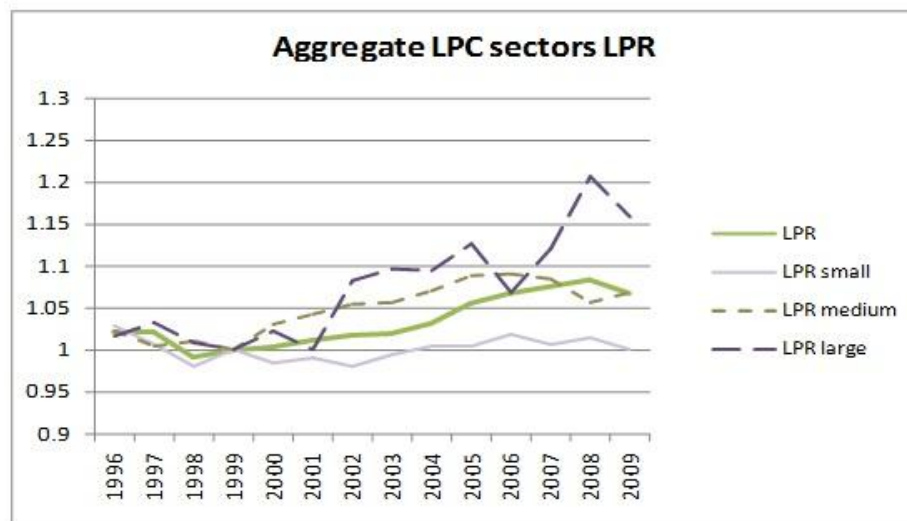
Source: Authors' calculations.

Next we illustrate graphically over time our labour productivity results for the aggregate of all the LPC sectors and for separate aggregates of manufacturing and service sectors²⁰. The graphs in Figure No. 1a show results for all the LPC sectors in aggregate while in Figure No. 1b results for the aggregate counterfactual industries (manufacturing and services) are presented. Figures No. 2a and 2b and Figures No. 3a and 3b similarly report results for the aggregate manufacturing and service sectors respectively. The main message from the figures is that the NMW seems to have had a clear and positive impact on aggregate labour productivity of Britain's low-paying sectors over the ten-year period since its introduction. The elasticity of aggregate labour productivity with respect to NMW is between 0.5 and 1.0 with large (always above 2) *t*-statistics. Productivity of the service sector is about 1.5 times more sensitive to increases in the NMW than that of the manufacturing sector. For the counterfactuals the elasticities are not statistically different from zero. This simple graphical analysis suggests that there is indeed a systematic relationship between NMW and labour productivity which merits more detailed investigation.

²⁰ Everywhere aggregate labour productivity is calculated using value-added as weight. Using number of employees as weight produces similar results.

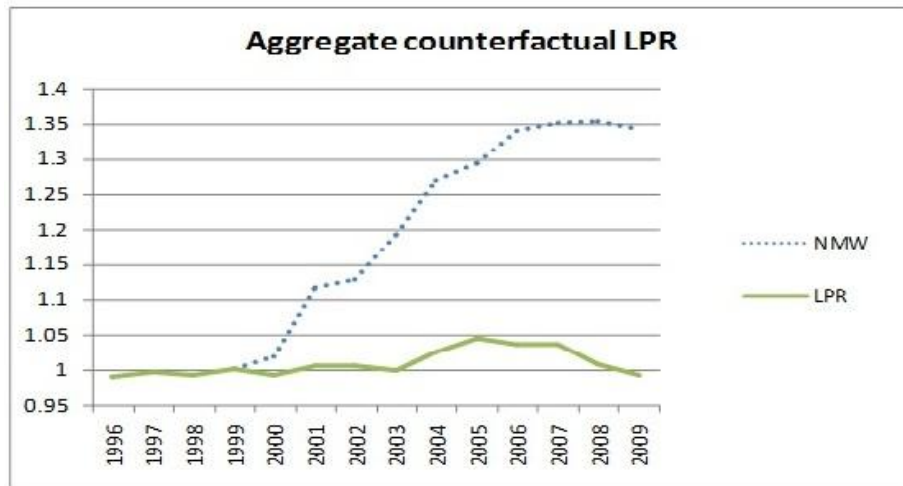
Figure No. 1a – LPR for Aggregate LPC Sectors.

Note: Elasticity of LPR wrt NMW: 0.58 ($t=9.94$).

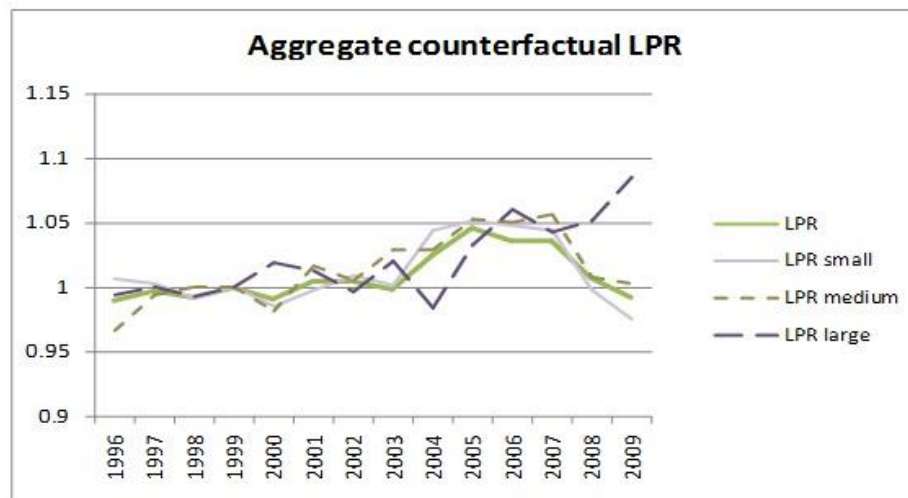


Source: Authors' calculations.

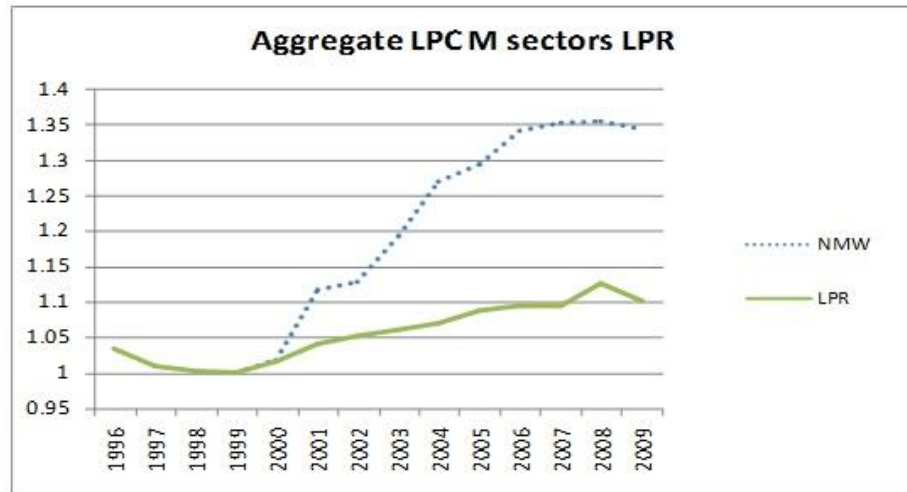
Figure No. 1b – LPR for Aggregate Counterfactual.



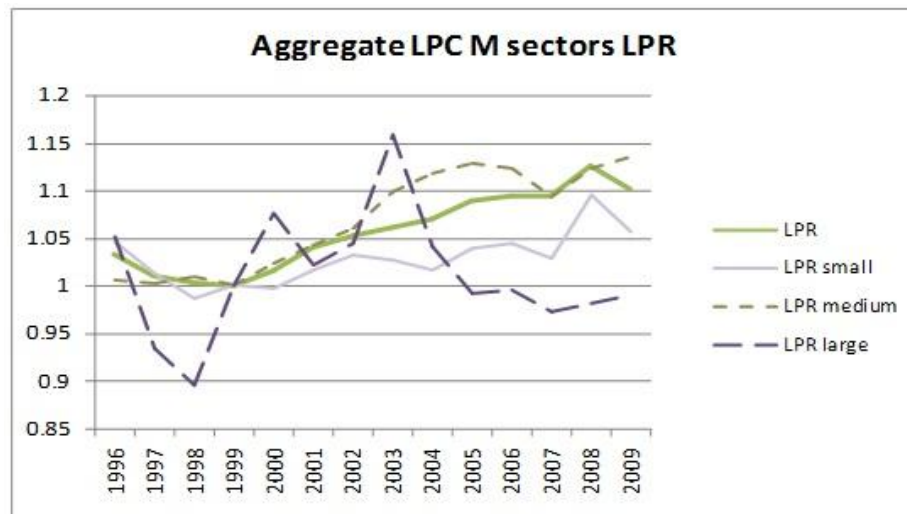
Note: Elasticity of LPR wrt NMW: 0.24 ($t=1.65$).



Source: Authors' calculations.

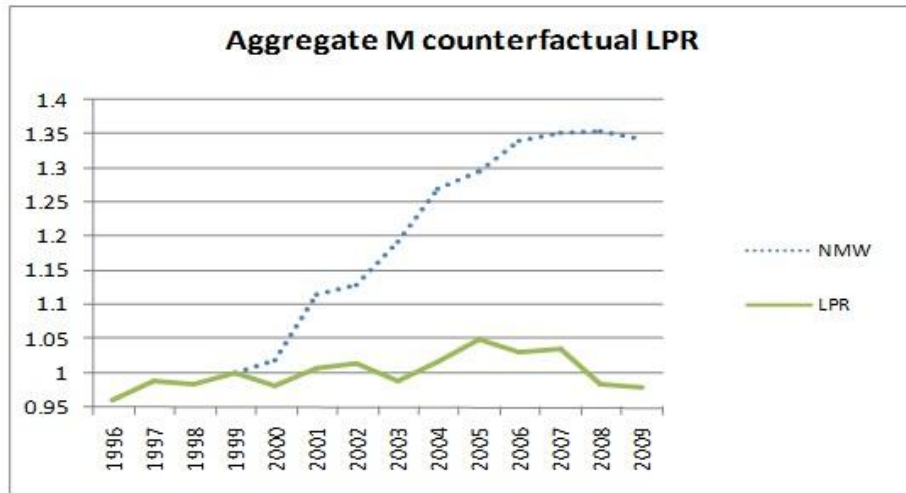
Figure No. 2a – LPR for Aggregate LPC Manufacturing Sectors.

Note: Elasticity of LPR wrt NMW: 0.78 ($t=11.20$).

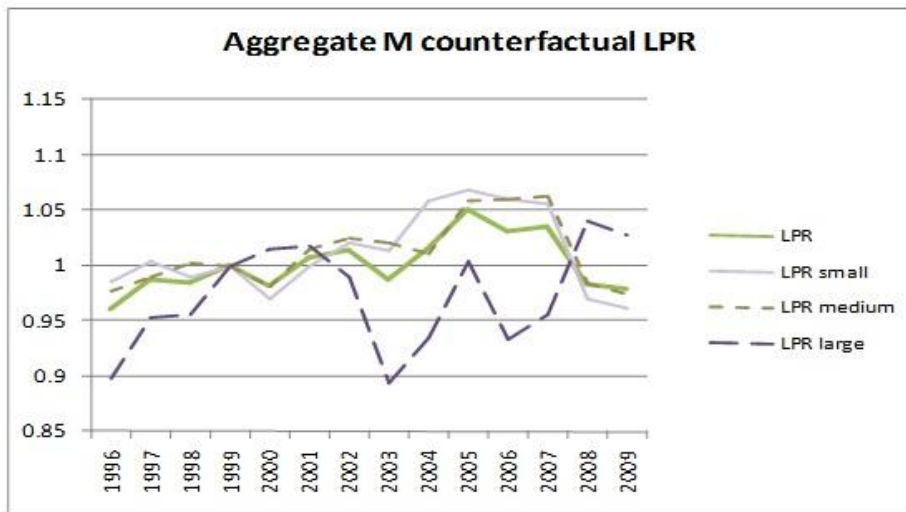


Source: Authors' calculations.

Figure No. 2b – LPR for Aggregate M Counterfactual.

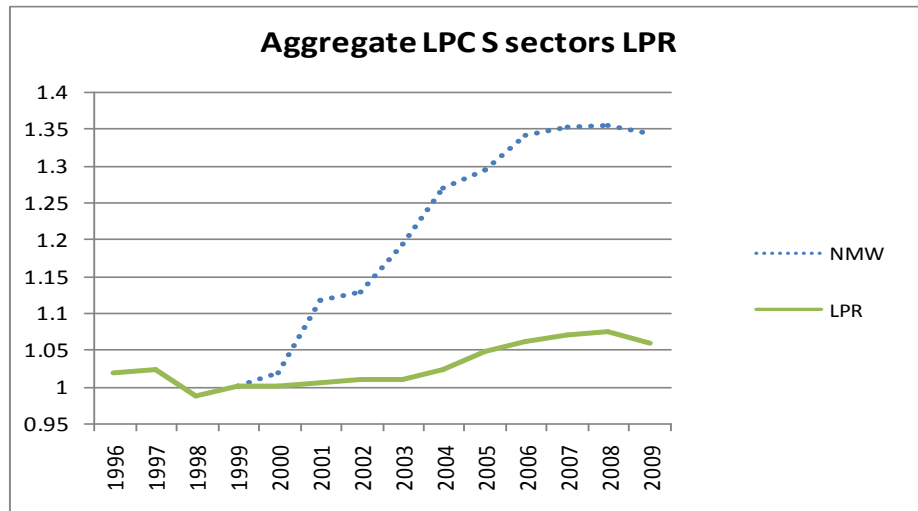


Note: Elasticity of LPR wrt NMW: 0.23 ($t=1.52$).

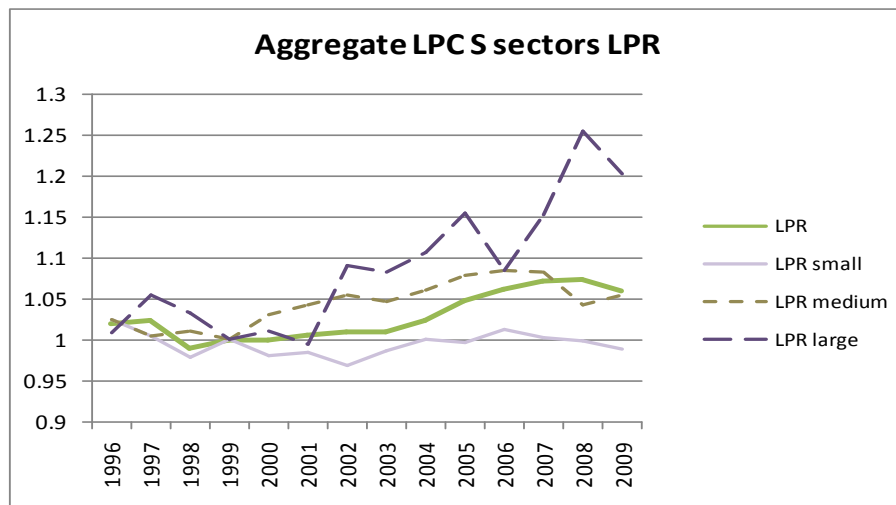


Source: Authors' calculations.

Figure No. 3a – LPR for Aggregate LPC Service Sectors.

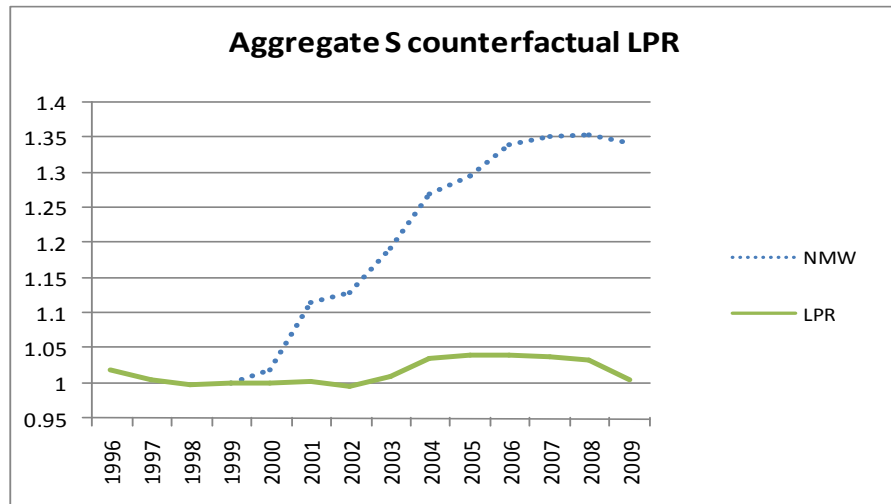


Note: Elasticity of LPR wrt NMW: 0.54 ($t=8.36$).

