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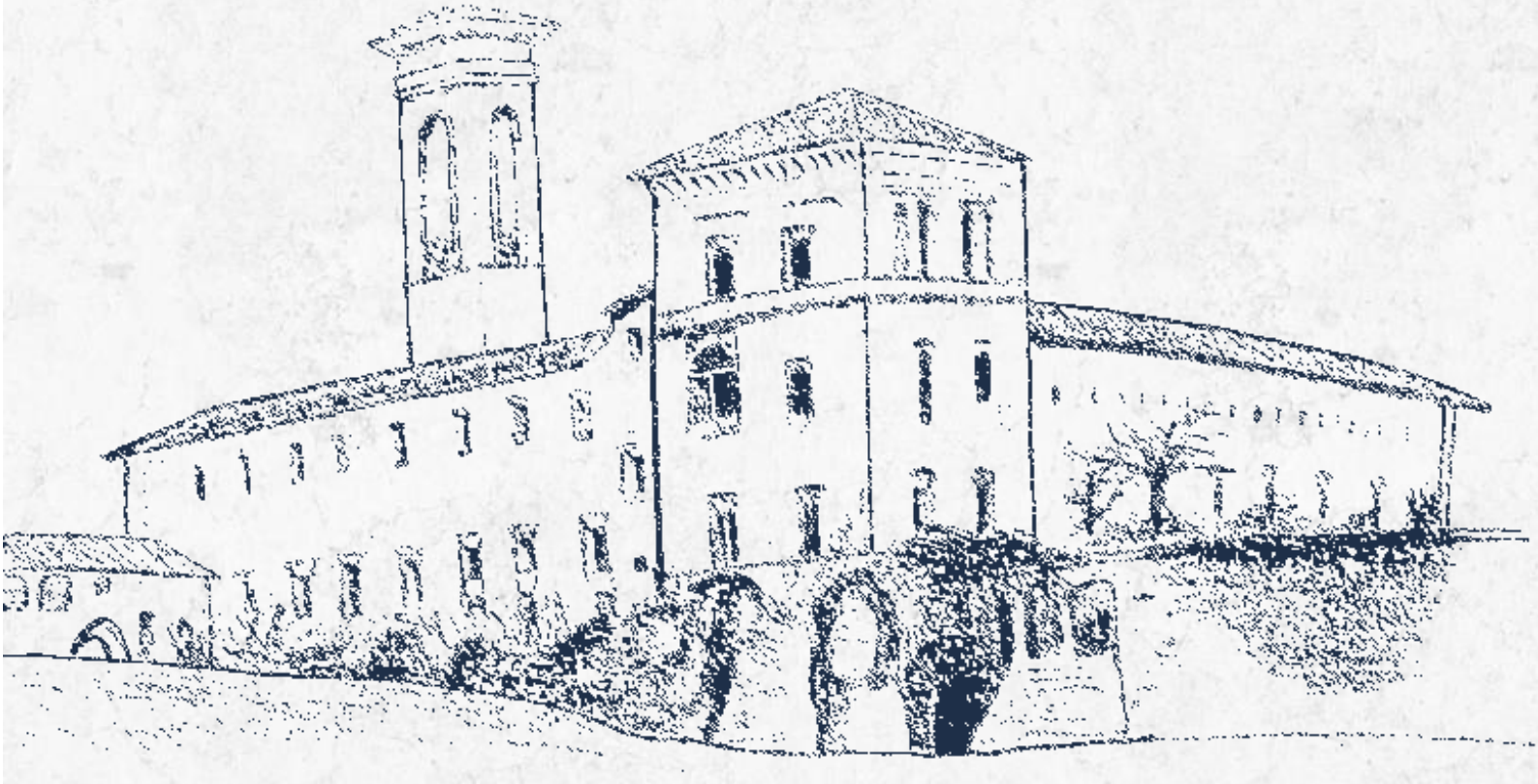

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Do Workers Want Security? Protection Against Dismissal in the 21st Century

Zoltán Petrovics *

Abstract. Job loss has a significant impact on individuals, irrespective of the legal classification of their employment. These circumstances result in the worker/employee[1] being deprived of their primary source of income, removing them from a fundamental aspect of life, endangering their possession of essential material, intellectual resources and daily livelihood. Today, most workers look for security and stability in their employment. However, these changes in the world of work are increasingly undermining the stability of employment relationships. This paper examines the potential theoretical basis for the regulation of protection against the termination of employment relationships by the employer. It is my contention that the right to protection against arbitrary termination should originate from the right to work and human dignity. To ensure all workers' protection, it is necessary to establish a framework grounded in human rights.

Keywords: *Dismissal; Job security; Employment relationship; Fundamental labour rights; Protection; Stability; Termination of employment*.

1. Introduction

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[1] In this study, the terms "worker" and "employee" are used synonymously.

It is challenging to ascertain others' aspirations. The most straightforward method is to inquire directly. However, in this instance, I will employ a theoretical approach to address the question in the title. I posit that the prevalent sentiment concerns the need for security among workers.

As Otto Kahn-Freund notes, the purpose of labour law is to rectify the imbalance in the bargaining power of the parties.[2] This can be achieved primarily through the provisions of labour law that protect employees. Nevertheless, it would be inaccurate to describe labour law as a set of rules solely designed to protect employees. To achieve a fair and balanced outcome, it is also necessary to consider the employers' interests. A similar approach should be taken considering the termination of employment's system. The primary issue is how labour law can reconcile the interests of the parties and rectify the imbalance of power between them when one party is no longer inclined to maintain the employment relationship. The termination of the employment relationship results in the loss of possession and enjoyment of basic material and intellectual assets for the employee, which may subsequently jeopardise their daily livelihood. In contrast, the employer is less likely to be affected. The consequences of termination may extend beyond the temporary vacancy of the position held by the departing employee, and in some instances, may even jeopardise the employer's continued existence. Clearly, the importance of retaining qualified personnel is becoming increasingly crucial in the contemporary era, and thus, employers value the stability of the employment relationship.

In the initial decades of the 21st century, several phenomena have emerged that accelerate the degradation of protection in traditional employment relationships and raise the need to expand protection in new employment relationships. These developments lead to two contradictory tendencies. On the one hand, they serve to expand the scope for managerial discretion on the employer's part. On the other, they seek to exert greater control over the exercise of that discretion. Despite their economic dependency, some workers remain outside the protective framework that safeguards against dismissal. Those in traditional employment relationships are also increasingly vulnerable. This is further reinforced by the sociological human ideal of the digital age: flexible, constantly on the move, seeking new challenges and not in need of those employment structures that 'lock them in'.

In the context of contemporary labour law, the capacity of regulation to respond effectively to the challenges posed by an increasingly competitive

[2] O. Kahn-Freund, *Labour and the Law*, Stevens and Sons, London, 1977, 6.

global economy is being subjected to persistent pressure.[3] Consequently, the current degree of job security may be diminished. In the context of economic crises, it is essential to reduce the regulations that protect workers and to have more flexible regulations regarding the termination of employment. Over the past five decades in Europe, beginning with the economic crisis of the 1970s, there has been a general tendency towards the freezing or gradual erosion of existing termination rules.[4] Since the 1980s, an increasing number of legal systems have sought to reduce the costs associated with termination of employment by either reducing the existing level of job security or by reducing the sanctions applicable to employers in the event of unlawful termination.[5] It appears that the "flexibility competition" [6] has become a pervasive phenomenon.[7]

The most common argument against regulating or strengthening the

[3] See Cs. Lehoczkyné Kollonay, *Gazdasági érdek – szociális érdek: az érdekek összehangolása az Európai Unió Bíróságán*, in Z. Bankó, Gy. Berke, L. Pál & Z. Petrovics (eds.), *Ünnepi tanulmányok Lőrincz György 70. születésnapja tiszteletére*, HVG-ORAC, Budapest, 2019, 258, https://munkajogilap.hu/wp-content/uploads/ebooks/Lorincz_70.pdf (accessed October 30, 2024).

[4] J. Howe, E. Sánchez & A. Stewart, *Job loss*, in M. W. Finkin & G. Mundlak (eds.), *Comparative Labor Law*, Edward Elgar Publishing, Cheltenham and Northampton, 2015, 268, B. Hepple, *Flexibility and Security of Employment*, in R. Blanpain & C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, Kluwer Law International, The Hague, London, Boston, 1998, 279, B. Hepple, *Dismissal Law in Context*, *European Labour Law Journal*, 2012, vol. 3, n. 3, 210, https://journals.sagepub.com/doi/abs/10.1177/201395251200300303 (accessed October 31, 2024).

[5] See e.g. Howe, Sánchez & Stewart, *op. cit.*, 274, 290, Hepple 2012, *op. cit.*, 211, R. Rebhahn, *Economic Dismissals – A Comparative Look with a Focus on Significant Changes Since 2006*, *European Labour Law Journal,* 2012, vol. 3, n. 3, 230–247, https://journals.sagepub.com/doi/10.1177/201395251200300305 (accessed October 31, 2024), J. Prassl, *Contingent crises, permanent reforms: rationalising labour market reforms in the European Union*, *European Labour Law Journal*, 2014, vol. 5, n. 3-4. 220–223, https://journals.sagepub.com/doi/abs/10.1177/201395251400500303 (accessed October 31, 2024), S. Laulom, *Dismissal law under challenge: new risk for workers.* Which securities for workers in time of crisis? CERCRID (UMR 5137) – ASTREES: Labour Law and Financial Crises: Contingent Responses? Conference paper, 2013, 4–21.

[6] In his analysis, Pierre Cahuc identifies that approximately half of the over 200 European reform measures implemented since the mid-1980s to address the issue of "Eurosclerosis" have been specifically designed to enhance the flexibility of labour markets [Pierre Cahuc, *For a Unified Contract. European Labour Law Journal*. 2012, vol. 3, n. 3, 191, https://journals.sagepub.com/doi/10.1177/201395251200300302 (accessed October 28, 2024)].

[7] See E. Kovács, *Individual dismissal law and the financial crisis: An evaluation of recent developments. European Labor Law Journal*, 2016, vol. 7, n. 3, 368–386, https://journals.sagepub.com/doi/abs/10.1177/201395251600700304 (accessed October 28, 2024).

termination of employment relationships is based on the liberal view that, under freedom of contract, workers are free to offer their labour on the market and anyone can 'purchase' it. This exchange is expressed in the contract of employment, which is a private contract that is irrelevant to public law and therefore has no constitutional basis for the state to interfere in the freely agreed relationship between the parties.[8] This understanding is predicated on the assumption that employers and employees are capable of managing their legal relationship in a manner that is optimal for them, even if they do not consistently select the most effective solution.[9]

In accordance with the arguments mentioned above, Richard A. Epstein posits the employment at will principle. The principle was established as a doctrine in the case law of the United States of America during the 18th and 19th centuries, and it remains the general rule in the majority of the Member States of the United States. The employment at will doctrine allows both the employer and the employee to terminate the employment relationship at any time without notice, either with or without just cause or without a morally defensible reason.[10] In defence of the principle, Epstein rejects the idea of limiting termination, arguing that the parties cannot foresee the future at the moment of the conclusion of the employment contract. Therefore, he proposes that the possibility of informal termination can be a solution to unforeseeable situations. Furthermore, Epstein posits that the protection of employees against arbitrary termination is unnecessary, since arbitrary employer behaviour is already subject to market forces. In fact, employers who act arbitrarily will be unable to attract and retain valuable labour, placing them at a competitive disadvantage in the labour market.[11]

As posited by Richard A. Posner, the implementation of a requirement for legitimate or reasonable justification for the termination of employment is inherently ineffective due to the right to a remedy. The process is costly, whether conducted before a court or an arbitrator and the associated costs are ultimately borne by consumers through higher prices or reduced wages, which disadvantages workers.[12] Therefore, the rules protecting employees against

[8] A. Takács, *A szociális jogok*, in G. Halmai & G. A. Tóth (eds.), *Emberi jogok*, Budapest, 2003, 838.

[9] 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, New York, 2011, 138.

[10] *Boyer v. Western Union Telegraph Company*, 124 F. 246 (C.C.D. Mo. 1903) http://www.forgottenbooks.com/readbook_text/Law_and_Business_v3_1000065605/277 (accessed October 28, 2024).

[11] R. A. Epstein, *In Defence of the Contract at Will*, *The University of Chicago Law Review*, 1984, vol. 51, n. 4, 947–948. https://www.jstor.org/stable/1599554 (accessed October 28, 2024).

[12] R. A. Posner, *Overcoming Law*, Harvard University Press, Cambridge, 1995, 308–310.

unfair dismissal unduly impinge upon the relationship between the parties.[13]
Conversely, Simon Deakin and Wanjiru Njoya highlight that, while the concept of freedom of contract permits parties to negotiate job security provisions freely, in practice this may not be a realistic outcome due to the inherent imbalance between the parties involved. Usually, the employee cannot act as an equal negotiating partner in the conclusion of an employment contract.[14]
In instances of termination of employment by the employer, the employee assumes the financial and social risks associated with the employer's decision.[15]
In contemporary societies, employment and the workplace have assumed a greater importance for the individual, as a substantial proportion of social goods (e.g. income, esteem, self-fulfilment and social relations) are provided by the workplace. The termination of employment results in the loss of these benefits, which can be challenging to regain. Considering this, it is essential to maintain reasonable limitations on the right of employers to terminate employment, while also protecting employees from arbitrary dismissal.[16]
My hypothesis is that the right to protection against arbitrary dismissal is a human right that stems from the right to work and the inherent human dignity. Initially, the study will address the arguments against the protection. Then, it will present theories that support the necessity for the provision of protection, drawing upon the analogy between employment and property, as well as the theories of human dignity and personal autonomy. Finally, it will examine the

[13] Howe, Sánchez & Stewart, *op. cit.*, 285.
[14] S. Deakin & W. Njoya, *The legal framework of employment relations*, Centre for Business Research, University of Cambridge, Working Paper No. 349, September 2007, 10, https://www.jbs.cam.ac.uk/wp-content/uploads/2023/05/cbrwp349.pdf (accessed October 29, 2024)
[15] See Gy. Kiss, *Munkajog.* Osiris, Budapest, 2005, 257, *ILO Termination of Employment Digest.* International Labour Office, Geneva, 2000, 14.
[16] In this study, I consider as arbitrary those instances of termination of employment by the employer which lack reasonable grounds and for which it cannot be demonstrated that the employment relationship has become untenable. It is pertinent to note that the employer should be safeguarded against arbitrary termination of the employee; however, this matter is not within the purview of the present study. Regarding arbitrary termination see W. Njoya, *Property at Work: the employment relationship in the Anglo-American firm*, Ashgate Publishing, Aldershot and Burlington, 2007, 6, 62, 200, J. Sarkin & M. A. Koenig, *Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy. Human Rights Quaterly*, 2011, vol. 33, n. 1, 19, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2123075 (accessed October 31, 2024), V. Mantouvalou, *Are Labour Rights Human Rights? European Labour Law Journal*, 2012, vol. 3, n. 2, 152, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007535 (accessed October 31, 2024), M. Weiss, *Job security: a challenge for EU social policy*, in N. Countouris & M. Freedland (eds.), *Resocialising Europe in a Time of Crisis*, Cambridge University Press, New York, 2013, 279, G. Davidov & E. Eshet, *Intermediate Approaches to Unfair Dismissal Protection*, *Industrial Law Journal*, 2015, vol. 44, n. 2, 167–169, 175., 178., 181–182., 191–192. https://doi.org/10.1093/indlaw/dwv007 (accessed October 31, 2024).

justification for protection against arbitrary termination of employment as part of the right to work.

2. A New Human for a New Security?

It is notable that European reforms under the flexicurity banner have typically reduced worker security, often reduced benefits associated with termination of employment, reduced legal consequences of wrongful termination, but not increased unemployment benefits, nor, in most cases, have they introduced training requirements.[17] Maarten Keune and Maria Jepsen conclude that an increase in flexibility does not necessarily coincide with an increase in security. Allegedly, the traditional concept of security, exemplified by the notion of job security, must be superseded by a novel approach to security, with training emerging as a pivotal element in ensuring the employability of workers. The focus appears to be on flexibility. The demands of employers for flexibility are typically heeded, whereas those of workers, the unemployed, and the inactive are compelled to relinquish job and income security in exchange for lifelong learning and active labour market measures. Furthermore, the notion of 'new' security is also inherently fragile. While unemployment is less of a concern for those with higher skills, there is still no assurance of equal access to education and training for all.[18]

Richard Sennet gives a remarkable characterisation of the 'new' security. He explains that in our globalised world, people's lives have become increasingly fragmented: their workplaces resemble 'railway stations' rather than 'villages'. The new 'icon' has become the perpetual 'wandering', and the need to 'move on', has become permanent. However, there are few who are able to cope with the precarious circumstances. Nowadays, people have fewer and fewer stable and secure social relations at their disposal and, therefore, are in a perpetual struggle with time: how to manage short-term relationships while moving from one task, job or place of residence to another. There is pressure to develop their skills, to exploit their talents, in a situation that encourages them to keep changing. The knowledge acquired is becoming obsolete time and again. The individual must learn how to move on from the past as quickly as possible, and just like a good consumer must always be looking for the new, treating the past as a consumer good that has served them, but discarding it when a more

[17] Laulom, *op. cit.*, 26.

[18] M. Keune & M. Jepsen, *Not balanced and hardly new: the European Commission's quest for flexicurity.* European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS) WP 2007.01. Brussels, 2007. 15. https://www.etui.org/sites/default/files/07%20European%20Commission%E2%80%99s%20quest%20for%20flexicurityWP%202007%201.pdf (accessed October 31, 2024).

perfect opportunity appears. However, most people are not like this by nature.[19]

The new cultural ideal demands the human being who is flexible and capable of being burdened to the limit. The institutions that actually dismantle private and family life are presented as enabling them to be harmonised. Most people find it challenging to manage these expectations in the absence of enduring relationships and a sense of stability, as they possess an intrinsic need for security and predictability. Stability is a fundamental human need, including for those who work, even if it is not in line with the image of the person as outlined by the cultural ideal. Workers need and deserve relative stability.

It is evident that the emphasis on flexibility, the reduction of job security, the benefits linked to termination of employment, the alleviation of the legal consequences of unlawful termination, and the low level of unemployment benefits, collectively result in the individual and their environment bearing the burden of reduced security. Nevertheless, the prominent discourse on flexicurity does not present a solution or the means to achieve this for those who lose security and exit the employment relationship. It can be concluded that flexicurity, at least in terms of the solutions it purports to offer, when implemented, clearly encourages a culture of self-reliance, whereby the primary responsibility for providing security lies with the individual. This approach is particularly problematic from a labour law perspective, as it undermines the very function and foundations of labour law, while marginalising its social function.

3. The Theoretical Foundation of Protection Against Dismissal

3.1. The Purpose of Employment and the Existential Need for Protection

The purpose of employment is a pivotal factor in the termination of an employment relationship. All cases leading to an end of the employment relationship presuppose the existence of circumstances in which the employment relationship is unable to fulfil its purpose. The fundamental objective of an employment relationship is to facilitate the employer's economic goals.[20] Also, it plays a prominent role in securing the employee's existential interests. Furthermore, the employment relationship has an

[19] R. Sennet, *The Culture of the New* Capitalism, Yale University Press, New Haven – London, 2006, 3–5. https://www.jstor.org/stable/j.ctt1nq6wd (accessed October 31, 2024).

[20] Z. Bankó, Gy. Berke, E. Kajtár, Gy. Kiss & E. Kovács, *Kommentár a munka törvénykönyvéhez*, Wolters Kluwer, Budapest, 2014, 58.

existential and social function since it is of paramount importance not only for the individual but also for society in terms of meeting needs.[21] This function is nuanced by the personal nature of the employment relationship. In fact, the employment relationship assures to all employees meaningful human work, which may also contribute to the development of personality and thus ensure the economic and intellectual basis for the employee's autonomy.

In light of the aforementioned considerations, it becomes evident that the employment relationship serves multiple purposes. From the employer's perspective, establishing an employment relationship is clearly a strategic necessity. The employer's ability to perform tasks associated with its operational requirements hinges on the establishment and maintenance of contractual relationships. Essentially, these relationships are designed to facilitate the fulfilment of tasks. In most cases, the employer is unable to perform the tasks it wishes to carry out. Therefore, the services it provides and the goods it produces require the physical and mental capacities and labour of other individuals. Furthermore, employment relationships are particularly important for the economy and society, as employers are essential for meeting needs and maintaining the functioning of society.

The function of the employment relationship is elucidated by the theory of the dual structure of the employment contract. As Mark Freedland explains, while the employment contract primarily involves the obligation of the parties to perform work and pay remuneration, it also encompasses a mutual promise by the parties that the employer will continue to employ the employee and that the employee will continue to work for the employer.[22] Consequently, the essential element of the employment relationship is the need for stability. If stability is considered the fundamental aspect of the employment relationship, it can be argued that its purpose is undermined if the parties terminate it unilaterally in breach of their mutual promises regarding future employment and work. Therefore, in order for termination to be lawful and to not cause too much 'pain', there must be circumstances which make it justifiable and acceptable to the other party.

Conversely, Rachel Arnow-Richman highlights that in employment relationships today, the parties no longer promise each other long-term employment and work. The contemporary business environment has shifted away from a focus on long-term loyalty and emphasises a fervent commitment to the job instead. In return, they offer employees a wealth of experience and the development of marketable skills. Consequently, the employees' financial security is contingent upon their own 'external marketability' rather than the

[21] Howe, Sánchez & Andrew, *op. cit.*, 285.
[22] M. Freedland, *The Contract of Employment*, Clarendon Press, Oxford, 1976, 20.

one of their current employer. Therefore, it is unreasonable to expect that the employment relationship with the employer will be permanent. However, the employee can reasonably expect to be able to find another similar and advantageous job when the employment relationship ends.[23]

Although Rachel Arnow-Richman's assertion may be factually accurate, since employability and marketability are especially relevant today, it is hard to ignore the fact that for most employees, a stable job is tantamount to existential security. In most cases the employee has a clear interest in maintaining the employment relationship. For the majority of people, the employment relationship represents one of the fundamental conditions for participation in society and for physical existence. The termination of the employment relationship by the employer causes temporary or permanent 'reproductive disruption'[24] in the employee's life. In addition to the obvious loss of income, the termination of employment can impact and potentially jeopardise an employee's living conditions. For the individual, job loss is often a traumatic event that can lead to a decline in well-being and financial stability.[25]

On the one hand, work is an essential factor of the individual's existence, self-determination, self-esteem, and the appreciation of the individual by others,[26] and on the other hand, it is an objectification that expresses their attachment to society. This entails that the community also has a significant interest in protecting the system of relations that provides the framework for work. Therefore, within the framework of the rule of law[27] this 'power' of the employer requires that it should be exercised responsibly and within limits.[28]

Consequently, in the event of job loss, the employee is entitled to an existential protection claim, which must be addressed by the legal system. As work is the

[23] R. Arnow-Richman, *Just Notice: Re-reforming Employment at Will. UCLA Law Review,* 2010, vol. 58, n. 1, 33.

[24] O. Czúcz, *Szociális jog I.* Unió, Budapest, s.a., 10–11.

[25] B. Hepple, *European Rules on Dismissal Law?*, *Comparative Labour Law Journal*, 1997, vol. 18., n. 2, 204, Cf. F. Hendrickx, *Flexicurity and the EU Approach to the Law in Dismissal*, *Tilburg Law Review*, 2007, vol. 14, n. 1–2, 91., R. M. Bastress, *A synthesis and a proposal for reform of the employment at-will doctrine. West Virginia Law Review,* 1988, vol. 90, n. 2, 342, https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=2099&context=wvlr (accessed October 31, 2024), Davidov & Eshet, *op. cit.*, 172–173.

[26] See V. Mantouvalou, *Introduction*, in V. Mantouvalou (ed.), *The Right to Work: Legal and Philosophical Perspectives*, Hart Publishing, Oxford and Portland, Oregon, 2015, 1, H. Collins, *Is There a Human Right to Work?*, in V. Mantouvalou (ed.), *op. cit.*, 18.

[27] Bob Hepple links the importance of regulating protection against arbitrary and unlawful termination to the rule of law when he argues that in a state governed by the rule of law, the provision of protection against unlawful termination of employment is a necessary element of social justice (Hepple 1997, *op. cit.*, 206).

[28] Davidov & Eshet, *op. cit.*, 174.

material source of the individual's existence and human autonomy,[29] the existential need for protection in the event job loss arises indirectly from the need to defend human autonomy.[30] This need for protection can be met in various ways. One possibility is for the workers to provide the 'safety net' themselves and to bear the costs and damages incurred. The other option is that the employer, the primary cause of the termination, will be liable for the adverse consequences of the situation it has created. However, job loss is only one side of the coin for the individual; on the other side of the same coin, from society's point of view, is unemployment. Consequently, the third party in this scenario is the family, neighbourhood and society, which will inevitably bear certain costs, whether consciously or not.

3.2. An Analogy between Job and Property

Nowadays, the overwhelming majority of people lack the requisite quantity and quality of assets to meet their needs without employment.[31] An investible asset for the 'capitalist' is an intangible mix of individual skills, qualifications, competences and personal qualities that enable the worker to enter into a contract of employment and to cover their living costs through the employment relationship established. In the absence of significant material assets, the worker has no alternative but to take up a job. This is the origin of the '*new property*'[32]concept.

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[29] Decisions of the Hungarian Constitutional Court 8/2011. (II. 18.) and 29/2011. (IV. 7.).

[30] See H. Collins, *Justice in Dismissal, The Law of Termination of Employment*, Clarendon Press, Oxford, 1992, 9–21, A. C. L. Davies, Perspective on Labour Law, Cambridge University Press, Cambridge, 2004. 162–163.

[31] Cf. R. L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State, Political Science* Quarterly, 1923, vol. 38, n. 3, 472–473, https://www.jstor.org/stable/2142367?seq=2 (accessed October 31, 2024).

[32] Cf. Gy. Kiss, *Alapjogok kollíziója a munkajogban*, Justis, Pécs, 2010, 114–115, https://real.mtak.hu/25691/1/alapjogok_kollizioja_a_munkajogban.pdf (accessed October 31, 2024). For a discussion of the 'new property', see also C. A. Reich, *The New Property After 25 Years*, *University of San Francisco Law Review,* 1990, vol. 24, n. 2, 223–272, https://openyls.law.yale.edu/bitstream/handle/20.500.13051/2557/The_New_Property_after_25_years.pdf?sequence=2&isAllowed=y (accessed October 31, 2024), H. A. McDougall, *The New Property vs. the New Community*, *University of San Francisco Law Review,* 1990 Winter, vol. 24, 399–420, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554810 (accessed October 31, 2024), R. A. Epstein, *No new property*, *Brooklyn Law Review,* 1990, vol. 56, n. 3, 747–769, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2331&context=journal_articles (accessed October 31, 2024), I. Holloway, *Natural Justice and the New Property*, *Monash University Law Review*, 1999, vol, 25, n. 1, 85–109, https://classic.austlii.edu.au/au/journals/MonashULawRw/1999/4.pdf (accessed October 31, 2024), D. A. Super, *A new new property*, *Columbia Law Review,* 2013, vol. 113, n. 7, 1773–1896,

In his analysis of the relationship between the state and the individual, Charles A. Reich posits that the individual's property today is less and less a matter of tangible goods and more a matter of the rights and social status acquired by the individual, which have replaced the function of property in the traditional sense. Among others, Reich cites occupations and employment (jobs) as examples of this phenomenon. In most cases, individuals may perceive these as more valuable than ownership of property or a bank account.[33] He concludes that acquired rights or status, such as a job, should be afforded protection similar to that of property.[34]

Considering the concept of *new property* in the context of freedom, Reich also highlighted the necessity of economic security for the individual in order to achieve genuine freedom. Today, the majority of social goods that matter the most to the individual are derived from organisations or the state. Consequently, these goods are primarily dependent on these organisations,[35] which can result in a significant economic dependence. The individual's freedom is contingent upon this economic dependence, which must be maintained within reasonable limits.[36] In the contemporary era, individuals are able to sustain their livelihoods through their affiliation with organisations.[37] The changed relationship between worker and work is exemplified by the observation that, by entering into an employment relationship, workers place their work as well as part of their lives at the disposal of employers. Through the employment contract, the employers gain not only access to the services of workers but also to this part of their lives as social beings.[38] Job loss can result

https://columbialawreview.org/wp-content/uploads/2016/04/Super.pdf (accessed October 31, 2024).

[33] C. A. Reich, *The New Property*, *Yale Law Journal,* 1964, vol. 73, n. 5, 738.

[34] *Ibid.*, 785. Cf. C. W. Summers, *Individual Protection against Unjust Dismissal: Time for a Statute. Virginia Law Review, In Memoriam: Bernard Dunau: Contemporary Problems in Labor Law,* 1976, vol. 62, n. 3, 532, https://ia800704.us.archive.org/view_archive.php?archive=/24/items/wikipedia-scholarly-sources-corpus/10.2307%252F0.650.1.zip&file=10.2307%252F1072376.pdf (accessed October 31, 2024). It should be noted, however, that the concept of labour as property had appeared much earlier. John Locke was of the opinion that *"every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."* See Locke, John, *The Second Treatise of Government* London, 1688. http://history.hanover.edu/texts/locke/j-l2-007.html (accessed October 29, 2024).

[35] C. A. Reich, *The liberty impact of the new property*, *William and Mary Law Review,* 1990, vol. 31, n. 2, 295, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1963&context=wmlr (accessed October 31, 2024).

[36] *Ibid.*, 296.

[37] *Ibid.*, 297.

[38] F. Raday, *Individual and collective dismissal – a job security dichotomy*, *Comparative Labor Law & Policy Journal,* 1989, vol. 10. n. 2, 149.

in the loss of existential security, including the erosion of social networks and the loss of social position, directly impacting all members of the family.[39] This can be paralleled with the ideas of Amartya Sen, who posits that economic unfreedom threatens other human freedoms, which can easily fall victim to economic vulnerability.[40]

From this point of view, a parallel can be drawn with Abraham H. Maslow's theory of the hierarchy of needs. He theorises that lower human needs must be met before higher needs can act as motivators. In order for basic needs such as physiological (e.g. hunger, thirst), security (e.g. safety, stability, predictability) or affection (e.g. community belonging) needs (e.g. identity, personal relationships) to be met,[41] it is necessary that economic and social rights, including the right to work, are effectively obtained. It is notable that the possession of a job also plays a significant role in the satisfaction of the other levels of need identified by Maslow. Work is a central aspect of the fulfilment of the need for esteem, recognition and self-realisation,[42] as well as a source of livelihood and human autonomy. This suggests that a worker who loses their job can rapidly descend several levels of the hypothetical pyramid of needs, making it impossible to satisfy all of them. Conversely, the termination of an employment relationship that had previously provided a significant degree of accomplishment regarding the need for self-fulfilment at the pinnacle of the pyramid is likely to experience a sense of "I have lost everything".

Charles Reich posits that an existing job, which is one of the individual's most significant investments, should be afforded with a certain level of legal protection and procedural guarantees after a certain period of employment, because this investment can be destroyed overnight by an organisational decision.[43] Hugh Collins draws a parallel between termination by the employer and the exercise of the state's criminal power. He asserts that, in some cases, the effects of termination of employment are as or even more detrimental to the employee than criminal sanctions.[44] The capacity of organisations to exert control over jobs (and other 'new forms of property' such as social security or social benefits, occupational licences, public services)[45] can influence individual

[39] Reich 1990, *op. cit.*, 301. Charles A. Reich refers to K. S. Newman, *Falling From Grace: The Experience of Downward Mobility in the American Middle Class.* Free Press, New York, 1988.

[40] S. Amartya, *Development as Freedom*, Alfred A. Knopf, New York, 2000, 8, https://archive.org/details/amartya-kumar-sen-development-as-freedom-alfred-a.-knopf-inc.-2000/page/n3/mode/2up (accessed October 31, 2024).

[41] A. H. Maslow, *A Theory of Human Motivation*, *Psychological Review,* 1943, vol. 50, n. 4, 370–381.

[42] *Ibid.*, 381–382.

[43] Reich 1990, *op. cit.*, 301.

[44] Collins 1992, *op. cit.*, 2. The criminal law analogy is also mentioned by Charles A. Reich (see Reich 1990, *op. cit.*, 302.).

[45] Reich 1964, *op. cit.*, 734-737.

behaviour, and the increasing reliance on such control is contributing to the emergence of authoritarian regimes and eroding the foundations of democratic systems.[46]

In Reich's view, workers may be deprived of their jobs only in the event of an overriding public interest and only with adequate compensation.[47] In my view, the overriding public interest should be interpreted in a broad sense, encompassing all circumstances in which the employment relationship is unable to fulfil its purpose. Similarly, Otto Kahn-Freund draws a parallel with the constitutional requirements of expropriation in connection with the termination of employment by the employer. In addition, Otto Kahn-Freund highlights the fact that the obligation to pay compensation in the case of both expropriation and dismissal represents a socio-ethical requirement.[48]

Similarly, Frederic Meyers addresses the matter through the lens of the concept of *'ownership of jobs'*. He begins by assuming that employees do not typically view their employment as a legal relationship established through a contract between themselves and their employer. Instead, they tend to perceive it as an independent entity, often simply referring to it as "my job." [49] In this sense, the concept of 'job' has become a concept that exists independently of the concept of an employment relationship.[50] Meyers posits that if the employment relationship can be the subject of property rights, or at the very least, an analogous relationship between the employee and the job is assumed, then its unimpeded possession must also be protected against arbitrary dismissal. In this context, Meyers refers to the Fifth Amendment to the Constitution of the United States of America, which provides that no person shall be deprived of, *inter alia*, their property without due process of law.[51]

Wanjiru Njoya also argues that the concepts of property rights and employment are interdependent,[52] and that employees may possess property

[46] Reich 1990, *op. cit.* 305.
[47] Reich 1964, *op. cit.*, 785.
[48] O. Kahn-Freund, *Labour Law: Old Traditions and New Developments*, Clarke, Irwin & Company Limited, Toronto/Vancouver, 1968, 38, https://archive.org/details/labourlawoldtrad0000kahn (accessed October 31, 2024). Cf. Njoya, *op. cit.*, 2.
[49] F. Meyers, *Ownerships of Jobs: A Comparative Study*, Institute of Industrial Relations, University of California, Los Angeles, 1964, https://archive.org/details/ownershipofjobsc0000meye/page/n5/mode/2up (accessed October 31, 2024). This phenomenon is also referred to by Kathleen Kim, see K. Kim, *Beyond Coercion: Undocumented Workers and Workplace Immigration Enforcement*, *UCLA Law Review,* 2015, vol. 62, n. 6, 1567.
[50] Meyers, *op. cit.*, 98.
[51] Meyers, *op. cit.*, 1–2, 15. Cf. T. Gelb, Hepple 1998, *op. cit.*, 279–280.
[52] Njoya, *op. cit.*, 1–21.

rights in relation to their work. Although it is accurate to state that employees are unable to sell or purchase their employment, there are instances where such circumstances arise in the context of classical property rights, even when the individual in question possesses only the right of ownership. However, this does not imply that employees are entitled to retain their position indefinitely. Similarly, the right of ownership can be limited or revoked from the 'owner' under well-defined conditions.[53] Furthermore, the concept of property rights implies that compensation for loss of employment must be based on the actual value of the employment to the employee.[54]

The foregoing theories are unified by the concept of safeguarding individual freedom and personal autonomy, and the existential necessity for protection. If we accept that the objective is to establish a social order that serves the common good and the well-being of its citizens, and that provides them with the highest possible standard of living,[55] it is insufficient to focus solely on the abstract public interest or the needs and interests of the economy. Instead, we must consider the individuals themselves. Furthermore, the protection of employment as a form of property can be linked to the notion that, since the Enlightenment, the concepts of freedom and property have been closely intertwined.[56] As Walter Leisner notes, civil rights without the assurance of property remain 'useless freedoms'.[57] Individual freedom remains an empty phrase in the absence of safeguards to protect the employment relationship. If one accepts that property is a legal institution for the distribution of the material basis of individual existence and self-expression,[58] then the status of job as a *'quasi-property'* which performs the same function in modern societies demands similar protection.

The concept of property in private law does not mean freedom without constraints. Property is associated with numerous constraints that are closely intertwined with the notion of freedom. It could be argued that "defining property as freedom is somewhat paradoxical",[59] given that property cannot be reduced to a mere absolute right,[60] nor can it be detached from its social context. The constraints associated with the concept of property are evident within the employment relationship. The legal framework imposes limitations

[53] *Ibid.*, 1-2.
[54] Deakin & Njoya, *op. cit.*, 16.
[55] Reich, *op. cit.*, 786.
[56] A. Menyhárd, *A tulajdon alkotmányos védelme*, *Polgári Jogi Kodifikáció,* 2004, vol. 6, n. 5–6, 24.
[57] W. Leisner, *Eigentum*, in J. Isensee & P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, *Band VI Freiheitsrechte*, C. F. Müller Juristischer Verlag, Heidelberg, 1989, 1024.
[58] Menyhárd, *op. cit.*, 27.
[59] *Ibid.*, 25.
[60] *Ibid.*, 27., Njoya, *op. cit.*, 3.

on the autonomy of employers with regard to the utilisation of labour. This is achieved through the regulation of employment, which encompasses aspects such as working hours, rest periods, the regulation of safe and healthy working conditions, and the protection of wages. These constraints are also reflected in the International Labour Organisation's Decent Work Agenda.[61] From the employee's perspective, the concept of 'property' can also be interpreted within this context. In fact, the juxtaposition of the 'possession' of the job and the purpose of the employment relationship suggest that this 'possession' is also governed by the principle of 'property obliges', that is to say, the manner in which the employee is required to possess their job and be in line with its social purpose. The lawful termination of the employment relationship is only permitted in instances where the employment relationship has lost its purpose, or where the manner of 'possession' is not compatible with its purpose. For instance, this may occur in the case of dismissal based on the employee's misconduct.

Hugh Collins asserts that the property analogy is an inadequate basis for protection against termination by the employer. He argues that if these theories were consistently applied, the employment relationship could not be terminated. In his view, the employee cannot claim the protection of the job as 'property' because, in the interests of efficiency, the employer must be able to replace employees with inadequate skills with better-performing employees.[62] It is important to note that none of these theories asserts that the employee possesses literal ownership of the job. They merely suggest that the relationship between the employee and the job, or the 'possession' of the existing job, should be considered a right. As with property law, this right should be subject to appropriate sanctions in the event of infringement.

3.3. Human Dignity and Personal Autonomy as a Foundation For Protection Against Dismissal

It is evident that the employee's entire personality is implicated in the employment relationship. Dependent work and subordination inevitably result in a situation that renders the employee vulnerable in relation to the employer. Thus, it is incumbent upon the employment relationship to safeguard the

[61] See http://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed October 29, 2024).
[62] Collins 1992, *op. cit.*, 10-12.

individual's human dignity against the potential exploitation of the employer's superior position.[63]

As Hugo Sinzheimer posited, *„die Arbeit ist also der Mensch selbst"*.[64] The capacity to work constitutes the personal foundation of human existence, and the human being is, by definition, an entity endowed with human dignity.[65] Furthermore, work is regarded as a conduit through which human dignity and autonomy, can be actualised for the majority of workers.[66]

Hugh Collins posits that respect for human dignity and personal autonomy constitute the foundation for the protection against dismissal. He observes that the termination of employment by the employer may have significant consequences for the employee's livelihood. A lengthy period of unemployment may be the cause of the worker's impoverishment, leading to a loss of social status and self-esteem. Additionally, the dissolution of friendships and social ties may occur, and depending on the nature of the employment relationship, the employee may face difficulties in finding alternative intellectual or physical challenges. Furthermore, the arbitrary termination of employment, or the way it is conducted, may also have a detrimental impact on the employee's reputation within the community, potentially leading to social stigma. This could even result in an anomic state.[67]

These difficulties draw attention to two underlying personal rights that need protection. On the one hand, the dignity of the person, which is of intrinsic value, and on the other, personal autonomy, which requires respect for the individuals' right to imbue their life with meaning through work. The protection of human dignity and autonomy may justify the imposition of controls on the right of termination by the employer.[68] Collins highlights that for a considerable number of individuals, work is not merely a necessity, but rather the conduit through which they can engage in meaningful human activity, pursuing intellectual and physical challenges that imbue their lives with purpose. It should be noted, however, that individuals may encounter such challenges outside of their professional lives and some individuals find work boring and unchallenging perceiving it as a mere source of income.

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[63] G. Kártyás, *XXI. század és munkajog: megőrizni vagy megreformálni?* in L. Pál & Z. Petrovics (eds.), *Visegrád 17.0 – A XVII. Magyar Munkajogi Konferencia szerkesztett előadásai*, Wolters Kluwer, Budapest, 2020, 42.

[64] *"The work is therefore the human being itself"*. See H. Sinzheimer, *Das Wesen des Arbeitsrechts*, in O. Kahn-Freund & T. Ramm (eds.), *Arbeitsrecht und Rechtsoziologie, Gesammelte Aufsätze und Reden*, Europäische Verlagsanstalt, Frankfurt, 1976, 108–110.

[65] Cf. H. Sinzheimer, *Grundzüge des Arbeitsrechts*, G. Fischer, Jena, 1927, 8.

[66] Hepple 1997, *op. cit.*, 204.

[67] Collins 1992, *op. cit.*, 15.

[68] *Ibid.*, 16. See also Howe, Sánchez & Stewart, *op. cit.*, 286.

Drawing on Joseph Raz's ideas on autonomy,[69] Collins asserts that one of the fundamental responsibilities of society is to facilitate opportunities for individuals to pursue their personal objectives, thereby enhancing their autonomy. This concept also necessitates that the state should improve the well-being of individuals through measures that, while assuring equal opportunities, afford them the widest possible range of genuine options to enable them to flourish and thus imbue their lives with purpose.[70] Furthermore, Collins posits that the degree of autonomy is not solely contingent on the number of available jobs, but also on their intrinsic quality. It is incumbent upon legislators to enact measures that reinforce the social structures that facilitate individuals' ability to lead increasingly meaningful and fulfilling lives through gainful employment. In labour market, Collins posits that this necessity is fulfilled by an employment relationship that provides a certain degree of security and promotes opportunities for professional advancement.[71]

Bob Hepple also places the protection against termination by the employer in a human rights context, underscoring the significance of the human dignity alongside that of equal treatment. He argues that the termination of employment by the employer, based on the freedom of property and enterprise, can only be exercised in accordance with legitimate economic considerations and without infringing the employee's human rights.[72]

The necessity of situating labour law within a human rights framework and the significance of human dignity and autonomy as potential foundations for labour law are underscored by Mark Freedland and Nicola Kountouris in their theory of *personality in work*.[73] The authors assume that autonomy entails both the capacity to make life decisions, including those pertaining to one's work, and the freedom from external constraints. Since human dignity is a fundamental right of the worker, regardless of the circumstances of their work performance,[74] and since the primary objective of labour law is to facilitate the fulfilment of human capabilities in the interests of human autonomy and equality, it follows that protection against unlawful termination should be

[69] Collins 1992, *op. cit.*, 18, J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford, 1986, 369–373.
[70] Neil M. Gorsuch quotes the theory of Joseph Raz, see N. M. Gorsuch, *The Future of Assisted Suicide and Euthanasia*, Princeton University Press, Princeton-Oxford, 2006, 86–87.
[71] Collins 1992, *op. cit.*, 18–19.
[72] Hepple 2012, *op. cit.*, 213.
[73] See M. Freedland & N. Kountouris, *The Legal Construction of Personal Work Relations*, Oxford University Press, Oxford, New York, 2011, 372–382.
[74] *Ibid.*, 374.

derived from this. To achieve this, it is necessary for the law to impose strict limits on the contractual autonomy of the parties.[75]

It is important to note that the Capability Approach is also consistent with the said points. The Capability Approach, as advanced by Amartya Sen and further developed by Martha Nussbaum, can provide a significant contribution to the establishment of protection against arbitrary termination of employment. According to Amartya Sen,[76] the assessment of policies and institutions should be based on their ability to enhance individual capabilities. These are defined as degrees of substantive freedom that enable individuals to achieve their well-being. Individuals should be able to effectively fulfil their life plans, but in order to do so, they need capabilities. He argues that rather than focusing on directly providing people with what they want to achieve, society should work to ensure that its members have the capabilities to provide them.[77] Martha C. Nussbaum[78] argues that policy should aim to achieve objectively defined development goals, and that the legal and other institutions of the state should be designed to ensure that a critical threshold level of well-being is within the reach of all citizens.[79]

This approach may serve to underscore the necessity for state intervention in instances of unequal power structures, such as those that may be observed within the context of employment relationships. Riccardo Del Punta posits that a Capability Approach has the potential to provide a solid foundation for labour law.[80] Labour law should not only protect workers from abusive employer power but should also provide them with freedom from such abuses.[81] In this regard, labour law regulation is not merely a right to protect

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[75] *Ibid.*, 378.

[76] See Sen, *op. cit.*

[77] G. Davidov, *Platform Workers, Autonomy, and the Capability Approach,* Forthcoming in W. Chiaromonte & M. L, Vallauri (eds.), *Trasformazioni, Valori e Regole del Lavoro, Volume III – Scritti per Riccardo Del Punta*, Firenze University Press, Firenze, 2024. 2, https://www.academia.edu/114101513/Platform_Workers_Autonomy_and_the_Capability_Approach (accessed April 4, 2025).

[78] See M. C. Nussbaum, *Women and Human Development. The Capabilities Approach*, Cambridge University Press, New York, 2000.

[79] M. C. Nussbaum, *Creating Capabilities. The Human Development Approach*, The Belknap Press of Harvard University Press, Cambridge, London, 2011, 38., G. Davidov, *The Capability Approach and Labour Law: Identifying the Areas of Fit*, The Hebrew University of Jerusalem Faculty of Law Mt. Scopus, Jerusalem 9765418 Israel, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 19-17. Published in B. Langille (ed.), *The Capability Approach to Labour Law*, Oxford University Press, Oxford, 2019. 15, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3422909 (accessed April 4, 2025).

[80] R. Del Punta, *Labour Law and the Capability Approach, International Journal of Comparative Labour Law and Industrial Relations*, 2016, vol. 32, n. 4, 383.

[81] *Ibid.*, 403., Davidov 2024, *op. cit.* 2.

vulnerable workers, but rather a tool to empower workers, thereby enhancing their autonomy, providing them more choice and increasing their freedom.[82] Furthermore, Del Punta's list of capabilities also includes the capacity for human respect and dignity,[83] which essentially means working conditions that are consistent with this. In my opinion, working conditions that respect human dignity must also encompass regulations pertaining to the termination of employment that are in alignment with this principle. This ultimately necessitates rules that provide protection against arbitrary dismissal.

These theories derive the protection against arbitrary and unlawful termination from the essence of the human being. The necessity for protection is derived from the individual's human dignity and from personal autonomy, which is fully consistent with the existential need for protection discussed earlier. Furthermore, the association of protection against arbitrary and unlawful termination with human dignity and the personal autonomy derived from it, signifies an acknowledgement that work constitutes a fundamental aspect of individual existence and a source of human autonomy. The establishment of protection on these foundations presents a compelling rationale for its designation as a human right.

4. Protection Against Arbitrary Termination of Employment Relationship as a Human Right

The aforesaid considerations indicate that the protection of an employment relationship from arbitrary dismissal is a fundamental human right that needs the implementation of regulations at the level of fundamental rights. It is my contention that the right to protection against arbitrary dismissal, which is a fundamental right of all workers/employees, can be derived directly from the right to work.

One potential interpretation of the right to work focuses exclusively on the limitations imposed by this right. This understanding of the right to work posits that the state is bound by the obligation to respect the right of every individual to freely choose their occupation. In this sense, the right to work is a freedom in the narrow sense of the term, and the state must refrain from interfering. The right to choose one's main source of livelihood is complemented by the prohibition of slavery or forced labour. This implies that individuals must be assured the right to choose their main source of livelihood and that they must also be prohibited from being forced to perform certain

[82] Davidov 2019, *op. cit.* 15.
[83] *Ibid.*, Del Punta, *op. cit.*

work against their will, whether or not for reward.[84]
The classical interpretation of the right to work is more expansive in its scope. Consequently, the right to work signifies the liberty to select and pursue a vocation, occupation, or profession.[85] In order to achieve this, it is sufficient for the state to maintain the necessary conditions to exercise this right. This includes the institutions of economic and employment policy, the education system, training and vocational training, which ensure the possibility to all workers of securing their livelihood through the occupation of their choice.[86] However, the right to free choice of employment and occupation does not imply that individuals may pursue their chosen occupation at will or without any constraints, nor that the state is obliged to provide work for all.[87] Rather, this understanding of the right to work recognises the individual subjective right to work as a right to free choice, free from coercion and discrimination.
Additionally, the right to work encompasses the safeguarding of existing employment. This approach suggests that the state's role is not merely to establish and operate a system that ensures the freedom to choose and exercise work. It also entails ensuring that individuals can retain their existing occupations without hindrance. This can be achieved primarily through the system of termination of employment and by preventing arbitrary termination of employment by employers.
The analogy between the right to work and the right to property leads to the conclusion that the positive content of the right to work does not entail that any individual can claim before the court to be placed in any job of their choice or otherwise to be assured a job. Similarly, the right to property does not entitle any individual to claim ownership of any object they desire, nor does it ensure ownership of property in general. The incongruity of this situation is readily apparent, yet it is curious that the definition of the right to property as a human right is seldom questioned.[88] These concerns appear to overlook the fact that neither 'property' nor 'work as property' can be considered a right in

[84] G. Mundlak, *The right to work: Linking human rights and employment policy, International Labour Review*, 2007, Volume 146, Number 3-4, 192-193, https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1564-913X.2007.00013.x (accessed October 31, 2024), H. Collins, *Is there a Human Right to Work?,* in V. Mantouvalou (ed.), *op. cit.*, 21.
[85] Decision of the Hungarian Constitutional Court 21/1994 (IV. 16.), Takács, *op. cit.*, 846.
[86] Hepple 1998, *op. cit.,* 277.
[87] A. Holló – Zs. Balogh (eds.), *Az értelmezett Alkotmány*. Magyar Hivatalos Közlönykiadó, Budapest, 2000. 684., Decision of the Hungarian Constitutional Court 327/B/1992. Bob Hepple, A Right to Work? *Industrial Law Journal.* 1981, vol. 10, 68.
[88] Cs. Lehoczkyné Kollonay, *Alkotmányos alapelvek a munkajogi szabályozásban*, in O. Czúcz & I. Szabó, *Munkaügyi igazgatás, munkaügyi bíráskodás. Radnay József 75. születésnapjára hálás munkatáraitól.* Szent István Társulat, Miskolc, 2002, 291–292.

the sense that any individual can claim access to property or work through individual enforcement, whether administrative or judicial. Nevertheless, all these rights are enforceable in the sense that once a person has acquired and 'owned' a particular item of property, for example a job, that property cannot be taken away by a higher power, such as the state or an employer, except through due process. This process must be carried out in accordance with the relevant legislation and must include the following steps: the grounds for the action must be valid and justified, the reasons for the decision must be clearly stated in writing, the individual must be given the opportunity to be heard, the individual must be informed of the remedy available to them, they must receive adequate compensation, and they must have the right to request a judicial review of the decision.[89]

In this context, it is also appropriate to briefly refer to the functional relationship between the right to property and social rights, such as the right to work. From a functional standpoint, both work and property can be considered fundamental assurances of personal autonomy. The traditional material basis for the individual's autonomy of action, namely property, can be ensured directly by the object of property and indirectly by property rights or public law-based rights that assume the role of property. It thus follows that constitutional protection must also evolve in accordance with the changing role of property in society.[90] As previously outlined in the context of theoretical perspectives that have drawn an analogy between employment and property, the employment relationship has undergone a significant transformation, assuming an increasingly prominent role akin to that of classical property. As an activity that provides a regular source of income can also be subject to constitutional property protection,[91] this may also explain the property-like protection of the right to work outlined above.

In accordance with General Comment No. 18 on the right to work of the Committee on Economic, Social and Cultural Rights, the right to work extends beyond the prohibition of forced labour and the freedom to choose one's occupation. It also encompasses the right to protection against unlawful

[89] *Ibid.*, 292, Cs. Kollonay Lehoczky, *The Hungarian Constitutional Court and Social Protection*, in Cs. Kollonay-Lehoczky, & A. Aaron, *Scritti in onore di Gino Giugni: studi sul lavoro*, Vol. 1–2., Cacucci, Bari, 1999, 1471.

[90] T. Drinóczi, *A tulajdonhoz való jog a magyar Alkotmánybíróság gyakorlatában*, *Romániai Magyar Jogtudományi Közlöny*, 2004, vol. 2, n. 2, 51.

[91] Decision of the Hungarian Constitutional Court 40/1997 (VII. 1.), Drinóczi, *op. cit.*, 55, H. Rab, *A nyugdíjbiztosítási ellátások fenntarthatóságának jogi garanciái*, HVG-ORAC, Budapest, 2012, 83.

dismissal.[92] In accordance with the principles of human rights, the right to work imposes a threefold obligation on the state: to respect, protect and effectively fulfil the right. The obligation to respect the right to work entails that the state must refrain from interfering, directly or indirectly, with the enjoyment of this right. The obligation to ensure protection entails the state's duty to take active measures to prevent third parties from interfering with the enjoyment of the right. Ultimately, to ensure the comprehensive realisation of the right, it is imperative that the state implements an array of suitable legislative, administrative, budgetary, judicial and other measures.[93]

In alignment with the principles mentioned above, the Committee on Economic, Social and Cultural Rights identifies a pivotal context wherein the right to work is elucidated as an indispensable tenet for the actualisation of other human rights. Moreover, it is postulated that this right is an inseparable and inherent part of human dignity. In fact, freely chosen or accepted work is a basic condition for a dignified human life. It is not only a certainty of the physical existence of individuals and their families, but it also contributes to the recognition of the individual within the community.[94] It is inconceivable that human dignity should be upheld without extending the dimension of the right to work in this direction. Work is one of the most important aspects of an individual's personal development and of their presence in society and the economy.[95]

The protection of individuals from arbitrary dismissal is not only a responsibility incumbent upon those engaged in economic activity, but also upon the state in its capacity as both regulator and employer. If the state fails to prevent arbitrary dismissals or engages in such practices itself, or if it fails to ensure the protection of individuals within its jurisdiction against arbitrary dismissal, including legislative measures, it also violates the right to work. As

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[92] *The right to work, General comment No. 18*, Committee on Economic, Social and Cultural Rights, adopted on 24 November 2005 Article 6 of the International Covenant on Economic, Social and Cultural Rights, Thirty-fifth session, Geneva, 7–25 November 2005, https://www.refworld.org/legal/general/cescr/2006/en/32433 (accessed on October 30, 2024).

[93] *Ibid.*, para. 22.

[94] *Ibid.*, para. 1, Sarkin & Koenig, *op. cit.*, 3, Collins 2015, *op. cit.*, 29, J. W. Nickel, *Is there a Human Right to Employment?*, *Philosophical Forum*, 1978–1979, Winter-Summer, vol. 10, n. 2–4, 149.
https://www.researchgate.net/publication/327655500_Is_There_a_Human_Right_to_Employment_Philosophical_Forum_11_1980_149-170 (accessed October 31, 2024).

[95] *The right to work, General comment No. 18* para. 4. See also N. Gundt, *The Right to Work vesus the EU activation policy: Effects on national social benefits*, Which securities for workers in time of crisis? CERCRID (UMR 5137) – ASTREES: Labour Law and Financial Crises: Contingent Responses? Conference paper, 2013, 2, Sarkin & Koenig, *op. cit.*, 3.

the Committee on Economic, Social and Cultural Rights observes, while states possess considerable discretion in determining the most appropriate measures to address their specific circumstances, they are obliged to take prompt action to ensure the protection of all individuals against unemployment as well as the provision of job security.[96] Furthermore, a failure by a state to establish a system of institutions to ensure protection constitutes a violation of the prohibition of unfair dismissal.[97]

5. Conclusion

Considering the aforementioned factors, it is evident that workers seek stability and security in their employment relationships. In the context of termination of employment, it is not merely their will that is decisive. As has been demonstrated above, it is the explicit obligation of the state to establish institutions that provide protection against arbitrary and unlawful termination of employment. In examining the theoretical foundation of protection against arbitrary dismissal by the employer, it can be concluded that the immediate basis of protection is associated with the employee's necessity for existential protection. Given the theoretical justifications for this protection, it can be asserted that it constitutes a universal human right intrinsic to the human condition. The right to work, which is part of the right to protection against unlawful deprivation of employment, constitutes an integral aspect of human dignity in this context. Therefore, arbitrary dismissal without legal limits and without justification constitutes an affront to human dignity. The protection of individuals against arbitrary termination of employment constitutes an integral aspect of the state's obligation to safeguard human dignity. The protection of employees from arbitrary dismissal by their employers can be considered a fundamental human right, deriving from the broader rights to work and human dignity.

The circumstances and considerations described above have not changed in the 20th and 21st centuries. It is my contention that these remain valid. The contemporary era has witnessed the emergence of several novel phenomena, including new forms of subordinate work. However, given the precarious nature of these employment arrangements, the arguments presented above are, in my opinion, particularly pertinent. It follows that protection against termination should extend to all forms of subordinate employment, encompassing all individuals engaged in such roles, regardless of their

[96] International Covenant on Economic, Social and Cultural Rights, Article 4(1). *The right to work, General comment No. 18,* para. 34–35 and 37.
[97] *The right to work, General comment No. 18,* para. 35.

categorisation. Therefore, the fundamental issue is not to determine whether a particular relationship constitutes an employment relationship, but rather to identify those who need protection.[98] A broad interpretation of the concept of 'employment' would encompass any form of human income-generating activity, even in the context of the platform or gig economy. This would mean that the rules governing arbitrary dismissal by the employer should apply to such activities, rather than being limited to those that constitute an employment relationship. In other words, the protection of individuals against the arbitrary deprivation of their livelihood as a result of their employment status should be enshrined as a fundamental assurance of labour law.

[98] See E. Menegatti, *'On-demand Workers by Application – Autonomia o Subordinazione?',* in G. Z. Grandi & M. Biasi (eds), *Commentario breve allo statuto del lavoro autonomo e del lavoro agile [Short Commentary on the statute of self-employment and mart working]*, Wolters Kluwer Italia, Milano, 2018, 109. Cf. I. Horváth, D. P. del Prado, Z. Petrovics, & A. Sitzia, *The Role of Digitisation in Employment and Its New Challenges for Labour Law Regulation: The Hungarian, Italian and Spanish Solutions, Comparison, and Criticism*, *ELTE Law Journal*, 2021, vol. 9, n. 2, 131, https://ojs.elte.hu/eltelj/article/view/5254/4274 (accessed October 29, 2024).