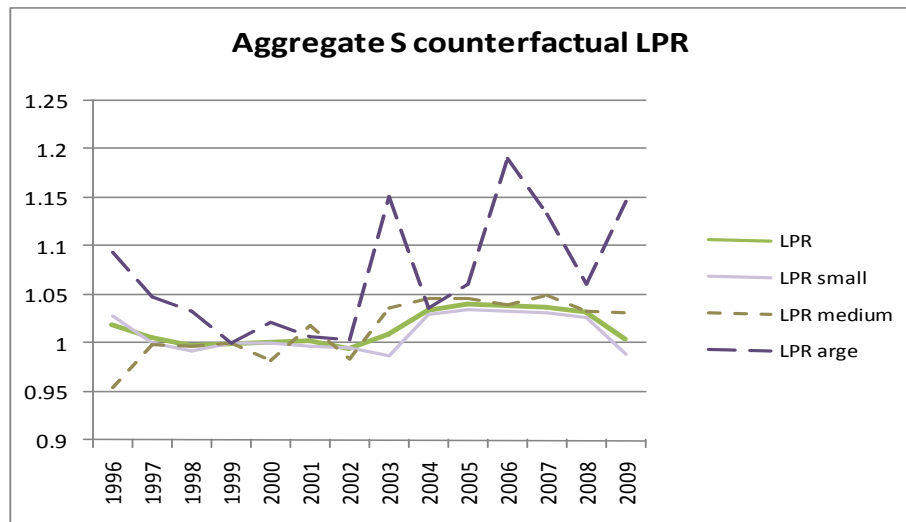


Source: Authors' calculations.

Figure No. 3b – LPR for Aggregate S Counterfactual.



Note: Elasticity of LPR wrt NMW: 0.25 ($t=1.18$).



Source: Authors' calculations.

4. NMW and Aggregate Labour Productivity: Difference-in-differences Analysis

In this section we follow Draca *et al.*'s²¹ unconditional difference-in-differences approach. First, we identify a group of firms within a sector that is more affected by the NMW introduction than a control group. In this treatment group, wages are expected to rise more due to the introduction of the NMW and thus the NMW's effect on productivity is expected to be larger. A treatment indicator variable is defined as $T=1$ for below – NMW firms in the pre-policy period and $T=0$ for a group of firms whose pre-policy wage exceeds a threshold equal to the NMW at introduction. Thus, the unconditional difference-in-differences (DD) estimate of the impact of the NMW on aggregate labour productivity is:

$$DD = (LPR_{NMW=1}^{T=1} - LPR_{NMW=0}^{T=1}) - (LPR_{NMW=1}^{T=0} - LPR_{NMW=0}^{T=0}). \quad (4)$$

In a similar manner, we estimate difference-in-differences for aggregate capital-labour (K/L) ratios – e.g. the capital deepening effect – to aid our attempt to shed light on the possible channels of productivity changes. We evaluate the effects before (NMW=0) and after (NMW=1) NMW introduction in all LPC sectors, aggregates of the manufacturing and service sectors, and by individual low-paying (LPC) sectors.

Empirically, we define our treatment groups as in Draca *et al.*²², based on average remuneration information from FAME²³. We divide the total remuneration figure for each firm by the full-time equivalent average number of employees to calculate an average wage. The treatment group ($T=1$) includes low-wage firms, with an average wage of less than £12,000 prior to the introduction of the NMW²⁴. The comparison group ($T=0$) contains firms similar to the treatment group firms but with an average

²¹ Draca *et al.*, *op. cit.*

²² *Ibid.*

²³ Draca *et al.*, (*ibid.*), use information from FAME, the Labour Force Survey (LFS) and the Workplace Employment Relations Survey (WERS) both to construct and validate their treatment group indicators. Specifically, they use within-establishment information from matched worker-establishment data in WERS to investigate the association between low pay incidence and average wages and to verify the effectiveness of their empirical strategy.

²⁴ For the results reported we identify as low-wage the firms with average remuneration of less than £12,000 over the three years prior to the introduction of the NMW in April 1999. This allows the elimination of outliers and also a more consistent identification of the low-wage firms.

wage between £12,000 and £24,000, a figure close to the median firm wage in our samples. The main premise of the identification strategy is that the firm wages below the threshold will experience a significant boost from the NMW introduction relative to the higher wage firms. Our identification strategy is further enhanced by the fact that the comparison group contains firms with average wages not exceeding the median wage (£24,000). Firms with much higher average wages are likely to be quite different in terms of their characteristics and therefore subject to different unobservable trends compared to the treatment group.

To check the robustness of our results we also create counterfactuals which contain firms from industries where the NMW's "bite" is expected to be weak. We select the industries based on literature evidence and expert opinions from both manufacturing and service sectors to roughly approximate the composition of the aggregate low-paying LPC sectors. We expect that in the counterfactuals' NMW effects on wages and ultimately on labour productivity will be much less pronounced. The empirical findings confirm our expectations.

The results for the effects of NMW introduction on labour productivity of the aggregate (all) LPC sectors and for manufacturing and service sector aggregates respectively are reported in the first panels of Tables 3 to 5²⁵. Our findings with respect to the impact of NMW on labour productivity are quite consistent across LPC sectors. It appears that the firms in the treatment groups where the NMW "bite" is stronger have experienced relative increases in productivity over the period 1999-2009. The effects are statistically significant in all LPC sectors except for hairdressing, leisure and agriculture. When considering productivity effects by firm size groups, the largest relative increases in productivity are observed for large firms in the aggregate (all sectors) sample and in the service sector sample. In the aggregate manufacturing sector the relative productivity increases are largest for medium-size firms.

In the second (bottom) panel of Tables 3 to 5 we also report results for the capital-labour (K/L) ratio measuring capital deepening. Changes in the K/L ratio may reflect technology adjustments in firms as a result of the NMW over the ten-year period since its introduction. Such adjustments can be seen as a long-term effect of the NMW and a potential source of labour productivity changes. It seems that in some of the LPC sectors, such as hospitality and social care, labour productivity improvements

²⁵ In Table A2 in the Appendix we provide detailed results on labour productivity effects of the NMW for each of the LPC sectors.

resulting from NMW introduction are indeed driven by substitution of labour for capital to a large degree compared with other LPC, mostly manufacturing, sectors where increases in TFP appear to be the main driving force.

For the aggregate (all sectors) and service sector samples there is statistical evidence for substitution of labour for capital in the low-paying sectors while in the counterfactual samples such evidence does not occur. An alternative explanation to this long-run adjustment mechanism besides the TFP changes could be firm exit. In Table No. 2 we report exit rates by LPC sector for 1998 and 2008 – just before the introduction of the NMW and ten years later. It appears that in sectors with relative productivity gains where the labour-for-capital substitution is weaker, the exit rates are higher in 2008. This observation seems to support the argument that in the long-run less productive firms may exit under the pressure of increasing costs due to the introduction of the NMW.

5. Discussion and Conclusion

Overall, our analyses show an improvement in labour productivity in all low-paying sectors as a result of the introduction of the NMW. Our analyses also reveal evidence of substantial heterogeneity across and within sectors across firm size groups, as the effects are particularly marked in larger firms while small firms show the least improvement in labour productivity. Our results provide significant empirical support for the long-standing theoretical argument in favour of a national minimum wage initially and tentatively advanced by the Webbs in the late Nineteenth Century²⁶.

Documenting the phenomenon and providing contemporary empirical evidence brings us to the limits of the type of analysis conducted here. Thus, we can only offer tentative hypothetical explanations of our results based on our discussions in previous sections. We attempt this in two areas: market position and internal company changes contributing to productive processes. As Mayhew and Neely and Keep *et al.*²⁷ argue, in-company processes leading to higher productivity remain a “black box”.

²⁶ S. Webb, B. Webb, *Industrial Democracy*, Longmans, London, 1897.

²⁷ K. Mayhew, A. Neely, *Improving Productivity – Opening the Black Box*, *Oxford Review of Economic Policy*, 22 No. 4, 2006, 445-456. E. Keep, K. Mayhew, J. Payne, *From Skills Revolution to Productivity Miracle – Not as Easy as it Looks?* *Oxford Review of Economic Policy*, 22 No. 4, 2006, 539-559.

This tends to suggest a need for further in-depth econometric testing as well as for detailed case study investigation.

Greater productivity gains in larger firms suggest possible pass-through effects in firms with more monopoly power who can pass on cost increases to customers. Their higher public profile is associated with high levels of compliance with the NMW legislation compared with smaller firms which may maintain a strategy to “stay underground”, i.e., keep low levels of visibility to all regulatory agencies rather than to move up market and improve²⁸. For larger firms, “staying underground” and seeking to avoid full compliance with NMW requirements is not a viable option. Thus, large firms are likely to experience large increases in labour costs compared with small firms. Large firms are also likely to exercise higher monopoly power compared with small firms.

The pass-through argument is also supported by our cross-sectoral evidence. Less competitive and mostly domestically-traded sectors such as social care show greater relative increases in productivity. Social care is a very varied sector that includes considerable social work, childcare and welfare segments as well as the residential home segment. Thus, much of it escapes the price-capping common in the latter segment²⁹. Even if it is impossible because of price-capping to pass costs on, a context of rising demand may provide incentives to improve productivity. There is also evidence in the social care sector of labour-for-capital substitution in the ten-year period. Hairdressing on the other hand does not seem to have been able to pass on labour cost increases or to substitute labour for capital. Furthermore, the industry has a long history of the problematic application of minimum rates of pay, suggesting that a non-compliance strategy appears a viable option for adaptation in the context³⁰. Druker *et al.*³¹ show that hairdressing employers prefer to maintain a “steady state”, limiting innovation and maintaining prices. Thus, pay increases cannot be

²⁸ M. Ram, P. Edwards, T. Jones, *Staying Underground: Informal Work, Small Firms and Employment Regulation in the UK*, *Work and Occupations*, No. 34, 2007, 318-344. R. Croucher, G. White, *Enforcing a National Minimum Wage: the British Case*, *Policy Studies* 28 No. 2, 2007, 145-161.

²⁹ S. Machin, A. Manning, *A Test of Competitive Labor Market Theory: the Wage Structure Among Care Assistants in the South of England*, *Industrial and Labor Relations Review*, 57 No. 3, 2004, 371-385.

³⁰ J. Druker, C. Stanworth, G. White, *The Impact of the National Minimum Wage on the Hairdressing Industry*, *Report to the Low Pay Commission*, London, 2002. R. Croucher, G. White, *op. cit.*

³¹ J. Druker *et al.*, *op. cit.*

passed on and innovation is ruled out, closing off both of the obvious options.

Internal firm reorganisation, besides long-run technology adjustments through labour-for-capital substitutions, also seems likely to be relevant and would ultimately lead to improvements in TFP. Larger firms may have more capacity to reorganise productive processes simply because there is more labour available, making solutions such as increased use of functional and time flexibility more possible. They may be more able to develop adaptive strategies because of more articulated management structures and more sophisticated or “progressive” HRM³² and operations management practices.

On the other hand, weak adoption of efficient operations management is characteristic of small British firms and especially “micro” and family firms employing less than twenty workers. They tend to be characterised by fragmented practices that are reactive to the environment³³. Many of the smaller companies, for example individual nursing homes are among the type of employers identified as likely to be “black hole” organisations in terms of their HRM and employment relations³⁴. They are unlikely to have a strategic approach to HRM and this may reduce their capacity to introduce and manage functional and time flexibility and hence improve productivity³⁵. Larger firms are more likely to adopt what Rainbird *et al.*³⁶, reporting on the social care sector, called “pro-active” rather than the “reactive” approach also found in the industry whereby companies simply react to regulatory pressure. Adam-Smith *et al.*³⁷ reached a similar conclusion in the hospitality industry: there was no evidence for a regulatory “shock” to management practices after the introduction of the NMW, but rather a reinforcement of existing hierarchies and ways of

³² J. T. Delaney, M. A. Huselid, *The Impact of HRM Practices on Perceptions of Organisational performance*, *Academy of Management Journal*, 39 No. 4, 1996, 949-969.

³³ R. Cagliano, K. Blackman, C. Voss, *Small Firms Under the Microscope: International Differences in Production/Operations Management Practices and Performance*, *Integrated Manufacturing Systems*, 12 No. 7, 2011, 469-482.

³⁴ D. Guest, N. Conway, *Peering into the Black Hole: the Downside of the New Employment Relations in the UK*, *British Journal of Industrial Relations*, 37 No. 3, 1999, 367-389.

³⁵ A. Friedrich, R. Kabst, W. Weber, M. Rodehuth, *Functional Flexibility: Merely Reacting or Acting Strategically?* *Employee Relations*, 20 No. 5, 1998, 504-523.

³⁶ H. Rainbird, E. Leeson, A. Munro, *Skills Development in the Social Care Sector*, Department of Health Policy Research Programme, Social Care Workforce Initiative, London, 2009.

³⁷ D. Adam-Smith, G. Norris, S. Williams, *Continuity or Change? The Implications of the National Minimum Wage for the Hospitality Industry*, *Work, Employment and Society* 17 No. 1, 2003, 29-47.

working. This is consistent with the LPC 2008 survey of employers which showed that in hospitality, employers were most likely simply to reduce the numbers employed as a reaction to an increase in the NMW. More sophisticated adaptive responses were not perceived as viable.

Thus, notwithstanding our speculation on its causes, we provide significant evidence that the introduction of NMW led to increases in labour productivity in all low-paying sectors and the increases are more marked in larger firms. There is also evidence of heterogeneity in responses across the low-paying sectors.

Appendix

Table No. A1 – SIC and SOC Coding of the Low-paying Sectors Defined by Industry and Occupation.

Low-paying sector/occupation	Old industry-based definition (SIC 2003)	New industry-based definition (SIC 2003)	Occupation-based definition (SOC 2000)
Retail	52	50, 52, 71.405	711, 721, 925
Hospitality	55	55	5434, 9222, 9223, 9224, 9225
Social care (residential and non-residential)	n.a.	85.3, 85.113	6115
Cleaning	74.7	74.7, 93.01	6231, 9132, 923
Security	74.6	74.6	9241, 9245, 9249
Hairdressing	93.02, 93.04	93.02, 93.04	622
Textiles and clothing	n.a.	17, 18	5414, 5419, 8113, 8136, 8137
Agriculture	01 – 05	01 – 05	911
Food processing	n.a.	15.1, 15.2, 15.3, 15.4, 15.5, 15.6, 15.7, 15.8	5431, 5432, 5433, 8111
Leisure, travel and sport	n.a.	92.13, 92.3, 92.6, 92.7	6211, 6213, 9226, 9229

Source: LPC.

Table No. A2 – Difference-in-differences Analysis of Labour Productivity Across LPC Sectors.

Sectors and subsamples	Total sample			Small firms			Medium firms			Large firms		
	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference
Retail	2.801	2.826	+0.025	2.823	2.835	-0.012	2.752	2.805	+0.052	2.695	2.744	+0.049
(T) LPR	(0.014)	(0.015)	(0.009)	(0.018)	(0.019)	(0.010)	(0.029)	(0.027)	(0.018)	(0.045)	(0.045)	(0.027)
Retail	3.253	3.252	-0.001	3.243	3.242	-0.001	3.230	3.242	+0.012	3.310	3.329	+0.019
(C) LPR	(0.010)	(0.010)	(0.006)	(0.013)	(0.013)	(0.008)	(0.017)	(0.016)	(0.009)	(0.033)	(0.034)	(0.021)
			+0.025***			+0.013			+0.040**			+0.030
			(0.010)			(0.012)			(0.019)			(0.033)
Hospitality	2.554	2.611	+0.057	2.687	2.722	+0.035	2.628	2.540	+0.088	2.160	2.203	+0.042
(T) LPR	(0.026)	(0.025)	(0.015)	(0.036)	(0.036)	(0.018)	(0.038)	(0.041)	(0.024)	(0.098)	(0.104)	(0.073)
Hospitality	3.128	3.084	-0.043	3.280	3.237	-0.043	3.113	3.108	-0.006	2.660	2.492	-0.168
(C) LPR	(0.032)	(0.034)	(0.017)	(0.040)	(0.043)	(0.025)	(0.044)	(0.045)	(0.024)	(0.157)	(0.174)	(0.095)
			+0.100***			+0.078***			+0.094***			+0.210**
			(0.024)			(0.031)			(0.036)			(0.121)
Social care	1.509	1.482	-0.028	1.626	1.524	-0.102	1.267	1.335	+0.068			
(T) LPR	(0.111)	(0.111)	(0.068)	(0.134)	(0.130)	(0.075)	(0.262)	(0.281)	(0.075)			
Social care	1.862	1.670	-0.192	2.264	1.989	-0.274	1.468	1.381	-0.086			
(C) LPR	(0.157)	(0.165)	(0.073)	(0.166)	(0.196)	(0.102)	(0.263)	(0.272)	(0.062)			
			+0.164**			+0.172*			+0.154*			
			(0.101)			(0.124)			(0.114)			
Cleaning	1.778	1.929	+0.150	2.464	2.400	-0.064	1.948	2.033	+0.084	1.381	1.566	+0.184
(T) LPR	(0.079)	(0.077)	(0.030)	(0.191)	(0.224)	(0.073)	(0.144)	(0.168)	(0.056)	(0.070)	(0.063)	(0.034)
Cleaning	2.808	2.791	-0.017	3.030	3.026	-0.004	2.673	2.679	+0.007	2.365	2.355	-0.009
(C) LPR	(0.081)	(0.078)	(0.033)	(0.138)	(0.128)	(0.048)	(0.116)	(0.106)	(0.055)	(0.237)	(0.220)	(0.101)
			+0.167***			-0.060			+0.077			+0.194**
			(0.050)			(0.086)			(0.079)			(0.108)