We're Not Robots": Legal Limits on Work Intensity at the AI-Powered Warehouse

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Abstract. Do legal norms in the OSH sphere set a boundary for the use of AI and algorithms at the workplace? With a focus on Amazon warehouses, this paper compares the rationale underlying recent laws enacted in Poland and the United States, which aim to define the amount of physical labour that can be performed by an employee during the working shift. In the U.S., warehouse quota laws were passed in five states in response to an organization of the work process that was found to cause high worker injuries. This system also came under scrutiny in Poland. At its centre were violations of an ergonomics standard that sets limitations on the workload, quantified as admissible values of energy burned by workers on the job. Such regulations express the OSH principle that employers must adapt the work to the individual. This paper argues that "individualization" as a legal premise might present a real challenge to AI-powered work organization, which overlooks individual predispositions and tailors the work to the most productive employees.

Keywords: *OSH; AI; Amazon; Work intensity; Energy expenditure.*

1. Introduction

Speaking at a rally about why he and his co-workers were demanding union recognition at DCK6, an Amazon delivery station in San Francisco, Dori Goldberg, a warehouse associate and Teamsters member, explained: "I'm literally sick and tired of being sick and tired all the time. I'm motivated to organise because I want to be able to live my life outside of work and have a

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good-quality job where I am not overextended"[1]. Despite Amazon's AI-augmented cobots, robotic arms, advanced algorithmic management systems, and other cutting-edge technology, Goldberg performs repetitive manual labour that involves sorting packages and loading them onto trucks. Like many other Amazon workers in the U.S., Goldberg and his co-workers are also demanding wage increases and a union[2].

Since Amazon is a highly centralised global employer, warehouse associates around the world are subject to very similar workplace policies and perform tasks in the same work processes. In effect, work conditions at U.S. company warehouses mirror those at company warehouses in countries like Poland. In 2021, Maria Magdalena Malinowska, an Inicjatywa Pracownicza union representative and Amazon associate at the POZ1 fulfilment centre near Poznań, was dismissed for allegedly taking photos documenting the removal of a co-worker's dead body from the warehouse by a funeral company. Malinowska had come to the warehouse that day to attend accident assessment proceedings following the death of yet another co-worker on the shift two months earlier. Amazon refused to allow her to enter the warehouse and participate in the accident assessment. She was fired after speaking to the press about the possible circumstances of these deaths, which she believed were linked to overwork[3].

These accounts testify to the low quality of many of the jobs that are left to humans in the warehousing industry, especially at companies like Amazon, often seen as synonymous with technological innovation. What follows is a discussion of work intensification as a key issue that underpins the demanding nature of physical labour at the AI-powered warehouse. Following Todolí-Signes, work intensification is understood here as the "process of raising the expected workload of an employee by increasing the amount of tasks to be undertaken or shortening the time allowed to complete those tasks"[4]. The process of work intensification can be distinguished as more exploitative for workers than the process of raising productivity quotas (sometimes called standards). The latter tends to be governed by labour law or is subject to rules

[1] L. Feliz Leon, *Efforts to Organize Amazon Are Advancing Across the US*, Jacobin, (11 October 2024), https://jacobin.com/2024/10/amazon-teamsters-union-san-francisco (last accessed: 28 February 2025).

[2] J. Rosenblum, *For Amazon Workers, $30 Is the New $15*, The Nation, (8 August 2024), https://www.thenation.com/article/activism/amazon-workers-30-demand/ (last accessed: 28 February 2025).

[3] The labour court in Poznań ruled Malinowska's termination was unlawful and she was reinstated in the spring of 2024.

[4] A. Todolí-Signes, *Making algorithms safe for workers: occupational risks associated with work managed by artificial intelligence*, Transfer: European Review of Labour and Research, 27(4), (2021), p. 6.

set during collective bargaining between social partners. Work intensification seems to be the outcome when rules on productivity quotas are either not in place, are unenforceable, or are easily bypassed.

This paper examines the role of digital technology in raising the workload. At Amazon's warehouses, technology is used to determine productivity quotas, which serve as a gauge of work intensification. The paper then explores the causal link between technologically mediated work intensification and occupational hazards, as this link is delineated in recent legal acts passed in the U.S. and Poland. These legislative initiatives were enacted with the (more or less directly expressed) aim of regulating physical labour performed in the context of high interaction between humans and technological tools, both in the forms of advanced machinery and AI-powered software. Whether focused on describing the productivity quota and what constitutes productive time, as in the case of U.S. bills, or on setting an ergonomics standard that prescribes a maximum workload during the working shift, as in Poland, these legislative initiatives can be seen as frontline responses to the rapidly evolving work environment.

The paper closely examines the regulations introduced and then compares the underlying rationale. Although the legal approaches differ, as they must, given the distinct nature of U.S. common law versus Poland's civil law system, the laws discussed share the fundamental premise that the amount of labour to be performed by a worker must be clearly defined. Secondly, the laws push employers to consider employees' individual predispositions in setting their performance expectations. By formulating this requirement, the regulations express a key provision of OSH law, according to which employers must "adapt the work to the individual." Articulated in legal acts on the international level and concretised in national (and state) case law, the principle of "individualisation" derives from the employer's obligation to protect the health and life of each and every worker. This obligation is fulfilled by providing a safe and healthy working environment. The paper argues that a broadly indiscriminate organisation of the labour process, which by design ignores employees' individual characteristics, not only exposes employees to occupational hazards but also upsets the terms of the employment relationship, as it models the process on the most productive employee, rather than the average or mediocre-performing worker.

The paper concludes by positing that workers are entitled to expect that technological innovation in the work process should serve to improve their well-being, and not only productivity results.

This paper focuses entirely on Amazon as a leading employer in the warehousing industry in both the U.S. and Poland. The idea for it was inspired by exchanges with colleagues and organisers affiliated with Amazon Workers

International (AWI)[5], a transnational coalition of warehouse associates involved in everyday shopfloor organising, coordinated strikes, and different forms of workplace struggle, since 2015. These exchanges sparked interest in understanding how labour law systems in different jurisdictions have weathered the challenges brought on by technological advancement. Legal comparison in this context has an evident practical dimension aimed at formulating successful demands and litigation strategies, as well as imagining how the law could better protect workers.

2. "Digital Taylorism": Productivity Quotas at Amazon Warehouses in Poland and the U.S.

New technology implemented at the warehouse as both hardware (machines that mostly supplement, rather than substitute, human labour) and software (AI and algorithmic management systems) serves primarily to increase productivity. A 2019 report published by the UC Berkeley Labour Center, entitled *"The Future of Warehouse Work: Technological Change in the U.S. Logistics Industry,"* describes how the explosive growth of online sales in recent years fuelled interest in digital technologies among entrepreneurs in the logistics and warehousing sector[6]. "[…] In the context of the low margins that characterise this industry," the authors point out, "productivity becomes paramount and improvements are focused on reducing costs"[7]. According to this report, the main impact of technological changes on workers is work intensification[8]. This, the authors argue, occurs through a twofold process they call *"digital Taylorism."* The first aspect of this process limits human interactions among co-workers by, in short, placing machines at the centre of what was traditionally a site of interpersonal relationships (including with superiors, now the amorphous "algorithmic boss"). The second aspect relates to the increasing standards of job performance designated by AI and algorithms.

When it comes to physical labour performed by humans, technological advances in the development of machines and AI-driven methods of data analysis allow for breaking down tasks into the smallest possible segments (often lasting a few seconds), shortening the intervals between those tasks, reducing their completion time, and making full productive use of the working shift. Much like Frederick Taylor's system of scientific management, digital technology serves to increase the volume of labour performed during the

[5] See: https://amworkers.wordpress.com

[6] B. Gutelius B., N. Theodore, *The future of warehouse work: Technological change in the U.S. logistics industry*, Berkeley, CA: UC Berkeley Labor Center, (2019).

[7] *op. cit.* p. 55.

[8] *op. cit.* p. 54.

working day. Yet unlike scientific management, which created a specific method of work performance that was then applied to employees, AI in the work process "seeks to detect among employees the optimal methods [of completing particular tasks – MR], and then highlight these methods as best practices" [9]. In effect, the aim is to "find the true sources of productivity in workers, catalogue how employees are doing on those metrics, and then properly incentivise those behaviours for future performance"[10]. Thus, technology allows the employer to identify patterns of the most efficient work by closely monitoring employees and their various conduct. Productivity targets are, in effect, generated from, and catered to, the most productive employees.

As described in a previous publication, productivity quotas at Amazon warehouses in Poland are set for a period of one month based on employees' individual performance during the preceding period[11]. Worker accounts and publicly available information suggest that a very similar – if not identical – system is used at Amazon warehouses in the United States. Accordingly, what Amazon calls "minimum performance indicators" are determined by algorithms and AI at the level of a certain percentile of individual work results, ranked in ascending order. As such, workers are expected to perform at a target set against the results achieved by other employees at the facility, and not predetermined by the employer. When employees exert themselves more, the productivity quota, or minimum performance indicator, rises in the next period. Monthly productivity quotas at Amazon's warehouses are set for the work process, regardless of employees' individual characteristics like age, gender, body mass, health, or life situation. Thus, all workers in a given work process are expected to perform labour according to the same quota, and each individual employee is distinguished solely based on their productivity score.

Productivity quotas at Amazon rise constantly because the company incentivises better performance from month to month by penalising the least efficient employees. As the Circuit Court in Poznań established in a case initiated by an Amazon employee who was dismissed for poor productivity, the system assumes in advance that a certain number of employees, which the company indicates as the 10th percentile, will not meet the productivity quota[12]. Effectively, workers who perform at this percentile will receive a negative evaluation (feedback about the need for improvement), as the Court

[9] M. Bodie et al., *The Law and Policy of People Analytics*, Univ. of Col. L. Rev. 88(4), (2017), p. 969.
[10] *op. cit.* p. 969.
[11] M. Rozmyslowicz and P. Krzyżaniak, *Automated Processing of Data on Work Performance and Employee Evaluation: A Case Study of Practices at Amazon Warehouses in Poland*, Italian Labour Law E-Journal, 16(2), (2023).
[12] Sąd Okręgowy w Poznaniu Judgement of 10 June 2020, reference number VIII Pa 135/19

indicated, "regardless of whether they performed their work objectively with due diligence and in a conscientious manner"[13]. A certain number of negative evaluation results qualify a worker for dismissal.

The Polish Labour Code contains general rules on the use of quotas (translated as performance standards or work standards) in all industries, understood as a measure of workload in terms of productivity and quality[14]. Quotas must take into account the level of technological advancement and work organisation achieved at the worksite, and can only be raised as technical and organisational improvements are implemented to facilitate an increase in the productivity or quality of labour[15]. Importantly, the employer is prohibited from raising quotas solely on the basis of an employee's exceeding performance, if this has occurred as a result of the employee's greater personal contribution or professional efficiency. As such, the employer cannot increase productivity quotas simply because some employees work above and beyond performance indicators. Undoubtedly, the aim of specifying conditions for the legal increase of quotas is to protect the well-being (the health and life) of employees. Although the rule on quotas is not located in the OSH section of the Labour Code, it expresses a legal norm from the OSH canon. Polish case law acknowledges that the employer is required "to provide a quota that is technically, organisationally, as well as physiologically and psychologically justified"[16]. Productivity standards are thus necessarily correlated with, and in fact determined by, providing adequate safeguards for the protection of employee health and safety.

Amazon maintains in both Poland and the U.S. that it does not use productivity quotas, pointing instead to its employee evaluation system. "At Amazon, individual performance is evaluated over a long period of time, in relation to how the entire site's team is performing," a company spokesperson explained in a statement sent out to U.S. media outlets in June 2024[17]. Yet Amazon's performance review serves simultaneously to assess individual employees and to determine a new productivity quota for the next evaluation period[18].

In relation to the rule on quotas provided for in the Polish Labour Code, the company maintains that the organisation of the work process at its warehouses

[13] *op. cit.*

[14] Article 83. These abstract rules apply to all industries.

[15] Article 83(2) and (3) of the Polish Labour Code.

[16] J. Wratny, *7. Kodeks pracy. Komentarz*, 4 (2005), Warszawa. The translation is my own.

[17] C. Marr, *Amazon Fights States on Defining Quotas in Warehouse Safety Laws*, Bloomberg Law, (24 July 2024) https://news.bloomberglaw.com/daily-labor-report/amazon-fights-states-on-defining-quotas-in-warehouse-safety-laws (last accessed: 28 February 2025).

[18] As argued in M. Rozmysłowicz and P. Krzyżaniak *op.cit.*

does not fall within the scope of the legal norms set out in the rule because the system is not used to determine piecework pay. Indeed, the quota rule is located in the section of the Labour Code entitled *"Remuneration for Work and Other Benefits"*, and its traditional interpretation is based on a correlation between the wage and the quota. Here, the quota is understood functionally to express the quantity and quality of work for the purposes of remuneration. In both Poland and the U.S., Amazon has an hourly wage system and does not directly associate wages or other pay benefits with either productivity or quality quotas. As such, in Poland, the company argues that since its system of "minimum indicators" does not serve to determine the amount of piecework pay, it does not have quotas. With no quota system in place, the rule, which conditions productivity increases on the implementation of organisational and technical improvements to the work process, does not apply, following the company's rationale. It must be said, however, that this is simply an elaborate means of circumventing the law[19]. Nonetheless, the legal norms contained in this provision of the Polish Labour Code call for reinterpretation, especially in light of the role of technology as a conveyor of both the amount and quality of work performed by individual workers.

U.S. federal law does not regulate the use of productivity standards. Therefore, there is no federal requirement for employers to provide workers with protections when increasing performance expectations. State legislators in the U.S. have attempted to tackle the work intensification problem head-on by passing laws specifically aimed at the regulation of productivity standards in the warehousing industry. Largely analogous laws have, as of this writing, been enacted in five states: California[20], New York[21], Minnesota[22], Washington[23] and Oregon[24]. In general, these bills require larger employers in the sector to

[19] According to Article 262 § 2(2) of the LC, disputes relating to the implementation of performance standards do not fall within the jurisdiction of labour courts. In effect, an unfair productivity quota could only be contested by a labour union in collective bargaining (or pre-strike negotiations). Amazon declines to bargain collectively with unions in both Poland and the U.S.

[20] California Assembly Bill 701 or the Warehouse Quotas Law went into effect on January 1, 2022, adding Part 8.6 (commencing with Section 2100) to Division 2 on Employment Regulation and Supervision of the California Labor Code.

[21] The Warehouse Worker Protection Act went into effect on June 19, 2023, adding article 21-A (section 780 - 788) to Chapter 31 on Labor of the Consolidated Laws of New York.

[22] The Warehouse Distribution Worker Safety law went into effect on August 1, 2023, adding section 6526 to Chapter 182 on Occupational Safety and Health of the Minnesota Statutes.

[23] The Warehouse Distribution Centers law went into effect on July 1, 2024, adding chapter 49.84 to Title 49 on Labor Regulations of the Revised Code of Washington (RCW).

[24] House Bill 4127 or the Warehouse Worker Protection Act took effect on January 1, 2025, amending chapter 653 on Minimum Wages of Title 51, Volume 16 the Oregon Revised Statutes (ORS).

provide each employee with written documentation summarising any quota to which the employee is subject. The laws define "quota" broadly, as a work standard, under which an employee is assigned or required to perform at a specified productivity speed, or perform a quantified number of tasks, or to handle or produce a quantified amount of material, within a defined time period and under which the employee may suffer an adverse employment action if they fail to complete the performance standard. The Washington, Minnesota, and New York laws hold in addition that a quota also exists where an employee's actions are categorised between time performing tasks and not performing tasks (time-on-task vs. time-off-task, or idle time in Amazon speak), if the employee may suffer an adverse employment action if they fail to meet the performance standard. The first of this legislation to be enacted, California Assembly Bill 701, known as the *Warehouse Quotas Law*, was hailed in the U.S. and abroad as a landmark legislative step aimed directly at regulating Amazon's AI-powered algorithmic management system[25].

3. Workplace Injuries and State Quota Laws in the U.S.

In 2023, U.S. labour unions issued the third in a series of reports on workplace injuries at Amazon, entitled *'In Denial: Amazon's Continuing Failure to Fix Its Injury Crisis'*[26]. The report examines data on workplace injuries submitted annually by Amazon to the federal Occupational Safety and Health Administration (OSHA)[27]. According to the report's findings, Amazon employed an average annual workforce of 716,688 people[28], accounting for 36 per cent of all U.S. warehouse workers in 2022. In that same year, Amazon facilities sustained nearly 39,000 injuries, the vast majority of which were serious, making the company "responsible for more than half (53 per cent) of all serious injuries in the industry"[29]. Reports from previous years point to the same trend in injuries, with the report for 2021 also stressing that "injury rates at Amazon's robotic facilities have consistently been higher than at its non-

[25] K. Paul, *California passes landmark bill targeting Amazon's algorithm-driven rules*, The Guardian, (10 September 2021), https://www.theguardian.com/us-news/2021/sep/10/california-bill-amazon-warehouse-quotas, (last accessed: 28 February 2025).
[26] The Strategic Organizing Center (SOC), *In Denial: Amazon's Continuing Failure to Fix Its Injury Crisis*, (April 2023), *see*: https://thesoc.org/wp-content/uploads/sites/342/SOC_In-Denial_Amazon-Injury-Report-April-2023.pdf (last accessed: 28 February 2025).
[27] OSHA is the U.S. federal regulatory agency with the authority to set and enforce protective workplace safety and health standards.
[28] *op. cit.* n. 29, p. 3.
[29] *op. cit.* The report uses the term "serious injury" to designate one, in which "workers were unable to perform their regular job functions (light duty) or were forced to miss work (lost time)", p. 2.

robotic facilities in every year for which data is available"[30]. The unions found this was due to the fact that "robots drive workers' production speed higher in facilities with automation, making working conditions even more dangerous" [31].

Studies of Amazon's system conducted by scholars[32], as well as a recent Senate committee report[33] and media inquiries[34], confirm the unions' findings that the company's AI and algorithm-driven work process is riddled with occupational hazards. In response to the ensuing health and safety crisis, the United States Department of Labor and the United States Attorney ordered OSHA to carry out a series of inspections at the company's warehouses across the country[35]. At least nine federal and state-level OSHA investigations carried out between 2021 and 2023 found violations of OSH law[36]. In January 2023, federal-level OSHA cited Amazon.com Service LLC for serious violations[37]. OSHA's inspection report indicates that Amazon workers "face immense pressure to meet the pace of work and production quotas […]" which, coupled with a "[…] high frequency of repetitive tasks such as bending, lifting, and twisting", is a cause of frequent injuries[38]. As a result of the investigations, Amazon was

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[30] The Strategic Organizing Center (SOC), *The Injury Machine: How Amazon's Production System Hurts Workers*, (April 2022), p. 9.

[31] *op. cit.*

[32] B. Gutelius and S. Pinto, *Pain Points: Data on Work Intensity, Monitoring, and Health at Amazon Warehouses*, Center for Urban Economic Development, University of Illinois Chicago, (October 2023), https://cued.uic.edu/warehousing-supply-chain-research/ (last accessed: 28 February 2025).

[33] On 15 December 2024, the Health, Education, Labor, & Pensions Committee of the U.S. Senate, chaired by Senator Bernard Sanders, released a report entitled, *The "Injury-Productivity Trade-off": How Amazon's Obsession with Speed Creates Uniquely Dangerous Warehouses*, https://www.help.senate.gov/imo/media/doc/amazon_investigation.pdf (last accessed: 28 February 2025).

[34] For example: W. Evans, *Ruthless Quotas at Amazon Are Maiming Employees*, The Atlantic, December 5, 2019, https://www.theatlantic.com/technology/archive/2019/11/amazon-warehouse-reportsshow-worker injuries/602530/ (last accessed: 28 February 2025).

[35] Press release, U.S. Attorney's Office for the Southern District of New York, *Amazon Cited By OSHA Based On SDNY Referrals For Serious Violations That Exposed Workers To Safety Hazards*, (18 January 2023) https://www.justice.gov/usao-sdny/pr/amazon-cited-osha-based-sdny-referrals-serious-violations-exposed-workers-safety, (last accessed: 28 February 2025).

[36] The Strategic Organizing Center, *op.cit.*, p. 2.

[37] Press release, OSHA national office, *Federal safety inspections at three Amazon warehouse facilities find company exposed workers to ergonomic, struck-by hazards*, (18 January 2023) https://www.osha.gov/news/newsreleases/national/01182023, (last accessed: 28 February 2025).

[38] OSHA inspection report (17 January 2023), p. 8, https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2023/01/OSHA20230063a.pdf, (last accessed: 28 February 2025).

ordered to automate some of its work processes and reduce working hours at individual workstations by increasing internal rotation or introducing additional breaks.

In large part, the injuries incurred by warehouse associates are musculoskeletal disorders (MSDs)[39], which affect the muscles, bones, soft tissue, joints, and spine[40]. MSDs are cumulative in nature and often worsen gradually over time, manifesting in functional incapacity. According to the Washington State legislature, "work-related musculoskeletal injuries and disorders account for at least one-third of all workers' compensation claims that result in time loss and wage replacement, are more severe than the average nonfatal injury or illness, and are a common cause of long-term disability in Washington State"[41]. In May 2021, a Washington State OSHA (WISHA) investigation found that "there is a direct connection between Amazon's employee monitoring and discipline systems and workplace MSDs"[42].

In another citation in March 2022, WISHA declared that Amazon's failure to fix health and safety hazards was "willful," because the company "is demonstrating plain indifference in that they have been made aware of the hazards and increased injury rates yet are making no effort to take corrective action"[43]. These serious health and safety problems became the pressing context for legislation aimed at setting rules on the use of productivity quotas.

Starting in late 2022, the California Warehouse Quotas law became the basis for the state Labour Commissioner's investigation of Amazon facilities. In June 2024, the Commissioner's Office announced that during the period from October 2023 to March 2024, it had found 59,017 violations of the Warehouse Quotas law at just two Amazon distribution centres[44]. In each of these cases, Amazon had failed to provide employees with written notice of the quotas they must follow. In accordance with the state Labour Code, penalties of $100 were cited for each violation, amounting to a total citation of about $6 million.

Uniquely among the quota bills enacted thus far, the California law includes a preamble, which outlines the causal link between technologically-mediated, highly productive labour and workplace injuries:

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[39] B. Gutelius and S. Pinto, *op.cit.*, p. 9.

[40] J. Humphreys and S. Verstappen, *The burden of musculoskeletal disease*, Medicine, 50(2), (2022), p. 82-84.

[41] Motive at Sec. 1(2) of the Engrossed Substitute Senate Bill 5217, enacted on July 23, 2023 giving Washington state the authority to regulate certain industries so as to prevent musculoskeletal injuries and disorders.

[42] WISHA citation 317961850, cited in B. Gutelius, S. Pinto, *op.cit.*, p. 9.

[43] The Strategic Organizing Center, *op.cit.*, p. 19.

[44] News release, State of California Department of Industrial Relations, *Labor Commissioner Cites Amazon Nearly $6 Million for Violating California's Warehouse Quotas Law*, (18 June 2024), https://www.dir.ca.gov/DIRNews/2024/2024-46.html /, (last accessed: 28 February 2025).

> The rapid growth of just-in-time logistics and […] advances in technology used for tracking employee productivity, have led to a rise in the number of warehouse and distribution centre workers who are subject to quantified work quotas. […] These quotas generally do not allow for workers to comply with safety guidelines or to recover from strenuous activity during productive work time, leaving warehouse and distribution centre employees who work under them at high risk of injury and illness.

This link is also reiterated in injury rate clauses incorporated into both the California and Minnesota quota bills. In both cases, the laws provide that if a particular worksite or employer is found to have an annual employee injury rate above the warehousing industry's average, the labour commissioner gains the authority to investigate possible violations under the quota law[45].

While the primary assumptions of the enacted state quota laws are the same, there are variations in the details. The laws require covered employers to provide each employee with a written description of each quota the employee is subject to, upon hire. This description must include the quantified number of tasks to be performed or materials that must be produced or handled within a defined time period, and any potential adverse employment action that could result from failing to meet the quota. The New York, Minnesota, Oregon, and Washington bills also explicitly order the employer to inform the employee of any quota changes thereafter[46]. The Washington bill additionally specifies that the employee must be informed verbally or in writing as soon as possible and before they are subject to the new quota[47]. The Minnesota law, meanwhile, orders the employer to provide a written description of the new quota no fewer than one working day prior to the effective date of any increase in an existing quota[48]. The New York, Minnesota, Oregon, and Washington bills furthermore include requirements on the language of communication[49]. The Washington and Minnesota laws stand out in this respect, as both expressly indicate (although in varying wording) that the written description of the quota must be understandable, in plain language, and in the employee's preferred language[50]. This aspect is particularly important, as it holds the employer

[45] Minn. Stat. 182.6526 subd. 5 and Cal. Lab. Code § 2107 (b).
[46] The New York (at § 781), Oregon (at § 3 (2) (b)) and Washington bills (RCW 49.84.020 (2)) require the employer to provide an updated written description of each quota to which the employee is subject within two business days of the quota change.
[47] RCW 49.84.020 (2) (a).
[48] Minn. Stat. 182.6526 subd. 2(c) (2).
[49] The New York law requires an employer to provide written description of a quota in English and in the language identified by each employee as their primary language (at § 781).
[50] For ex. RCW 49.84.020 (4).

accountable for not simply printing out spreadsheets of likely incomprehensible, raw numerical data. Rather, in order to satisfy this provision, the employer must make the written description of the quota understandable (giving in turn the employee the authority to claim that they did not understand the quota, or that the language used to describe it was too convoluted).

In following all of the enacted state quota bills discussed here, an employer cannot take adverse employment action against an employee for failing to meet a quota that has not been disclosed to the employee[51]. The California Labour Commissioner understands an adverse employment action as "any action taken by an employer that materially and negatively affects employment, including a negative performance review, a reduction in pay or hours, or termination"[52].

Significantly, the California, New York, Minnesota, and Washington bills further extend this restriction on adverse employment action to quotas considered unlawful. Employees are not required to meet unlawful, or prohibited quotas. An unlawful or prohibited quota is one that prevents an employee from taking meal or rest periods, using bathroom facilities, or including reasonable travel time to and from bathroom facilities[53]. Under the California, Minnesota, and Washington bills, an unlawful quota is also one that prevents compliance with occupational health and safety laws. Thus, a quota may be unlawful if, in order to meet it, the employee had to violate OSH regulations. The Minnesota law adds prayer periods to this list, specifying that an employee is not required to meet a quota that prevents compliance with prayer periods[54].

The Washington law importantly expands the scope of this provision. According to the state bill, an unlawful quota is also one that does not provide "sufficient time" for breaks, travel to break sites, or to perform any activity required by the employer in order to do the work subject to any quota[55]. Further, the bill spells out that the quota must provide sufficient time to take any actions necessary for the employee to exercise their statutory rights to a safe and healthful workplace, including but not limited to time to access tools or safety equipment necessary to perform the employee's duties[56]. Finally, a quota is unlawful if it exposes an employee to occupational safety and health

[51] For ex. California Lab. Code § 2102.

[52] State of California Department of Industrial Relations, *Frequently Asked questions on Warehouse Quotas (Assembly Bill 701)*, https://www.dir.ca.gov/dlse/FAQwarehousequotas.htm (last accessed: 28 February 2025).

[53] For ex. § 782 of the New York law.

[54] Minn. Stat. 182.6526 subd. 3.

[55] RCW 49.84.030.

[56] RCW 49.84.025.

hazards in violation of the requirements of Washington's Industrial Safety and Health Act[57]. The Washington law also specifies that reasonable travel time must include consideration of the architecture and geography of the facility and the location within the facility that the employee is located at the time. This last aspect is particularly relevant to Amazon warehouse associates employed at fulfilment centres that cover enormous surface areas, often measured in multiple football fields.

The state quota bills provide employees with a set of protections and benefits. Firstly, current and former employees who believe they have been disciplined for failing to meet a quota, or that a quota they were subject to was unlawful, are accorded the right to request information not only about the quota, but also about work speed data[58]. The employer must provide a copy of the most recent 90 days of the employee's own personal work speed data (the Washington law requires the employer to provide work speed data for the prior six months). Additionally, the New York, Minnesota, and Washington bills order the employer to provide aggregate work speed data for similar employees at the same facility for the same time period (90 days, or six months, respectively)[59]. Some bills institute a time period, in which the employer is required to comply with the request (for example, two business days for quota information and seven business days for work speed data in Washington). With the exception of the Oregon law, the bills explicitly prohibit employers from retaliating against employees for exercising the right to request information or for filing a complaint about a quota.

Enforcement of the bills' provisions is generally consigned to the appropriate labour commissioner, with the California and Washington bills outlining in detail the procedural rules. Interestingly, the Washington bill provides that under certain circumstances, an employer.

4. Energy Expenditure and Poland's Ergonomics Standard

In Poland, official data on workplace accidents have not indicated a concerning rise in injury rates at Amazon or within the wider warehousing industry. However, union representatives have long suspected that the work processes at

[57] RCW 49.84.032.

[58] The bills define employee work speed data as information relating to an individual employee's performance of a quota, including, but not limited to, quantities of tasks performed, quantities of items or materials handled or produced, rates or speeds of tasks performed, measurements or metrics of employee performance in relation to a quota, and time categorized as performing tasks or not performing tasks (for ex. California Lab. Code § 2100 (e) (1)).