Table A2 – Continued

Sectors	Total sample			Small firms			Medium firms			Large firms		
	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference
Security (T) LPR	1.174 (0.363)	1.436 (0.335)	+0.262 (0.068)				1.172 (0.257)	1.345 (0.169)	+0.173 (0.122)	1.205 (0.615)	1.508 (0.599)	+0.302 (0.027)
Security (C) LPR	1.756 (0.131)	1.673 (0.140)	-0.083 (0.065) +0.345** (0.170)				2.086 (0.351)	2.038 (0.426)	-0.048 (0.121) +0.221 (0.218)	1.495 (0.101)	1.425 (0.124)	-0.070 (0.091) +0.372* (0.245)
Hairdressing (T) LPR	2.188 (0.154)	2.209 (0.176)	+0.021 (0.053)	2.245 (0.183)	2.196 (0.198)	-0.049 (0.045)	2.072 (0.312)	2.254 (0.413)	+0.181 (0.128)			
Hairdressing (C) LPR	2.744 (0.136)	2.654 (0.125)	-0.090 (0.103) +0.111 (0.162)	2.695 (0.123)	2.591 (0.144)	-0.104 (0.098) +0.055 (0.166)	4.138 (0.357)	3.969 (0.167)	-0.269 (0.190) +0.350* (0.225)			
Textiles (T) LPR	2.290 (0.048)	2.460 (0.056)	+0.169 (0.038)	2.399 (0.073)	2.477 (0.083)	+0.078 (0.042)	2.253 (0.080)	2.441 (0.100)	+0.188 (0.069)	2.204 (0.075)	2.386 (0.098)	+0.182 (0.073)
Textiles (C) LPR	2.982 (0.036)	3.016 (0.037)	+0.034 (0.025) +0.135*** (0.044)	3.197 (0.059)	3.186 (0.060)	-0.011 (0.035) +0.090** (0.054)	2.900 (0.051)	2.885 (0.053)	-0.015 (0.028) +0.203*** (0.062)	2.890 (0.062)	2.927 (0.074)	+0.037 (0.048) +0.145** (0.086)
Agriculture (T) LPR	2.237 (0.052)	2.231 (0.056)	-0.006 (0.032)	2.295 (0.056)	2.293 (0.060)	-0.032 (0.035)	2.066 (0.168)	2.203 (0.131)	+0.137 (0.132)	1.051 (0.387)	0.928 (0.440)	-0.122 (0.033)
Agriculture (C) LPR	2.819 (0.052)	2.807 (0.052)	-0.012 (0.033) +0.006 (0.046)	2.861 (0.065)	2.829 (0.065)	-0.032 (0.039) +0.030 (0.053)	2.608 (0.101)	2.705 (0.090)	+0.097 (0.071) +0.040 (0.137)	1.997 (0.463)	2.076 (0.150)	+0.078 (0.410) -0.201 (0.472)

Table A2 – Continued

Sectors	Total sample			Small firms			Medium firms			Large firms		
	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference	Pre 1999	Post 1999	Difference
Food processing (T) LPR	2.450 (0.040)	2.582 (0.042)	+0.133 (0.029)	2.530 (0.083)	2.696 (0.075)	+0.167 (0.050)	2.435 (0.051)	2.514 (0.038)	+0.079 (0.039)	2.429 (0.091)	2.532 (0.092)	+0.103 (0.057)
Food processing (C) LPR	3.128 (0.028)	3.215 (0.027)	+0.087 (0.017) +0.046* (0.034)	3.298 (0.064)	3.403 (0.066)	+0.105 (0.027) +0.062 (0.052)	3.124 (0.039)	3.155 (0.038)	+0.030 (0.024) +0.049 (0.048)	2.951 (0.052)	3.084 (0.057)	+0.134 (0.039) -0.030 (0.076)
Leisure (T) LPR	2.490 (0.051)	2.490 (0.056)	+0.000 (0.034)	2.550 (0.064)	2.490 (0.068)	-0.059 (0.042)	1.976 (0.166)	1.999 (0.166)	+0.023 (0.091)	2.378 (0.139)	2.665 (0.119)	+0.287 (0.113)
Leisure (C) LPR	3.016 (0.044)	3.000 (0.044)	-0.016 (0.033) +0.015 (0.048)	3.079 (0.049)	3.067 (0.050)	-0.011 (0.035) -0.048 (0.054)	2.675 (0.144)	2.743 (0.131)	+0.067 (0.093) -0.044 (0.131)	3.007 (0.139)	3.051 (0.126)	+0.044 (0.082) +0.243** (0.137)

Note: Figures in *italics* indicate the difference-in-differences (DD) and figures in **bold** indicate sectors and firm size groups with statistically significant (at 10% or better) DD in labour productivity (LPR) after the implementation of the NMW in 1999. The levels of significance are denoted as follows: *** 1% or better; ** 5% or better; * 10% or better. (T) denotes the treatment group and (C) denotes the comparison group.

Source: Authors' calculations.

Worker Safety and Human Security: the Case for Global Governance

Peter Hough *

1. Security and “Securitization” in International Relations

The process commonly referred to as globalization has led to internal political issues being increasingly externalized and external political issues being increasingly internalized. Traditionally, domestic policy concerns like health and rights are more prominent than ever on the global political agenda and events occurring in other states, such as disasters or massacres, are more often than ever deemed to be of political significance for people not personally affected. In light of these changes, and the reduced prevalence of inter-state wars, it has become a matter of contention amongst theorists of International Relations whether Security Studies should maintain its traditional emphasis on military threats to the security of states or widen its focus. Traditionalists agree with Realist Walt that “security studies may be defined as the study of the threat, use and control of military force”¹. Alternative perspectives, though, have argued increasingly that the discipline should either: i) extend its reach to include non-military threats to states (wideners) or, ii) go further and bring within its remit the security of individual people, not just states, in relation to a range of threats, both military and non-military (deepeners).

Wideners and deepeners of security contend that wars, international or internal, are not the only threats that face states, people and the world as a whole. Indeed, they never have been. Throughout history people have

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¹ S. Walt, *The Renaissance of Security Studies*, *International Studies Quarterly* 35, No. 22, 1991, 212.

been killed by things other than soldiers and weapons and states have been weakened or destroyed by things other than military conflict. Hence, with the overwhelming military shadow of the Cold War lifted, many “wideners” emerged in Security Studies literature in the 1990s. A seminal article by academic and State Department adviser Jessica Matthews in 1989 proved influential on the later US Clinton-Gore administration by highlighting the need for states to give proper concern to the newly-apparent threats posed by environmental problems such as ozone depletion and global warming². Ayooob highlighted that internal rather than external threats were the principal security concerns of most Less Developed Countries (LDCs)³. Peterson and Sebenius made the same point with reference to the most developed and powerful state, the USA, positing that a crisis in education and a growing economic “underclass” should be understood as security threats⁴. Lynn-Jones and Miller addressed the need to give attention to a range of previously neglected internal and external threats such as virulent nationalism and the social impact of migration⁵. Although viewed as unwelcome by traditionalists, such as Walt, this widening of security did not undermine the Realist logic of conventional Security Studies. The focus was still on the state system and seeing relationships between states as governed by power. Widening was simply a case of extending the range of factors which affect state power beyond the confines of military and trade affairs.

1.1. *The Deepening of Security*

Going beyond widening the domain of Security Studies is the “deepening” approach led by Pluralists (Liberals), Critical Theorists and Social Constructivists in International Relations. Deepeners embrace the concept of “human security” and argue that the chief *referent object* of security should not be the state but the individual people of which these institutions / groups are comprised. The Pluralist Falk, for example,

² J. Matthews, *Redefining Security*, *Foreign Affairs* 68, No. 2, 1989, 162-177.

³ M. Ayooob, *Defining Security: a Subaltern Realist Perspective*, in K. Krause, M. Williams (eds.), *Critical Security Studies*, University of Minnesota Press, Minneapolis, 1997, 121-146.

⁴ J. K. Peterson, P. G. Sebenius, *The Primacy of the Domestic Agenda*, in G. Allison, G. Treverton (eds.), *Rethinking America's Security: Beyond Cold War to New World Order*, W.W. Norton & Co., New York, 1992, 57-93.

⁵ S. Lynn-Jones, S. Miller, *Global Dangers: Changing Dimensions of International Security*, MIT Press, Cambridge USA and London, 1995.

considers that security ought to be defined as “the negation of insecurity as it is *specifically* experienced by individuals and groups in concrete situations”⁶. This is a significant leap from widening which, as pointed out by Falk “still conceives of security largely from the heights of elite assessment, at best allowing the selected advisor to deliver a more enlightened message to the ear of the prince”⁷. The United Nations Development Programme became the best known advocate for adopting a human security approach in incorporating the concept in their annual reports from the early 1990s.

The concept of security must change from an exclusive stress on national security to a much greater stress on people’s security, from security through armaments to security through human development, from territorial to food, employment and environmental security⁸.

Governments which have declared that their foreign policies are influenced by human security include those of Canada, Norway and Japan. The root of the problem with the traditional approaches to security politics is what Wyn-Jones, a Critical theorist, describes as the “fetishization of the state”⁹. This tendency in International Relations is not resolved by widened approaches which – whilst accepting the idea that non-military issues can be securitized – still tend to emphasize threats from the perspective of states and maintain the logic that only the state can be the *securitizing actor* (i.e. decide whether the issue is acted upon as a matter of urgency). Hence “statecentricism” is maintained, if in a subtler form. The practical limitation with this is that not only are the traditional security agents of the state (i.e. the army, externally and police, internally) often inadequate for dealing with security problems affecting the people of that state, they are often a chief cause of those problems.

Whilst the practical concern of traditionalists like Walt that widening the focus of Security Studies should not distract attention from military threats can be arguments that have some validity, given the post Cold War rise of certain military threats such as terrorism and the proliferation of

⁶ R. Falk, *On Humane Governance. Toward a New Global Politics*, Polity, Cambridge, 1995, 147.

⁷ *Ibid.*, 146.

⁸ UNDP, *Human Development Report*, 1993.

⁹ R. Wyn-Jones, *Security, Strategy and Critical Theory*, Lynne Rienner, Boulder, USA, 1999.

nuclear weapons, the intellectual rationale for maintaining a narrower focus is weak. In a book taking a wider approach to security, Wirtz contends that “if the threat of force, the use of force or even the logistical or technical assistance that can be supplied by military units does little to respond to a given problem, it is probably best not to treat the specific issue as a security threat”¹⁰. He also scoffs at the idea that global warming should be construed as a security issue, maintaining that “It is not exactly clear [...] how military forces can help reduce the build-up of greenhouse gases in the atmosphere”¹¹. This view gives an indication of how blinkered the mainstream study of security can be. Defining an issue as one of security on the basis of whether or not it involves military forces strips the term of any real meaning. Security is a human condition. To define it purely in terms of state bodies whose aim is to help secure their state and people in a certain dimension, rather than the people whose security is at stake, is both odd and nonsensical. This way of framing what is and what is not a security issue is akin to saying that children being taught to read by their parents are not being educated or that happiness does not exist unless it is induced by the performances of state-sponsored clowns. A security issue, surely, is an issue which threatens (or appears to threaten) one’s security. Defining a security issue in behavioural terms rather than excluding certain categories of threats because they do not fit conventional notions of what defines the subject area gives the term some objective meaning. If people, be they government ministers or private individuals, perceive an issue that threatens their lives in some way and respond politically to this then that issue should be deemed to be a *security* one.

It should be noted, though, that human security itself is a contested concept with more and less expansive versions now employed in both academic and political discourse. Wider human security is often characterized as combining “freedom from want” and “freedom from fear” (from the UNDP description of the concept) in that it considers any issue with direct or indirect life-threatening consequences for individuals to be a matter of security. Concerns among some advocates of and individual-focused approach to security that “existing definitions of

¹⁰ J. Wirtz, *A New Agenda for Security and Strategy?*, in G. Baylis, J. Wirtz, E. A. Cohen, C. S. Gray (eds.), *Strategy in the Contemporary World. An Introduction to Strategic Studies*, Oxford University Press, Oxford, 2002, 309-327, 312.

¹¹ J. Wirtz, *op cit.*, 311.

human security tend to be extraordinarily expansive and vague”¹² led them to favour a more restricted version merely based on “freedom from fear”. This narrow version of human security concentrates on direct and deliberate violent threats, excluding less directly human-caused insecurity like diseases and disasters. The Canadian government has generally been supportive of such an approach in their advocacy of human security as a pragmatic determinant of when specific, concrete foreign policy actions – such as taking part in a humanitarian intervention or developing international human rights conventions – should be undertaken. In contrast, Japanese government’s endorsement of human security has tended to be more in line with the expansive version as favoured by the UNDP. Certain fatalism might be noted in assuming that only direct and deliberate threats to life can be deemed worthy of security status. Such a restriction might make the concept easier to deal with but it does so by simply choosing to ignore the insecurities of most of the world’s people even when the means of securing them are apparent.

Hence, by adopting the wide human security framework, the notion of security is recast as a social construct which strips away the need for the analyst to speculate on what *they think* is the most threatening of the myriad issues on the contemporary international political agenda and concentrate instead on analyzing how and why certain issues are actually perceived of as vital and responded to in an extraordinary way by decision-makers. The preoccupation of Security Studies with the state is very much a relic of the Cold War. In some ways this is understandable since the discipline of International Relations, and its sub-discipline Security Studies, only emerged in the 1930s and was thus very much forged in an era of unprecedented military threats. Realism was in the ascendancy at the close of the Second World War since the application of force had proved its worth in curbing aggression and restoring order in Europe and Asia. Pre-World War II international cooperation, in the form of the League of Nations, and “softly-softly” appeasement diplomacy vis-à-vis aggressors failed to keep the peace comprehensively. In addition, the total war of World War Two and the “total phoney war” of the Cold War, whereby whole populations were threatened by state quarrels in ways not seen before, bound individuals to the fates of their governments in an unprecedented fashion. The scale of the threat posed by nuclear war in the second half of the twentieth century served to weld the security of

¹² R. Paris, *Human Security. Paradigm Shift or Hot Air?*, *International Security* 26, No. 2, 2001, 88.

individual people in the US and elsewhere to that of their governments. The state would assume the responsibility for protecting its citizens and demand their loyalty in return for a strengthened version of the “Social Contract” relationship articulated by political philosophers such as Hobbes and Locke from the seventeenth century. Hobbes’ advocacy of the need for the *Leviathan* (meaning a strong state) to save individuals from the dangerous anarchy that would otherwise result from the pursuit of their own selfish interests was a major influence on the Realists. In the late twentieth century, anarchy was the international state system and the dangers came, to a greater extent than ever before, from other states. McSweeney observes that security over time had come to be defined in International Relations solely as an adjective rather than a noun, or as “a commodity rather than a relationship”¹³. The human part of the status had been lost and the term became synonymous with *Realpolitik*, the interest of the state. Military might and the application of the “national interest” can secure lives but can also, of course, imperil them. Additionally, human lives can be jeopardised by a range of issues other than military ones. A thorough application of security in the study of global politics must, surely, recognize this or else admit that it is a more limited field of enquiry, viz. “War Studies” or “Strategic Studies”. The conceptualization of International Relations, like the conduct of International Relations, was very much frozen in time between 1945 and 1990.

The meaning of “security” is not just an arcane matter of academic semantics. The term carries significant weight in “real world” political affairs since threats to the security of states have to be a priority for governments and threats to the lives of people are increasingly accepted as more important than other matters of contention. It is clear that designating an issue as a matter of security is not just a theoretical question but bears “real world” significance. The traditional, Realist way of framing security presupposes that military issues – and certain economic questions for Neo-realists – are security matters and as such must be prioritized by governments above other “low politics” ones, such as worker safety, important though these might be. For human security advocates, this is demonstrably outdated and out of step with people’s real insecurities.

Deaths in accidents and disasters far outstrip political and criminal killings combined (see Table No. 1). Taken in isolation, the 321,000 deaths at

¹³ B. McSweeney, *Security, Identity and Interests. A Sociology of International Relations*, Cambridge University Press, Cambridge, 1999, 15.

work in 2008 represent nearly twice the fatalities in war, terrorism and all other forms of political violence. Why, then, are the insecurities of these victims not considered the remit of international relations?

Table No. 1 – Global Causes of Death in 2008.

Cause	Number of Deaths
Disease / ill-health	52.25 million
Disasters / accidents	3.63 million
Suicide	0.78 million
Criminal violence	0.54 million
War / political violence	0.18 million

Source: WHO, Global Burden of Disease 2008, World Health Organization, Geneva, 2011.

2. Workplace Accidents and International Security Politics

Despite the death toll, man-made accidents – in their various forms – are least frequently thought of, and hence acted upon, as matters of security. Natural disasters, crime, disease and environmental changes have come increasingly to “enjoy” being dealt with as matters of security but this has rarely been the case for accidents, including occupational ones. The absence of explicitly threatening causal factors, be they non-human or human with “malice aforethought”, has led to accidents being, to a certain extent, accepted as “one of those things” and safety from them not becoming securitized in the same way as other causes of harm. Most accidents, though, are wholly unnatural and rooted in contemporary human societal practises that are becoming more widespread throughout the world. As such “technological” and “traditional” accidents are actually no more unavoidable than other social systemic problems like war and crime. In particular, accidents have underlying socio-economic causes inextricably linked to the global politico-economic system.

Most clearly associated with modern living is industrialization, which is itself related to far more hazardous forms of employment and production than pre-industrial economic activity. Table No. 2 illustrates that, like structural disasters, major industrial disasters can be prevented. Most of the disasters listed occurred in countries in the early stages of industrialization and economic development.

Table No. 2 – The World's Worst Industrial Disasters

	Place	Date	Type	No. killed
1	Bhopal, India	1984	Chemical leak	2,500
2	Hineiko, China	1942	Mining disaster (explosion)	1,549
3	Courrieres , France	1906	Mining disaster (explosion)	1,099
4	Jesse, Nigeria	1998	Oil pipeline fire	1,082
5	Chelyabinsk, USSR	1989	Gas pipeline explosion	607
6	Oppau, Germany	1921	Chemical plant explosion	600
7	Texas, USA	1947	Ship carrying fertilizer exploded in port	561
8	Cubatao, Brazil	1984	Petroleum plant fire	508
9	Lagunillas, Venezuela	1939	Oil refinery fire	500
10	Mexico City	1984	Petroleum gas plant explosion	452

Sources: CRED (2011)¹⁴. Disasters instigated by natural phenomena, military strikes, or military accidents are not counted towards.

¹⁴ CRED, *International Disaster Database*, Centre for Research on the Epidemiology of Disasters, Brussels, 2011. <http://www.emdat.be/> (Last accessed 20 September 2011)

The world's worst ever industrial accident occurred at Bhopal, India, on 3 December 1984. During the production of the pesticide *Carbaryl* the plant, run by the US-based multi-national corporation *Union Carbide*, accidentally released 40 tonnes of the highly-toxic chemical methyl-isocyanine (MIC) used in the production process. At least 2,500 people living nearby the plant were killed and around 180,000 other people have since suffered from a range of long-term health effects and birth defects. As an intermediate chemical, MIC did not feature on the world's foremost safety inventory of the time, UNEP's International Register of Potentially Toxic Chemicals, and Indian authorities were unaware that it was being stored. Investigations also proved that safety standards on the plant were weak and that previous fatal accidents had occurred.

According to Dudley, at a 1986 "Chemistry After Bhopal" conference organized by the chemical industry, a spokesman compared the disaster to the sinking of the *Titanic*¹⁵. In the same way as the world's most infamous transport disaster prompted an evaluation of safety standards but not the abolition of passenger sea travel, industrial chemical production should not be restricted on the back of one major disaster, it was claimed. Whether Bhopal was a freakish one-off, however, is disputed. The disaster prompted a rise in Pressure Group activity and academic research into chemical safety in the developing world which suggested a reversal of the *Titanic* analogy was more appropriate. Rather, Bhopal represented the tip of the iceberg with many less visible disasters lying submerged from public and political view. Twenty years on from Bhopal, the International Labour Organization (ILO) suggested that the Indian government had reported 231 work-related fatal accidents when the true figure was nearer 40,000¹⁶.

Whereas disasters in LDCs can escape public glare and political response, far less deadly accidents can produce significant responses when they occur in the developed world. The 1976 leak at a chemical plant in the Milan suburb of Seveso was a watershed for European chemical safety legislation and its impact continues to resonate despite claiming only one immediate casualty. A cloud of Trichlorophenol (TCP) and dioxin TCDD formed around the plant as a result of the leak, although no acknowledgement of this was made to nearby villages for four days. Within three weeks animals and crops had died, thirty people were hospitalized and one person had died whilst, long-term, a significant

¹⁵ N. Dudley, *This Poisoned Earth. The Truth About Pesticides*, Platkus, London, 1987.

¹⁶ ILO *World Day for Safety and Health at Work A Background Paper*, International Labour Organization, Geneva, 2005.

increase in birth defects was recorded¹⁷. The disaster had profound political effects. The plant was owned by a Swiss company, prompting fears that they had exploited laxer safety standards in Italy. Directive 82/501/EEC – the so-called Seveso Directive – was drafted by the European Community, tightening safety standards and making it mandatory to notify local populations of any such accident. A similar shock to the European system occurred in 2010 when a spill of caustic waste at an alumina plant at Ajka, Hungary led to toxic chemicals burning 9 people to death and turning a stretch of the Danube across several countries red, making graphically apparent the physical and political interconnectedness of the EU.

The two most significant nuclear accidents of the 20th century occurred in the two superpowers of that age, the unprecedented international political influence of which was built on that very power source. In 1979, a technical malfunction at the Three Mile Island nuclear power plant in Pennsylvania, caused a release of radioactive gas from one of the reactors. There were no confirmed casualties from this accident but it attracted huge publicity which was seized upon by anti-nuclear protestors and no new nuclear power plants have been built in the USA since. The 1986 Chernobyl disaster in the former USSR was the worst nuclear power plant disaster ever and, in line with the added “fear factor” associated with this form of energy production, stands as the most notorious industrial disaster to date. Lax safety standards are generally held as the key reasons for the explosion and fire which destroyed one of the plant’s four power reactors and released huge amounts of solid and gaseous radioactive material into the surrounding area. Thirty-two plant and emergency staff were killed in the immediate aftermath of the explosion and in the following weeks some of this material was deposited over a large swathe of Northern Europe, prompting an unknown number of long term deaths. In 2011, nuclear safety was again put in the spotlight with the disaster of the Fukushima Daiichi nuclear power station, prompted by the devastating tsunami that struck Japan. Three workers were killed and thousands of residents moved out of the region and, whilst levels of public radiation exposure were officially reported as not being dangerous, many fear that significant health defects will come to emerge in the future. As with transport disasters and most human security threats, however, large scale and/or high-profile disasters represent only a small, highly

¹⁷ F. Pocchiari, V. Silaro, G. Zapponi, *The Seveso Accident and its Aftermath*, Springer-Verlag, Berlin, Heidelberg, New York, 1987.

visible, fraction of the full picture. The vast majority of accidents in the workplace are individual or small scale. The International Labour Organization (ILO) estimated that around one third of a million people a year in the world are killed in occupational accidents (including traffic accidents whilst working). If deaths when commuting to or from work and illness caused at work are included, the figure rises to over 1.2 million¹⁸.

3. The Collateral Damage of Industrialization? The Rise of Accidental Threats

Deaths by accident are very much a feature of the modern world. There have, of course, always been accidental deaths but this form of threat to human life is closely associated with technological development and has risen in accord with industrialization and the onset of modernity. In fact, it is possible to argue that accidents, in terms of their perception as such, did not exist for most of human history. The pre-industrial advance of science was significant in providing a means for comprehending unfortunate acts as something that could be explained and hence avoided. Green argues that “Before 1650, an accident was merely a happening or an event, and there appears to have been no space in European discourse for the concept of an event that was neither motivated nor predictable”¹⁹. Today, people die in a variety of non-technological accidents, such as drowning, but most fatal accidents are an unfortunate by-product of technological development. Health and safety legislation in developed countries has succeeded in reducing the potential hazards associated with transport, industrial production and the use of public buildings but, concurrently, people continue to travel more than ever and the industrial production and transportation of potentially hazardous substances continue to increase.

Smith posits that 1984 was a watershed year for technological disasters²⁰. Table No. 2 confirms this. As well the Bhopal disaster, that year also saw

¹⁸ ILO *Introductory Report: Global Trends and Challenges on Occupational Safety and Health at Work*, XIX World Congress on Safety and Health at Work, Istanbul 11-15 September 2011, 155-187.

¹⁹ J. Green, *Risk and Misfortune. The Social Construction of Accidents*, UCL Press, London, 1997, 196.

²⁰ K. Smith, *Environmental Hazards. Assessing Risk and Reducing Disaster*, Routledge, London and New York, 2001, 322.

a petroleum fire in Cubatao, Brazil which killed 508 people and a petroleum gas explosion in Mexico City which took away 540 lives. In total, more people were killed in major incidents this year than in all technological disasters of the previous forty years. In particular, the three prominent disasters were in LDCs avidly pursuing industrial development. This served to demonstrate that, as with natural disasters, there was a socio-economic dimension with industrial accidents, too. The vast majority of such deaths prior to 1984 had been attributable to small scale accidents in the developed world, giving credence to the notion that these were an unfortunate but inevitable form of collateral damage offset by the overall social gains resulting from sustained economic growth and mass consumerism. The scale of the problem in industrializing LDCs or “emerging markets” now far outstrips that in the Global North. Between 1998 and 2001, in contrast to stable or falling figures in the developed world, work fatalities in China rose from 73,500 to 90,500 and in Latin America from 29,500 to 39,500²¹.

The 1984 disasters also illustrated that technological accidents had become an international political economy issue in another dimension. It was evident from investigation that safety standards at the Union Carbide’s Bhopal plant were far more lax than at their home plant in West Virginia. The disaster gave ammunition to Pressure groups and commentators concerned that globalization was a case of “race to the bottom” in that MNCs would escape domestic safety constraints and seek out low-wage, low-safety sites for their operations.

An added trans-boundary and global dimension to workplace accidents comes from the disproportionate number of victims from migrant labourers. For example, whilst confirmed figures are not available, reports have suggested a shocking death toll in the United Arab Emirates, a country with the highest proportion of migrant workers in the world. It has been suggested that two construction workers per week die in Abu Dhabi and that 880 Indian and Pakistani’s working on Dubai’s rapidly emerging skyline were killed on the job in 2004²². Even in the country with what are regularly suggested to be the world’s highest living standards and one of the most liberal immigration policies, Norway,

²¹ ILO/WHO, *World Day for Safety and Health at Work A Background Paper*, International Labour Organization, Geneva, 2005.

²² S. Sonmez, J. Apostopoulos, D. Tran, S. Dentrepe, *Human Rights and Health Disparities for Migrant Workers*, *Health and Human Rights* 13, No. 2, 2011.

migrant workers are nearly three times as likely to suffer an accident at work than the working population as a whole²³.

4. International Policy on Accidents

In the 1996 volume *The Long Road to Recovery: Community Responses to Industrial Disaster*, which was the culmination of a four year United Nations University project investigating a number of disasters, James Mitchell argued that “it is difficult to argue that there has been much progress in converting these surprises into routing hazards”²⁴. Among the chief policy recommendations of the book is for an international clearing house of industrial hazard information to be established to improve the learning process²⁵. This is a particularly dismal conclusion since such a proposal has been on the global political agenda since the 1920s when debated by the International Labour Organization (ILO).

4.1. The ILO and Industrial Accidents

The ILO was founded in 1919 as part of the League of Nations system, absorbing the work of the International Association for Labour Legislation which had been set up in 1901. The ILO’s 1929 *Prevention of Industrial Accidents Recommendation (R31)* incorporated a resolution of the previous year’s International Labour Conference (ILC) that information be collated systematically on accidents and their causes. Numerous ILO Conventions dealing with worker safety have been drafted and concluded in the proceeding decades, culminating in the 1993 *Prevention of Major Industrial Accidents Convention (C174)*. Amongst the key requirements placed on ratifying states of this Convention are:

a) Article 4: the formulation, through consultation with stakeholders, of state safety policies.

²³ B. Langeland, *Work Related Accidents and Risks Among Migrant Workers*, European Working Conditions Observatory, Norway, 2009. www.eurofound.europa.eu, (Last accessed 11 August 12)

²⁴ J. Mitchell, *The Long Road to Recovery: Community Responses to Industrial Disaster*, United Nations University Press, Tokyo, 1996, 274.

²⁵ *Ibid.*

b) Article 16: the dissemination of information on safety measures on how to deal with an accident and prompt warning in the event of an accident.

c) Article 17: locating hazardous installations away from residential areas.

d) Article 22: ensuring the prior informed consent of importing authorities before exporting substances or technologies to other states prohibited for safety reasons in your own state.

These provisions are in accord with received wisdom on industrial safety and domestic legislation of most industrialized countries, but many are ambiguous and the Convention, as a whole, is surprisingly short for a legal document on such a broad, technical issue. A further limitation comes from the fact that the agreement also specifies that the provisions do not apply to the nuclear industry, to military installations or to off-site transportation (except pipelines). Despite all of this, nineteen years after the Convention had been signed, only sixteen countries had ratified it (it entered into force in 1997 after the second ratification)²⁶. This is, in part, due to the snail's pace of international legislation but it can also be seen that most governments do not take much interest in international safety policy. The ratification rate for older ILO safety conventions is little better. The 1985 Occupational Health Services Convention (C161), which requires that a state's occupational health services advise employers and workers on safety, had been ratified by only 30 of the ILO's 185 Member States as for 2012. This is particularly telling since, whilst many developed states can cite the fact that they have more thorough domestic legislation as a basis for not ratifying the Accidents Convention, the ILO consider that few non-ratifying countries to C161 do have equivalent existing laws²⁷.

In order to increase the ratification rates and the general awareness of occupational hazards, in 1999 the ILO launched the "In Focus Programmes on Safety and Health at Work and the Environment" – known as SafeWork – headed by Takala. SafeWork is unequivocal in its belief that injuries and deaths are not an inevitable side-effect of modern work. "If all ILO Member States used the best accident prevention

²⁶ Ratifying States are: Sweden (1994), Armenia (1996), The Netherlands (1997), Colombia (1997), Estonia (2000), Brazil (2001), Saudi Arabia (2001), Albania (2003), Zimbabwe (2003), Belgium (2004), Lebanon (2005), India (2008), Luxembourg (2008), Bosnia-Herzegovina (2010), Slovenia (2010), Ukraine (2011).

²⁷ J. Takala *Introductory Report of the International Labour Office*, XV World Congress on Occupational Safety and Health, April 12-16, 1999, 4.

strategies and practices that are already in place and easily available, some 300,000 deaths (out of the total of 360,000) [...] could be prevented”²⁸.

4.2. Chemical Safety Policy

The obvious hazard inherent in trading chemicals across borders has prompted the most extensive of all global regimes in the industrial safety sphere. Two similar regimes, developed in the 1980s and implemented in the 1990s around the principle of “Prior Informed Consent”, bear testimony to Beck’s assertion in support of his Risk Society thesis that; “In contrast to material poverty [...] the pauperization of the Third World through hazard is contagious for the wealthy”.²⁹ The 1998 Rotterdam Convention³⁰ and 1989 Basle Convention initiated effective international regulatory systems compelling the exporters of, respectively, chemicals or hazardous waste to notify state authorities in the importing country if the material is restricted in the country of origin. These agreements provide some safeguards against the exploitative dumping of dangerous materials in countries poorly equipped to deal with them but also help wealthy countries feel surer that such dangerous substances will not revisit them in foodstuffs or pollution in the “circle of poison” effect.

Global regulation with regards to the use and production of, rather than trade in, hazardous chemicals is predictably less rigorous but has developed over time. The WHO have had a role in developing international labelling guidelines for pesticides since 1953³¹. A plethora of international standards in this area were brought together in 2002 under the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) co-managed by three IGOs. The Organization for Economic Cooperation and Development (OECD) is in charge of managing the development of health and environmental hazard information for developing a classification scheme. It has set up an expert advisory group towards this end. The United Nations Committee of Experts on the Transportation of Dangerous Goods (UNCEDTDG) has the task of

²⁸ J. Takala, *Introductory Report: Decent Work. Safe Work*, XVI World Congress on Safety and Health at Work, Vienna, 27 May 2002, 6.

²⁹ U. Beck, *Risk Society. Towards a New Modernity* Sage, London, New Delhi, Thousand Oaks USA, 1992, 44.

³⁰ *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Pesticides and Chemicals in International Trade*.

³¹ P. Hough, *The Global Politics of Pesticides*, Earthscan, London, 1998, 55-57.

determining criteria for classifying the physical hazards of chemicals (for example their flammability). The ILO has assumed responsibility for the overall coordination of the system, acting as its secretariat, and has also set up a working group containing governmental and worker representatives charged with the task of producing the means for communicating the classification scheme. As well as labelling standards, this will include data sheets for workers involved in chemical transport and guidance information for governments on how to implement the scheme. The system began the process of ratification in 2003 and by 2011 had been implemented by 67 States. It should be noted, though, that harmonized global standards are becoming more popular for they can facilitate trade by levelling the “playing field” and enhance human security.

The Seveso disaster was the catalyst for a series of EC initiatives on industrial safety culminating in the creation of the EU Major Accident Reporting System (MARS) which was fleshed out in the “Seveso II” Directive of 1996 (96/82/EC). MARS is an extensive database of accidents administered by the Major Accidents Hazards Bureau within the European Commission’s Joint Research Centre in Ispra, Italy. MARS has proved so effective that it has fostered cooperation well beyond the EU’s borders in what could be considered an instance of “spillover-spillover”. The OECD utilizes the system to facilitate information exchange on chemical spills and the UN’s Economic Commission for Europe (UN/ECE) use it as the main point of a regime based on their Convention on the Transboundary Effects of Industrial Accidents. The UN/ECE Convention, which came into force in 2000, links the EU states with other European states including Russia and features a notification system whereby the parties commit themselves to giving full and prompt information to neighbouring countries in the event of an accident.