[59] For ex. § 785 (1) of the New York law.

the company's warehouses expose workers to a high risk of occupational injuries and illnesses[60]. This situation is likely due, in part, to the restrictive legal definitions of what constitutes a workplace accident or an occupational illness. According to the legal definition, a workplace accident must begin with a "sudden event brought on by an external cause"[61]. Interpreted literally, both the suddenness and external origin of the injury imply that MSDs, which develop over time due to repetitive motions and eventually manifest in conditions like reduced limb function, are unlikely to be recognised as workplace accidents. Similarly, the legal definition of occupational illness is limited to a closed list of chronic conditions, which must manifest over a prescribed period, with only six types of MSDs officially recognised[62]. Consequently, many serious injuries do not qualify as workplace accidents, and long-term health issues often do not entitle workers to compensation, as they fail to meet the legal definition of an occupational illness. It can therefore be concluded that in Poland, regulations regarding occupational accidents and illnesses are out of step with technological advancements in work processes, which create new occupational hazards that are not covered by these regulations[63].

A further issue contributing to the lack of data on workplace accidents is the employer's dominant role in the accident assessment process. By law, the employer is responsible for convening the accident assessment team, selecting its members (including an employee representative), approving the findings in the post-accident report, and having the final say if there are disagreements within the team[64]. The employer is also solely responsible for maintaining a register of workplace accidents[65]. In practice, these regulations enable the employer to exert considerable influence over the accident assessment process and the subsequent reporting to authorities.

This situation is reflected in official injury records and statistics. However, this issue is not unique to Poland. In their study on work intensity, monitoring, and

[60] K. Leśniewicz, *Ofiary wypadków w Amazonie czują się jak winni przestępstwa - mówi zwolniona związkowczyni*, OKO Press, (30 November 2021) https://oko.press/ofiary-wypadkow-w-amazonie-czuja-sie-jak-winni-przestepstwa-mowi-zwolniona-zwiazkowczyni (last accessed: 28 February 2025).

[61] Article 3(1) of the Act of October 30, 2002 on social insurance for labour accidents and occupational diseases.

[62] Regulation of the Council of Ministers of June 30, 2009 on occupational diseases.

[63] H. Szewczyk posited this argument in reference to the Polish regulations already in 2011, see: Helena Szewczyk, *Choroby zawodowe i parazawodowe pracowników w znowelizowanym kodeksie pracy*, Forum Prawnicze, 2 (2011), p. 70.

[64] §9(3) and §10(2) Decree of the Council of Ministers of July 1, 2009 on determining the circumstances and causes of accidents at work.

[65] *op. cit*, § 16.

health at Amazon warehouses in the U.S., B. Gutelius and S. Pinto highlight similar issues with the injury reporting system, which they claim "fails to capture the full scope of injuries occurring in Amazon warehouse facilities" [66].

Although injury records do not suggest a major Occupational Safety and Health (OSH) problem at Amazon's facilities in Poland, the warehouse work process was nonetheless found by the State Labour Inspectorate to expose workers to serious occupational hazards. Central to these findings were violations of legal norms that set maximum limits on the amount of physical labour that can be performed during a working shift. OSH regulations in Poland incorporate an ergonomics standard that defines work intensity limits for physical tasks such as the manual handling of loads (e.g., lifting, carrying, pushing, pulling)—activities typical in warehousing. In this context, work intensity is quantified as allowable energy expenditure, expressed in kilojoules (kJ) burned by workers during their work. These legal limits are defined in the Ordinance of the Minister of Labour and Social Policy on occupational health and safety in the manual handling of loads and other physically demanding tasks (hereafter: the Ordinance). Amended in 2018, the Ordinance stipulates that net energy expenditure required to perform physical tasks should not exceed 5,000 kJ per shift and 20 kJ per minute during occasional physical work for women, and 8,400 kJ per shift and 30 kJ per minute for men[67]. This Ordinance applies to all sectors of the economy where physical labour is involved.

The link between high energy expenditure and the likelihood of developing work-related MSDs is relatively well documented in industrial engineering literature. It is widely accepted that as productivity expectations increase, tasks become more repetitive, requiring greater energy expenditure, which in turn leads to physical fatigue and exposes workers to a higher risk of MSDs[68]. A study of the warehousing sector in particular found that "[o]rder picking is the most time-consuming and labour-intensive activity in warehousing. Due to the need to frequently handle items, order picking requires high human energy expenditure and poses a risk environment for workers to develop MSDs"[69].

In the spring of 2018, following reports of unhealthy working conditions at Amazon's fulfilment centres in Poland, the Chief Labour Inspector ordered a comprehensive inspection of work at the company's warehouses. Coordinated

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[66] B. Gutelius and S. Pinto, *op.cit.*, p. 17-18.

[67] § 6 (3) and (4).

[68] N. Mohd Nur et al., *The effects of energy expenditure rate on work productivity performance at different levels of production standard time*, J Phys Ther Sci. 27(8), (August 2015), p. 2431-3.

[69] D. Battini et al., *Human energy expenditure in order picking storage assignment: A bi-objective method, Computers & Industrial Engineering*, Computers and Industrial Engineering, 94, (2016), p. 147-157.

by the District State Labour Inspector in Rzeszów, a total of 12 inspections were carried out at four Amazon warehouses in April, May, and June 2018, without prior notification to the employer. During these inspections, labour inspectors measured the energy expended by selected warehouse workers by assessing their pulmonary ventilation[70] during the work process, using an MWE meter[71]. "Energy expenditure was measured at 11 workstations, of which 7 showed high values of energy expenditure," reported the Minister of Labour in a report to Parliament summarising the investigation[72]. The Labour Inspectorate's measurements revealed that, for some Amazon employees, the amount of physical effort required to perform the expected tasks exceeded the legal limits on energy expenditure for a working shift[73]. As a result, labour inspectors found that these workers were allowed, in violation of the law, to perform prohibited work that posed serious risks to their health. A total of 11 citations were issued for 6 men and 5 women, ordering Amazon to reassign these employees to other workstations. On the day of the measurements, all 11 employees tested exceeded the 5,000 kJ[74] and 8,400 kJ limits[75]. Two female

[70] Pulmonary ventilation is the process of air flowing into the lungs during inspiration (inhalation) and out of the lungs during expiration (exhalation).

[71] *Miernik Wydatku Energetycznego* or the Energy Expenditure Meter. A transportable device used to precisely calculate energy expenditure, constructed at the *Centralny Instytut Ochrony Pracy* (CIOP - the Central Institute for the Protection of Work), located in Warsaw, Poland. *See*: www.ciop.pl

[72] The Minister of Family, Work and Social Policy, (14 September 2018), administrative number: K8INT25331.

[73] Court documents indicate that measurements were taken at randomly selected workstations, while the employees chosen for the study had been working at Amazon for at least several months. The inspectors took account of their gender, age, weight and height. Samples of energy expenditure were taken 7 to 12 times from each tested employee, at different times of the working shift. The employer was allowed to take active part at every stage of the inspection. Union representatives were also present throughout the study. Tests were carried out during a standard work day, outside of the peak season.

[74] Energy expenditure results for the female employees tested (source: case law listed at *supra* n. 76 and 77):

1. J.P. (47 years old) 8,709 kJ, AFE Rebin and AFE Pack workstation;
2. A.R. (age not indicated) 9,104 kJ, AFE Rebin and AFE Pack workstation;
3. H.K. (age not indicated) 9,408 kJ, Receive workstation;
4. D.J. (63 years old) 10,343 kJ, AFE Rebin and AFE Pack workstation;
5. E.S. (59 years old) 12,754 kJ, AFE Pack workstation.

[75] Energy expenditure results for the male employees tested (source: case law listed at *supra* n. 76 and 77):

1. M.P. (58 years old) 8,676 kJ, Receive workstation;
2. P.J. (age not indicated) 9,207 kJ, Ship workstation;
3. W.W. (51 years old) 10,659 kJ, Pack workstation;
4. O.D. (age not indicated) 11,235 kJ, Dock workstation;
5. T.L. (42 years old) 13,731 kJ, Pack workstation;

workers (aged 63 and 59) among this group were found to have burned over twice the legal limit (10,343 kJ and 12,754 kJ, respectively). Consequently, during a single work shift, these employees exerted themselves at an intensity equivalent to more than two days' worth of labour.

The Labour Inspectorate issued citations for immediate execution, citing the imminent danger to the health of the workers concerned. Amazon appealed the citations to the District State Labour Inspector in Rzeszów, seeking their revocation. However, the citations were upheld in four decisions, which Amazon subsequently appealed to the lower administrative court in Rzeszów. In all four cases, the courts dismissed Amazon's complaints[76]. Finally, Amazon appealed to the Supreme Administrative Court of Poland, which in 2022 upheld the lower courts' rulings, once again dismissing Amazon's complaints[77]. In total, all eight administrative decisions sided with the Labour Inspectorate's findings[78]. A central issue evaluated by the courts was the method used to measure energy expenditure and whether work intensity could be measured uniformly for a large group of workers. It is important to note that the legal limits set in the Ordinance are maximum values (not averages) achieved by

6. A.H. (63 years old) 14,452 kJ, Ship workstation.

[76] 1) Wojewódzki Sąd Administracyjny in Rzeszów, judgement of 22 November 2018, reference number II SA/Rz 991/18, *see*: https://orzeczenia.nsa.gov.pl/doc/A9480EA18E, (last accessed 1 December 2024);
2) Wojewódzki Sąd Administracyjny in Rzeszów, judgement of 22 November 2018, reference number II SA/Rz 999/18, *see*: https://orzeczenia.nsa.gov.pl/doc/8B8766AC2C, (last accessed 1 December 2024);
3) Wojewódzki Sąd Administracyjny in Rzeszów, judgement of 19 December 2018, reference number II SA/Rz 1149/18, *see*: https://orzeczenia.nsa.gov.pl/doc/0908B35BDA, (last accessed 1 December 2024);
4) Wojewódzki Sąd Administracyjny in Rzeszów, judgement of 22 February 2019, reference number II SA/Rz 1194/18, *see*: https://orzeczenia.nsa.gov.pl/doc/11645228D8, (last accessed 1 December 2024).

[77] Naczelny Sąd Administracyjny, judgement of 18 May 2022, reference number III OSK 1010/21, *see*: https://orzeczenia.nsa.gov.pl/doc/8570D63316, (last accessed 1 December 2024);
2) Naczelny Sąd Administracyjny, judgement of 18 May 2022, reference number III OSK 1011/21, *see*: https://orzeczenia.nsa.gov.pl/doc/84A4BD8ED9, (last accessed 1 December 2024);
3) Naczelny Sąd Administracyjny, judgement of 18 May 2022, reference number III OSK 1162/21, *see*: https://orzeczenia.nsa.gov.pl/doc/F715DD9C05, (last accessed 1 December 2024);
4) Naczelny Sąd Administracyjny, judgement of 23 November 2022, reference number III OSK 1555/21, *see*: https://orzeczenia.nsa.gov.pl/doc/CF8BED7DF6, (last accessed 1 December 2024).

[78] Each case was ruled by a panel of three judges. A total of 12 judges ruled in these cases (some judges presided over multiple cases).

individual employees (not a statistically representative group). Accordingly, work becomes unsafe and thus prohibited when an individual employee exceeds the energy expenditure limit. The employer is liable for exposing that employee to unsafe working conditions. This is particularly relevant as Amazon (and similar employers) organises work processes and manages its workforce en masse. Big data technologies, such as AI and algorithms, facilitate this system by allowing the employer to make automated decisions affecting large groups of workers, or even the entire workforce. Since monthly productivity quotas at Amazon's warehouses are based on the best performance results achieved by workers in a particular task, Amazon expects both male and female workers to meet the same quotas, disregarding the fact that the legal norms on maximum energy expenditure in Poland differ for men and women.

In its appeals, Amazon argued that measuring each individual employee's energy expenditure during specific tasks would be an excessive burden, requiring the company to entirely reorganise its work process. The company presented its own calculations of energy expenditure, conducted at various workstations during routine risk assessments. These tests, carried out by a private laboratory, were based on estimated observations extrapolated to 1,000 workers, and did not find any values exceeding the legal limit[79]. However, the panel of three judges who ruled on cases ref. no. II SA/Rz 991/18 and II SA/Rz 999/18 noted, "The [Labour Inspectorate] rightly argues that the method is based on estimation rather than measurement, and [the employer's method] does not account for the pace and intensity of work"[80]. The courts concluded that this practice merely created a presumption of compliance with the legal standard. Moreover, in the two cases cited, the same court observed that the company had indicated that its estimates were based on one employee's energy expenditure, whose results were then generalised to the larger workforce. "[S]ignificantly," the court wrote, "a 22-year-old woman, 182 cm in height and weighing 82 kg, was selected as the tested person, which raises reasonable doubts about the representativeness of the results obtained"[81]. Amazon had also tested energy expenditure using the pulmonary ventilation method but again submitted test results for a young employee, whose energy expenditure was within the legal limit.

In all four judgements, the lower courts reasoned that since the employer is legally obliged to provide safe and healthy working conditions, this should be interpreted as requiring the employer to measure energy expenditure using

[79] The estimation method, also known as Lehmann's method, involves estimating average energy expenditure for individual sequences in the work process based on preset values, available in ready-made charts.

[80] My translation.

[81] My translation.

methods that reflect the "realistic workload of individual employees." The Supreme Administrative Court, in its rulings, reiterated that the primary objective of the employer's obligations in OSH law is the protection of workers' health and lives. As the courts concluded, any measurement that shows a worker is expending more energy than is legally tolerable is sufficient to deem the work unsafe.

5. "Individualisation" and OHS Legal Norms

The issue of technologically mediated work intensification in the warehousing sector, and specifically at Amazon, has been approached through different legal perspectives in the two national jurisdictions examined in this article – the U.S. and Poland. However, the same fundamental assumption underpins both approaches: the amount of labour to be performed by a worker must be clearly defined. Secondly, when defining performance expectations, the employer cannot disregard the individual predispositions of the employees.

State quota laws in the U.S. have focused on compelling employers in the warehousing sector to define the amount of work to be performed by providing descriptions of each quota to which the employee is subject, in writing. Thus, the employee must be informed of the employer's expectations for every work process in the warehouse. These rules grant the employee individual (and subjective) authority to evaluate the legality of the quota by assessing whether it is understandable, allows sufficient time for bathroom breaks, rest periods, prayer periods, compliance with OSH regulations, or provides enough time for the employee to complete the work itself, depending on state legislation. It follows that a given quota may allow one employee adequate time for these activities, while it may not afford enough time for another employee. A negative assessment of the quota by the employee gives her the right to take action.

According to Poland's ergonomics standard, female and male employees can only expend up to a legally defined maximum amount of energy during an 8-hour working shift. Work within the kilojoule limit is considered safe, while work that requires the employee to exceed the kilojoule limit is deemed unsafe and exposes the employee to imminent danger. The Labour Inspectorate's evaluation of energy expenditure by Amazon employees in Poland suggests that work tends to be more labour-intensive for older workers (aged 40 and above)[82]. Together, the Polish ordinance and the Labour Inspectorate's

[82] In January 2023, due to a lack of sufficient evidence, the United States District Court for the Northern District of California dismissed a third attempt at a class action against Amazon.Com Services LLC, in which a former worker alleged that Amazon's enforcement of work quotas

findings (confirmed by the administrative courts) establish that at least two individual characteristics – gender and age – have a decisive effect on how the workload impacts employee health and safety. Life experience suggests that other factors, such as body mass, state of health, or external elements like night shift work, might also contribute to increased energy expenditure.

The idea that the employer must clearly express work expectations is not novel. The correlation between quotas and wages, as traditionally understood in the Polish Labour Code (enacted in 1974), reflects the rational aims of both sides in the employment relationship regarding wage labour. That is, the employer's and employee's mutual understanding that an agreed-upon amount of labour will be compensated with the agreed-upon sum. Technology disrupts this agreement, enabling the employer to continually extract more labour from the employee for the same wage. In addition to determining the most productive ways of completing particular tasks and setting productivity expectations, technology also enables the employer to calculate the exact number of products processed by employees during the working day. Failure to process the expected number of products can result in adverse employment actions, including termination – a determinant that U.S. bills rightly define as a "quota". As such, employers like Amazon might be said to operate a piecework system, which instead of correlating quotas with wages, links them to continued employment.

Yet, the motivation for regulating physical labour under the conditions discussed in this article, in both the U.S. and Poland, stems from its detrimental effects on workers' wellbeing. In the U.S., these effects were widely documented as serious injuries. In Poland, these effects were inferred from energy expenditure tests conducted on Amazon employees, for whom the tasks performed required excessive physical effort. It is clear that not all employees suffer injury or overwork themselves at Amazon. Nonetheless, both the U.S. injury reports and the findings of the Polish Labour Inspectorate indicate that work at Amazon is not safe for all workers, and that the employer has not eliminated all known hazards. The U.S. and Polish regulations aim to prompt employers to eliminate these occupational hazards by associating performance expectations with individual employees' capabilities.

"Individualisation" as a legal premise lies at the heart of OSH regulations, stemming from the employer's obligation to protect the health and life of each and every worker. This obligation is fulfilled by providing a safe and healthy

violates California's Fair Employment and Housing Act because it has a disparate impact on employees 49 years and older. *See*: Daniel Wiessner, *Amazon beats claim that warehouse quotas biased against older workers*, Reuters, (28 January 2023), https://www.reuters.com/legal/amazon-beats-claim-that-warehouse-quotas-biased-against-older-workers-2023-01-27/ (last accessed: 28 February 2025).

working environment. As expressed in international legal acts, it is concretised in national (and state) case law and derives from the employment relationship itself. The ILO Occupational Safety and Health Convention, 1981 (No. 155) stipulates that national OSH policy must consider the relationships between the material elements of work and the individuals who carry out the work, including the adaptation of machinery, equipment, working time, organisation of work, and work processes to the physical and mental capacities of the workers[83]. Although neither Poland nor the United States has ratified the core ILO conventions on occupational health and safety (No. 155 and No. 187), both countries are members of the ILO. By freely joining, they have endorsed the principles and rights set out in the ILO Constitution and in the Declaration of Philadelphia[84]. Moreover, at its 110th session in 2022, the International Labour Conference (ILC) adopted a resolution on the inclusion of a safe and healthy working environment in the ILO's framework of fundamental principles and rights at work. Consequently, both Convention No. 155 and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) were declared fundamental conventions of the ILO[85]. Therefore, all members, even if they have not ratified these two conventions, are obligated, by virtue of their membership in the ILO, to respect, promote, and realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights covered by these Conventions, specifically the right to a safe and healthy working environment[86].

In the case of Poland, the employer's duty to protect the life and health of each worker by providing healthy and safe working conditions is expressly provided for in the Labour Code[87]. This obligation is understood as an element of the employment relationship, which stems from the individual employment contract. Polish courts have consistently upheld that this particular employer's obligation is highly individualised[88]. Furthermore, as an EU Member State,

[83] Article 5(b).

[84] (1)(a) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022), https://www.ilo.org/resource/conference-paper/ilo-1998-declaration-fundamental-principles-and-rights-work-and-its-follow (last accessed: 28 February 2025).

[85] Text of ILC.110/Resolution 1, (June 2022), https://www.ilo.org/resource/ilc/110/resolution-inclusion-safe-and-healthy-working-environment-ilos-framework (last accessed: 28 February 2025).

[86] (2)(e) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up.

[87] Art. 15 and art. 207 § 2 LC.

[88] For example, Sąd Najwyższy judgement of 12 December 1974 r., reference number II PR 262/74, OSNC 1975, n. 7-8(122).

Poland transcribed provisions of the European Framework Directive on Safety and Health at Work 89/391 EEC, which specifically states that employers must "adapt the work to the individual" [89]. These legal norms were incorporated into the 1997 ordinance on general standards of occupational health and safety, which requires the employer to adapt working conditions and processes to the capabilities of the employee, particularly through appropriate design and organisation of workstations, selection of machinery and other technical equipment, working tools, and methods of production and work – taking into account the reduction of the workload, especially monotonous work and work at a predetermined pace, and reducing the negative impact of such work on employees' health[90].

In the U.S., the federal Occupational Safety and Health Act of 1970, which applies in both the private sector and the federal government, includes a General Duty clause[91]. Accordingly, the employer must provide each of their employees with employment and a place of work that are free from recognised hazards that are causing or likely to cause death or serious physical harm to the employees. The General Duty clause holds the employer liable even in the absence of a specific rule or standard on a particular workplace hazard, and OSHA can inspect and issue a citation based solely on this clause[92]. State OSHA plans concretise these provisions (they must meet or exceed the standards set by the OSH Act), though not all states have such plans. Some states, such as Washington and Minnesota, have incorporated ergonomics standards into their OSH regulations. The Minnesota law requires employers in the warehousing sector to create and implement an effective written ergonomics programme focused on eliminating the risk of their employees developing or exacerbating MSDs[93]. In 2023, the Washington state legislature enacted a law allowing it to adopt rules aimed at preventing MSDs in certain industries considered high-risk for these disorders, including "Fulfillment Centres". The state's publications indicate that plans for future rulemaking in the industry include the use of ergonomics analysis tools to set a reasonable pace of work[94].

[89] Article 6.
[90] § 39(2)(4).
[91] Section 5(a)(1).
[92] J. Lang Gordon, *Under Pressure: Addressing Warehouse Productivity Quotas and The Rise in Workplace Injuries*, Fordham Urban Law Journal, Vol. XLIX, (2022), p. 166.
[93] Minn. Stat. 182.677 subd. 2.
[94] *See*: *Ergonomics Priority for Prevention, May 2024, Washington State Department of Labor and Industries, Division of Occupational Safety and Health*, https://www.lni.wa.gov/safety-health/safety-rules/rulemaking-stakeholder-information/Ergo_docs/FulfillmentCenters_FactSheet2024.pdf (last accessed: 28 February 2025).

In both national jurisdictions discussed in this article, the employer's responsibilities in the OSH sphere are owed individually to each employee. This does not preclude the employer from using collective safeguards; indeed, collective protective measures that render the work process safe should be prioritised over measures for individual employee protection. However, it does bring to light a key tension in Amazon's system, where employees' individual predispositions and life situations (what ultimately distinguish humans from machines) play no constructive role in the organisation of the work process. Instead, individual predispositions are seen as potential obstacles to achieving productivity expectations, which the worker must overcome to maintain employment.

As this article argues, the organisation of the work process, which is broadly indiscriminate and tailored to workers as a mass, without consideration of their individual characteristics, exposes employees to occupational hazards, as seen in the case of Amazon. Furthermore, it challenges labour law, as it allows the employer to define a new model of employee conduct. Polish labour law scholar Bąba calls this type of employment status "technological subordination", a distinct form of en masse command over employees that goes beyond the employer's control over an individual worker[95]. Bąba has argued that by ignoring individual aspects of employees, the employer shifts away from "the mediocre" or "the average" as the standard of performance, instead constantly setting expectations at the limits of human capabilities, with the requirement that employees strive to exceed those limitations[96]. In effect, the work and its occupational risk assessment are modelled on the most productive employee, rather than the average, mediocre-performing worker. The findings of the Polish administrative courts, cited earlier in cases ref. no. II SA/Rz 991/18 and II SA/Rz 999/18, illustrate that in Amazon's view, a worker best suited to the warehouse job might be a 22-year-old woman who is 182 cm tall and weighs 82 kg.

Beyond physical characteristics, psychological predispositions may also be necessary to maintain performance in the context of such highly intensive labour. As documented in the literature, data collected on patterns of worker productivity is not only numerical in nature[97]. In effect, a performance evaluation system could also be designed to favour specific traits or employee behaviours that contribute to higher productivity scores. Such preferred attributes might include social apathy or aloofness in relations with coworkers,

[95] M. Bąba, *Podporządkowanie technologiczne w zatrudnieniu*, Państwo i Prawo, 2, (2022).
[96] *op. cit.*, p. 99.
[97] P. V. Moore, *The Mirror for (Artificial) Intelligence: In Whose Reflection?*, 42 Comp. Lab. L. & Pol'y J. 41(1), (2019) p. 58.

aimed at filtering out employees who converse during work, as well as those who build community and foster respect among their colleagues. This pressure might also target employees who are more psychologically inclined to assert their autonomy and use their productive time for rest breaks, bathroom breaks, prayer breaks, OSH compliance, and so on.

6. Conclusion

The Warehouse work continues to require a significant amount of human manual labour. As an industry leader in the use of AI and algorithm-driven technology to both organise the work process and manage the workforce, Amazon is simultaneously one of the world's largest employers. As this article has sought to demonstrate, physical labour performed in an environment with high interaction between humans and technological tools carries serious occupational risks when technology is primarily used to increase productivity. Significantly, the duty to protect workers' wellbeing by providing safe and healthy working conditions is not static and cannot be fulfilled once and for all. Rather, it is a constant, dynamic obligation that evolves along with the work process and is updated with each new machine or other change.

Both international and national OSH standards affirm this evolutionary aspect by requiring the continuous improvement of the protection provided to workers. ILO Conventions No. 155 and No. 187 frequently use the term "progress", associating OSH standards with ongoing development and enhancement. Convention No. 187 requires each Member State to take active steps towards progressively achieving a safe and healthy working environment[98]. In its declaration of purpose, the U.S. federal OSH Act stipulates that safe and healthful working conditions are to be assured through research in occupational safety and health, including the psychological factors involved, as well as through the development of innovative methods, techniques, and approaches to address occupational safety and health challenges, and by exploring ways to identify latent diseases and establish causal connections between diseases and work in environmental conditions[99].

According to the Polish Labour Code, the employer must ensure safe and healthy working conditions by making appropriate use of scientific and technical advancements[100]. The newly enacted European AI Act also asserts that its purpose is to promote the adoption of human-centric AI, which serves

[98] Article 2(2).
[99] Sec. 2(b)(5) and (6).
[100] Article 207(2).

as a tool for people, with the ultimate aim of enhancing human wellbeing, including improving working conditions[101].

Thus, public authorities and employers have a specific obligation to utilise scientific and technological innovation to eliminate work-related injury and illness. On the workers' side, this provision entitles them to benefit from the fruits of scientific and technological progress[102]. It has been proposed in the literature that technology in the work process could be designed to adapt to workers' abilities through "adaptive automation", where algorithms and AI could be programmed to ensure an optimal workload in terms of OSH[103]. In the author's view, such use of technology remains highly problematic, as it would still allow the employer to organise the work process without actually eliminating all known occupational hazards. As Todolí-Signes asserts, the best way to prevent and eliminate occupational hazards is by organising the work safely[104]. In the case of physical labour with high interaction between humans and technological tools, this should be done with the average, mediocre-performing worker in mind.

[101] Article 1(1), Recital 6 and Recital 20.

[102] T. Wyka, *Generalny obowiązek pracodawcy ochrony życia i zdrowia pracowników*, Prawo i Zabezpieczenie Społeczne, 4 (2002), p. 21.

[103] A. Todolí-Signes, *op. cit.*, p. 13.

[104] *op. cit.* p. 14.

Identifying Digital Active Ageing Policies in the EU: The Case of Italy

Marianna Russo [*]

Abstract. Ageing is one of the key social and economic challenges facing Europe in the 21st century. Since the 1990s, the EU has promoted active ageing policies to enhance the role of older people in society. As the digital transition reshapes the world of work, identifying effective tools for the inclusion of older workers is crucial. While digitalisation is often viewed as a barrier for this group, due to perceived inflexibility and limited digital skills, a closer look reveals that certain technologies can support rather than hinder older workers' participation in the labour market.

Keywords: *Older workers; active ageing policies; digitalisation; EU labour market; Italy.*

1. Introductory Remarks on the Aims, Objectives, and Methodology of this Research

According to the *World Social Report 2023*, population ageing[1] is among the

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[1] It is an inevitable consequence when the extension of the average life span is accompanied by a declining fertility rate. According to the World Population Prospects (2022 Revision) written by the United Nations, global fertility is projected to fall from 2.3 children per woman in 2021 to 2.1 in 2050: see *https://www.un.org/en/global-issues/population#:~:text=Fertility%20rates,2021%20to%202.1%20in%202050*. "Demographic transition stems from longer lives and smaller families": UNITED NATIONS, *Leaving No One Behind In An Ageing World. World Social Report*, UN Publications, 2023, p. 29. In some countries data are even more alarming: according to ISTAT, the Italian Statistical Institute, in 2022 there was a negative record for birth rate (only 393,000 births). The average number of children per woman dropped to 1.24 (Istat Report 26.10.2023).

most significant demographic trends[2] of our time. Data show that, over several decades, the number of older individuals has increased globally, while birth rates have declined. By 2050, the number of people aged 65 and over is expected to double, exceeding 1.6 billion worldwide[3].

Although this demographic shift is occurring across all regions, the pace and extent vary. Statistical data indicate that the ageing trend is most advanced in Europe[4], North America, Australia and New Zealand, as well as much of East and South-East Asia. In many countries within these regions, the proportion of older individuals exceeds 10%, and in several cases, surpasses 20% of the total population. Japan leads with 28% of its population aged over 65, followed by Italy (22.8%), Greece and Portugal (21.8%), Germany (21.4%), and France (20.3%)[5].

This makes the phenomenon of population ageing particularly pronounced in Europe. The so-called "Old Continent" is, quite literally, becoming the oldest. By 2060, the proportion of young people (under 15) is projected to decline to 13.6%, while the share of older adults (65–79) is expected to rise to 17.8%. The proportion of the "very old" (over 80) is set to double, reaching 12.5%[6].

Population ageing has wide-ranging implications for society and the economy[7], particularly in terms of policy planning. It significantly affects the labour market, reshaping the size, characteristics, and composition of the workforce[8].

Importantly, this irreversible global trend[9] is occurring alongside the digital transition—another major societal transformation. Both processes have far-reaching effects on economic and social life, including the organisation of work.

Against this backdrop, the present research seeks to explore how the European Union is responding to the twin transitions – demographic and digital – in the workplace. The focus is on how to valorise the "age factor", namely the experience, skills, and organisational loyalty of older workers, while also promoting measures to ensure their health and safety through the use of new technologies.

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[2] UNITED NATIONS, *World Social Report 2023, cit.*, p. 2. A. SAMORODOV, *Ageing and labour market for older workers*, ILO publications, 1999, p. 2, wrote that "the next century will be known as an era of population ageing".

[3] UNITED NATIONS, *World Social Report 2023, cit.*, p. 3.

[4] The Ageing Report 2021, written by the European Commission, attests that the ageing process is already advanced in the EU: p. 19.

[5] Population Reference Bureau 2019, in *https://www.prb.org/resources/countries-with-the-oldest-populations-in-the-world/*.

[6] *https://www.unibocconi.it/en/news/old-continent-getting-older.*

[7] Due to the increase in social spending.

[8] UNITED NATIONS, *World Social Report 2023, cit.*, p. 53; CNEL, *Rapporto 2024, cit.*, p. 1.

[9] UNITED NATIONS, *World Social Report 2023, cit.*, p. 17.

To this end, the study first outlines the relevant EU regulatory framework. It then turns to a case study to assess the practical implementation of EU rules and policies on age management within a Member State. Italy has been chosen due to its status as one of the world's most "silver" countries and the "greyest"[10] in Europe, placing it at the forefront in addressing the unprecedented challenges of demographic change[11].
The case study analysis draws on recent Italian legislation and both private and public collective agreements. The aim is to assess the extent to which these instruments provide for the effective and sustainable inclusion of older workers in the labour market, and whether they are sufficient to meet current and future challenges.

2. Brief Overview of Age Management in the EU Regulatory Framework

According to Article 2 of the Consolidated Version of the Treaty on European Union, one of the EU's core values is equality[12]. This principle is applied across various domains[13], including the workplace, as affirmed by Directive 2000/78/EC[14], which establishes a general framework for equal treatment in employment and occupation[15].
Age is explicitly listed as a protected characteristic under both Article 21 of the *Charter of Fundamental Rights of the European Union* (CFREU) and Article 1 of the aforementioned directive[16]. Anti-discrimination protection constitutes one of

[10] The old-age index in Italy reached an all-time high on January 1, 2023, with 193 elderly people for every 100 young people. Population ageing is higher in the North, with Genoa reaching a peak of 273 elderly people for every 100 young people: see *https://www.silvereconomyforum.it/la-rete-delle-citta-della-longevita-sicurezza-salute-e-ambiente/*.
[11] CNEL, *Rapporto 2024. Demografia e forza lavoro*, 18.12.2024, in *www.cnel.it*.
[12] "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".
[13] Just think of art. 21 of the Charter of Fundamental Rights of the European Union on non-discrimination.
[14] Issued on November 27, 2000.
[15] For a broader comment, see U. Belavusau, K. Henrard, *The Impact of the 2000 Equality Directives on EU Anti-Discrimination Law*, Hart Publishing, Oxford, 2019, p. 3 and ff.
[16] The literature on age discrimination at work is extensive and the implications of the issue are so numerous and complex that it is not possible to fully consider them here. Therefore, it is necessary to consult some essential references, *ex pluribus*: European Commission, *Age discrimination and European Law*, Luxembourg, 2005; O. Bonardi, *Le discriminazioni basate sull'età*, in M. Barbera (edited by), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, Milan, 2007, p. 125; ILO, *Age discrimination and older workers: Theory and legislation in comparative*

"central forms of regulation of current EU law"[17] and is among the most frequently litigated issues before the Court of Justice of the European Union (CJEU)[18]. However, it is not the only approach. Since the early 2000s[19], the European Commission has actively promoted *active ageing* policies as a complementary strategy.

Active ageing policies typically address three broad domains: employment, social participation, and independent living[20]. They consist of various measures and initiatives aimed at promoting and enhancing the contributions older people can make to society. These policies are designed not only to protect older workers from age-based discrimination but also to foster their inclusion through positive and proactive measures. The legal foundation for these initiatives lies in Article 25 of the CFREU, which states: *"The Union recognises*

context, Geneve, 2008; N. Bokum, T. Flanagan, R. Sands, R. Steinau-Steinrück, *Age discrimination law in Europe*, Wolters Kluwer, 2009; M. Sargeant (edited by), *Age Discrimination and Diversity. Multiple discrimination from age perspective*, Cambridge University Press, 2011; A. Numhauser-Henning, M. Rönnmar (edited by), *Age discrimination and labour law. Comparative and conceptual perspectives in the EU and beyond*, Wolters Kluwer International, 2015; M. Sargeant, *Age Discrimination in Employment*, Routledge, New York, 2016; O. La Tegola, *Il divieto di discriminazioni per età nel diritto del lavoro*, Cacucci, Bari, 2017. In a more general way M. Barbera, A. Guariso (edited by), *La tutela antidiscriminatoria*, Giappichelli, Turin, 2020.

[17] M. Barbera, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario,* in *Giornale di diritto del lavoro e di relazioni industriali,* 2003, no. 3-4, p. 401.

[18] The first ruling on the topic is CJEU 22.11.2005, C- 144/04 (Mangold), in *https://eur-lex.europa.eu/*. This was followed by many others, including CJEU 16.10.2007, C-411/05 (Palacios de la Villa v. Cortefiel Servicios SA); CJEU 5.03.2009, C-388/07 (Age Concern England v. Secretary of State for Business); CJEU 13.09.2011, C- 447/09 (Prigge/Deutsche Lufthansa); CJEU 5.07.2012, C-141/11 (Torsten Hörnfeldt v Posten Meddelande); CJEU 26.09.2013, C-476/11 (Kristensen v Experian) and, more recently, CJEU 17.11.2022, C-304/21 (VT v. Ministero dell'Interno); CJEU 20.04.2023, C-52/22 (BF v. Versicherungsanstalt öffentlich Bediensteter); CJEU 7.12.2023, C-518/22 (J.M.P. v. AP Assistenzprofis GmbH), all in *https://curia.europa.eu/*. One of the elements that make the rulings on the topic more varied and sometimes conflicting is the presence of a justification clause (for the sole hypothesis of age-based differential treatment) provided for by art. 6 of the European directive no. 2000/78. It is an open content clause, meaning it is susceptible to different interpretations, making the dividing line between discriminatory acts and justified unequal treatment more difficult and ambiguous.

[19] European Commission, *Realising the European Union's potential: Consolidating and extending the Lisbon Strategy*, Brussels, 2001; European Commission, *Increasing the employment of older workers and delaying the exit from the labour market*, Brussels, 2004. Actually, active ageing policies were included in the EU agenda also in the 90s, albeit in a milder way: see the 1994 EU summit underlined the need to improve employment opportunities for older workers.

[20] See EUROPEAN COMMISSION, *Population ageing in Europe. Facts, implications and policies*, Bruxelles, 2014, p. 9; EUROSTAT, *Active ageing and solidarity between generations. A portrait of the European Union*, Luxembourg, 2011, p. 7.

and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life."

The workplace, as a key arena of social participation, presents significant challenges when it comes to age management. Eurostat data[21] demonstrate persistent disparities in the employment levels of older workers across Europe. Although the employment rate for older workers[22] has increased considerably over the past decade[23], significant variation remains. For example, the share of workers aged 55 and over ranges from 46.6% in Luxembourg to 82.6% in Iceland.

The demographic shift towards an ageing population is not yet matched by an adequate response from labour markets. In many cases, older workers continue to be marginalised or excluded from productive employment[24]. Several factors contribute to this gap, starting with cultural perceptions that portray older employees as less productive, inflexible[25], technologically incompetent[26], or more susceptible to workplace accidents[27] and longer recovery times. Additionally, older workers often represent a higher financial cost to employers, as pay is frequently linked to seniority rather than productivity.

In response to these barriers, the European Commission designated 2012 as the *European Year for Active Ageing and Solidarity between Generations*[28]. This initiative aimed to promote autonomy, dignity, and participation among older

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[21] See *https://ec.europa.eu/eurostat/databrowser/view/tesem050/default/table?lang=en*.

[22] Aged from 55 to 64.

[23] The European average increased from 47.9% in 2013 to 62.3% in 2022.

[24] D. AVRAMOV, M. MASKOVA, *Active ageing in Europe,* Council of Europe Publishing, Luxembourg, 2003, p. 94.

[25] Generally older workers have professional qualifications that hardly adapt to the rapid changes imposed by technical and structural transformations. The professional and experience possessed by *seniors* risks losing importance in the face of the varied and ever new needs that come from the internationalised labour market.

[26] See H. BLOSSFELD, S. BUCHHOLZ, K. KURZ (edited by), *Aging populations, globalization and the labor market. Comparing late working life and retirement in modern societies*, Edward Elgar Publishing, UK, 2011, p. 6. The authors underline the need for companies to keep up with the rapid diffusion of communication technologies and to be flexible, adopting work organisation models in continuous and sudden transformation.

[27] Actually, there is no scientific evidence of a correlation between seniority and accident risk: ISTUD, *L'epidemiologia e i costi degli infortuni e delle malattie delle risorse umane relativi alla incidenza del fattore anagrafico*, in *www.istud.it*, 2009, p. 98. Young workers are often more exposed than older workers due to lack of experience, more stressful work shifts, and less awareness of risk (p. 99). However, young workers more easily accept the use of both new technologies that simplify and make the activity safer, and personal protective equipment (p. 99).

[28] See Decision no. 940/2011/EU of the European Parliament and of the Council of 14 September 2011.

people[29]. The Commission proposed a range of active ageing measures[30], including:

- Enhancing working conditions and environments to maintain health and well-being throughout working life, thereby supporting life-long employability[31];
- Providing access to continued vocational education and training to facilitate re-entry into, and sustained participation in, quality employment;
- Combating negative stereotypes and age-based discrimination in the workplace;
- Promoting work–life balance and flexible working arrangements.

In addition, some measures involve economic incentives to encourage the hiring of individuals aged 55 and over[32].

3. Extending Working Life across Europe

The premature exclusion of older workers from the labour market has negative consequences for both individuals[33] and society[34]. Their continued contribution is essential to avoid a significant imbalance between the economically active population and those who are dependent. According to the baseline scenario of Eurostat's latest population projections[35], the EU's old-age dependency ratio[36] is expected to reach 57% by 2100 – almost double the 2019 figure of 31%[37]. In practical terms, this means there will be one inactive person for every two workers[38].

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[29] See EUROPEAN COMMISSION, *Active Ageing Report*, Special Eurobarometer no. 378, Brussels, 2012.

[30] COUNCIL OF THE EU, *Council Declaration on the European Year for Active Ageing and Solidarity between Generations: The Way Forward*, Brussels, 2012, p. 8 and ff.

[31] EUROPEAN COMMISSION, *Population ageing in Europe, cit.*, p. 41.

[32] EUROPEAN COMMISSION, *Active ageing and gender equality policies*, Publications Office of the European Union, Bruxelles, 2012, p. 71.

[33] The early inactivity of workers involves not only the loss of potential future earnings, but, above all, the opportunity for personal fulfillment. This may affect both the physical and psychological health of the individual: R. BLANPAIN, *Le differenze di trattamento e la discriminazione connessa all'età: una società per tutte le età*, in *Diritto delle relazioni industriali*, 2005, no. 4, p. 942.

[34] "The economy will not be able to survive without the talents and experience of older workers": R. BLANPAIN, *Le differenze di trattamento, cit.,* p. 944.

[35] *https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20200713-1.*

[36] The old-age dependency ratio is the ratio of the number of elderly people at an age when they are generally economically inactive, compared to the number of people of working age.

[37] By 2100, across the EU Member States, the old-age dependency ratio is projected to be highest in Poland (63%), followed by Italy, Malta, and Finland (all 62%) as well as Croatia

A shrinking labour force will struggle to meet the needs of a growing elderly population. This dynamic poses a serious threat to the sustainability of welfare systems, particularly pension schemes, as the increasing number of beneficiaries places pressure on a diminishing base of contributors.

One of the clearest responses to demographic ageing and the imperative of economic sustainability has been the extension of working life and, correspondingly, the raising of retirement ages across Europe. Over the past few decades, numerous European countries have introduced measures to delay retirement.

In Germany, the *RV-Altersgrenzenanpassungsgesetz* (Law on the Adjustment of Retirement Ages) was adopted in 2008. This law initiated a major reform of the public pension system, gradually increasing the statutory retirement age to 67. The process began in 2012 with the 1947 birth cohort and will conclude in 2029 with those born in 1964[39].

Belgium[40] has also enacted pension reforms, with the retirement age set to rise from 65 to 66 in 2025, and to 67 by 2030[41]. Further reforms are under discussion following a government agreement in July 2022 aimed at promoting employment and reducing inequality[42].

In the Netherlands, the statutory retirement age—fixed at 65 since 1957—began increasing in 2013 due to rising life expectancy[43]. As of 2023, it stands at 66 years and 10 months[44].

Spain implemented a significant pension reform in 2011[45], which included provisions for gradually raising the retirement age[46]. More recently, additional

(61%). At the other end of the scale, the lowest ratios are projected in Cyprus (52%), Sweden and Czechia (both 53%), Germany, Denmark and Belgium (all 54%).

[38] EUROPEAN COMMISSION – Directorate for economic and financial affairs, *The 2015 Ageing Report: economic and budgetary projections for the 28 EU Member States (2013-2060),* Brussels, 2015, no. 3, in *www.ec.europa.eu*, p. 22.

[39] OECD, *Key policies to promote longer working lives. Country note 2007 to 2017. Germany*, OECD publications, 2018, p. 1.

[40] Belgian act 28.12.2011; Law 10.08.2015.

[41] J. SCHOLS, *Reform of the statutory pension scheme in Belgium, ESPN Flash Report 2022/59*, European Social Policy Network (ESPN), Brussels, 2022.

[42] K. LALIEUX, *Pensions: agreement on 3 measures that support work and reduce inequalities*, in *https://lalieux.belgium.be/nl/pensioenen-akkoord-over-3-maatregelen-die-werk-ondersteunen-en-ongelijkheden-verminderen*, 2022.

[43] See F. PENNINGS, *Social security law in the Netherlands*, Wolters Kluwer, 2022, p. 467.

[44] In 2024 the statutory retirement age is at 67.

[45] Law 1.08.2011, no. 27 on the updating, adaptation and modernisation of the social security system. See also royal decree law 15.03.2013, no. 23.

[46]According to the rules in force, in 2023, the retirement age in Spain is 66 years and 4 months: *https://tradingeconomics.com*.

legislative measures have been introduced to "establish a new framework for the sustainability of public pension systems"[47].
In France, despite widespread protests[48], a controversial reform raised the statutory retirement age from 62 to 64 by 2030.
Italy has also followed this trend, with a series of pension reforms[49] since the 1990s gradually increasing the minimum retirement age. The Monti-Fornero reform[50], in particular, raised the statutory retirement age to 67[51]. Although subsequent governments have proposed modifications, the law remains in force.
This brief overview illustrates that raising the retirement age is a widespread trend across Europe, despite considerable differences in national social security systems.

4. Age Management and Digitalisation in the EU Social Dialogue

With increasing life expectancy and the implementation of recent pension reforms, European workers are remaining in employment for longer periods. As a result, it is essential to adapt career pathways and working conditions to the evolving needs of an ageing workforce. In this context, the European social dialogue[52] has addressed the issue of age management, aiming to identify effective strategies to support older workers.
The EU social partners play a strategic role in promoting improved working conditions and enhanced labour protections, in accordance with Article 31 of the Charter of Fundamental Rights of the European Union (CFREU)[53]. Social dialogue between workers' and employers' representatives is a cornerstone of the European social market economy[54], and the Treaty on the Functioning of

[47] Royal decree law 16.03.2023, no. 2.
[48] For months, France has endured ongoing strikes and protests over controversial government pension reforms: *https://www.bbc.com/news/world-europe-64997414*.
[49] Legislative decree 30.12.1992, no. 503; Law 8.08.1995, no. 335; Legislative decree 18.02.2000, no. 47; Law 23.08.2004, no. 243; Legislative decree 5.12.2005, no. 252; Law 24.12.2007, no. 247; Law 3.08.2009, no. 102. For a broad overview of the Italian pension reforms, see M. CINELLI, *Diritto della previdenza sociale*, Giappichelli, Torino 2022, p. 587; M. D'ONGHIA, M. PERSIANI, *Diritto della sicurezza sociale*, Giappichelli, Torino, 2022, p. 131.
[50] Law decree 6.12.2011, no. 201, converted with modifications by law 22.12.2011, no 214.
[51] In 2023 for both men and women (applying till 2026).
[52] Employer organisations and trade unions at EU level are engaged in European social dialogue, provided for under artt. 154 and 155 of the Treaty on the Functioning of the European Union (TFEU).
[53] The first paragraph of art. 31 establishes that "every worker has the right to working conditions which respect his or her health, safety and dignity".
[54] EUROPEAN COMMISSION, *The role of social partners in the design and implementation of policies and reforms*, Bruxelles, 2016, p. 1.

the European Union (TFEU) recognises its promotion as a shared objective of the EU and its Member States[55]. As stipulated in Article 155 TFEU, agreements concluded at Union level are intended to co-design, in collaboration with the European Commission and national governments, balanced measures that foster an enabling environment for businesses and improved living and working conditions.

In 2017, after nine months of negotiations, the European Social Partners signed the Autonomous Framework Agreement on Active Ageing[56]. This agreement represents a significant contribution to EU active ageing policy, aiming to build upon and enhance existing initiatives across various national contexts.

According to the EU social partners, ensuring that workers of all ages are able to remain in quality, productive, and healthy working conditions should be a core objective of business management. Digitalisation, when properly harnessed, may serve as a powerful tool in achieving this aim. Although new technologies are often perceived as a barrier for older workers – due to stereotypes regarding their flexibility and digital adaptability – technological innovations in the workplace can support work–life balance and may function as a form of reasonable accommodation[57] for older employees.

For this reason, the 2017 Framework Agreement actively promotes digital innovation and encourages the participation of older workers in training to ensure adequate digital competence[58].

This position is further supported by the European Parliament resolution "On an Old Continent Growing Older – Possibilities and Challenges Related to Ageing Policy Post-2020"[59], and by the creation of the European Innovation Partnership on Active and Healthy Ageing[60], launched by the European Commission. Both initiatives highlight the impact of demographic change on the labour market and stress the need for ongoing improvements in workplace management and practices, including the utilisation of digital tools such as teleworking.

The sustained interest of the European social partners in remote work is particularly noteworthy[61]. Reviewing and updating the 2002 Framework

[55] Art. 151 TFEU.

[56] On March 8, 2017.

[57] Art. 5 Directive 2000/78/EC.

[58] European Social Partners' Autonomous Framework Agreement on Active Ageing, 2017, pp. 5-6.

[59] European Parliament resolution of 7 July 2021.

[60] *https://futurium.ec.europa.eu/en/active-and-healthy-living-digital-world.*

[61] See M. RUSSO, *Twenty years of EU agreements on remote work from 2002 to 2022. What next?*, in *Freedom, Security & Justice: European Legal Studies*, 2022, no. 3, p. 215; D. MANGAN, *Agreement to*

Agreement on Telework[62] is currently a key priority, as set out in the Joint Work Programme 2022–2024, signed on 28 June 2022. The revision of remote working arrangements – varying in form and regulation across Member States – is vital, as telework may represent a viable mechanism for supporting a sustainable and inclusive digital and demographic transition.

5. National Case Study: Digital Active Ageing Policies in Italy

Active ageing measures must be implemented—where appropriate—at national, sectoral, and organisational levels to facilitate the continued participation of older workers in the labour market up to the statutory retirement age. It is therefore useful to assess whether, and to what extent, the EU regulatory framework on active ageing has been transposed into practice within a Member State. Italy serves as a particularly relevant case for this analysis, as it is currently the "oldest" country in Europe in terms of population structure.

For several years, Italy has experienced a pronounced and rapid demographic shift characterised by an ageing population. This trend has attracted significant policy attention and has been accompanied by notable developments in legislation and initiatives aimed at supporting older individuals.

To explore the implementation of digital active ageing policies in Italy, this case study adopts two main analytical lenses: recent legislative innovations and collective agreements. These sources provide clear evidence of how active ageing strategies are being developed and how digitalisation is being employed to enhance their effectiveness.

5.1. Italian Legislative Developments on the Matter

Law 23.03.2023, No. 33, marks a significant milestone in the field and is regarded as a "bill of rights" for the elderly. This law empowers the government to promote measures for active ageing, prevention of frailty, and the provision of care and assistance for older individuals. To implement this law, Legislative Decree 15.03.2024, No. 29, was issued. Its 43 articles address a broad range of aspects related to the promotion of dignity, autonomy, and social inclusion for the elderly population.

Particularly noteworthy is Article 5 of Legislative Decree No. 29/2024, which is expressly dedicated to measures promoting health and active ageing in the

discuss: the Social Partners Address the Digitalisation of Work, in *Industrial Law Journal*, 2021, no. 4, p. 689.

[62] Framework Agreement signed on the 16th of July 2002.

workplace[63]. According to the first paragraph of Article 5, employers are required to comply with the risk assessment and prevention obligations stipulated in the consolidated health and safety legislation. This includes considering the Workplace Health Promotion model recommended by the World Health Organization and the guidelines outlined in the National Prevention Plan[64]. These guidelines encourage the implementation of processes and interventions designed to make the workplace more suitable for older individuals through appropriate organisational changes.

Ensuring worker safety and investing in their health are fundamental elements in creating a conducive working environment. To achieve this goal, it is crucial to raise awareness of the importance of well-being at work and to promote educational interventions. Therefore, the prevention strategy emphasises lifelong learning, risk assessment, and ongoing monitoring. However, to address health determinants effectively and contribute to overall well-being, it is essential to foster collaboration and programmatic integration between relevant central institutions, including involving the Ministry of Labour and Social Policies in the development of an active ageing plan for the workplace.

Furthermore, there are multiple references to the role of new technologies and the contribution they can make in preventing occupational risks and promoting safety and health in the workplace.

The second paragraph of Article 5 of Legislative Decree No. 29/2024 identifies agile work as an effective tool for age management: "The employer shall adopt any initiative aimed at assisting older employees in carrying out, even partially, their work in an agile manner, in compliance with the provisions set forth in the current national collective sector agreements."

"Agile work"[65] – more commonly known as smart work – was introduced by Law 22.05.2017, No. 81, in Article 18 and subsequent provisions. This is not a new form of employment, but rather a way of carrying out subordinate work, established through agreement between the employer and employee. Agile work is characterised by flexibility in both location and hours, as workers perform their jobs partly within company premises and partly remotely, using technological tools.

Although agile work initially applied to a limited number of employees, it saw a substantial increase during the COVID-19 pandemic, as it became a key

[63] Legislative decree 9.04.2008, no. 81.

[64] It was drawn up by the Ministry of Health for the five-year period 2020-2025.

[65] On the topic see, *ex multis*, M. MARTONE, *Il lavoro agile nella l. 22 maggio 2017, n. 81: un inquadramento*, in G. ZILIO GRANDI, M. BIASI (edited by), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, Milano, 2018, p. 461; C. SPINELLI, *Tecnologie digitali e lavoro agile*, Bari, 2018; M. TUFO, *Il lavoro digitale a distanza*, Napoli, 2021; M. Russo, *Il datore di lavoro agile. Il potere direttivo nello smart working*, Edizioni Scientifiche Italiane, Napoli, 2023.

measure for maintaining operations while reducing the risk of contagion in the workplace. The widespread use of agile work during this period has allowed for a more in-depth exploration of its potential and its challenges.

At first glance, agile work might appear to present challenges for age management, as it involves the use of new technologies and a more dynamic organisation of work activities. However, it could serve as an effective means to balance personal and professional needs flexibly, while mitigating age-related stressors[66] such as long commutes and crowded workplaces. Moreover, the specific agreements between employers and employees outline the most relevant methods to be implemented when the smart worker is offsite[67]. This flexibility enables both parties to tailor working arrangements to meet business and employee needs, ensuring mutual satisfaction.

From both a psychological and practical perspective, the use of blended working methods (a mix of remote work and on-site presence) may offer a gradual transition towards retirement for older workers, adjusting their work rhythms and reducing interaction with colleagues through alternating days at the office and days working remotely[68]. This may act as a softer approach to retirement, "by shifting their emphasis more toward leisure time and nonwork activities"[69] or conversely, allowing for continued work beyond the traditional retirement age.

However, agile work is not without its challenges[70]. Careful attention and

[66] M. BROLLO, *Lavoro agile: prima gli anziani?*, in V. FILÌ (edited by), *Quale sostenibilità per la longevità? Ragionando degli effetti dell'invecchiamento della popolazione sulla società, sul mercato del lavoro e sul welfare*, Adapt University Press, Bergamo, 2022, p. 67.

[67] Art. 19 Law no. 81/2017. On the great relevance of the agile work agreement see the Directive signed by the Italian Minister for Public Administration on 29.12.2023.

[68] According to experts, "losing your job or ending it due to retirement is a sort of mourning […]. If this process stops abruptly and not gradually, the chances of adaptation are lower. It is known that many people arrive at retirement apparently happily and then the new situation emerges as a trauma": I. ROMANO, *Smart working e over 60: un ponte verso il pensionamento?*, in *www.spazio50.org*, 4.08.2020.

[69] N. W. VAN YPEREN, B. WÖRTLER, *Blended Working and the Employability of Older Workers, Retirement Timing, and Bridge Employment*, in *Work, Aging and Retirement*, 2017, no. 1, p. 102.

[70] It is not possible to deal with the topic in detail here, so please refer to the doctrine on the topic: see, *ex multis*, J.E. RAY, *Grande accélération et droit à la déconnexion*, in *Droit social*, 2016, no. 11, p. 912; E. DAGNINO, *Il diritto alla disconnessione nella legge n. 81/2017 e nell'esperienza comparata*, in *Diritto delle relazioni industriali*, 2017, no. 4, p. 1024; R. ZUCARO, *Il diritto alla disconnessione tra interesse collettivo e individuale. Possibili profili di tutela*, in *Labor & law. issues*, 2019, vol. 5, no. 2, p. 215; M. RUSSO, *Esiste il diritto alla disconnessione? Qualche spunto di riflessione alla ricerca di un equilibrio tra tecnologia, lavoro e vita privata*, in *Diritto delle relazioni industriali*, no. 3, p. 682; M. BIASI, *Individuale e collettivo nel diritto alla disconnessione: spunti comparatistici*, in *Diritto delle relazioni industriali*, 2022, no. 2, p. 400.

appropriate training are required to mitigate potential physical[71] and psychosocial risks[72]. Additionally, agile working relies on the use of digital devices, yet there is an age-based digital divide, which represents a longstanding inequality in access to new technologies and the skills required to utilise digital tools effectively.

The accelerated digitalisation of the workplace – particularly during the COVID-19 pandemic – has exacerbated the effects of this digital divide, leaving many older workers unable to fully engage with the digital systems implemented[73]. The difficulties older individuals[74] face in participating in the digitalisation of society and the workplace have further contributed to their exclusion.

In this context, reducing the generational digital divide is crucial for ensuring full access to digital services, technological devices, and improved age management strategies[75].

Articles 19 and 20 of Legislative Decree No. 29/2024 focus on digital literacy and promote initiatives to train the elderly in digital skills, supporting them in the use of new technologies. This focus on digital literacy could benefit older workers by enabling them to take full advantage of flexible working arrangements, such as agile work, and to utilise wearable technology. Wearable technology includes accessories and garments enhanced with electronics, which can be divided into two categories: wearable devices (e.g., smartwatches and smart glasses) and smart textiles (fabrics that sense and react to the environment)[76].

These technologies can promote workplace well-being by continuously monitoring employees' health, such as heart rate, perspiration, physical strain,

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[71] Working through digital devices can cause ergonomic problems, such as muscle strain and musculoskeletal disorders, due to the posture necessary when spending many hours in front of the computer, and vision problems.

[72] Hyperconnectity can lead to isolation, overworking, burnout, mental disorders: see EUROFOUND, ILO, *Working anytime, anywhere: The effects on the world of work,* Publications Office of the European Union, Luxembourg, and the International Labour Office, Geneva, 2017, p. 37 ss. See also European Parliament resolution 21.01.2021 with recommendations to the Commission on the right to disconnect no. 2019/2181.

[73] G.M. VAN JAARSVELD, *The Effects of COVID-19 Among the Elderly Population: A Case for Closing the Digital Divide*, in *Frontiers in Psychiatry*, 2020, vol. 11, p. 1.

[74] A. ROSALES, J. SVENSSON, M. FERNÁNDEZ-ARDÈVOL, *Digital ageism in data society*, in A. ROSALES, M. FERNÁNDEZ-ARDÈVOL, J. SVENSSON (edited by), *Digital ageism. How it operates and approaches to tackling it*, New York, 2023, p. 1.

[75] See M. RUSSO, *Digitalisation and age management. Elderly-centered policies and tools at work*, in C. DI CARLUCCIO, A. FESTA (a cura di), *Il lavoro tra transizione ecologica e digitale. Esperienze europee a confronto*, Editoriale Scientifica, Napoli, 2024, p. 313.

[76] K. MALTSEVA, *Wearables in the workplace: The brave new world of employee engagement*, in *Business Horizons*, 2020, vol. no. 63, p. 493.

and environmental conditions like exposure to noise, hazardous substances, or extreme temperatures. Additionally, wearables can provide crucial information about safety risks, resource allocation, equipment failure, and predictive maintenance, which can support decision-making[77]. and reduce health and safety risks in the workplace.