4.3. Nuclear Power Policy

As has been demonstrated, safety standards for the production of nuclear energy and the transportation of its constituent elements and by-products tend not to be included in general international policy on accident prevention. Instead, the responsibility for this lies with the International Atomic Energy Authority (IAEA), an IGO set up by the UN in 1957 to coordinate policy on both military and civilian use of nuclear power. The IAEA has an International Nuclear Safety Advisory Group which has coordinated the establishment of a range of “Safety Principles” and a “Codes of Practice on the International Transboundary Movement of

Radioactive Waste”. Prompted by the Chernobyl disaster and the end of Cold War secrecy, the IAEA codified their most extensive legal instrument to date in the 1990s with the Convention on Nuclear Safety, which came into force in 1996. The Convention covers a range of issues including the siting and construction of power plants and emergency-preparation. However, despite the implied strengthening of IAEA standards with the use of the term “convention” in place of “principles” and “codes of practice”, this is not a robust piece of legislation. In the IAEA’s own words: “The Convention is an incentive instrument. It is not designed to ensure fulfilment of obligations by parties through control and sanction”³².

The high perception of risk attached to the production of nuclear power has made this a contentious issue of domestic politics in many countries but has also promoted a most literal form of spillover, inducing political cooperation between states. The Chernobyl disaster, more than Soviet-Western rapprochement, was the spur for the EC to launch the TACIS programme (Technical Assistance to the Commonwealth of Independent States) in 1991 which grants benefits to the successor states of the Soviet Union and has a strong focus on the modernization of the nuclear industry.

On the other side of the coin, concerns over the potential risk of nuclear accidents in other countries has also served to sour relations between closely integrated countries. Chernobyl was also a key factor in instigating independence movements in Ukraine, where the plant was based, and in nearby Belarus. In both of these Slavic Soviet Socialist Republics anti-Russian nationalism was less of a spur for secession than the feeling of being treated as the USSR’s industrial wasteland. Hence many of the Ukraine’s large Russian minority voted for independence and Belarus has sought to maintain as strong as possible links with Russia since gaining independence.

Further west, the desire of former USSR satellite states to integrate themselves into the European Union’s integration project has brought nuclear safety questions to the fore. The Austrian government, backed by public opinion, threatened to veto the Czech Republic’s accession to the EU unless it halted the development of its Temelin nuclear power station located near the Austrian border. The EU, satisfied by an International Atomic Energy Agency (IAEA) review in 2001 and a 2000 Austro-Czech

³² IAEA, Convention on Nuclear Safety, 2012. www-ns.iaea.org, (Last accessed 13 June 2012).

bilateral agreement on safety (The Melk Protocol), did not make closing the new plant a condition of membership but the issue remained contentious in Austrian civil society and party politics. In 2002, the EU called upon Lithuania to close its Soviet built nuclear plant, Ignalina, as a condition of membership, and in doing so agreed to provide substantial aid to assist in the project and compensate for the funding of alternative sources of energy production.

Even within the established ranks of the EU government policies on nuclear power differ substantially and cause friction amongst the most integrated states on Earth. The avowedly non-nuclear Republic of Ireland's government has long complained about the UK's Sellafield nuclear power station, located on the Irish Sea coast and in 2001 attempted to take legal action against the expansion of the plant. The case was dismissed by the International Tribunal for the Law of the Sea but the issue continued to be a source of diplomatic tension between the two states. Similarly, the Finnish government's declaration of its plans to expand its reliance on nuclear power in 2002 drew criticism from a number of its fellow EU member states, many of whom had begun to phase out this source of energy production. The 2011 Fukushima leak caused a backlash against nuclear energy just as its stock was rising due to its relative attractiveness vis-à-vis fossil fuels in terms of mitigating climate change. Japan and Germany were at the forefront of countries reversing future reliance on nuclear power.

5. Conclusion

Accidents are the most atypical of global security concerns and yet represent a much bigger threat to most people's lives than those most typical of security concerns, that is war and terrorism. Most of you reading this are hundreds of times more likely to die in an accident than be killed by a soldier or terrorist. Security "wideners" and even some human security advocates, whilst acknowledging that diseases, crime, environmental change and natural disasters can sometimes be matters of security, are reluctant to grant this status to accidents and man-made disasters. This reluctance seems to boil down to three objections: i) There is no military or power politics dimension; ii) They are not deliberate "attacks" on countries or people; iii) This is a domestic and not international political concern.

Security wideners ignore accidents because there is no real scope for sending in troops to fight anyone or help clear up in the aftermath.

However, such a line of argument makes sense only on the assumption that security is a synonym for “involves the military” rather than a description of what one is striving to provide for his/her own people in political life. A further barrier to the “securitization” of disasters for some is the absence of direct and deliberate human causation. Even MacFarlane and Foong Khong, whilst purporting to advocate human security, opine that disasters and accidents; “fail the ‘organized harm’ test tsunami waves, traffic accidents, the spread of viruses and crop failure are usually not organized by individuals to do their victims in”³³. For most human security advocates, though, there is certain fatalism in assuming that only direct and deliberate threats to life can be deemed worthy of security status. Securing people against such accidents is, again, a political task accepted by industrialized governments from as far back as the late nineteenth century when “social security” policies began to evolve in response to changing economic and social conditions. Accidents, hence, are actually no more unavoidable than other social systemic problems like war and crime and people can be secured against them, at least to some degree. The human agency argument is flawed on two levels. Firstly, there is human agency in most accidents. Human failings, whether at the state, corporate or individual level, account for most accidents and, hence, can be addressed in political actions. Secondly, must we deduce from this line of reasoning that anyone threatened or killed indirectly is not insecure? Are the “collateral killings” of war or insurgency then not military or terrorist victims? Securing people against accidents has long been recognized as a task of responsible democratic government and, whilst that remains, there is compelling logic that globalization has now shifted some responsibilities to a wider level.

The notion that worker safety is a purely domestic concern is difficult to sustain in the face of globalization on either an ethical or functional argument. If there is a “responsibility to protect” those imperilled by political violence, why should there not be for those imperilled by their government’s or host government’s political negligence? Indeed, it could be argued that the international community should feel a greater sense of responsibility when it comes to industrial accidents since they are more functionally connected to these events in enjoying the fruits of this hard labour. The contemporary death of Chinese miners or Indian construction workers recruited to build skyscrapers for global finance firms and hotels

³³ N. MacFarlane, Y. Foong Khong, *Human Security and the UN. A Critical History*, Indiana University Press, Bloomington, US, 2006, 275.

in the Gulf States should trouble Western consumers and governments as much as notorious domestic disasters did in the nineteenth and twentieth century.

This shift, though, has a long way to go. Global standards on the safety aspects of business and employment are limp when set against comparable standards for facilitating the trade in the devising of this process. The ILO and the IAEA do not have the same sort of authority in compelling states to protect workers and citizens living near industrial areas that the World Trade Organization has in compelling them to allow goods into their countries. Hence we see one reason why many political activists have come to view economic globalization as a dangerous exercise in unfettered liberalism, guided only by the profit motives of the global North. It is indeed telling that, whereas the idea of freeing up the movement of products, services and money is well established as a global norm, the notion of a free movement of the workers producing such common goods is barely conceivable. As Dauvergne says of accidents; the “global jury of states is assigning no blame, no ethical responsibility, dismissing these deaths as mere accidents in the quest for global prosperity”³⁴.

However, “unfettered liberalism” is not the political system which has emerged from the political evolution of states which have industrialized and modernized and there is no reason to believe that it will be for the global polity. The industrialization of Western European and North American states prompted the emergence of policies to protect those put at risk by these social changes based both on compassion and pragmatism. An ideological consensus emerged in the late nineteenth century in support of the notion of “state welfarism” (dependence on the state). The dangers associated with industrial employment and the economic uncertainties of trade prompted the emergence of interventionist Liberalism in place of its previous unfettered free-market version, paternal Conservatism and the birth of Socialism. The development of welfare systems in Western Europe, and to a lesser extent in the USA, arose from a blend of altruistic human security concerns and internal state security. Germany, under the arch-Conservative Bismarck, pioneered the idea of state protection for workers prompted mainly by the pragmatic realism that reform from above was the best means of prevent revolution from below. Bismarck’s aim was not so much human security as state security;

³⁴ P. Dauvergne, *Dying of Consumption: Accidents or Sacrifices of Global Morality*, *Global Environmental Politics* 5, No. 3, 2005, 44.

maintaining the unity of his newly-formed country which was witnessing some of the earliest manifestations of Socialist thought.

In addition, the precedent for freeing up trade between countries on a regional scale is that a levelling of an uneven playing field is a necessary precursor to achieving this. The issue may not arise for countries of a similar level of economic development, like the European Free Trade Association (EFTA) or the European Economic Community in its early years. The logic of spillover later dictated, however, that the EC embraces a social dimension alongside the “Single Market” when it took on board the relatively poor states of Ireland, Portugal, Spain and Greece. States with poor safety standards are either giving themselves an unfair competitive advantage (from an economic perspective) or being exploited (from a social perspective). Hence, even the North American Free Trade Association (NAFTA), set up very much on an economic rationale without the idealism of the European integration project, drew on the start the “North American Agreement on Labor Cooperation” (NAALC). NAALC, centred on an industrial dispute resolution mechanism incorporating occupational safety, came into force alongside the main NAFTA agreement in 1994 to overcome the problem of Mexico’s comparative advantage / disadvantage compared to its wealthier partners in the North.

With the inexorable rise of a coherent global economic system, global society is now, albeit slowly, awakening to this need for worker safety standards. Incidents of workers or residents near industrial plants in LDCs being killed are no longer unfortunate problems unconnected with the relatively safe lives of people in the global North. Developed world consumers are functionally connected to these systemic failures as never before and increasingly aware of this fact. The rise in the global North of “fair trade” products, in which the consumer pays a premium for goods imported from developing countries on the premise that the workers have not been exploited, and the “anti-globalization” social movement bears testimony to this fact. What is needed, though, is not the abandonment of globalization but a more rounded notion of globalization which balances profits with responsibilities as is broadly the norm in most developed democracies.

Such changes are slowly occurring. As with most of the areas of security, the globalization of democracy and human rights offers hope for improving personal safety from accidents since more and more people are able to demand action from their governments. Studies have shown, for example, that the unionization of work forces increases human security in that countries, such as China, without independent trade unions tend to

have higher numbers of accidents³⁵. In addition, recent evidence points towards the development of a “union effect” on safety at the global level. In 1997, the work initiated by the WTO towards establishing ISO (International Organization for Standardization) standards for health and safety management, alongside other “technical standards” by which to harmonize the global trading environment, was abandoned in the face of intensive global lobbying led by the International Confederation of Free Trade Unions (ICFTU). The ICFTU campaigned, principally over the internet, for global standard setting to be informed more by human safety than an economic rationale and so be coordinated by the ILO with its Union affiliations. Evidence is now beginning to emerge of a globalization of a safety culture. Whilst progress has been limited on the C174 and C161 conventions, ratifications for subsequent ILO conventions on occupational safety and health (OSH) have notably improved since most countries committed themselves to a “national preventative safety and health culture” and the notion of a “right to a safe and healthy working environment” at the Seoul Declaration on Safety and Health at Work³⁶. International guidance has been disseminated more effectively in a networking of the “good safety is good business” message. As evidence of the progress, the number of global work fatalities has reduced in recent years. Having risen from just under to just over 320,000 per year from the late 1990s to early 2000s, the figure recorded for 2008 was 320,580. Securing people at work, at home, travelling or at leisure is for governments and societies, though, more than charity or even duty. A more secure and health workforce and society is more productive and contented. 4% of global GDP is estimated to be lost to accidents and around this amount was trimmed off the Japanese GDP by the single Fukushima disaster³⁷. As industrialized European states came to realize from the nineteenth century, exploiting workers and short-changing citizens is only profitable as long as such people can be shown that there are alternatives. Disillusioned and angry workers have been a factor in nearly all revolutions. Health and safety is the dull stuff of politics and business but it is, nonetheless, “life and death” both for members of

³⁵ A. Abrams, *A Short History of Occupational Health*, *Journal of Public Health Policy* 22, No. 1, 2001, 34-80. A. Cheng, *Fatal Accidents Fall Slightly on Roads, at Work*, *South China Morning Post*, 17 April 2003 www.china-labour.org.hk (Last accessed 5 June 2003).

³⁶ ILO, *Introductory Report: Global Trends and Challenges on Occupational Safety and Health at Work*, XIX World Congress on Safety and Health at Work, Istanbul, 11-15 September 2011, 155-187.

³⁷ *Ibid.*

society and for governments and long recognized as such in industrialized democracies.

Such evidence of progress cannot disguise the fact that the WTO far outstrips the ILO in global influence but indicates that globalization is not entirely driven by corporate profit and that a future, more evolved form of the process may see a world in which human security is enhanced alongside the spoils of increased trade. Apart from the occasional high-profile disaster, like those at Bhopal or Fukushima, the victims of workplace accidents do not trouble our consciences or enter into the calculations of government's international political priorities.

If the daily global casualty rate at work would be concentrated in one place, it would be all over the first pages of the world's newspapers³⁸.

The growing global discourse of human security can help in the battle to redress the currently skewed governmental and intergovernmental priorities. Human security can shine a light on the dark side of globalization and be the basis for a better, fairer kind of global governance in which workers as well as consumers are appropriately rewarded and secured. History shows us that this is a natural development and ultimately beneficial to all sides. It gives expression to the plight of most insecure and neglected people, individual vulnerable workers.

³⁸ K. Tapiola, ILO, 2005.

The Youth Employment Challenge in Nigeria

Tayo Fashoyin *

1. The National Context

The Nigerian labour force represents the proportion of the working population aged 15 years or older. As the figures show, about 50% of the population was in the labour force during 2010 meaning that the labour force has grown in parallel with an increase in the population. The labour force includes those who are in employment and the unemployed, that is, those who are not working but are actively looking for an occupation. According to the official data of 2010¹, the share of workers in the informal economy amounted to a significant 43.2 million.

In this sector, there are 27.5 million female operators, while male workers accounted for slightly less (27.2 million). The informal economy also includes minors who are generally excluded when counting the labour force. It is this profile of employment that has led observers to emphasize the connection between unemployment and poverty, as two sides of the same coin. Umo, for example, takes the view that given that 102 million or 61% of population in Nigeria estimated at 167 million in 2011 was in

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¹ *Employment Summary Report*. Abuja, National Bureau of Statistics, 2010.

poverty, the policy challenge should concern both poverty eradication and employment generation².

This is certainly the case since the vast majority of those in employment in Nigeria – like in a number of other African countries – are not in salaried or regular employment, but are usually classified as economically active or gainfully employed in the informal economy.

This share of the economically active is not part of the labour force as those in the informal economy may be employed on a seasonal basis – for example in agriculture – be self-employed, or in profitable or non-profitable family businesses. Or they may be earning wages in small undertakings or businesses that are most often unregistered. Remuneration is generally far below the statutory minimum wage, and often provided on an irregular basis, as dependent on the profit prospects of the venture. In such cases there is no certainty of continuity of employment, where the question of benefits is not usually part of the equation. Most often, remuneration is supplied in the form of salaries or fees and wages that are low and irregular.

This picture that regular salaried employment is hardly the dominant form of employment is not peculiar to Nigeria or indeed to Africa, as it is common to many developing economies.

Youth in Nigeria are part of this labour market reality as by far it is one of the overwhelming components of the Nigerian workforce. However, youth face more difficulties as regards employment prospects than other groups in the labour market, and the statistics are illustrative of this state of affairs.

Overall, the relatively recent data speaks to a sustained prevalence of high unemployment rates. In this sense, the official national unemployment rate rose to 19.7% in 2009, then to 21.1% in 2010, reaching 23.9% in 2011. In the same year, it was 17.1% in the urban areas and much higher in the rural areas (25.6%). In fact, it has been suggested that for the broad 15-64 age group, unemployment was unofficially estimated at about 56.3% in 2011³.

When loosely defined, youth is said to account for about 70% of the population, based on a population growth rate of 2.8%. According to official statistics, some 4.5 million of the population enter the labour market annually, most of whom are young jobseekers. Yet, only 10% can

² J. U. Umo, *Policies and institutions for effective youth employment and poverty eradication in Nigeria*, Paper Presented at the 53rd Annual Conference of the Nigerian Economic Society, Abuja, 2012.

³ National Bureau of Statistics, 2011, 10.

be absorbed because employment growth is not fast enough to include those looking for employment⁴.

Thus the rate of youth unemployment in Nigeria has risen over the past decade. While unemployment among this group was 12.6% in 2002, it rose to 23% in 2010, a figure which was about twice the national unemployment rate. By way of comparison, the Nigerian youth unemployment, estimated at 34% in 2008 was nearly 3 times the Sub-Saharan African unemployment rate of 12.6%⁵. This has occurred despite the appreciable growth of the Nigerian economy, with an annual GDP growth averaging at 9.2% during the 2000 to 2008, although in the latter years economic growth fell to 7.8% in 2009 and further to 7.3% in 2011. Notwithstanding this decline, it is evident that relative economic prosperity has not been accompanied by job growth.

The societal cost of a large army of unemployed people – particularly young entrants into the labour market – is unsettling. As reported a year ago, youth across North Africa vented their frustration of unemployment in riots. While such mass demonstrations are not unusual in Nigeria, perhaps a much more threatening response has been their resort to all forms of deviant and fraudulent behaviour, armed robbery and threats to lives and properties regularly witnessed across the country.

2. The International Context

It must be acknowledged that the youth unemployment challenge is a universal societal malaise, which from time to time has drawn the attention of governments and non-governmental organizations across the globe. This is because joblessness among this critical group – which can be a potential for the labour market – represents a waste of human resources, a large portion of whom are educated and trained, but also because it is a source of explosive uprising capable of destabilizing society. Clearly and for understandable reasons, the International Labour Organization is undoubtedly the most consistent body that has addressed the youth unemployment challenge across the globe, with a special focus on African countries ever since its founding. In 2012, the ILO devoted its attention to the youth employment problem, in its report on *The Youth*

⁴ National Bureau of Statistics, 2008, 264.

⁵ See V. P. Diejomaoh, *Accelerating youth employment creation in Nigerian: the challenge of sustained implementation*. Paper presented at the 53rd Annual Conference of the Nigerian Economic Society, Abuja, 2012.

Employment Crisis Time for Action. In a similar vein, the World Economic Forum addressed this theme with particular reference to an earlier report by the African Progress Panel⁶.

Also, the General Conference held by the African Development Bank in 2012 was devoted to the special theme of Youth Employment based on the 4th *African Economic Outlook 2012 Report* jointly published by the African Development Bank, the Development Centre of the Organization of Economic Cooperation and Development, the United Nations Development Programme, and the United Nations Economic Commission for Africa.

The United Nations Department of Economic and Social Affairs has equally prioritized the Youth Employment Challenge by devoting its 5th World Youth Report 2012 on Youth Employment, highlighting youth perspectives on the challenge and crisis, while the United Nations Department of Economic and Social Affairs adopted a resolution targeting youth unemployment as a priority area⁷.

3. The Public Policy Response

Summarizing the intolerable nature of this challenge, Diejomaoh emphasizes that the time has come for “action on jobs, justice and equity. It is time to accelerate youth empowerment, and it is time to incorporate youth perspectives into policies, programmes and projects for youth employment and empowerment in general”⁸. Nevertheless, the point is that in Nigeria, there is no shortage of public policy measures that are put in place now and then to reduce or curtail the increase in unemployment, among the population, chiefly among the youth. The issue is that – as Diejomaoh and others have pointed out – policies must be seen through, evaluated and assessed, and their impact determined so as to chart the next line of action.

That said, one might note that policies are either poorly conceived, or do not take into account the peculiarities of the target population of beneficiaries. In fact, it is disconcerting that more often than not, public policies have not been made with either a clear knowledge of the nature of the challenges facing the targeted beneficiaries or, the concerned

⁶ Africa Progress Panel, *Africa Progress Report: 2012 Jobs Justice and Equity Seizing Opportunities in times of Global Change*, 2012.

⁷ These reports are reviewed in V. P. Diejomaoh, *op. cit.*

⁸ *Ibid.*

population is hardly part of the decision on how to address the unemployment problem. Equally worrisome is the evidence that job creation programmes are usually devised generally as stand-alone initiatives, independent from one another, and from other public policies concerning macro-economic management.

In the past 3 decades or so, several job creation strategies have been introduced, which did not live up to the people expectations, and have generally made only minor impact on the unemployment challenge. A reference to a few of such policies is appropriate, if only to draw attention to the inherent disconnect between the challenge and public policy approaches, for redress. According to Umo, no less than 40 programmes had been created at the federal level during the past 3 decades, to overcome the problem of employment and poverty, particularly among the youth⁹.

The National Directorate of Employment (NDE) was established in the early 1980s to provide training, apprenticeship and management development skills for entrepreneurs. An average of about 108,000 people joined the NDE's programmes annually, which meant that the body would not have directly created more than 3 million over the 26 years of its existence! Another Programme, the National Poverty Eradication Programme (NAPEP) was set up in 2001 to cope with mass poverty. The Programme supervised some 22 poverty schemes. No independent assessment of its impact in the fight against poverty exists and – as Umo concludes – NAPEP did not have any perceptible impact in the fight against mass poverty in the 12 years of its existence. The fact that poverty and unemployment have not been abated further upholds this argument.

Also, as Umo observes, the fact that several such programmes and schemes “operated as independent bodies, whereas they should have logical interface with other macroeconomic policies so as to maximize returns” underscores the little effect of their possible impact. Indeed, and without prejudice to the creation of several – if ineffective – strategies, Nigeria's allocation to poverty reduction has never been more than 8% of GDP, that was the case in the 1970s. In the following years, while the population has increased, the share of allocation to poverty reduction has been declining.

⁹ J. U. Umo, *op. cit.*

3. Conclusion

Youth unemployment and poverty has been rising, despite an array of public policies that proved ineffective. Poor or inadequate funding and the dysfunctional educational system, such as faulty curricular development and poor schooling on the part of students, render most graduates from secondary schools unemployable. Policies must be well-designed and based on broad consultation, including the youths and their leaders – potential employers – to define the key challenges and how to ameliorate them. Also, such policies and schemes must be periodically evaluated and improved when necessary so as to ensure their effectiveness in dealing with the drastic levels of unemployment, particularly amongst the youth. There is obviously considerable scope for more investment in strategic areas to create jobs specifically for the community of labour market participants.

The Quest for Inclusive Labour Market in Africa

Mesele Araya *

Although the pace of its economic performance has slowed down as a result of the global economic crisis and the Arab Spring, Africa has recently reported some degree of economic growth.

The data presented by the *African Economic Outlook* (AEO) in 2012¹ – on the occasion of which an annual conference was held in Arusha, Tanzania on 28 May 2012, in collaboration with the Africa Development Bank (AfDB), the United Nations Economic Commission for Africa (UNECA), the United Nations Development Programme (UNDP) and the OECD Development Centre – indicated that Africa achieved a growth rate of 3.4% in 2011, although down by 1.6% from 2010 for the reasons mentioned above.

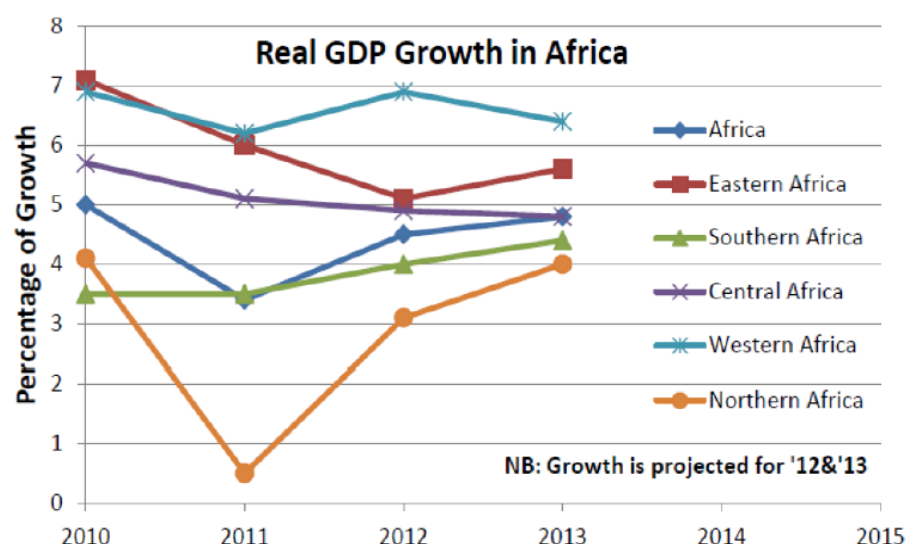
While waiting for the North African economy to recover from the effects of the Arab Spring and for sustained progress in all other regions, the continent is expected to register a growth rate of 4.5% in 2012 and 4.8% in 2013. For the sake of clarity, Table No. 1 presents the (projected) growth rates for Africa and its regional growth rates over four years.

Nevertheless, the African youths have not been contented and optimistic for the fact that such noticeable economic progress has not been accompanied by an increase in employment levels that help them integrate fully into the labour market.

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¹ www.africaneconomicoutlook.org (Last accessed 23 February 2012).

Table No. 1 – Real GDP Growth in Africa 2010 – 2013.



Source: *African Economic Outlook*, May 2012.

Indubitably, Africa has succeeded in generating a number of jobs over the last decade, yet they were insufficient to accommodate all the young jobseekers. In this sense, a study carried out by the ILO in 2011² pointed out that 73 million jobs were created between 2000 and 2008, but only 16 million were filled by young people aged between 15 and 24 years old. Furthermore, as signalled in the African Renewal in 2006³, Africa's economy should grow by 7% annually in order to halve the percentage of people living in poverty by 2015. But this is not likely to be achieved shortly as average real GDP growth has not exceeded 5% per annum in the continent (see Table No. 1).

Failing to keep up with the required growth rate is further evidenced by the poor levels of labour market outcomes. Data on employment from the *African Economic Outlook* of 2012 show that 22 out of 40 million young African jobseekers – chiefly women – have given up looking for a job. At present, youth makes up 60% of the unemployed people in the continent (see Table No. 2 for an overview of a number of countries); with this

² ILO, *Towards Decent Work in Sub-Saharan Africa - Monitoring MDG Employment Indicators*, Geneva, 2011a.

³ www.un.org (Last accessed 5 May 2012).

percentage clearly revealing that millions of young people in Africa have recently faced bleak employment opportunities.

Significantly, the issue of youth unemployment in Africa is going to remain a particular concern for national governments and their development partners over the coming decades. This is because given the current trends, the number of young people in the continent is “expected to double by 2045 that makes Africa’s labour force 1 billion strong by 2040”, which in turn may push many young Africans into the group defined as the working poor in the years to come. On the basis of these considerations, the African Economic Outlook Report warns that youth unemployment can be an emerging threat for both the economic growth itself and social cohesion in the long run.

Highly exacerbated by weak and inefficient labour market institutions – concerning both the formal and informal sectors – the nature of labour market performance in Africa is more complex to explain than in some other areas of the world⁴. Nevertheless, in order to make the level of labour market exclusion somewhat clear, it is imperative to go through the youth unemployment trends of some African countries over the past few years.

Nigeria’s case is an interesting one to start with. It is the most populated nation in Africa and – although presenting a growth rate of 6.9% in 2011 – it was not able to provide young workers with decent jobs, reporting an unemployment rate of 37.7% for this category of workers at the end of the year. The same happened in Sierra Leone and the Democratic Republic of Congo, where the unemployment rate for young people for the same time period was 60% and 70%, respectively. As for the latter, one might note that no youth employment policies have been devised yet, with the result that only 100 of 9000 graduates are able to find an occupation in the Congolese labour market every year.

Unemployment remains a crucial problem in Senegal too, especially for young people whose employment rate is 25% below that of the adults. In a similar vein, in Benin there are fewer job opportunities for the youth, and employers are reluctant to hire new entrants. This state of affairs results in unemployment rates among the youth being twice as high as their adult counterparts. Equally serious are the occupational trends in Burkina Faso, where the private sector is very poorly developed and structurally unable to absorb new jobseekers, thus young people account for 80% of the total percentage of the jobless.

⁴ www.un.org/africarenewal (Last accessed 24 April 2012).

As for Niger and Gabon, 40% and 30% of young first-time jobseekers respectively have inadequate qualifications for the labour market. In the urban areas of Togo, unemployment affected 21.4% of young people in 2011. The same percentage has been reported in Guinea Bissau, a country marked by both political turmoil and a mismatch between training for the youth and the employers' needs.

Youth unemployment is a complex issue also in the North African economies, and there is a common belief that it was one of the driving forces of the 2010/11 political upheaval, which caused the region's economic growth to plummet from 4.1% in 2010 to 0.5% in the following year (see Table No. 1 where the growth rate of the region was near to zero on the wake of the uprising).

In addition, the data released by the Gulf News⁵ in late August 2012 revealed that the real youth unemployment rate in this region is no less than 41% in the 15-24 age group. Unvaryingly, figures from the ILO in 2012 pointed out that young people in the region were three to four times more likely to be without a job than their adult counterparts. Youth unemployment and joblessness is in general a serious problem in Algeria, Tunisia, Egypt and Morocco, which results in a considerable dissatisfaction with the youths' lives.

Although the reasons may vary from one country to another for a number of differences in local labour market traditions, international institutions (the ILO and the AEO in 2012, and the World Bank in 2011, among others) signalled that the high level of youth unemployment is mainly the result of the persisting mismatch between education and labour market demands.

In consequence, alongside the lack of necessary skills in the globalized marketplace, another issue arises in that educated youths have less employment opportunities – even in the public sector – compared to their less educated peers in most North African countries.

A case in point is Morocco, as according to a survey produced by the AfDB in 2011⁶, 61% of young Moroccans with secondary education or higher education were unemployed, compared with 8% of uneducated youth in 2010. On the whole, nations of the region have been criticized repeatedly that they were unable to develop knowledge-based economies that would have generated value-added economic activities and growth-generating jobs⁷.

⁵ m.gulfnews.com (Last accessed 13 March 2012).

⁶ The African Development Bank Group in North Africa, Tunisia, 2011.

⁷ www.middle-east-online.com (Last accessed 3 February 2012).

Of course most countries in Eastern Africa have also been experiencing similar labour market problems. By way of example, youth unemployment in Kenya constitutes 70% of total unemployment, while in Tanzania – home to the annual conference mentioned above – youth unemployment is almost twice the national unemployment rate and affects urban youth and young women in particular. Ethiopia has also failed to generate satisfactory employment opportunities for the youth although making considerable progress towards some Millennium Development Goals (MDGs). In addition, with an estimated rate of youth unemployment equal to 42%, skill deficits cause many young Rwandans to become “working poor”.

The same holds true in the Southern region of the continent. To mention a few, South Africa has already failed to devise occupational strategies for its youth, with the employment rate for this group about 48%. Even in Mauritius – the continent’s most developed country in terms of social and human capital – the percentage of youth unemployment rate in 2011 amounted to 21.9%. Equally tough is the situation in Comoros, as here young people of working age are faced with widespread unemployment affecting some 45% of their age group. This kind of unemployment is said to be structural as involving all young people, whether skilled or not.

In Mozambique as well, the overall unemployment rate stands at 27% and many of the labour market entrants are forced into marginal jobs in the informal economy, with little prospect in terms of stability of employment. Further, over 50% of people in the 15-24 age group are jobless in Swaziland, and 63% of the urban young people are out of the labour market in Zambia.

Regretfully, what makes things worse is that a significant number of countries did not devise youth employment strategies and did not make any effort to become familiar with the manner in which young people look for a job, one typical example of these countries is São Tomé and Príncipe. This aspect basically implies that the current labour market situation and economic trends – alongside an unawareness of the needs of young people – might cause a dysfunctional labour market in Africa.

Table No. 2 – Recent Rate of Youth Unemployment for Selected African Countries.

Country	Youth Unemployment Rate (%)	Total Unemployment Rate (%)
Nigeria	37.7	23.9
South Africa	48	23.9
Egypt		11.8
Algeria	21.5	10
Botswana	-	17.6
Comoros	44.5	14.3
Congo Democratic Republic	70	-
Congo Republic	42	16
Djibouti	-	50
Gabon	30	16
Ghana	25	
Gambia	40	-
Guinea Besu	30	-
Mali	15.4	
Mauritania	59.9	-
Mauritius	21.9	7.9
Mozambique	-	27
Namibia	-	51.2
Sierra Leone	60	-
Rwanda	42	-
Sudan	22	11
Swaziland	50	-

Source: Author's own Elaboration from the African Economic Outlook Report⁸, May 2012.

Naturally, the effects of joblessness go much beyond those related to economic aspects or income poverty. This is largely to mean that unemployment in Africa – chiefly among young men – is a main driver of civil unrest, political turmoil, criminality and armed rebellion⁹.