For these technologies to be utilised effectively, it is essential to foster digital literacy among older workers. Lifelong learning is crucial in this context. Unfortunately, older workers often face the greatest need for technological training, yet they are the least likely to attend relevant courses offered by their employers. This lack of participation is sometimes a personal choice, but it is often a result of business decisions, where investment in the professional development of older employees – particularly those approaching retirement – is seen as a poor use of resources[78].

The implementation of lifelong learning remains a global challenge, as noted by the UN's Open-ended Working Group on Ageing[79]. In the EU, there is a notable divide between Northern and Southern Europe. Northern European countries have been actively engaged in ongoing training for workers for several years[80], achieving significant success in integrating older people into the workforce. In contrast, this issue remains in its infancy in Southern European countries, where further promotion and implementation are necessary.

The provisions outlined in Articles 19 and 20 of Legislative Decree No. 29/2024 offer a promising starting point for bridging the digital divide.

5.2. The Role of Collective Bargaining in Improving Age Management

In the Italian labour law system, collective agreements are frequently used to further regulate the more technical aspects of law implementation and to resolve management issues.

From this perspective, social partners not only play a key role in improving the labour conditions of older workers through collective bargaining, but their involvement in training is also essential. Helping employees make the best possible use of digital technologies that are introduced should be one of the

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[77] V. PATEL, A. CHESMORE, C.M. LEGNER, S. PANDEY, *Trends in Workplace Wearable Technologies and Connected-Worker Solutions for Next-Generation Occupational Safety, Health, and Productivity*, in *Advanced Intelligent Systems*, 2022, no. 4, p. 1.

[78] T. TIKKANEN, *The lifelong learning debate and older workers*, in T. TIKKANEN, B. NYHAN (edited by), *Promoting lifelong learning for older workers. An International overview,* Cedefop, Luxembourg, 2006, p. 19.

[79] *https://social.un.org/ageing-working-group/*.

[80] A. ANTIKAINEN, *Is lifelong learning becoming a reality? The case of Finland from a comparative perspective*, in *European Journal of Education*, 2001, no. 3, p. 379.

most important tasks for trade unions, as highlighted in the European Social Partners Agreement on Digitalisation[81].

If not collectively negotiated and adequately implemented, the use of agile and remote work might disadvantage older workers due to the digital divide. Therefore, the role of social partners is crucial in responding to this new form of work organisation, by defining and implementing policies related to agile work and negotiating strong provisions in collective bargaining agreements to ensure the rights and conditions of older workers.

Agile work is not the only possible measure for age management, as other areas of intervention may concern multiple aspects of the employment relationship, including recruitment, training and lifelong learning, flexibility of working hours, promotion of health and safety in the workplace, career transitioning in later life, and gradual accompaniment to retirement[82].

Regarding the public sector, the collective agreement of central functions – which regulates employment relationships for employees in ministries, tax agencies, and non-economic public bodies – generally plays a leading role, serving as the model followed by the other three public sectors[83]. This is also true in relation to age management, as demonstrated by the collective agreement signed by ARAN (Agency for the Representation in Negotiations of the Public Administration) and certain trade unions on 27th January 2025.

Compared to the collective agreement currently in force for the public sector of central functions[84], the recently signed agreement introduces significant innovations concerning age management.

Firstly, in the third section (dedicated to employment relationships), the expression "age management" appears, which was absent in the 2019–2021 agreement. More specifically, Article 27, titled "Age Management Objectives and Tools", pays particular attention to the increasing average age of workers and encourages administrations to adopt targeted strategies for employees' personal development throughout their careers. It also stresses the importance of promoting optimal health conditions and preventing occupational diseases and accidents at work.

One of the proposed tools[85] to concretely achieve these objectives is particularly interesting. It seeks to enhance the active role of more experienced personnel within the administration, as they represent a valuable repository of

[81] Signed in June 2020. In doctrine, see T. TREU, *La digitalizzazione del lavoro: proposte europee e piste di ricerca*, in *Federalismi*, 2022, no. 9, p. 190.

[82] ISFOL, *L'age management nelle grandi imprese italiane. I risultati di un'indagine qualitativa*, Roma, 2015, p. 62.

[83] Local functions, health, and education and research.

[84] Collective agreement 2019-2021, signed on 9.05.2022.

[85] See lett. a) of the second paragraph of art. 27.

skills and knowledge to be passed on to newer employees. Therefore, administrations would work to foster intergenerational dialogue through adequate support for new hires and peer-to-peer training sessions aimed at encouraging the exchange of skills between generations, thus reducing the risk of isolation and facilitating the integration of new resources. This intergenerational dialogue builds upon the traditional mentoring model and promotes "reverse mentoring", as it encourages the exchange of knowledge and skills between older and younger workers.

Another key point is the introduction of greater flexibility in task management[86], such as promoting remote working methods (including agile work[87]), part-time options, and establishing flexible schedules to support a healthy work-life balance. However, in relation to agile work and remote work[88], this regulatory provision does not seem to align with the articles of the same collective agreement on agile and remote work. In fact, the list of priorities for access to both smart work and remote work does not include any reference to employee age but focuses instead on categories of workers such as those with documented health needs, those who care for family members with serious disabilities under Law No. 104/1992, and workers who are parents. Nevertheless, the third paragraph of Article 13, concerning agile work, refers to "the priority rights established by the regulations in force at the time". The question arises: did Article 5, paragraph 2, of Legislative Decree No. 29/2024 introduce a priority?[89] Answering this is not straightforward.

The third aspect addressed by the second paragraph of Article 27 of the collective agreement is the constant monitoring of environmental conditions and worker health[90], as the promotion of occupational safety for older employees has always been a key component of active ageing measures. While there is no explicit reference to the use of digital tools (such as wearable technology) to carry out this monitoring, this issue could be addressed in the future through supplementary collective bargaining at the level of individual administrations.

The final measure discussed in the second paragraph of Article 27 is the review of training and lifelong learning methods, with the aim of preventing or eliminating the risk of skill obsolescence among staff. Unfortunately, especially in Southern European countries, lifelong learning remains in its infancy and

[86] Lett. b) of the second paragraph of art. 27.
[87] Art. 13 of the collective agreement.
[88] Art. 15 of the collective agreement.
[89] "The employer shall adopt any initiative aimed at assisting older people in carrying out, even partially, their work in an agile manner, in compliance with the provisions set forth in the current national collective sector agreements".
[90] Art. 27, paragraph 2, lett. c).

needs to be promoted and implemented more effectively. Moreover, it is often older workers who fail to attend training and professional development courses. This is sometimes a personal choice, but more often it is a business decision, as companies may view investing in the professional development of employees approaching retirement as a waste of time and resources[91].

To counter this trend, Article 26 of the collective agreement establishes that, when ranking employees for paid study leave (150 hours per year), older workers should be given preference[92] when all other criteria are equal.

According to the last paragraph of Article 27, each administration is tasked with conducting annual monitoring of the results of the age management policies that have been implemented. The results of this monitoring will be discussed with the trade unions. If done correctly, this annual report could be of great practical value in improving age management within public administrations.

In contrast to the collective agreement for public central functions, which explicitly addresses age management from a digital perspective, the latest agreements signed in the private sector do not contain similarly insightful provisions on the matter.

First, there is no explicit reference to age management or the need for special attention and protection for older workers. As a result, references to seniority (for salary purposes, for example[93]) focus on years of service rather than chronological age.

In the regulation of agile working methods, some recent collective agreements refer to the national protocol on agile working, signed on 7th December 2021 by the social partners and the Minister of Labour. This trilateral agreement is the product of intensive work carried out during the critical phases of the COVID-19 pandemic. It does not contain any specific references to older workers or age management. However, by adopting a literal interpretation, older workers could potentially be classified under the category of "fragile workers" addressed in Article 10, for whom agile working may represent a reasonable accommodation to facilitate access to work. Older workers may also fall within the scope of Article 11 of the national protocol, which promotes agile work as an inclusion tool for companies.

Finally, it is important to note that the collective agreements that typically drive collective bargaining in the private sector, such as those in the metalworking sector[94], are somewhat outdated and have not yet been renewed. Therefore, it

[91] T. TIKKANEN, *The lifelong learning debate and older workers*, in T. TIKKANEN, B. NYHAN (edited by), *Promoting lifelong learning, cit.*, p. 19.

[92] Art. 26, paragraph 7, of the collective agreement.

[93] See art. 216 of the collective agreement for trade, signed on 22.03.2024.

[94] Signed on 5.02.2021.

is crucial to address this gap and deal with the issue more effectively.

6. Concluding Remarks: Facing the Challenges and Seizing the Opportunities

At the end of this European overview and the analysis of the national case study, it is clear that careful and balanced age management is essential to address the current demographic transformation of the labour market and the concurrent digital transition.

In this context, promoting digital active ageing policies – which involve the application of technological tools to foster the inclusion and participation of older workers – appears to be the most suitable approach. Indeed, the use of digitalisation in the workplace can have positive effects from multiple perspectives. On the one hand, it can enhance the inclusion of older workers in the labour market and improve their working conditions throughout their careers; on the other hand, it can support the sustainability of social security systems by reducing absenteeism and occupational injuries, and by enabling more informed retirement decisions. This may help prevent premature retirement driven by personal or health-related concerns.

However, returning to the original question, it is crucial to assess whether the European Union in general – and Italy in particular – is ready to tackle ageism in employment alongside the digital transition. The answer is far from straightforward.

The EU regulatory framework has consistently emphasised equality and inclusion, including in the field of employment. The European Commission has included active ageing policies in its agenda since the 1990s. Furthermore, the EU social dialogue has sought to align demographic and digital transitions by promoting technological tools in work organisation, such as remote working. Nevertheless, the results to date remain unsatisfactory, and digital active ageing policies are still in their infancy – for example, in the area of wearable technology, which may represent a new frontier for the inclusion of older workers[95].

In January 2025, the European Agency for Safety & Health at Work (EU-OSHA) issued guidelines on "Smart digital systems for better safety and health at work"[96] but there is only one reference to older workers, when they highlight the greater accessibility for workers with specific needs, included ageing workers or those with health conditions.

[95] EU Commission, *Internet of Things. Wearable Technology*, Brussels, 2015.

[96] EU-OSHA, *Smart digital systems for better safety and health at work*, Bilbao, 2025, in *https://osha.europa.eu/en/publications-priority-area/smartdigital-Systems.*

Furthermore, in recent years EU-OSHA has paid particular attention to the introduction of exoskeletons in the workplace[97] but there are not references to aged employees. Exoskeletons – also known as "industrial exoskeletons" when used in the workplace – augment, amplify, or reinforce the performance of a worker's existing body components, primarily the lower back and the upper extremity (arms and shoulders). Despite a lack of research, manufacturers of these devices claim productivity gains, work quality improvements, and numerous benefits in reducing musculoskeletal loads[98]. Their use may offer a valuable opportunity to increase the active participation of older people in the workplace, and some European companies are beginning to explore the introduction of such devices among their workforces. However, their adoption raises several critical issues.

Indeed, European policies and legal frameworks are particularly cautious and prudent in relation to the challenges posed by emerging technologies. Firstly, wearables collect and process significant amounts of personal data. Their introduction into the workplace therefore risks creating a conflict between employees' rights to privacy and data protection, and employers' legal duty of care. Consequently, the only way to legally benefit from such digital devices is by ensuring full compliance with privacy and data protection legislation[99]. From this perspective, health data processed by employers through wearables must be handled "lawfully, fairly, and in a transparent manner"[100],, and used only "for a specified purpose"[101], such as safeguarding workers' health. Any further processing for non-compatible purposes – for instance, performance management – is not permitted, in line with the principle of purpose limitation. The processing of personal data must also be "adequate, relevant and limited to what is necessary in relation to the purposes", in accordance with the principle of data minimisation[102].

Additionally, if employers within the European Union wish to use wearables in the workplace, they must comply with the obligations set out in the EU AI

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[97] EU-OSHA, *Occupational exoskeletons: wearable robotic devices to prevent work-related musculosketetal disorders in the workplace of the future*, Bilbao, 2020, in *https://osha.europa.eu/en/publications/occupational-exoskeletons-wearable-robotic-devices-and-preventing-work-related.*

[98] L. BOTTI, A.P. BACCHETTA, M. OLIVA, R. MELLONI, *Exoskeletons at Work: Opportunities, Suggestions for Implementation and Future Research Needs*, in *Human Aspects of Advanced Manufacturing*, 2023, no, 1, p. 77.

[99] In particular, the General Data Protection Regulation no. 2016/679. On the topic, P. COLLINS, S. MARASSI, *Is That Lawful? Data Privacy and Fitness Trackers in the Workplace*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2021, no. 1, p. 65.

[100] Art. 5, par. 1, lett. a), GDPR.

[101] Art. 5, par. 1, lett. b), GDPR.

[102] Art. 5, par. 1, lett. d).

Act[103], which entered into force on 1st August 2024[104]. These obligations relate to transparency, monitoring, training, and reporting[105].

The question is not "if" this technology should be used – given its potential benefits – but *how* to use it appropriately, in a human-centric and value-based manner.

Regarding the national case study, it is worth noting that Italy, as the country with the largest proportion of elderly people in its population among European states, is among the first to face this challenge. While new legislation has been introduced to address the issue, full implementation will take time, as evidenced by the uneven application of these provisions within collective bargaining frameworks.

Furthermore, Legislative Decree No. 29/2024 dedicates only one article to employment relationships and addresses just two[106] of the many aspects in which age management could be developed in the workplace.

Although the collective agreement on public central functions is highly noteworthy and provides a variety of tools to support age management within public administrations, it must be remembered that it has not been signed by some of Italy's most significant trade union organisations[107]. Moreover, this public sector agreement remains an isolated example, although draft agreements for the local functions and health sectors – which include similar provisions on age management – are currently under negotiation. In the private sector, by contrast, there have been no substantial advances to date.

In conclusion, despite the considerable attention paid to the issue, a great deal of progress remains to be made in ensuring the implementation of digital active ageing measures in the workplace.

[103] AI Act 2024/1689 of 13 June 2024,

[104] It does not require any further implementation by EU member states.

[105] The AI Act provides for fines of up to EUR 35 million or 7% of annual global turnover for serious breaches.

[106] Promotion of health and safety at work and valorisation of agile work.

[107] For example, CGIL.

Should Workers Want to Work on Sundays?

Till Staps [*]

Abstract. This paper examines the legality of designating Sunday as the fixed day of weekly rest, using Germany as a case study while also considering relevant European and international law. It then explores the ongoing debate on the flexibilisation of Sunday work under German working time law, which imposes stricter limits than Article 5 of the European Working Time Directive. The growing push for flexibility – particularly in the context of remote and home-based work – is critically assessed, along with proposed legal reforms at both the German and European levels. The paper concludes by advocating for the retention of Sunday as a fixed rest day, warning against the gradual erosion of workers' health and safety rights under the guise of flexibility. The issue's relevance clearly extends beyond the German legal context.

Keywords: *Daily Rest; European Working Time Directive; Flexibility; Remote Work; Sunday Work; Weekly Rest Period; Work on Sundays; Working from Home; Work-Life Balance.*

1. Introduction

Since the CJEU's ruling in *United Kingdom v. Council*, debates over work-free Sundays have seemingly quietened – but only on the surface. In reality, pressure is mounting against one of the cornerstones of German workers' health and safety protections, with the issue increasingly entangled in European and international law.

Prior to this judgment, the weekly rest period under the Working Time

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Directive (WTD) was generally understood to include Sunday. However, the CJEU held that there was no particular link between Sunday and the protection of workers' health and safety over any other day of the week. As a result, Sunday lost its specific legal significance as a rest day in EU law, and references to Sunday were subsequently removed from Article 5 of the WTD.

Despite this[1], Sunday remains the customary weekly rest day in many EU Member States. Nonetheless, recent years[2] have seen a trend towards liberalisation and deregulation in Sunday work practices. In contrast, there are also calls – particularly in the context of the proposed Directive on the Right to Disconnect[3] - for renewed EU-level protections, including a potential reintroduction of a work-free Sunday. This has brought the topic of Sunday work back to the forefront of European working time law discussions[4].

In Germany[5], the debate is particularly contentious. The German constitution protects Sunday as a day of rest, and calls for greater flexibility – especially in light of the rise in remote and home-based work following the COVID-19 pandemic – have sparked significant legal and political controversy.

This paper provides a detailed insight into the German debate on the flexibilisation of Sunday work, while situating it within the broader European and international legal framework. It explores the similarities and differences in how Sunday work is regulated across the EU's multi-level legal system, drawing comparisons with other Member States.

The paper begins by outlining the relevance of the issue. It then analyses and critiques the current legal position of Sunday work in EU primary and secondary law, as well as in international law. The particularities of the German constitutional ban on Sunday work are examined in detail, followed by a comparative analysis of different legal frameworks.

Subsequently, the paper discusses criticisms of Germany's current Sunday

[1] European Commission, Detailed report on the implementation by Member States of Directive 2003/88/EC concerning certain aspects of the organisation of working time, SWD(2023) 40 final, p. 17.

[2] A. Petričević, *Economic Justifiability of Work on Sunday. Dilemmas and Suggestions*, in C. E. Popa Tache et al. (eds.), Adapting to Change Business Law Insights from Today's International Legal Landscape, Adjuris, Bucharest, 2023, p. 48.

[3] European Sunday Alliance, Joint Statement on the Occasion of the Annual European Day for a Work-Free Sunday on March 3, 2021.

[4] See, for example: J. Frivaldszky, *A vasárnapi kötelező pihenőnap természetjogi alapjai és közpolitikai lehetőségei*, in *Iustum Aequum Salutare*, 2015, vol. 11, no. 1, 59-99; J. Stelina, *Legal Restriction on Work on Sundays and Festive days in Poland*, in Proceedings of the International Conference European Unions's History, Culture and Citizenship 11th Edition, Bucharest, 2018, 105-114.

[5] See also: D. Ulber, T. Staps, *Sonntagsarbeit im Mobile- und Homeoffice – Grundlagen und Grenzen des Verbots der Sonntagsarbeit in der digitalisierten Arbeitswelt*, in *Vierteljahresschrift für Sozial- und Arbeitsrecht* (VSSAR), 2023, vol. 41, no. 1, 55-86.

work regulations and evaluates the main arguments and legislative proposals advocating for greater flexibility. It ultimately questions whether opposition to the Sunday work ban truly reflects workers' interests.
The paper concludes with a political outlook on Sunday work in both Germany and the EU, and makes the case for maintaining regulations that protect Sunday as a rest day – arguing that such protections remain essential for safeguarding workers' health and safety.

2. Relevance of the Topic and Object of Investigation

Before turning to the legal analysis, it is important to briefly outline the relevance of the issues raised. This section also provides an overview of the object of investigation and the methodology employed, in order to clarify the analytical approach taken in this article.

2.1. Current Figures

Sunday work is a reality for many workers today. According to the Sixth European Working Conditions Survey (2015), nearly one-third (30%) of workers across 35 European countries reported working at least one Sunday per month[6]. Even in Germany, where Sunday work is generally prohibited, 8.5% of workers regularly or frequently worked on Sundays in 2023[7]. As noted in the introduction, there are growing calls for the liberalisation of the Sunday work ban in Germany – particularly for those engaged in home-based or remote work. The data suggests considerable potential for flexibilisation in this area, given the rising number of remote workers. As of February 2024, nearly a quarter of workers in Germany worked from home at least part of the time[8]. These figures underscore the need to re-examine the issue of Sunday work more closely.

2.2 Object of Investigation

This paper primarily addresses the legal-dogmatic dimensions of Sunday work. It includes a *de lege ferenda* discussion on potential legal reforms and engages

[6] Eurofound, *Sixth European Working Conditions Survey – Overview report*, Publications Office of the European Union, Luxembourg, 2016, p. 58.
[7] https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-3/wochenendarbeitl.html (accessed April 5, 2025).
[8] https://www.ifo.de/en/facts/2024-03-04/working-home-firmly-established-germany#:~:text=In%20February%2C%2024.1%25%20of%20employees,ifo%20expert%20Jean%2DVictor%20Alipour (accessed April 5, 2025).

with comparative legal perspectives. Where available, empirical data is also incorporated to substantiate the analysis.
Can the paper therefore answer the provocative question: should workers want to work on Sundays? Given that working time law largely falls under public law, this question is not straightforward. The answer lies in what has been described as the paradox of labour law: that restricting private autonomy can, in fact, enhance individual autonomy by protecting health, safety, and well-being. Through its limitations, labour law can contribute to improving the real-life freedom of workers.

3. Legal Status of Sunday Work in European Law

Apart from one exception in Article 10 of Directive 94/33/EC on the protection of young people at work, neither primary nor secondary Union law explicitly regulates work on Sundays or public holidays. This section first examines the relevant legal framework.

3.1 Primary EU Law

Neither the Treaty on the Functioning of the European Union (TFEU), the Treaty on European Union (TEU), nor the Charter of Fundamental Rights of the European Union (hereinafter CFREU) explicitly regulate Sunday work. Even Article 31 CFREU, which guarantees fair and just working conditions, does not specify whether work on Sundays is permissible. The right to weekly rest, enshrined in Article 31(2) CFREU, does not include a reference to a work-free Sunday.
However, Article 5 of the Working Time Directive (WTD), which regulates weekly rest periods, provides a concrete expression of this fundamental right. As such, Article 5 must be interpreted in light of Article 31 CFREU[9].

3.2 Secondary EU Law

The most notable references to Sunday work in secondary EU legislation are found in the WTD and in Directive 94/33/EC on the protection of young people at work. Given its central role in EU working time legislation, the WTD will be examined first.

[9] CJEU, Judgement of 14. May 2019 – Case C-55/18 (CCOO), marginal no. 31.

3.2.1 The Working Time Directive

Currently, the WTD makes no mention of Sundays – though this was not always the case. Article 5(2) of the former Directive 93/104/EC stated that the minimum rest period referred to in paragraph 1 "shall in principle include Sunday". However, the phrase "in principle" indicated that a work-free Sunday was not mandatory. This was further emphasised in Recital 10 of the directive, which stated:

> Whereas, with respect to the weekly rest period, due account should be taken of the diversity of cultural, ethnic, religious and other factors in the Member States; whereas, in particular, it is ultimately for each Member State to decide whether Sunday should be included in the weekly rest period, and if so to what extent.

This provision was highly controversial from the outset[10], and it is therefore unsurprising that Article 5(2) did not remain in force for long. In 1996, the Court of Justice of the European Union (CJEU) annulled Article 5(2) in *Case C-84/94*, in which the United Kingdom challenged Directive 93/104/EC, or alternatively, several of its provisions, including Article 5(2) [11]. The Court held that:

> [...] the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week[12].

For the CJEU, the cultural and historical tradition of Sunday as a day of rest did not constitute sufficient justification[13]. It remains unclear how the Court might have ruled had the Council provided a more thorough justification. However, the reasoning implies that such a provision could fall within the EU's competence under Article 153 TFEU[14], provided it was adequately substantiated.

Following the CJEU's decision in *C-84/94*, the European Parliament adopted a "Resolution on Sunday Work" offering guidance to Member States, social

[10] J. Mackley, *The Making of the Working Time Directive*, in Y. Kravaritou (ed.), The Regulation of Working Time in the European Union, P.I.E.-Peter Lang, Brussels, 1999, p. 132.
[11] CJEU, Judgement of 12. November 1996 – Case C-84/94 (United Kingdom v. Council).
[12] CJEU, Judgement of 12. November 1996 – Case C-84/94 (United Kingdom v. Council), marginal no. 37.
[13] J. Stelina, *op. cit.*, p. 107.
[14] D. Ulber, *§ 14 Arbeitszeit*, in U. Preis, A. Sagan (eds.), Europäisches Arbeitsrecht, Otto Schmidt, Cologne, 2024, marginal no. 14.42.

partners, and the European Commission[15]. As a result, the WTD was revised, and the reference to Sunday was omitted from Directive 2000/34/EC of 22 June 2000.
Today, Article 5(1) WTD states that Member States shall take the necessary measures to ensure that every worker is entitled to a minimum uninterrupted rest period of 24 hours in each seven-day period, in addition to the 11 hours of daily rest provided for in Article 3. No explicit reference to Sunday is made in this provision. Some scholars refer to this as a "factual Sunday" rest period, indicating that while Sunday is no longer mandated, it often continues to serve as the de facto rest day in many Member States[16].

3.2.1.1 Jurisdiction of the CJEU

In addition to Case C-84/94, another major judgment is of considerable relevance. In 2017, the CJEU issued a decisive ruling regarding the placement of the weekly rest period within a seven-day timeframe. In the case of *Maio Marques da Rosa*, the Court held that the weekly rest period does not have to immediately follow "a period of six consecutive working days", but rather must be provided within each seven-day period[17]. This interpretation means that workers may legally work twelve consecutive days without a weekly rest period. Consequently, this decision confirms that Sunday no longer holds any particular significance under Article 5 of the Working Time Directive (WTD).

3.2.1.2 Criticism of the Current Legal Situation and Its Interpretation

It is problematic that Article 5 WTD does not explicitly include Sundays. A non-uniform weekly rest day complicates the potential for the social synchronisation of life. Yet, such synchronisation is crucial for achieving the core objective of the WTD: the protection of health and safety. Bell argues that the growing emphasis on individual autonomy weakens the collective significance of rest periods, ultimately contributing to the rise of an "always-on" culture[18].

[15] OJEC, No. C20 of 20. January 1997, p. 140.
[16] Concerning this wording, see further: D. Ulber, *Art. 5 Satz 1 der Arbeitszeitrichtlinie als Regelung über einen „faktischen Sonntag"?*, in *Europäische Zeitschrift für Arbeitsrecht* (EuZA), 2018, vol. 11, no. 4, 484-491.
[17] CJEU, Judgement of 9. November 2017 – Case C-306/16 (Maio Marques da Rosa), marginal no. 51.
[18] Concerning the daily rest: M. Bell, *Responding to the 'Rapidification' of Working Life: the Right to Disconnect*, in *Studies: An Irish Quarterly Review*, 2021, vol. 110, no. 440, p. 434.

When some workers are working while others are off, this can create pressure to remain available and even to work during one's rest period[19]. For instance, on a day off when colleagues are working, there may be a heightened expectation to respond to emails, creating mental pressure to remain connected—an effect less prevalent on a shared rest day. This phenomenon can be empirically illustrated by the behaviour of workers during paid annual leave. According to a 2024[20] survey, 66% of workers in Germany were available during their summer holidays. Half of those surveyed cited pressure from colleagues, and 59% from their superiors[21]. A similar situation is to be expected during irregular weekly rest periods. These expectations are only likely to diminish if rest is synchronised and universally observed.

Moreover, the CJEU's interpretation of Article 5 WTD in the *Maio Marques da Rosa* case must be viewed as a regression in terms of safeguarding worker health and safety, as it permits twelve consecutive working days. These risks undermining both the effect and the regularity of weekly rest periods[22]. In allowing such extended work periods, the Court failed to adequately uphold the primary objective of the WTD: the protection of health and safety[23].

This lack of a standardised weekly rest period, combined with the possibility of working twelve days consecutively, also appears inconsistent with the CJEU's evolving interpretation of health. The Court has recently adopted a broad definition of health, aligning with the WHO's understanding of health as "a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity." In recent cases concerning stand-by time during rest periods, the Court has considered the social implications of reduced leisure time[24]. The current interpretation of Article 5 fails to meet this more comprehensive view.

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[19] M. Bell, *op. cit.*, p. 434.

[20] https://www.bitkom.org/Presse/Presseinformation/Erreichbar-fuer-Job-Drittel-schaltet-Urlaub-komplett-ab (accessed April 5, 2025).

[21] https://www.bitkom.org/Presse/Presseinformation/Erreichbar-fuer-Job-Drittel-schaltet-Urlaub-komplett-ab (accessed April 5, 2025).

[22] P. Burger, *Weekly 24-Hour Rest Period to be Provided within Each Seven-Day Period*, in *International Labor Rights Case Law*, 2018, vol. 4, no. 2-3, p. 244.

[23] Conflicting scientific findings were not considered by the CJEU: D. Leist, *Anmerkung zu EuGH, Urteil vom 09.11.2017, Rs. C-306/16*, in *Zeitschrift für europäisches Sozial- und Arbeitsrecht* (ZESAR), 2018, vol. 17, no. 8, p. 339.

[24] Particularly in cases concerning stand-by periods: CJEU, Judgement of 9. March 2021 – Case C-344/19 (Radiotelevizija Slovenija), marginal no. 65.

3.2.1.3 How Closely is Sunday Related to Health and Safety?

It remains questionable whether there is, today, a justified reason to consider Sunday as more closely related to health and safety than any other day of rest. The CJEU's decision in Case C-84/94 dates back to 1996, a time when limited research existed on the effects of Sunday work[25]. However, more robust scientific findings are now available. A 2011 study by Wirtz et al. indicates that Sunday work can adversely affect worker safety, health, and work–life balance[26]. One key finding is that the negative effects of Sunday work on health and safety cannot be fully offset by taking another day off during the week[27]. The authors stress that time off on Sundays is particularly valuable for workers' recuperation and regeneration[28].

It must be acknowledged that it remains unclear whether this "negative relationship" between Sunday work and recovery also applies in countries where Sunday is not traditionally a non-working day[29].

Nearly thirty years after the ruling in Case C-84/94, it is evident that the cultural importance of work-free Sundays persists in many Member States. This tradition has not entirely disappeared from EU law. For example, Regulation No. 1182/71 of the Council of 3 June 1971, which defines rules concerning periods, dates, and time limits, states in Article 2(1) that 'working days' exclude public holidays, Sundays, and Saturdays. Furthermore, Article 3(4) provides that if a deadline falls on a Sunday, it shall expire at the end of the following working day. This provision aims to ensure a degree of reliability regarding rest on Sundays.

It can therefore be concluded that Sunday retains a closer connection to the protection of health and safety than other days of the week. The historical significance of Sunday rest in EU Member States now finds additional support in scientific evidence.

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[25] A. Wirtz et al., *Working on Sundays–Effects on Safety, Health, and Work-life Balance*, in *Chronobiology International*, 2011, vol. 28, no. 4, p. 362.

[26] A. Wirtz et al., *op. cit.*, p. 362.

[27] A. Wirtz et al., *op. cit.*, p. 369; A. Wirtz et al., *Sonntagsarbeit – Auswirkungen auf Sicherheit, Gesundheit und Work-Life-Balance der Beschäftigten*, in *Zeitschrift für Arbeitswissenschaft* (ZfA), 2011, vol. 65, no. 2, p. 144.

[28] A. Wirtz et al., *op. cit.*, p. 369; A. Wirtz et al., *op. cit.*, p. 144.

[29] With a call for further research: L. Vieten, A. M. Wöhrmann, A. Michel, *Boundaryless working hours and recovery in Germany*, in *International Archives of Occupational and Environmental Health*, 2022, vol. 95, no. 1, p. 287.

3.2.2 Directive 89/391/EEC

Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work is also fully applicable to matters concerning weekly rest periods, according to the most recent judgment of the CJEU. Its applicability extends to minimum weekly rest periods and maximum weekly working time, without prejudice to more stringent and/or specific provisions contained in the Working Time Directive (WTD)[30]. However, Directive 89/391/EEC does not contain any provisions regarding the timing or synchronisation of weekly rest days.

3.2.3 Directive 94/33/EC

A regulation concerning Sunday work is found in Directive 94/33/EC on the protection of young people at work. This is the only directive that establishes specific requirements regarding Sunday work. Article 10 provides that the minimum weekly rest period referred to in the first and second subparagraphs shall, in principle, include Sunday. The phrase "in principle" implies that a work-free Sunday is not mandatory. This interpretation is supported by Recital 19 of the directive, which similarly qualifies the requirement for a work-free Sunday. The wording of this recital closely resembles that of Recital 10 of the former WTD (93/104/EC).

3.2.3.1 The Conformity of Directive 94/33/EC with EU Competences

By including this qualification, the European legislator sought to avoid conflict between EU law and the religious traditions of Member States[31]. It may be argued that the EU lacks the competence to regulate Sunday work, as it arguably does with the WTD. This position is widely held in jurisprudence[32]. However, it is contested here.

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[30] CJEU, Judgement of 9. March 2021 – Case C-344/19 (Radiotelevizija Slovenija), marginal no. 61.

[31] A. Pünkösty, *Certain Aspects of the Relationship Between Religion and the European Union*, in P. L. Láncos et al. (eds.), Union Policies, The Hague, 2016, p. 35.

[32] For example: M. Benecke, *Dir. 94/33*, in E. Ales et al. (eds.), International and European Labour Law, Nomos, Baden-Baden, 2018, marginal no. 52. Benecke calls Art. 5(2) Directive 94/33 a "problematic provision". S. Kolbe, *Art. 10 Ruhezeiten*, in M. Franzen et al. (eds.), Munich, 2024, marginal no. 4. The position of Končar appears unclear: P. Končar, *94/33/EC: Protection of Young People at Work*, in M. Schlachter (ed.), EU Labour Law, Wolters Kluwer, Alphen aan den Rijn, 2015, p. 338.

The justification for prescribing a work-free Sunday for young people lies in the obligation for children and adolescents to attend school on other weekdays[33]. Without a Sunday rest, it would be impossible to guarantee two weekly rest periods of 24 hours each, as required. On school days, young people do not receive a full 24-hour rest period. This argument is reinforced by Article 3(2)(a) of the ILO Minimum Age (Non-Industrial Employment) Convention, 1932 (No. 33). While Article 3(1) permits the employment of children over the age of twelve in light work outside school hours, Article 3(2)(a) expressly excludes Sundays from this exception.

This is relevant because, according to Recital 4 of Directive 94/33/EC, due account must be taken of the principles of the ILO concerning the protection of young people at work. On this basis, the European Union is competent to regulate work-free Sundays in the context of Directive 94/33/EC.

Finally, children and adolescents are often dependent on adults to accompany or support them in their leisure activities. Since most adults typically have Sundays off, it is necessary for young people's rest days to coincide with Sunday to ensure access to such support.

3.3 Interim Conclusion

The WTD requires only a minimum uninterrupted rest period of 24 hours, in addition to the 11 hours of daily rest provided for in Article 3. In contrast, Directive 94/33/EC is more stringent. Pursuant to Article 10, the minimum weekly rest period shall, in principle, include Sunday. According to the interpretation set out here, this provision falls within the EU's competence.

4. Legal Status of Sunday Work in International Law

Article 2(5) of the European Social Charter (hereinafter ESC) provides that the weekly rest period shall, as far as possible, coincide with the day recognised by tradition or custom in the country or region concerned as a day of rest. In most countries, this day is Sunday[34]. This provision reinforces the right to daily and weekly rest periods as enshrined in Article 31(2) of the Charter of

[33] K. Riesenhuber, *Europäisches Arbeitsrecht*, Berlin/Boston, 2021, p. 656.

[34] F. Marhold, E. Kovács, *Art. 2 RESC*, in E. Ales et al., International and European Labour Law, Nomos, Baden-Baden, 2018, marginal no. 27; A. M. Świątkowski, *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn, Kluwer Law, 2007, p. 81.

Fundamental Rights of the European Union (CFEU) [35]. Germany has ratified Article 2 of the ESC[36].

The European Committee of Social Rights may determine that a breach of Article 2(5) ESC has occurred if it finds that a significant portion of the workforce in a Member State works on Sundays and takes their weekly rest on another day[37]. However, the practical effectiveness of Article 2(5) ESC should not be overestimated, as the Charter does not provide for binding sanctions to compel Member State compliance[38].

Provisions with similar content can also be found in international labour law, specifically in Article 2 of ILO Convention No. 14 (Weekly Rest (Industry) Convention) and Article 6 of ILO Convention No. 106 (Weekly Rest (Commerce and Offices) Convention)[39]. These ILO conventions have been ratified by 24 and 13 EU Member States, respectively. Germany has not ratified either convention.

The relationship between ILO standards and EU law is complex[40]. According to Recital 6 of the Working Time Directive (WTD), due account should be taken of the ILO's principles concerning the organisation of working time. However, how this recital is applied varies. As illustrated in the *Maio Marques da Rosa* case, the CJEU has interpreted the WTD in light of ILO conventions in some cases related to European working time law[41].

In practice, therefore, international legal provisions have no decisive influence on the regulation or prohibition of Sunday work under EU law, even if they contain stricter standards than those provided by the WTD.

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[35] A. Bogg, M. Ford, *Art. 31 – Fair and Just Working Conditions*, in S. Peers, The EU Charter of Fundamental Rights, Oxford, 2021, marginal no. 31.56.

[36] Bundesgesetzblatt II. 1964, p. 1261.

[37] With further reference to the Conclusions: A. M. Świątkowski, *op. cit.*, p. 81.

[38] See for further criticism regarding the collective complaints system: R. R. Churchill, U. Khaliq, *The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, in *European Journal of International Law*, 2004, vol. 15, no. 3, 417–456.

[39] See in addition: P. Burger, *op. cit.*, p. 245.

[40] G. Casale, *International labour standards and EU labour law*, in N. Countouris, M. Freedland (eds.), Resocialising Europe in a time of crisis, Cambridge University Press, Cambridge, 2013, 81-104.

[41] Also: P. Burger, *op. cit.*, p. 245; further on the consideration of Recital 6: L. Brandt, T. Lueken, *Differenzierende tarifliche Nachtarbeitszuschläge vor dem Hintergrund von Unions- und Verfassungsrecht*, in *Arbeit und Recht* (AuR), 2023, vol. 71, no. 1, p. 31.

5. Legal Status of Sunday Work in German Law

Germany's prohibition of Sunday work and work on public holidays is one of the few regulations in German labour law that is directly enshrined in the German Constitution (*Grundgesetz*, hereinafter GG)[42]. The constitutional provisions are implemented in federal law through the Working Time Act (*Arbeitszeitgesetz*, hereinafter ArbZG). Both the constitutional framework and the statutory provisions are outlined below.

5.1 The German Constitution

The German Constitution expressly prohibits work on Sundays and public holidays. This regulation is unique among European constitutions[43]. However, the prohibition does not hold a central position within the Constitution; it is found in Section XI, which concerns Transitional and Concluding Provisions. Article 140 GG stipulates that Articles 136, 137, 138, 139 and 141 of the Weimar Constitution of 11 August 1919 (*Weimarer Reichsverfassung*, hereinafter WRV) form an integral part of the Basic Law.

Specifically, it is Article 139 WRV that provides for the protection of Sundays and public holidays, stating: "Sundays and public holidays recognised by the state shall remain protected by law as days of rest from work and of spiritual improvement."

It is widely accepted that Article 139 WRV constitutes an *objective legal institutional guarantee*, rather than conferring a subjective individual right[44]. Its historical foundation lies in a combination of "Christian doctrinal influence and the social democratic commitment to the protection of Sundays and public holidays"[45]. Consequently, today's protection afforded by Article 140 GG in conjunction with Article 139 WRV is not confined to religious or ideological meanings of Sundays and holidays[46].

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[42] D. Ulber, T. Staps, *op. cit.*, p. 55.

[43] M. Morlok, *Art. 139 WRV*, in H. Dreier (ed.), Grundgesetz Kommentar Band 3, Mohr Siebeck, Tübingen, 2018, marginal no. 6.

[44] Federal Constitutional Court, Court Order of 18. September 1995 – Case 1 BvR 1456/95, in Neue Juristische Wochenschrift, 1995, vol. 48, no. 51, p. 3379. The content as a subjective right is controversial in detail. See for further arguments: K. Westphal, *Die Garantie der Sonn- und Feiertage als Grundlage subjektiver Rechte*, Tübingen, 2003.

[45] A. Seifert, *Religious Expression in the Workplace, The Case of the Federal Republic of Germany*, in U. Becker et al. (eds.), The Significance of Religion for Today's Labour and Social Legislation, Mohr Siebeck, Tübingen, 2018, p. 132.

[46] Federal Constitutional Court, Judgement of 1. December 2009 – Case 1 BvR 2857/07, 1 BvR 2858/07, in *Neue Zeitschrift für Verwaltungsrecht* (NvWZ), 2010, vol. 29, no. 9, p. 574.

5.2 The German Working Time Act

These constitutional requirements are reflected in two key provisions of the ArbZG. First, § 1(2) ArbZG sets out that one of the Act's purposes is to protect Sundays and public holidays recognised by state law as days of rest from work and of spiritual improvement. Secondly, § 9(1) ArbZG prohibits the employment of workers on Sundays and public holidays between midnight and midnight. The prohibition of Sunday work is widely regarded as a cornerstone of German labour law[47].

5.2.1 The Rule

In fact, the wording of § 9(1) ArbZG extends beyond the term "work", using instead the broader concept of *Beschäftigung*, which encompasses any business-related activity—not just work in the narrower sense[48]. Regarding its personal scope, § 9(1) ArbZG applies exclusively to employees, meaning that self-employed individuals are not covered. This is a mandatory statutory provision, and due to the public law nature of working time regulations, workers cannot waive this protection—even voluntarily[49]. The ArbZG is also intended to protect public interests and third parties, not solely individual employees[50]. While restrictions for the self-employed are not covered by the ArbZG, such limitations may arise from state-level public holiday laws[51], which are not explored further here.

5.2.2 The Exception

Beginning with § 9, the entire third section of the ArbZG is dedicated to rest on Sundays and public holidays. The most notable provisions are §§ 10 and 11. Section 10 ArbZG governs exceptions to the Sunday and holiday work ban. *De lege lata*, many of these exceptions already apply to remote or home-based work. For example, § 10(1)(1) ArbZG permits work in emergency and rescue

[47] S. Morgenroth, N. Hesser, *Working Hours, Holidays and Health and Safety*, in J. Kirchner et al. (eds.), Key Aspects of German Employment and Labour Law, Springer, Heidelberg, 2018, p. 112.

[48] Federal Labour Court, Decision of 22. September 2005 – Case 6 AZR 579/04, in *Neue Zeitschrift für Arbeitsrecht* (NZA), 2006, vol. 23, no. 6, p. 331.

[49] Federal Labour Court, Judgement of 24. February 2005 – Case 2 AZR 211/04, in *Neue Zeitschrift für Arbeitsrecht* (NZA), 2005, vol. 22, no. 13, p. 761.

[50] D. Ulber, *Grundfragen des Arbeitszeitrechts im 21. Jahrhundert*, in *Soziales Recht* (SR), 2021, vol. 11, no. 5, 189-204.

[51] With further references: J. Ulber, *§ 9 Sonn- und Feiertagsruhe*, in J. Ulber, R. Buschmann, Arbeitszeitrecht, Bund, Frankfurt am Main, 2019, marginal no. 12.

services, as well as in fire brigades. Given the broad interpretation of this exception, private emergency call centres (e.g., operated by automobile clubs) are also included[52].
Additionally, § 11 ArbZG provides for compensatory rest in the event of Sunday or holiday work. Importantly, § 11(1) ArbZG mandates a minimum of 15 work-free Sundays per year. Thus, even where exceptions apply, employees are generally not permitted to work every Sunday—even if they wish to do so.

5.2.3 Exceptions Compatible with Telework?

Are the existing exceptions compatible with teleworking? At first glance, this may appear doubtful, since the statutory wording contains no explicit reference to telework. However, many exceptions can be interpreted as compatible with remote work arrangements. For instance, call centre services covered under § 10(1)(1) ArbZG can now be performed entirely remotely. Another example is § 10(1)(14) ArbZG, which allows Sunday work for the maintenance of data networks and IT systems—services that can likewise be performed through teleworking. This shows that some existing exceptions already accommodate the realities of modern telework.

5.2.4 Enforcement of Sunday Work

The German Trade Regulation Act (*Gewerbeordnung*, hereinafter GewO) establishes the employer's right to issue directives to employees, including the determination of working hours, pursuant to § 106 GewO. This means that, within the scope of statutory exceptions, employers may lawfully require employees to work on Sundays. The German Federal Labour Court has interpreted this right broadly. Even if an employer refrained from requiring Sunday work for decades, this does not negate the right to do so—subject to legal limitations[53].
Apart from statutory prohibitions, Sunday work may also be excluded by employment contracts or collective agreements. Where the law permits exceptions to the Sunday work ban, the employer may only exercise their directive right within the limits of those exceptions. The prohibition under § 9(1) ArbZG remains a key statutory limitation.
When exercising this right, employers must act within the bounds of *reasonable discretion* (*billiges Ermessen*). For instance, they must consider the employee's

[52] See the reasoning of the German legislator: Bundestags-Drucksache, 12/5888, p. 29.
[53] Federal Labour Court, Judgement of 15. September 2009 – Case 9 AZR 757/08, in *Neue Zeitschrift für Arbeitsrecht* (NZA), 2009, vol. 26, no. 23, p. 1336.

fundamental rights, such as freedom of religion and conscience[54]. In a 2005 case, a court ruled in favour of a worker who refused to work on Saturdays for religious reasons (the Sabbath)[55], holding that the worker's fundamental rights took precedence[56]. By analogy, the same applies to employees who wish to avoid Sunday work on religious grounds. This reasoning was confirmed by the Higher Labour Court of Hamm in a case involving a Baptist who refused Sunday work[57].

However, there are limits to this protection. If an employee knowingly enters into an employment contract where Sunday work is an inherent part of the role, they may not subsequently invoke religious grounds to refuse such work[58]. Moreover, operational necessity may influence the balancing of rights[59]—for example, in hospitals, where Sunday work is part of core duties[60].

5.3 Interim Conclusion

The German Constitution prohibits Sunday work under Article 140 GG in conjunction with Article 139 WRV. This constitutional mandate likely explains why the statutory ban under § 9(1) ArbZG has not been amended following the CJEU's decision in Case C-84/94. Since the entry into force of the ArbZG in 1994, Sunday work has been generally prohibited, subject to numerous exceptions, particularly those found in § 10 ArbZG. Under § 106 GewO, employers may direct employees to work on Sundays, but only within the framework of those statutory exceptions.

6. Comparison of the Legal Frameworks

EU law, international law, and German law do not regulate the protection of Sunday work in a congruent manner. In a direct comparison between EU law

[54] U. Preis, F. Temming, *Individualarbeitsrecht*, Otto Schmidt, Cologne, 2024, marginal no. 582.
[55] Higher Labour Court of Schleswig-Holstein, Judgement of 22. June 2005 – Case 4 Sa 120/05, in *Entscheidungen in Kirchensachen seit 1946* (KirchE), 2009, vol. 47, 246-258.
[56] Higher Labour Court of Schleswig-Holstein, Judgement of 22. June 2005 – Case 4 Sa 120/05, *op. cit.*, pp. 253-258.
[57] Higher Labour Court of Hamm, Judgement of 8. November 2007 – Case 15 Sa 271/07, in *Entscheidungen in Kirchensachen seit 1946* (KirchE), 2011, vol. 50, 317-329.
[58] Federal Labour Court, Judgement of 24. February 2011 – Case 2 AZR 636/09, in *Neue Zeitschrift für Arbeitsrecht* (NZA), 2011, vol. 28, no. 19, p. 1090.
[59] Higher Labour Court of Schleswig-Holstein, Judgement of 22. June 2005 – Case 4 Sa 120/05, *op. cit.*, pp. 256-257; Federal Labour Court, Judgement of 24. February 2011 – Case 2 AZR 636/09, *op. cit.*, p. 1092.
[60] U. Preis, *Religionsfreiheit im Arbeitsverhältnis zwischen säkularem Staat, Freiheitsrechten und Diskriminierungsverboten*, in *Kirche und Recht* (KuR), 2011, vol. 17, no. 1, p. 53.

and German law, the regulation in § 9(1) ArbZG is less flexible[61]. However, German provisions are in conformity with the WTD, as they are even more favourable[62]. This accords with Art. 15 WTD, which allows Member States to apply or introduce laws, regulations, or administrative provisions more favourable to the protection of the safety and health of workers.
Moreover, a comparison between German law and international law leads to the conclusion that German law is stricter, as it explicitly designates Sunday as a day of rest. This, in fact, is a central point of criticism in German legal discourse.

7. Criticism of the Recent Regulation of Work on Sundays in Germany

As previously mentioned, Germany's current legal framework is subject to considerable criticism due to its strictness. The main point of contention is the lack of flexibility in the Sunday regulation. Many authors argue that it should be relaxed in accordance with Art. 5 WTD, to allow workers a minimum uninterrupted rest period of 24 hours plus the 11 hours of daily rest referred to in Article 3, for each seven-day period[63].
The specific arguments raised and whether they are convincing will be examined below. Two main reasons are frequently cited: the practical needs of the German economy and the individual wishes of workers. Where calls are made for greater flexibility in Sunday regulations for home or remote work, both the personal preferences of workers and economic considerations are referenced. The issue of economic competitiveness will not be further addressed here due to space constraints[64].
There are also concerns that Germany's regulation of a work-free Sunday does not adequately account for the needs of those who wish to work on Sundays for religious reasons. This critique will be assessed, followed by a personal opinion.

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[61] H. Hanau, *Zum Flexibilisierungspotenzial der Arbeitszeitrichtlinie*, in *Europäische Zeitschrift für Arbeitsrecht* (EuZA), 2019, vol. 12, no. 4, p. 423.
[62] Federal Labour Court, Judgement of 8. December 2021 – Case 10 AZR 641/19, in *Der Betrieb* (DB), 2022, vol. 75, no. 20, p. 1266.
[63] See, for example: U. Baeck, M. Deutsch, T. Winzer, *Arbeitszeitgesetz Kommentar*, C.H. Beck, Munich, 2020, p. 230; C. Freyler, *Arbeitszeit- und Urlaubsrecht im Mobile Office*, Mohr Siebeck, Tübingen, 2018, p. 210; H. Hanau, *Schöne digitale Arbeitswelt?*, in *Neue Juristische Wochenschrift* (NJW), 2016, vol. 69, no. 36, p. 2617; J. Holthausen, *Arbeitszeit und ihre Erfassung*, in *Zeitschrift für die Anwaltspraxis* (ZAP), 2023, vol. 35, no. 19, pp. 969-970; C. Picker, *Arbeiten im Homeoffice – Anspruch und Wirklichkeit*, in *Neue Zeitschrift für Arbeitsrecht Beilage* (NZA-Beil.), 2021, vol. 38, no. 1, p. 8.
[64] Summarizing this matter: D. Ulber, T. Staps, *op. cit.*, pp. 80-82.

7.1 Workers Want to Work on Sundays

The supposed desire of workers to be allowed to work on Sundays is frequently cited in German jurisprudence.

7.1.1 The Dispute

It is argued that workers wish to independently decide how to balance work and private life, and maintain their work-life balance[65]. Improved opportunities for organising family life are often emphasised[66]. This reason is especially significant in promoting the employment of women[67]. However, this view is not supported by any empirical evidence.

7.1.2 Statement

Empirical data is generally not provided. Currently, no known survey in Germany indicates that workers want the legal option of working more flexibly on Sundays. A 2017 survey asked German workers whether they would generally accept weekend work as a burden. Only 13 percent responded affirmatively[68]. It remains unclear what the outcome would have been had the question been limited to Sunday work alone.

Similar findings are observed in other Member States. For example, a Croatian survey revealed that over two-thirds of respondents supported a non-working Sunday[69]. It therefore seems reasonable to assume that only a minority of workers actually wish to work on Sundays.

Furthermore, the supposed preference for Sunday work, as assumed by its advocates, presents practical issues. Even if Germany were to introduce a variable weekly rest period, it would still be the employer who determines working hours (§ 106 GewO). There is no statutory guarantee that employers would release workers on a weekday to compensate for working on a Sunday.

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[65] A. Bissels, I. Meyer-Michaelis, *Arbeiten 4.0 – Arbeitsrechtliche Aspekte einer zeitlich-örtlichen Entgrenzung der Tätigkeit*, in *Der Betrieb* (DB), 2015, vol. 68, no. 40, p. 2334; S. Jacobs, *Schutz vor psychischen Belastungen durch die Individualisierung des Arbeitszeitrechts*, Nomos, Baden-Baden, 2019, p. 70; M. Lachmann, *Das Arbeiten an Sonn- und Feiertagen*, in *Arbeitsschutz in Recht und Praxis* (ARP), 2024, vol. 5, no. 10, p. 301; N. Maier, *Erweiterte berufsbezogene Erreichbarkeit*, Springer, Wiesbaden, 2019, p. 158.

[66] N. Maier, *op. cit.*, p. 158.

[67] B. Schiefer, E. Baumann, *Das neue Mutterschutzgesetz*, in *Der Betrieb* (DB), 2017, vol. 70, no. 49, p. 2933.

[68] https://de.statista.com/prognosen/1016566/umfrage-in-deutschland-zur-akzeptanz-von-arbeiten-am-wochenende (accessed April 5, 2025).

[69] A. Petričević, *op. cit.*, pp. 51-52.

Another practical issue is that kindergartens and schools are closed on Sundays, preventing parents from sending their children there. The right to choose the weekly rest day independently could only belong to workers if explicitly provided for in the ArbZG. Currently, the right lies with the employer (§ 106 GewO). Notably, the advocates of greater flexibility do not call for an amendment to the ArbZG to allow workers to freely choose their rest day. European law, including Art. 5 WTD, does not provide for such a right either.
Even if such a right existed, it is unlikely that all employers would be able or willing to offer Sunday work. A comparison with Saturday work illustrates this: although permitted, only 15.9% of workers in Germany worked constantly or regularly on Saturdays in 2023[70].
Increased voluntary Sunday work also entails more involuntary Sunday work. Certain support services are necessary to facilitate voluntary work. For instance, remote workers rely on the maintenance of data networks and IT systems, which requires staff pursuant to § 10(1) no. 14 ArbZG.
Thus, invoking the alleged will of workers appears to be a pseudo-solution. It seems that calls for greater flexibility are largely driven by economic interests, with workers' preferences used merely as a pretext.

7.2 Religious Discrimination?

In the current debate on liberalising Sunday work in Germany, the issue of discrimination against religious minorities is rarely raised. It is notable that even the Federal Constitutional Court did not address this aspect in its most prominent ruling on Sunday work[71]. Nonetheless, the potential for religious discrimination within the Sunday work ban merits examination.

7.2.1 The Contention

The regular work-free Sunday is regarded as a disadvantage for those whose religious practices do not align with Sunday observance, such as Muslim, Buddhist, or Jewish workers[72]. For these individuals, a variable day of rest might be preferable, as it would allow for the selection of a weekly rest day in line with personal religious observance.

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[70] https://www.destatis.de/DE/Themen/Arbeit/Arbeitsmarkt/Qualitaet-Arbeit/Dimension-3/wochenendarbeitl.html (accessed April 5, 2025).
[71] See the critical remark by: J. von Lucius, *Sonntag für alle*, in *Critical Quarterly for Legislation and Law* (CritQ), 2010, vol. 93, no. 2, 190-211.
[72] A. Seifert, *op. cit.*, p. 158; likewise: J. T. Czigle, *Religious Holidays at the Workplace in the European Union – Issues, Questions, and a Note on the Achatzi-Case*, in Iustum Aequum Salutare, 2023, vol. 19, no. 1, p. 92 f.

7.2.2 Statement

While Sunday has Christian origins, it is no longer legally tied to religious observance. Rather, it has become a widely accepted social practice[73]. This is reflected in the legal unification of Germany[74], during which the work-free Sunday was formally regulated in the ArbZG.

Even the Labour Code of the former GDR regulated the work-free Sunday in § 168(1)—without any religious connotation. The unification thus supports a non-religious interpretation of Sunday protection. Likewise, the constitutional protection under Art. 140 GG in conjunction with Art. 139 WRV is not restricted to a religious or ideological understanding[75].

Therefore, § 9(1) ArbZG does not serve to privilege Christian workers. Christian workers are no more protected from Sunday work than workers of other faiths. All depend on the employer's discretion under § 106 GewO if they wish to avoid Sunday work. In this regard, no legal distinction is made between religious groups. German law already allows for appropriate solutions on a case-by-case basis under § 106 GewO.

7.2.3 Proposal for Solution

In my view, a potential solution would be the introduction of a new statutory right in the ArbZG to entitle employees to time off for religious observance. This would strengthen the position of religious workers seeking time off. To date, consideration of religious beliefs in the application of § 106 GewO has developed solely through case law. Austrian law could serve as a model for a more explicit legal framework[76].

[73] With the same argumentation for Austrian law: R. Schindler, *Rechtsfragen zu Arbeitspausen und der Feiertagsruhe*, in R. Resch (ed.), Ruhe- und Erholungszeiten, ÖGB Verlag, Wien, 2013, pp. 54-55.

[74] The German Unification Treaty referred to work on Sundays. For this see: M. Weiss, *The Transition of Labor Law and Industrial Relations: The Case of German Unification - A Preliminary Perspective*, in *Comparative Labor Law Journal*, 1991, vol. 13, no.1, p. 7.

[75] Federal Constitutional Court, Judgement of 1. December 2009 – Case 1 BvR 2857/07, 1 BvR 2858/07, *op. cit.*, p. 574.

[76] The wording of the Austrian provisions of the Austrian Rest Periods Act was apparently already used in a variety of formulations when the ArbZG was created. See: P. Häberle, *Der Sonntag als Verfassungsprinzip*, Duncker & Humblot, Berlin, 2006, p. 84.

7.2.3.1 § 8 ARG as an Example?

Section 8 of the Austrian Rest Periods Act (*Arbeitsruhegesetz*, hereinafter ARG) governs time off for religious observance. A freely translated version of § 8 ARG reads:

> An employee who is required to work during the weekly rest period or on a holiday shall, upon request, be granted the time necessary to fulfil religious duties, provided these cannot be fulfilled outside working hours and the time off is compatible with operational requirements.

This provision is controversial in Austria because its wording is seen as discriminatory against individuals whose religious rest day does not fall on a Sunday[77]. § 8(1) ARG refers to the weekly rest period, which under § 3(1) ARG includes Sunday.
While some legal scholars argue for the analogous application of this provision to non-Sunday rest periods, this view has not yet prevailed[78]. Therefore, one can share the opinion that § 8 ARG's wording should not be adopted verbatim. However, its principle may serve as a model for German law.

7.2.3.2 Example of a New Section in the ArbZG

Alternatively, a new section—§ 9a ArbZG—could be introduced to explicitly state that religious beliefs must be given special consideration when organising working hours, and that workers are to be granted time off to fulfil religious duties.
In my opinion, such a provision would enhance legal certainty and clarity. Workers could easily identify their rights, without relying on obscure case law. While the decision on whether an instruction meets the standard of "reasonable discretion" would still be for the courts, such a provision would at least acknowledge the needs of workers seeking a weekday rest for religious reasons.

[77] R. Schindler, *op. cit.*, p. 56. He therefore advocates for a revision of § 8 ARG.
[78] In favour of an analogous application: A. Potz, *Diener zweier Herren – Dienstverhinderung aus religiösen Gründen*, in J. Fütterer et al. (eds.), Arbeitsrecht – für wen und wofür?, Nomos, Baden-Baden, 2015, p. 211. Against such an application: F. Schrank, *Arbeitszeit Kommentar*, Linde, Wien, 2021, p. 796.

8. Discussion for the Proposal for a Solution

The three most important criticisms of a fixed weekly rest day in Germany have now been presented and discussed. In the following section, the ideas for the flexibilisation of German law *de lege lata* and *de lege ferenda* will be investigated. The examination begins with proposals that are not based on EU law, followed by options that relate solely to German law.