A recent study conducted by the World Bank in 2011b¹⁰ reveals that one out of two young people who join rebel movements in Africa mention joblessness as their main drive. This state of play has led many to rename

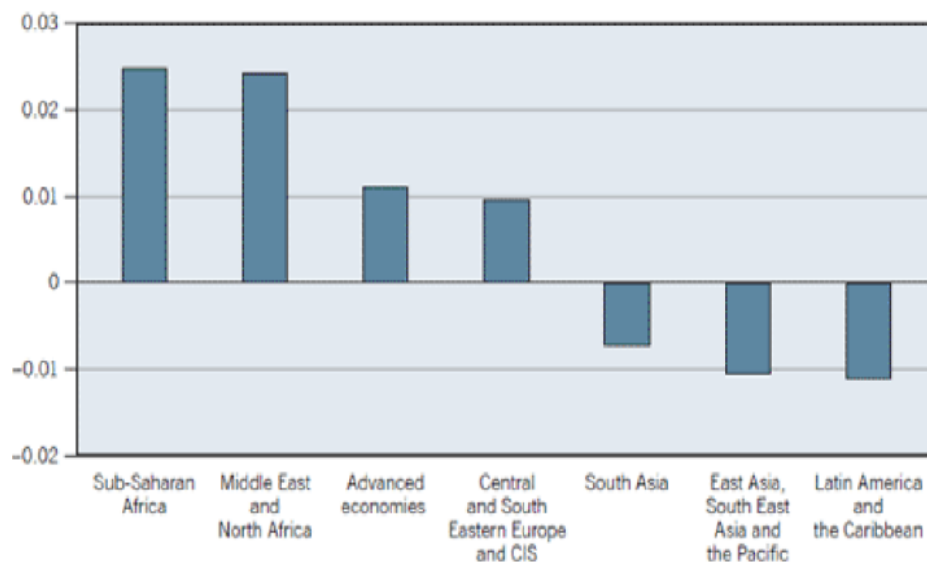
⁸ www.africaneconomicoutlook.org (Last accessed 4 May 2012).

⁹ www.voanews.com (Last accessed 12 March 2012).

¹⁰ World Bank, *World Development Report 2011: Conflict, Security, and Development*, Washington DC, 2011b.

youth unemployment as a “ticking-time bomb”, to reflect its dangerousness in terms of social and political instability. By the same token, in considering a recently issued Social Unrest Index, the ILO in 2012¹¹ has highlighted that 57 out of 106 countries experienced a risk of increased social unrest around the world in 2011 relative to 2010. In terms of regional distribution, Sub-Saharan Africa, the Middle East and North Africa were the regions that were marked the most by frequent social unrest (see Table No. 3 below). The table also shows that, on the contrary, regions which have experienced low levels of youth unemployment such as those in Latin America and the Caribbean and East Asia, South-East and the Pacific area have reported a steep decline in their social Unrest Index over the two years.

Table No. 3 – Change in the Risk of Social Unrest between 2010 and 2011 (Scale of 0 to 1).



Source: IILS Estimates based on Gallup World Poll Data, 2012.

Indeed, “youth unemployment in Africa is actually more than a security risk”¹² for the fact that millions of young jobseekers are discouraged and hopeless, aggravated by lack of sufficient information on the job market.

¹¹ www.ilo.org (Last accessed 23 April 2012).

¹² www.prb.org (Last accessed 2 June 2012).

The only option left for them is then to find their ways to other regions of the world and enter undeclared work.

Subsequently, many young Africans are currently forced to make risky decisions that may cost their lives as they move to other regions illegally.

The reality is very disappointing for the fact that only the “luckiest” among the illegal immigrants succeed in reaching the coastal areas of Greece, Italy, Spain, Portugal, Yemen, and Saudi Arabia, to name a few, yet many of them die in small sinking boats or in the deserts.

In this sense, the African Courier of 2009 reported that thousands of young Africans have perished in the last 15 years, in their attempt to reach Europe through the Sahara desert and then by boat across the sea. The New Generation Foundation for Human Rights and the Every One Group of 2011¹³ also disclosed that a number of illegal young African immigrants who were unable to pay money for smugglers to reach foreign countries were found dead, some of whom with stolen organs. Isn’t it then inhuman scenario and a huge cost for the African economies that basically triggered by the existing labour market exclusion in the continent?

It was based on these challenging facts that in his address at the AEO annual conference, the Vice-President of AfDB Prof. Mthuli Ncube stated that “the continent is experiencing jobless growth. That is an unacceptable reality on a continent with such an impressive pool of youth, talent and creativity.” Parallel to this, the annual Report of the *Outlook* underlined that “without urgent action to modernise their economies, African countries risk wasting the tremendous potential offered by their youth”. The implication is then so brief and direct that now is the time for Africa to turn its human capital into economic opportunity and prosperity by promoting inclusive labour market. If fully integrated into the labour market, the current “youth bulge” in Africa could be a window of opportunity, too far from a threat, with possibilities to create “economic miracles”, just similar to that of “Asian economic tigers”. This hope is not groundless, but the result of recent experience and empirical studies.

Estimates by the ILO show that halving the global rate of youth unemployment could bring \$2,200 to \$3,500 billion to the world economy, of which 20 per cent would be a return for the sub-Saharan Africa economies.

¹³ Edition.cnn.com (Last accessed 3 February 2012).

In the same way, in 2008¹⁴ the World Bank states that ensuring inclusive labour market is a “precondition for Africa’s poverty eradication, sustainable development, and peace; and in countries emerging from conflict, access to employment for youth is integral to peace-building processes.”

In this sense, generating sufficient jobs for the youth by prioritising inclusive labour market should be at the top of the agenda for the African countries if the wish for Africa is really to promote equitable and efficiency-driven economies in line with other major concerns.

In an effort to promote inclusive labour market for the African youth, no single policy can offer the solution as the issue – by its own nature – is a multi-faceted one.

However, the 2012 African Economic Outlook report provides some useful insights in this respect. In considering a number of responses, the Outlook points out that as the public sector can no longer absorb new labour market entrants, actions should be taken at large-scale in a synergic fashion among sectors. To this aim, launching sound macroeconomic policies and labour market reforms based on indigenous backgrounds-along with enhanced social dialogue and political commitment-might help African governments to promote job creation in the private sector and enhance self-employability of the youths.

Additionally and, more importantly, many scholars also argue that since in most countries shortcomings in education to equip the youth with the required competency and entrepreneurial skills have been blamed for such a considerable labour market failure, rethinking the school-to-work transition path of youth could be a fundamental approach in tackling the issue of youth unemployment at its root.

In a nutshell, this commentary urges for the African governments and their development partners that there might be a good opportunity to give priority to the youth employment issue and review their policy agenda towards promoting inclusive labour market and equitable growth for all. The alternative scenario is otherwise a dysfunctional labour market leading to increased levels of political instability and less social cohesion, as recently evidenced by the Arab Spring in North Africa.

¹⁴ The World Bank, *Youth and Unemployment in Africa: the Potential, the Problem, the Promise Report*, December 2008.

***Manual on Collective Bargaining
and Dispute Resolution in the Public Service***
**by the Sectoral Activities Department
of the International Labour Office. A Review**

Louise Floyd *

The Manual on Collective Bargaining and Dispute Resolution in the Public Service (from here on *The Manual*) was produced by the International Labour Organisation's Sectoral Activities Department to put forward ideas – consistent with ILO practices – that may be used by unions and governments for preventing and resolving disputes in public service.

The Manual correctly identifies that governments, throughout the world, are important employers, so the manner in which public sector disputes are resolved and the extent to which positive workplace relations are built and maintained, is important to both the government and the public.

The austerity measures that have been brought about after the global financial crisis have seen conflict and changes within the civil services of various countries worldwide. The UK government is dramatically changing to a procurement-based service; there have been many redundancies in different state jurisdictions throughout Australia; and in other lands, such as Hong Kong, the emergence of China is seeing issues arise about the politicisation of the public sector workforce. For these reasons, it is this reviewer's opinion that *The Manual* is a timely piece of work and raises issues that should prove useful to both academics and practitioners in the public sector.

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The present review refers to Sectoral Activities Department of the International Labour Office. *Manual on Collective Bargaining and Dispute Resolution in the Public Service*, ILO, Geneva, 2011. 169 pp. ISBN 978 92 2 125790 5.

Importantly, *The Manual* acknowledges that the notion of public service differs from jurisdiction to jurisdiction. In some areas, it is closely linked to employment by government, while in other areas it refers to the provision of public services, regardless of whether the model involves public-private partnerships or direct employment by government. In a similar vein, the culture and government structure of different countries influences workplace relations in the public sector. For all these reasons, *The Manual* does not advocate one hard and fast system of dispute resolution, but rather makes suggestions (“a common platform” as it were – pages 2-3), which can be adapted as appropriate to different systems.

Keeping that flexibility in mind, some of the particular points made in *The Manual* are useful to point out. There are discussions about gender and collective bargaining; as well as vulnerable groups and how they can be included in bargaining processes (so as to address disability, or the problems stemming from being a migrant worker, for example). *The Manual* underscores the importance of capacity building (so that the parties involved in bargaining have the capacity to negotiate); codes of practice for bargaining are discussed; as are joint problem-solving approaches so that issues are resolved collaboratively between parties.

But the heart and soul of *The Manual* is about collective bargaining in the public sector workplace. And to that end, *The Manual* traverses topics ranging from: social dialogue as a starting point; adequate intervention; bargaining approaches and models; promoting model workplaces; active facilitation of negotiations; duty to bargain in good faith; clarity and structure of agreements; dispute resolution mechanisms; arbitration; industrial action; and the need for ongoing review and revitalisation of systems.

No one particular country is singled out as the model; however, the reviewer found the analysis of some aspects of Canadian public sector bargaining to be particularly interesting. As the Canadian Public Service Labour Relations Act acknowledges:

“Effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest [...]”

The Manual builds on work of for example Professor Clive Thompson from the University of New South Wales as well as working papers like, Working Paper 277, “Dispute prevention and resolution in public services labour relations: Good policy and practice”. As the emphasis in collective bargaining changes from manufacturing to public sector activities, *The Manual* plays an important role in scholarship. It intends to promote the

implementation of the ILO's Labour Relations (Public Service) Convention No 151 (1978). One hopes it succeeds in that quest.

***The International Handbook of Labour
Unions: Responses to Neo-Liberalism***
**by Gregor Gall, Adrian Wilkinson
and Richard Hurd.**
A Review

Christopher Leggett *

The International Handbook of Labour Union: Responses to Neo-Liberalism (from here on *The Handbook*) opens with a reference by its editors (Gall *et al.*) to the 1999 protests against globalization in Seattle at the meeting of the World Trade Organization there as “a large scale conflagration”. More than just symbolically important as the size of the protest was, it was not a “conflagration”, no Molotov cocktails were thrown at the police, although the *New York Times* erroneously reported that some were. Is the malapropism of “conflagration” for “confrontation” caused by editorial zeal? Possibly, but the contributions to the *Handbook* though committed to challenging the neo-liberal agenda take measured and analytical approaches to its assessment and the responses of labour unions to it. The choice of “handbook” is apposite in that each country chapter offers substantial factual information in addition to analyses and assessments of labour unions’ responses to neo-liberalism.

The Handbook applies its editors’ “rough categorisation” of labour unions’ responses to neo-liberalism of “agreement and support”, “qualified and conditional support”, “social democratic opposition” and “socialist resistance” to labour unions in the nation states of Argentina (Atzeni and

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Ghigliani), Australia (Peetz and Bailey), the UK (McIlroy), China (Cooke), France (Contrepolis), Germany (Dribbusch and Schulen), India (Noronha and Beale), Russia (Ashwin), South Korea (Chang), and the USA (Bruno and Trumka). Their rationale for inviting national contributions is that in spite of globalization “neo-liberalism is not predicated upon the decline of the power and authority of the nation state, but rather the use of the nation state by internal and external forces to promote and implement neo-liberalism for international institutions like the World Bank, the International Monetary Fund, the World Trade Organization et al., dating from the Bretton Woods era, as advocates and agents for neo-liberalism are insufficient in themselves to effectively promulgate neo-liberalism”. The residual distinctiveness of each nation state’s relation to neo-liberalism gives rise to nomenclatures that include Stalinist neo-liberalism (Australia), Peronism (Argentina), Rhenish capitalism (Germany) and market bolshevism (Russia).

Gall *et al.* commit *The Handbook* to union resistance to neo-liberalism but also to union support for and acquiescence in it. In addition to the international institutions as agents for neo-liberalism, they position human resource management as its agency in the workplace. In summary, they regard neo-liberalism as a means of refashioning and reconfiguring capitalism after the long boom post World War II. It is not an environment conducive to successful labour unionism. Consequently, and the thread running through the contributions to *The Handbook* and summarised in the final chapter (Turner) is that if labour unions are to revitalise themselves after the thirty or so years of neo-liberal onslaught, they have to engage in and with a wider spectrum of progressive social reformers than continue to pursue traditional “go-it-alone” strategies.

What then have been the responses in the countries selected for *The Handbook*? American unions are not equipped to resist neo-liberalism because they are basically conservative, fractured, differently affected and at different times by neo-liberalism, dependent on the Democratic Party, and ill-prepared for the challenge of the neo-liberal agenda. Argentinean unions have resisted neo-liberal policies but their alliances within the labour movement have proved temporary and devoid of unity. British unions have tended “to accept neo-liberalism in practice”, and in Australia “There is no sign at this point of a radical oppositional response to the Labour government’s revisionist neo-liberalism”. In contrast, French labour unions have maintained the values ‘that underlie activist involvement and political demands’ and sought to strengthen their ‘subversive institution’ function by externalising conflicts, and the

potential for German unions is towards a democratisation beyond the established forms of corporatist co-determination.

The All-China Federation of Trade Unions “believes that marketization and globalization are good for the Chinese economy” but urge for more protective labour legislation, and the Indian TUC’s response to neo-liberalism is equally ambivalent, varying between “a mutual gains position and support for a regulated labour market”. Russian unions’ policy is labelled “failed social democratic opposition”. The Federation of Korean Trade Unions began to challenge neo-liberalism in 2001, something the more militant Korean Confederation of Trade Unions had been doing for much longer, but its militancy largely excludes the bulk of the workforce that includes irregular employees, women and migrant workers.

In addition to the editors’ introduction, “Labour unionism and neo-liberalism”, there are five non-national contributions. Kelly examines the elusive concept of union power, and concludes that the prospects of a unionism centred on collective bargaining resistance to neo-liberalism look poor but better where unions change the way people think about the economy, markets and government and are mobilised into collective action and protest. Dibben and Wood bring together the thinking on the relationship between social action and structure, accepting that there is no “magic bullet” for union revival, but there are opportunities for them to represent core workers and the more vulnerable workers by challenging governments and powerful institutions. Fletcher identifies some of the challenges facing social movement unionism, with examples from the “global south”, including South Africa, South Korea and Argentina. Munck asks who the subjects of union activity are, the main issues they face, and how these can best be addressed. In short, his answers are that the working class is fragmented and augmented by the entry of the Indian and Chinese working masses, that its main task is the (re)regulation of global capital, and that it will need to go global to achieve this. Finally, Turner while acknowledging that defensive battles by unions can contribute to reform but if the dominance of neo-liberal governance is to be undermined unions will have to join “broad local, national and global movements”.

Two chapters address neo-liberalism in the USA and Turner’s, although generalising the labour movement draws mainly on the US experience. The AFL-CIO President, Richard Trumka notes the irony of the seldom use of “neo-liberal” in a country that is “among the most neo-liberal societies in the world”. He reserves “neo-liberalism” for the ideology of free markets, an ideology that “bears little resemblance to how

governments and markets actually interact in modern societies”, and uses “Wall Street Agenda” as more appropriate for the dominant US policies.

The Handbook is necessarily constrained in its geo-political scope by the publishing requirements and the availability of research on the editors’ selection of, and the number of, nations. Because the editors put great store by the relationship between the state and neo-liberalism, it would be of interest to the reader if *The Handbook* included labour unions’ responses to neo-liberalism in Japan in Asia, Canada or Mexico in North America, Brazil in South America, Nigeria in Africa and Greece, Spain or Italy in Europe, not to mention several Middle East countries. The selection of some of these countries would enable the regional dimension, such as the European Union, the Association of Southeast Asian Nations and the North American Free Trade Area, of the relationships between unions and neo-liberalism to be explored. But even without these *The Handbook* is an informative, coherent, and useful resource in its own right.

***International & Comparative Employment
Relations: Globalisation and Change***
**by Greg J. Bamber, Russell D. Lansbury
and Nick Wailes.**
A Review

Anne Junor*

This valuable book is edited by three Australian academics, all of international standing, two of whom are perceived as highly respected “elders” of the employment relations discipline. As indicated in the book endorsements by Peter Auer (ILO) and Sarosh Kuruvilla (Cornell), and the forward by Thomas Kochan, this is an authoritative text, endorsed by top international academics in the field. Similar to earlier editions it will be widely used in the teaching of international and comparative industrial and employment relations. The chapter contributors include respected authorities on national employment relations systems, including Professor C.S. Venkata Ratnam, co-author of the chapter on India, who died before the book reached the bookshops.

Whereas the fourth edition, published in 2004, was subtitled “Globalisation and the Developed Market Economies” this fifth edition, published seven years later, is subtitled “Globalisation and Change”, and has a geographically wider and more dynamic focus. The introductory chapter begins with a discussion of contextual changes signalled or wrought by the post-2008 global financial crisis – changes that give a new

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urgency to the central problem of employment relations – the problem of securing living standards within and across societies whilst safeguarding productive capacity and economic stability. While the book's 2004 edition covered four Anglophone countries (the UK, USA, and Australia), four European countries (Italy, France, Germany and Sweden), and two East Asian OECD countries (Japan and Korea), the balance in the fifth edition shifts more to Asia, with the addition of chapters on China and India. Denmark, as an exponent of flexicurity, is substituted for Sweden. The same four Anglophone countries as in 2004 are now characterised as instances of liberal market economies (LMEs), while Germany, Denmark and Japan are chosen to represent Coordinated Market Economies (CMEs), with Italy and Korea which do not fit into either category. This typology is cross-cut with one in which the five European “developed economies” are contrasted with Japan and South Korea (“Asian developed economies”) and China and India (“Asian emerging economies”). With evidence on the one hand of globalisation and on the other of an almost uniform trend to employment relations decentralisation and low union density, the country analyses are based on the now-entrenched orthodoxy of blending industrial relations regulation and firm-level human resource management strategy/practice.

The LME/CME typology emerges from the editors' use of a comparative framework derived from the Varieties of Capitalism (VoC) approach of Hall and Soskice¹. This approach seems appropriate, as it brings together industrial relations, vocational training and education, corporate governance, inter-firm relations and intra-firm employee relations (p. 19). It is offered as a resolution of the convergence/divergence debate, long central to international comparative studies. In their introductory overview, the editors identify difficulties with the use of Kerr's² notion of pluralistic industrialism to resolve this debate. Kerr's attempted resolution used the notion of underlying convergence, shaped by the logic of industrialisation, overlaid or counteracted by a diversity of national institutional arrangements. As the editors indicate, it begged the question of which model of industrialism was the basis or end-point of convergence, and the further question of the relevance of the very notion of industrialism, given the shift nearly

¹ P. Hall, D. Soskice (eds.), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage*. Oxford University Press, Oxford, 2001.

² C. Kerr, *The Future of Industrial Societies: Convergence or Continuing Diversity?* Harvard University Press, Cambridge, MA, 1983.

everywhere to service work. The need to take account of diversity had led all three editors to a recent research focus on industry-level, rather than country-level international comparisons³. A further issue faced by the editors and authors is whether the term “diversity” really captures the apparently growing duality or polarisation, within and between countries and regions, of “core” and “peripheral” labour markets. Moreover, as illustrated by the dominant debate over flexibility, a key question in the context of globalisation, is “the extent to which the same set of institutions can produce different outcomes over time” (p. 18).

The editors’ advocacy of a firm-centred VoC approach to working through these questions means that the coordination problems faced by firms in market economies become the central problematic. Rubery⁴ however points out some basic weaknesses in the VoC approach, including its tendency to a functionalist assumption that national or international regulatory institutions neatly supplement the coordinating role of the market. Rubery points out, for example, that there is much that cannot be explained by the basic LME/CME distinction. For a large employee group – namely women – the greatest national divergence in patterns of labour market participation and occupational distribution is not between LMEs and CMEs, but within CME economies. Rubery argues that (like the logic of industrialism literature before it) the VoC literature fails to take adequate account of the rise of service firms. She also argues that an over-simplistic conceptualisation of the state and of state support for the business community fails to account for the contested and contradictory nature and impact of state action. There are “contradictions” in the various roles of the state in regulating production, welfare and reproduction (family, education), and thus the result may not be the institutional stability assumed in the VoC literature. Instead, instabilities and certain incoherence may arise from tensions and slippages between the systems regulating labour markets, training, welfare and care. The poor articulation of these systems may, for example, legitimate relationships among gender, skill and labour market segmentation. In

³ G. J. Bamber, J. H. Gittell, T. A. Kochan, A. von Nordenflycht, *Up in the Air: How Airlines can Improve Performance by Engaging their Employees*, Cornell University Press, Ithaca, 2009. N. Wailes, R. Lansbury, A. Kirsch, *Globalisation and Varieties of Employment Relations: An International Study of the Automotive Assembly Industry*, *Labour and Industry* 20, No. 1, 2009, 89-106.

⁴ J. Rubery, *How Gendering the Varieties of Capitalism Requires a Wider Lens*, *Social Politics* 16, No. 2, 2009, 192-203.

place of the VoC approach, Rubery argues for comparative studies based on dynamic national systems models, integrating different classifications of countries based on different parts of the socio-economic framework (firms, welfare, education, families)⁵.

One useful suggestion then for a future sixth edition would be to widen the analytical framework beyond the firm-level coordination problem, just as in earlier editions it was necessary to widen the perspective beyond regulatory institutions by looking at firm-level management issues. For example, the problem of integrating international labour mobility into national or regional systems of labour market and welfare regulation is of growing importance, as illustrated by a recent Canadian study of the generation of social exclusion⁶. The introduction to the current book includes a useful discussion of national employment relations responses to globalisation (using institutionalist and business systems analyses) (pp. 14-18). It also covers international employment relations initiatives such as International Framework Agreements and Global Union Federations; identifies the emerging role of labour-oriented NGOs, and briefly discusses the role of the ILO, international labour standards and the decent work agenda (pp. 25-33). The US chapter, by Katz and Colvin, contains an important comment:

“The problem confronting labour movements all over the globe is that they need cross-national unionism, but their efforts to create such unionism face substantial barriers. These barriers include divergent interests (i.e. each labour movement wants the employment) and national differences in language, culture, law and union structure” (p. 81).

Another suggestion for the sixth edition would thus be the inclusion of a section containing chapters on international organisational and government structures, and on international industries and union mobilisation, such as IndustriALL, and telecommunications, education, media and public service internationals.

The fifth edition already has many strengths. The overall thematic approach outlined above makes each of the individual country chapters

⁵ G. Bosch, S. Lehnendorff, S. and J. Rubery, *European Employment Models in Flux: A Comparison of Institutional Change in Nine European Countries*, Basingstoke, Palgrave, 2009; J. Rubery, *op. cit.*

⁶ M. Gellatly, J. Grundy, K. Mirchandani, M. A. Perry, and M. Thomas, “Modernising” Employment Standards? *Administrative Efficiency, Market Regulation, and the Production of the Illegitimate Claimant in Ontario, Canada*, *The Economic and Labour Relations Review* 22, No. 2, 2011, 81-106.

sufficiently comparable to allow students to draw patterns of comparison and contrast. Yet the framework is loose enough to allow chapter authors to use their own structures to explain very specific institutional issues. As a result, the template is not formulaic: each chapter unfolds according to its own logic. At the most superficial level, there can be little uniformity of approach in the face of major country differences. Denmark, for example, has a population of 5.5 million, a 78% workforce participation rate, and as argued in the chapter by Madsen, Due and Andersen (pp. 236-238), comprehensive social security support for labour market transitions, a 64% unionisation rate and a 83% collective agreement coverage rate. China has a population of 1.3 billion, a 58% participation rate in the formal labour market, a social security system described in the chapter by Cooke (p. 307) as “rudimentary”, over 90% union density with little bargaining power in the public and formal sectors and low union density in the private and informal sector. Its emerging regional or industry-based collective agreements, often very broad-based, are made between unions and employers without real negotiation or employee participation (Cooke, pp. 319-320). India, on the other hand, where freedom of association is enshrined in the Constitution, nevertheless has a union density of 7% (understandable when 60% of the population are dependent on agriculture and the majority of workers are in the informal rural sector) (Venkata Ratnam and Verma, pp. 330, 345). Whilst industrial settlements in a range of jurisdictions are binding, in some cases for up to ten years, there are few enforcement mechanisms for collective agreements. These seem to involve rather chaotic processes of individual worker ratification and non-exclusive and competing coverage within workplaces, both in terms of bargaining agent recognition and in terms of application. As a result 2 % of workers overall and 30 % in the formal sector are covered by collective agreements (Venkata Ratnam and Verma, pp. 336-343).

Each chapter lends itself to an exploration of the origins of similarities and differences through an interesting account of historical, political, legal and economic backgrounds. These are presented in different ways, whether through an explicitly sub-headed section, or woven through the exposition of issues. As in earlier editions, each chapter ends with a useful chronological table, in some cases including references to events additional to those outlined in the text, whose significance the keen student might follow up. All country chapters set out the industrial parties or actors, and the role of the state as regulator, employer and industrial party. In the CME and Asian chapters, lucid expositions of structures take on a particular importance. For example in the chapter on Germany, Anglophone readers will be interested both in the operation of collective

bargaining and co-determination, and in the remaining juridification of enforcement, through case law based on judgments in local, regional and national labour courts (Keller and Kirsch, pp. 202, 2004). Just under 50% of private sector employees in former West Germany and 40% in former East Germany are covered by Works Councils, whose rights range from weak (access to information and documentation and oversight of legal compliance) through moderate (right to make recommendations and be consulted) to strong (right of veto over personnel decisions; right to negotiate social matters such as hours and rosters). Whilst workplace level co-determination is formally separate from industry level collective bargaining, unions provide training and support for activists on works councils (Keller and Kirsch, pp. 206, 207).

The accounts of how different countries have approached the widespread trend to decentralisation of bargaining level provide fertile ground for theoretically satisfying comparative studies and also for exploring important strategic and public policy questions. When does decentralism contribute to economic stabilisation, and when is it destabilising? What patterns of redistribution have eventuated between wages and profits, and which workers and/or regions have been positively and adversely affected? When does complexity provide checks and balances and when does it result in incoherence? Writing on Italy, Baccaro and Puglinano (pp. 151-155) describe the chequered history, between 1992 and 2007, of attempts at national-level concertation of company-level bargaining. Issues explicitly mentioned in national-level agreements were bargained locally by agents that were at the same time union bodies and worker representative structures. The authors argue that national-level coordination failed, not for structural reasons, but because of strategy conflicts among the three peak union bodies. In 1993 these bodies worked with the national government on stabilisation measures including abolition of wage indexation and nation-wide ceilings on the wage outcomes of industry- and company-level bargaining, and in 1995 they secured major pension reforms in return. In the tripartite pacts of 1996 and 1998 they accepted flexible and contingent labour practices in exchange for social policy consultation and devolved decision-making. While the consensus frayed in the early 2000s, national-level agreements continued with or without the support of the most left-leaning peak union body. Baccaro and Puglinano (p. 155) argue that this helped stabilise the economy and allowed Italy to join the euro currency, albeit at the expense of workers' trust in unions. In the washout from the current crisis, further evaluation will undoubtedly appear in the next edition.

The guiding theme of firms' problems of non-market coordination gives the book an appeal to students interested in management approaches to employment relations. Other students will be interested primarily in worker perspectives, whether on substantive outcome (interest) questions such as standards of living, equitable distributions, and decent work, or on process (rights) questions such as freedom of association, representation, voice, participation, mobilisation and labour standards enforcement. Each of the country chapters ends with a discussion of key debates current at the time of writing. In the UK chapter, Marchington, Waddington and Timming briefly raise fairness, pay equity, gender equality, discrimination against immigrant workers and research on bullying/harassment. They discuss the UK's belated 1997 adoption of the EU Social Chapter, its clash with voluntarism and its implications in terms of workplace participation and OHS, work/life provisions and the regulation of part-time and fixed-term employment (pp. 52-56). As one would expect from the first of these authors, there is also a discussion of the fragmentation of employment relations that has resulted from networking and the blurring of organisational boundaries through outsourcing (pp. 56).

Insecure work, and its relationship to the "decent work" agenda, emerge more centrally as a key concern in several of the country chapters. Suzuki and Kubo, for example, argue that in Japan there is now an unbridgeable "cleavage" between the one-third of jobs complying with the social norm of lifetime jobs, still requiring very long hours, and the other two-thirds of jobs that are "atypical", whether part-time, temporary, dispatched or sub-contracted (Suzuki and Kubo, pp. 259, 267-272). Overwhelmingly, employers say that they use "atypical" work to reduce labour costs. The 1986 legislation allowed the use of dispatched workers in technical jobs and specific occupations; a 1999 amendment exempted only manufacturing and construction, and in 2004 agency temporary work was legalised in manufacturing (pp. 267-268). Regulation of the duration of temporary employment is weak, and wages paid by small subcontracting firms are much reduced. Japanese of South American extraction are concentrated in such work (p. 268), and the proportion of women in all forms of non-regular work in Japan rose from 34.3% to 53.9% between 1987 and 2006 (p. 272). In South Korea too, where the majority of employment is in the pace-setting and relatively highly unionised public sector, labour market polarisation has also become a major issue since the Asian financial crisis of 1997 (Lee, pp. 293, 297). Large firms responded to the crisis by significant downsizing and outsourcing: the proportion of the labour force employed in firms of over 500 fell from 17.2% to 8.7% between 1993 and 2005 (p. 297). Lee paints an all too familiar picture of

increased labour market segmentation, wage dispersion whereby in 2006 non-standard workers earned half the monthly rate of regular workers, and mobility barriers between primary and secondary labour market jobs (p. 298). Without mincing words, Lee attributes these trends not only to de-industrialisation and external shocks but to government-led neo-liberal reforms, large firms “exploitative profit maximisation”, and self-protective “business unionism” strategies to exclude the majority of unorganised labour (p. 299). Lee sees these developments as the outcome of South Korea’s “compressed development”, from restructuring, through democratisation to economic crisis.

Finally, a thread running through a number of the chapters is the role of the political complexion of governments, in the face of the pervasive influence of neo-liberalism. In France, for example, unions have pressed for industrial legislation during the terms of left-wing governments. Collective bargaining has been shaped by legislation, for example the 1982 Mitterrand laws, and some governments subsequently generalised bargaining outcomes through legislation (Goetschy and Jobert, pp. 180-181). While governments of both left and right have legislated measures to reduce unemployment, it was the leftist Jospin government that in 1998 and 2000 introduced the strongly-contested Aubry law for the 35-hour week. The legislation required that the shorter hours be implemented through bargaining at sector and enterprise level, and gave a “decisive boost” to collective agreement-making (p. 182). Legislation might also unpick bargaining gains: the right-wing Chirac government legislated in 2008 to allow for renegotiation of the 35-hour week at plant level, in what the unions saw as a betrayal, providing for “a gradual dismantling of an important part of the French labour code in the area of work time organisation, achieved without the government’s prior consultation with the social partners” (Goetschy and Jobert, p. 192-3). Whilst governments across the political spectrum have maintained training policies, it was a Socialist government that after 1988 introduced the “minimum integration income”, and the 1997 government of Jospin that introduced the Jobs for Young People program, providing heavy subsidies to ensure five years of full-time contracted work at no less than the national minimum wage in socially useful areas (pp. 181-2).

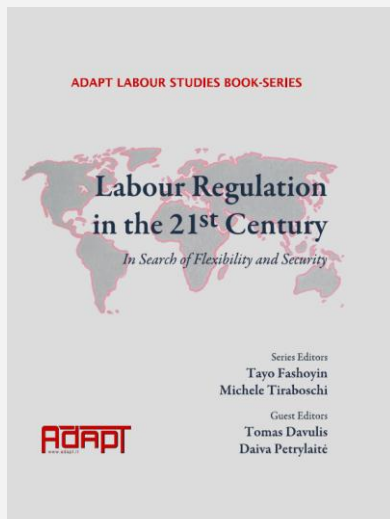
Hopefully, this review has suggested that the book provides a wealth of analysis, as well as of detail prompting further thought. Unlike the third and fourth editions of the book, the fifth edition does not contain a concluding chapter in which the editors draw out key themes and issues. Perhaps this was in order to make way for the two additional country chapters. Perhaps it was for teaching reasons, in order to place the onus

back on the reader to think through the themes and synthesise the issues. This reader for one, enjoyed reading the book, finding more to think about each time a chapter was revisited, and emerging after several readings with still more to mull over.

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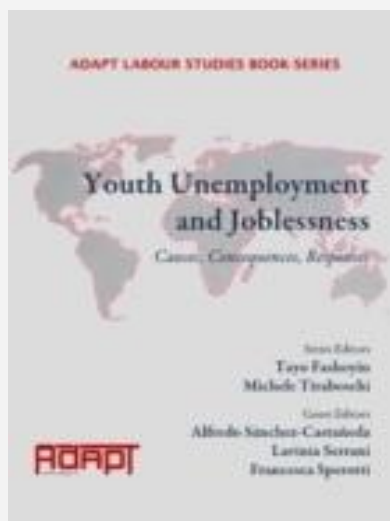


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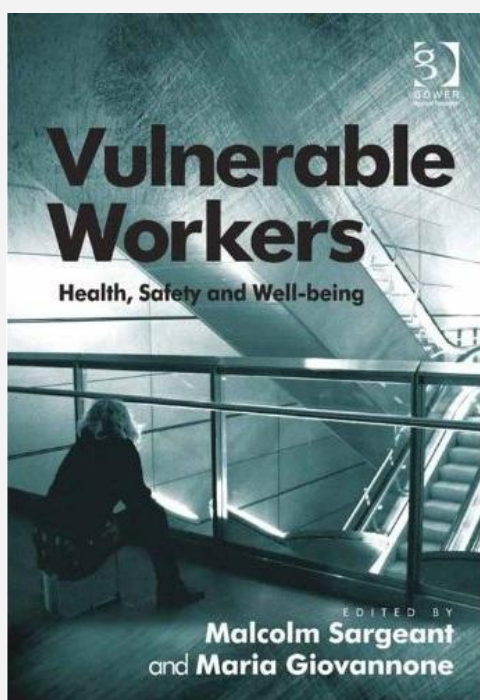


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