8.1 Derogations from the WTD for Remote or Home-Based Workers

The most far-reaching option for allowing remote work or working from home on Sundays is to exclude such workers from the scope of application of the Working Time Directive (WTD). This could be achieved either through interpretation or by legislating a new exception within the WTD.

8.1.1 By Interpretation

The idea of excluding remote or home-based workers from the scope of the WTD is gaining traction in Germany[79]. Although the majority opinion remains opposed to such an exclusion[80], the matter warrants discussion. The starting point for this idea must be Article 17(1)(a) WTD. According to this provision, Member States may derogate from Articles 3 to 6, 8, and 16, particularly in the case of managing executives or other persons with autonomous decision-making powers. It is argued that remote or home-based workers could fall under the category of "other persons with autonomous decision-taking powers". In Germany, these derogations are implemented in § 18 ArbZG. If a worker qualifies under this derogation, the entire ArbZG does not apply. However, this derogation requires that, due to the specific characteristics of the activity concerned, the duration of working time is not measured and/or predetermined, or can be determined by the worker themselves.
Some Member States appear to interpret Article 17(1)(a) WTD particularly broadly. These examples will be presented before being evaluated in the context of the German legal framework.

[79] See also: A. Barrein, *Das Homeoffice zwischen Rechtsanspruch und ungeklärten Rechtsproblemen*, in *Recht der Arbeit* (RdA), 2024, vol. 77, no. 1, p. 21; P. Wollert, *Entgrenzte Tätigkeit und ständige Erreichbarkeit im Mobile Office*, Nomos, Baden-Baden, 2022, pp. 197-203.
[80] For example: T. Klein, *Schriftliche Stellungnahme*, in Bundestag Ausschussdrucksache 19(11)752, p. 52; D. Ulber, T. Staps, *op. cit.*, pp. 84-85.

Derogations for home-based workers were previously included in Finnish legislation[81]. Today, such a derogation exists in the *Code du Travail* of Luxembourg. According to Article L. 211-3(4), the provisions on working time do not apply to workers who work from home. The article states: "Les dispositions du présent titre ne sont pas applicables: […] 4. aux salariés à domicile;"

Moreover, derogations for home-based and teleworking[82] employees can also be found in Italy. These examples suggest that a broad interpretation of Article 17(1) WTD may not be entirely implausible.

Advocates of flexibilisation argue that the European legislator did not initially anticipate the rise of remote and home-based work, and therefore Article 17(1) WTD must be interpreted in a contemporary manner[83]. However, the legitimacy of such interpretations is questionable in light of the case law of the CJEU. The Court of Justice of the European Union requires a *very strict* interpretation of Article 17(1) WTD[84]. Specifically, the Court insists that the derogation's wording must apply throughout the entire working time[85] and that "the scope must be limited to what is strictly necessary"[86].

Given these requirements, it is not permissible to infer autonomy merely from the fact that work is carried out from home. Article 17(1) WTD does not support such a generalisation. The fact that work is performed independently of a fixed office location does not, in itself, indicate that working time is unmeasurable or cannot be predetermined or controlled by the worker. This is instead a matter of contractual agreement between employer and employee. Workers cannot be excluded from the scope of the WTD merely because they belong to a specific category or have been defined as such[87].

A general exclusion of remote or home-based workers from the scope of Article 17(1) WTD would therefore likely be contrary to EU law[88]. The proposal to exclude all remote or home-based workers from the WTD's scope cannot be supported due to its incompatibility with EU law. Consequently, no such derogation can be introduced in § 18 ArbZG.

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[81] The former section of the Finnish law on working time can be found in: CJEU, Judgement of 26. July 2017 – Case C-175/16 (Hälvä), marginal no. 6.

[82] European Commission, SWD(2023) 40, *op. cit.*, p. 38.

[83] P. Wollert, *op. cit.*, p. 203.

[84] J. Pompa, T. Jaspers, *Occupational Health and Safety and Working Time*, in T. Jaspers et al. (eds.), European Labour Law, Intersentia, Cambridge, 2024, p. 642.

[85] CJEU, Judgement of 17. March 2021 – Case C-585/19 (Academia de Studii Economice din București), marginal no. 62.

[86] CJEU, Judgement of 9. September 2003 – Case C-151/02 (Jaeger), marginal no. 89.

[87] V. Leccese, *Dir. 2003/88*, E. Ales et al. (eds.), International and European Labour Law, Nomos, Baden-Baden, 2018, marginal no. 116.

[88] See also: D. Ulber, T. Staps, *op. cit.*, pp. 84-85.

8.1.2 By Creation

The creation of a new exception for remote or home-based work within Article 17 WTD is likewise not advisable. First and foremost, such an exception would be overly far-reaching and would run counter to the declared objective of the WTD, which is to safeguard the health and safety of workers.
Furthermore, a comparison between activities performed remotely or from home and the current derogations in points 1 to 4 of Article 17(1) WTD reveals that these activities are not sufficiently similar. Thus, systemic reasons also argue against the introduction of a new exception.
Finally, such an exception would not be compatible with the established case law of the CJEU.

8.1.3 The "Teleworker Paradox"

As shown, the demand for the flexibilisation of Sunday work is emerging against the backdrop of increasing remote and home-based work. It has been previously put forward the thesis that a variable rest day would result in greater, unrestricted accessibility of workers. Empirical evidence from Germany supports this[89]. Moreover, it is reflected in the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect[90].
The very need for such a directive indicates that workers' rest periods – especially during the week – are not being respected. Simultaneously, while there is growing demand for the flexibilisation of Sunday work, the reasoning behind the draft directive highlights that those working from home or remotely are significantly more likely to work longer hours and experience shorter rest periods, which adversely affects their health[91].
According to the logic of those advocating greater flexibility for Sunday work, it is precisely those workers—already particularly vulnerable to health-related overwork—who are to be subjected to even more unregulated labour. This is contradictory and reveals that "flexible working" serves merely as a pretext for enforcing the most extensive possible relaxation of working time regulations, thereby increasing workers' availability to employers.
This may be why the European Sunday Alliance is calling on the European Commission to align the directive on the right to disconnect with Article 2 of

[89] See the arguments and the cited study from Germany above (3.2.1.2).
[90] OJEC, No. C456 of 10. November 2021, p. 161.
[91] OJEC, No. C456 of 10. November 2021, p. 164.

the European Social Charter (ESC)[92]. This proposal can be considered to be justified; however, it would be more appropriately regulated within the broader framework of the WTD. The directive on the right to disconnect should explicitly reference the WTD in this respect.
To date, this proposal has attracted little attention, either in legal scholarship or political discourse. The right to disconnect could therefore be conceived as going hand-in-hand with an obligation to disconnect. Once again, it is Bell whose idea should be emphasised. He highlights the collective dimension of this right, noting that workers can assist others in exercising their right to disconnect by fulfilling an obligation not to be available themselves[93]. This becomes particularly straightforward on a Sunday rest day shared by all.

8.2 Brief Interruptions Versus the Right to Disconnect

A covert form of flexibilisation could arise if temporary and brief interruptions to Sunday rest were deemed permissible. The alleged insignificance of such interruptions is a frequently debated topic.
German law does not permit temporary or brief interruptions based on the wording "Beschäftigung" in § 9(1) ArbZG, which encompasses more than just formal work[94]. Consequently, the possibility of minor tasks during weekly rest periods is not debated in Germany[95]—the clear statutory language establishes clear boundaries.
At the EU level, a more flexible interpretation of the term "uninterrupted" in Article 5 WTD might be considered. However, this would likely soon be precluded by the directive on the right to disconnect. Brief interruptions, therefore, do not represent a legitimate avenue for flexibilisation.

8.3 Voluntary Work on Sunday

Some proposals advocate making Sunday work voluntary[96]. In such cases, however, another day must serve as the weekly rest day. Voluntary Sunday work

[92] European Sunday Alliance, *op. cit.*
[93] M. Bell, *op. cit.*, p. 435.
[94] The term *"Beschäftigung"* covers any activity that is associated with the business. See further (5.2.1).
[95] R. Falder, *Immer erreichbar – Arbeitszeit- und Urlaubsrecht in Zeiten des technologischen Wandels*, in *Neue Zeitschrift für Arbeitsrecht* (NZA), 2010, vol. 27, no. 20, p. 1153; R. Krause, *Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf*, in Ständige Disputation des Deutschen Juristentags (ed.), Verhandlungen des 71. Deutschen Juristentags, C.H. Beck, Munich, 2016, p. B48.
[96] See, for example: A. Kössel, *Deutsches Arbeitszeitrecht im Wandel?*, in *Der Betrieb* (DB), 2019, vol. 72, no. 35, p. 1960.

is a foreign concept within the framework of German working time law. *De lege lata*, voluntariness is only relevant where Sunday work is already legally permitted. Voluntariness itself does not constitute an independent justification for exceptions.

One example can be found in the German Maternity Protection Act (*Mutterschutzgesetz*, hereinafter MuSchG). According to § 6(1) sentence 2 MuSchG, Sunday work is permissible only if "the woman expressly declares her willingness to do so." Here, Sunday work is made even more restrictive, as an existing exception is further conditioned upon voluntariness.

As discussed above, a problem arises from the employer's right to issue instructions under § 106 GewO. This provision allows the employer to determine when the substitute rest day will occur. In such cases, flexibility is again reduced, as workers may end up working on Sundays but not receiving a substitute rest day of their own choosing.

Some scholars have therefore proposed that workers should be allowed to choose their individual rest day[97]. However, three arguments speak against this approach.

First, due to the structural inferiority of employees, there are doubts as to whether such voluntariness can genuinely exist[98]. Secondly, empirical evidence suggests that variable rest days are unlikely to be as disruption-free as uniform rest days[99]. Finally, it must be examined whether voluntary work on Sundays is compatible with the German constitution.

8.3.1 Is an Individually Definable Rest Day Constitutional in Germany?

Doubts have been raised about the constitutional admissibility of such a regulation, as the German Constitution protects the work-free Sunday in Article 140 of the Basic Law (GG) in conjunction with Article 139 of the Weimar Constitution (WRV). Some proponents of liberalisation refer to a decision by the Federal Constitutional Court in support of their argument. The judgment in case 1 BvR 2857/07 concerned the opening of shops in the state of Berlin on all four Sundays in Advent[100].

One of the Court's conclusions was that, in principle, typical weekday bustle (so-called *werktägliche Geschäftigkeit*) must cease on Sundays and public

[97] C. Freyler, *op. cit.*, p. 212; S. Jacobs, *op. cit.*, p. 70.

[98] With further references: D. Ulber, T. Staps, *op. cit.*, pp. 74-75.

[99] See the arguments and the cited study from Germany above (3.2.1.2).

[100] An English summary is available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2009/bvg09-134.html (accessed April 5, 2025).

holidays[101]. Those advocating flexibilisation argue that remote or home-based work is generally quiet and, therefore, does not involve such bustle[102]. While it is correct that the Court based its reasoning partly on the concept of weekday bustle, the judgment must not be reduced to that point alone. Its scope is broader.

The Court did not only emphasise rest from the daily routine but also highlighted the objective of guaranteeing people opportunities for recreation on Sundays. Society should be assured a minimum amount of shared free time, enabling social, cultural, political, and family activities. This synchronised temporal freedom also facilitates the exercise of fundamental rights such as the freedom of assembly[103]. Thus, the protection of the work-free Sunday must also extend to individuals who wish to work on that day[104].

The Federal Administrative Court supports this view. In 2020, it ruled that the legislator has legally defined the level of Sunday protection without taking into account the public perceptibility of Sunday work[105]. A reduction in the level of protection—through the granting of individual permits—cannot be justified by the non-public nature of certain work activities[106]. This position was expressly confirmed in relation to remote work. In 2023, the Berlin Administrative Court decided that the lack of public perceptibility associated with working from home does not alter the statutory protection of Sundays[107].

8.3.2 Possibility of Constitutional Amendment

Whether Article 139 WRV—which states that Sunday shall remain protected by law as a day of rest from work and for spiritual improvement – can be repealed via constitutional amendment remains an open legal question. Article 79(3) GG contains the so-called *eternity clause*, which might conflict with such

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[101] Federal Constitutional Court, Judgement of 9. June 2004 – Case 1 BvR 636/02, in *Neue Juristische Wochenschrift* (NJW), 2004, vol. 57, no. 33, p. 2370; Federal Constitutional Court, Judgement of 1. December 2009 – Case 1 BvR 2857/07, 1 BvR 2858/07, *op. cit.*, p. 574.

[102] See, for example: C. Arnold, T. Winzer, *§ 3 Flexibilisierung im individuellen Arbeitsrecht*, in C. Arnold, J. Günther (eds.), Arbeitsrecht 4.0, C.H. Beck, Munich, 2022, marginal no. 26; C. Picker, *op. cit.*, p. 8.

[103] Federal Constitutional Court, Judgement of 1. December 2009 – Case 1 BvR 2857/07, 1 BvR 2858/07, *op. cit.*, p. 573; likewise: S. Muckel, *Geschlossene Läden am Sonntag zeitgemäß?*, in *Zeitschrift für Rechtspolitik* (ZRP), 2017, vol. 50, no. 6, p. 190.

[104] D. Ulber, T. Staps, *op. cit.*, p. 77.

[105] Federal Administrative Court, Judgement of 6. May 2020 – Case 8 C 5/19, in *Neue Zeitschrift für Verwaltungsrecht* (NvWZ), 2020, vol. 39, no. 18, p. 1367.

[106] Federal Administrative Court, Judgement of 6. May 2020 – Case 8 C 5/19, *op. cit.*, p. 1367.

[107] Administrative Court of Berlin, Judgement of 27. April 2023 – Case VG 4 K 311/22, in *Gewerbearchiv* (GewA), 2023, vol. 69, no. 8, p. 344.

an amendment. It states: "Amendments to this Basic Law affecting the [...] principles laid down in Articles 1 and 20 shall be inadmissible". However, neither Article 1 nor Article 20 GG requires absolute protection of Sundays[108]. The prevailing legal opinion holds that a constitutional amendment in this area would be possible, and that the eternity clause does not preclude it[109].

8.3.3 Interim Conclusion

An individually definable weekly rest day is not compatible with the German Constitution *de lege lata*. Under current law, work on Sundays is either permitted or prohibited[110] – there is no legal provision allowing for a flexible adjustment of Sunday work. To introduce such flexibility, a constitutional amendment would be required. While this is theoretically possible, the *eternity clause* does not prohibit such a change, there are compelling arguments against amending the constitution in this way.

In particular, the proposal to permit Sunday work for remote or home-based workers risks becoming a gateway for the gradual erosion of health and safety protections for workers[111]. As of today, Article 139 WRV remains largely uncontested and thus continues to serve as the constitutional foundation for the work-free Sunday in German federal law. Furthermore, a constitutional amendment does not appear to be politically desired at this time, as will be discussed below.

8.4 Political Prospects in Germany and the EU

While the flexibilisation of labour law is frequently debated in abstract terms in German politics, Sunday work is rarely addressed in concrete terms. In its 2021 coalition agreement, the last federal government merely stated – vaguely – that it intended to support trade unions and employers in enabling flexible working time models[112].

Sunday work does, with one exception, not feature in the current coalition agreement between the SPD and CDU/CSU parliamentary groups following the federal elections in February 2025. Their only plan on this matter is to

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[108] S. Korioth, *Art. 139 WRV*, in G. Dürig et al. (eds.), Grundgesetz Kommentar, C.H. Beck, Munich, 2024, marginal no. 6a.

[109] S. Korioth, *op. cit.*, marginal no. 6a; P. Unruh, *Religionsverfassungsrecht*, Nomos, Baden-Baden, 2024, § 16 marginal no. 546.

[110] V. Ossoinig, *Regulierung von Wissensarbeit*, Kassel University Press, Kassel, 2019, p. 108.

[111] Likewise: V. Ossoinig, *op. cit.*, p. 108.

[112] SPD, Bündnis 90/Die Grünen and FDP, Mehr Fortschritt wagen, Koalitionsvertrag 2021–2025, p. 54.

create an exception to the prohibition of Sunday work for the baker's craft[113]. But their primary labour law proposal is to introduce a weekly maximum working time to replace the current daily limit, while retaining existing rest period regulations[114]. Therefore, these proposals do not appear to affect the legal status of the work-free Sunday.

At the European level, Sunday work is also not a major issue. Neither the proposed directive of the European Parliament and Council on the right to disconnect nor other recent EU legal acts address Sunday work.

As far as the WTD is concerned, the situation is even more complex. A comprehensive revision of the directive in the near future is considered unlikely[115]. Although a political effort to justify why Sunday – rather than any other day – should serve as the weekly rest day for reasons of health and safety would be desirable, it also appears unrealistic at present.

9. Conclusions

Sunday work raises a range of legal issues that span multiple levels of law. This is not only a point of intersection between international, EU, and constitutional law, but also one in which the question of whether Sunday should remain the uniform weekly day of rest is still influenced by its religious origins. Added to this complexity is the fact that empirical evidence is necessary to adequately address the matter.

This paper has explored this field of tension within the context of the debate on the flexibilisation of Sunday work in Germany. It has demonstrated that the current regulation of the weekly rest period is too flexible to sufficiently protect workers' health and safety. Article 5 of the Working Time Directive (WTD) does not ensure synchronisation and permits up to twelve consecutive working days. A more suitable regulation is found in Directive 94/33/EC, which provides that the minimum weekly rest period shall, in principle, include Sunday. As shown, this regulation also falls within the scope of the EU's competencies. International instruments, such as the European Social Charter (ESC) and various ILO conventions, likewise generally identify Sunday as the weekly rest day.

In Germany, the work-free Sunday is constitutionally enshrined. The legal debate centres on whether the prohibition of Sunday work should be made

[113] CDU, CSU und SPD, Verantwortung für Deutschland, Koalitionsvertrag 21. Legislaturperiode, p. 18.
[114] CDU, CSU und SPD, *op.cit.*, p. 18.
[115] See, for example: S. De Groof, *Working Time in Modern Law*, in L. Mella Méndez, L. Serrani (eds.), Work-Life Balance and the Economic Crisis, Cambridge Scholars Publishing, 2015, p. 177.

more flexible. The ban is often criticised as too rigid and outdated, particularly in the context of modern working arrangements such as remote or home-based work. However, this call for flexibilisation should not be followed. On the contrary, it is precisely these workers who require greater protection from the risks of unbounded work—what has been referred to as the "Teleworker Paradox." This protection can be achieved by preserving Sunday as the weekly rest day.

It is important to recognise that the concept of society needing synchronised periods of rest is not obsolete[116]. In fact, given the increasing dissolution of work-life boundaries, such synchronisation is more vital than ever.

Admittedly, a prohibition on Sunday work is not without drawbacks. For instance, individuals who wish to observe a different rest day for religious reasons may prefer to work on Sundays. The option of an individually defined rest day for religious reasons can already be accommodated under German jurisprudence and could also be formalised in the Working Time Act (ArbZG) through a new provision.

However, when weighing all the arguments presented in this paper, it becomes clear that a uniform, work-free Sunday is strongly preferable from the perspective of workers' protection. This is particularly significant when considering future developments, as it is well known that remote and home-based work will continue to expand across many sectors and may increasingly become a new social norm. Calls for broader exceptions risk accelerating a gradual erosion of fixed rest days through changes in social practice.

It therefore remains to be seen how legislation on Sunday work will evolve. Despite ongoing criticism, legal reform in Germany appears unlikely in the near future. At the EU level, it will be interesting to observe whether the work-free Sunday will eventually feature in discussions on the Right to Disconnect.

[116] Opposing view: M. Lachmann, *op. cit.*, p. 301.

Can the Employer Determine the Trade Union Organisation? A Recent Lesson from the Czech Republic's Semi-Promotion of Collective Bargaining

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Abstract. In some countries, trade unions have certain rights or privileges guaranteed by the constitution, such as the right to collective bargaining and to negotiate a collective agreement. However, these rights are significantly restricted in other countries, particularly given recent internal social problems. This article explores the representativeness of trade unions in general, with a specific focus on the Czech Republic. We will consider what can be a source of legitimacy, as understood and promoted by an ex-communist Eastern European legislator in 2024. The Czech legislator empowered employers to decide which trade union organisation out of many operating in their facility shall be recognised unless most employees oppose the employer's will. If we compare it with international and European obligations, it is a bold move. Is it inspiration or deprivation when we compare the Czech story with recent trends of trade union representativeness in the Western and Central European legal space?

Keywords: *Trade Unions, Collective Bargaining, and Representativeness.*

1. Introduction

The Charter of Fundamental Rights and Freedoms of the Czech Republic

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prohibits both limiting the number of trade unions[1] and favouring particular unions within an enterprise or sector. Following the experience of the Revolutionary Trade Union Movement[2] in socialist Czechoslovakia, the legislator enshrined freedom of trade union association as a fundamental value in the Charter. The principle of basic equality among trade unions formed the basis for the Constitutional Court of the Czech Republic to reject the majority principle as a guiding criterion in 2008, when it repealed the relevant provision in the then-new Czech Labour Code[3], which had continued to recognise a trade union organisation based on majority representation. However, as the past 30 years in the Czech Republic have shown, the de facto – and even legal – equality of trade unions remains a chimaera. If the actual number of employees affiliated with Czech trade unions is neither officially tracked nor verifiable, and if unions themselves informally estimate this figure at around 12% of all employees, can this still be considered a sufficient majority to influence government or corporate social policy?

Given this issue, the International Labour Organization (ILO), from its inception, prioritised the representativeness of workers' representatives over equality among them. From the outset, its non-governmental delegates have not been selected by all workers' representatives – nor even by all trade union organisations operating within member states – but solely by the most representative ones. Similarly, tripartite dialogue – the formalised interaction between the government, trade union organisations, and the largest employers' associations – is, according to the ILO, to be conducted not by all trade union organisations, but only by those deemed the most representative[4]. As the ILO Committee of Experts has stated, representativeness does not limit the freedom of association; rather, it enhances it, provided that predetermined and objective criteria are used to establish representativeness[5].

Thus, while there has been a general international move away from the principle of equality among all trade unions – and a corresponding denial of the right of all employees to choose their representative – the Czech legislator has taken a different approach. In contrast, it has introduced a system whereby the representativeness of a trade union is determined by the employer's

[1] This is set out in Article 27(2) of the Charter. For the sake of brevity, the term *trade union*, as understood in Czech law, will be used consistently as a collective term encompassing basic trade union organisations, regional trade union organisations, trade union federations, and federations or confederations of trade unions.

[2] It was the only permitted trade union.

[3] Act No. 262/2006 Coll. Labour Code.

[4] Article 1 of ILO Convention No. 144.

[5] Cf. ILO, Freedom of Association Committee of the Governing Body of the ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition 2018, International Labour Office, par. 515 and 1351.

decision, which is only marginally subject to correction through the will of the majority of the employer's workforce. Such a regulatory approach favours the employer, whose decision cannot be overridden by the majority of unionised employees, but only by the will of all employees – including those who are not, and do not wish to be, union members.

The aim of this article is not to analyse how the amended[6] Section 24(3) et seq. of the Labour Code can be implemented in practice, but rather to assess whether the chosen concept of representativeness remains consistent with the international obligations of the Czech Republic and, if so, whether it fulfils the meaning and purpose of Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages. Specifically, the article asks whether, in light of recent European developments, the Czech model has the potential to promote and expand collective bargaining. It must be recalled that the amendment was introduced to implement an EU directive that obliges Member States to actively support and encourage collective bargaining. To this end, the article will first examine the Czech Republic's international and EU commitments, followed by an analysis of national trends in determining representative trade union organisations. Finally, the new Czech regulation will be evaluated in the context of these findings.

2. Representativeness in International and EU Terms

The concept of representativeness of a trade union may be inherently restrictive, as it enables the exclusion of certain trade union organisations from collective bargaining and/or the denial of other—or even all—collective rights based on selected criteria for determining a lack of representativeness. This exclusion may be effected either by the State, typically through legislation, or by the employer through its own measures, whereby it ceases to engage with a particular trade union. International legal protections in this area are primarily designed to guard against the excesses of totalitarian regimes, drawing inspiration from historical experience.

In the international legal framework, several instruments are relevant to the issue of representativeness. These include conventions of the International Labour Organization (ILO), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), and the European Social Charter.

[6] The amendment was implemented through by Act 230/2024 Coll. (In Czech: Zákon č. 230/2024 Sb. kterým se mění zákon č. 262/2006 Sb., zákoník práce, ve znění pozdějších předpisů, a některé další zákony).

According to Article 8 of the ICESCR, the establishment and activities of trade unions may not be subject to any restrictions other than those prescribed by law and deemed necessary in a democratic society, in the interests of national security, public order, or the protection of the rights and freedoms of others. Furthermore, the Covenant explicitly refers to ILO conventions, stating that its provisions shall not prejudice the content of those conventions.

2.1. The International Labour Organization (ILO)

The ILO Constitution stipulates that non-governmental delegates are appointed by the trade unions "which are most representative of employers or workpeople, as the case may be, in their respective countries"[7]. Representativeness is to be determined on the basis of predefined and objective criteria, established in consultation with the most representative organisations of employers and workers. Trade unions must provide their representatives with adequate supporting documentation.

However, a more detailed regulation of trade union representativeness is conspicuously absent from the International Labour Organization (ILO) conventions. Article 3 of ILO Convention No. 87 and Article 2 of ILO Convention No. 98 leave considerable room for national regulation in this area. Under these conventions, a workers' representative need not be a trade union per se, but may also be another body either elected or delegated by the trade union, or an entirely different body freely elected by the employees (or the employer, in specific contexts) without the participation or involvement of a trade union.

The interpretation of Convention No. 87 by the ILO is primarily derived from a body of decisions by the Committee of Experts, compiled in the Digesta[8]. These conclusions affirm that the adoption of statutory provisions governing trade union operations[9] does not, in itself, violate the internationally recognised autonomy of trade unions to formulate their own statutes and rules of procedure – provided that such regulation is general in nature.

Issues arise only where the registry court's decision on registering a trade union's rights and obligations exceeds the discretionary scope legally afforded to that judicial authority[10]. In particular, detailed regulation of a trade union's internal functioning is viewed as problematic unless it is limited to formal or

[7] Article 3 (5) of the ILO Constitution.

[8] Cf. ILO. Digesta, *Part Six "Right of organisations to draw up their constitutions and rules" in Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fifth (revised) edition*.

[9] Cf. Digest conclusion 370.

[10] Cf. Digest conclusion 373.

minimal requirements. The regulation of the relationship between trade unions and their basic organisations should remain exceptional, applicable only in unusual circumstances[11]. Even in such cases, trade unions must retain all available means of defence to safeguard their autonomy from undue interference[12].

2.2. The European Convention

Among the relevant international treaties, particular mention should be made of the European Convention on Human Rights, where the freedom of association—enshrined in Article 11—has progressively been interpreted to include the freedom of coalition. The European Court of Human Rights (ECtHR) has held that the freedom to form and join trade unions is protected under Article 11, and this includes the right not to be compelled to join a trade union[13].

Importantly, the right of trade unions to engage in collective bargaining has also been recognised as part of the freedom of association[14]. This includes protection against state interference, such as the exclusion of municipal employees from the right to bargain collectively.

However, in cases involving a conflict between ecclesiastical autonomy and trade union rights, the ECtHR has sometimes prioritised the protection of religious institutions. In one notable judgment, the Court found no violation of Article 11 in the decision of the Romanian courts to refuse registration of a trade union established by 35 members—including clergy—of the Roman Catholic Church. The refusal was justified on the grounds that the formation of such a union posed a threat to the internal hierarchical structure of the Church, and the Court held that this concern fell within the scope of legitimate protection of ecclesiastical autonomy[15].

2.3. The European Social Charter

The European Social Charter (ESCh) supports the right to collective bargaining under Article 6. According to this provision, States undertake to ensure the effective exercise of the right to collective bargaining by promoting,

[11] Cf. Digest conclusion 386.
[12] Cf. Digest Conclusion 386.
[13] Cf. Sørensen and Rasmussen v. Denmark, *Grand Chamber's judgment, Applications nos. 52562/99 and 52620/99*, par. 58, ECHR 2006-I.
[14] Cf. Demir and Baykara v. Turkey, *Grand Chamber's judgment, Application no. 34503/97.*
[15] Cf. Sindicatul "Păstorul cel Bun" v. Romania, *application no. 2330/09, Grand Chamber's judgment.*

where necessary and appropriate, mechanisms for voluntary negotiation between employers or employers' organisations and workers' organisations, with the aim of determining terms and conditions of employment through collective agreements.

Article 6(2) has traditionally been interpreted by the European Committee of Social Rights (ECSR) as placing a positive obligation on States to encourage collective bargaining by trade unions, rather than to hinder or restrict it. The underlying rationale, once again, is the economically weaker position of employees and trade unions in relation to employers.

However, this right does not imply that all trade unions are automatically entitled to participate in collective bargaining or to conclude collective agreements. Access to the bargaining process may be subject to a representativeness criterion. That said, any such limitation must not be excessive or disproportionate. The European Court of Human Rights (ECtHR) has rejected the principle of parity—i.e., the mandatory inclusion of all trade unions in negotiations—as a requirement under Article 11 of the European Convention on Human Rights[16].

When both the French[17] and Spanish legislatures allowed entities other than trade unions to negotiate collective agreements, the ECSR interpreted Article 6(2) of the ESCh to mean that such an arrangement is only permissible in exceptional circumstances. Specifically, this would apply where trade unions are either unwilling or factually unable to recruit members, despite State efforts to support their existence. Even in such cases, procedural safeguards must ensure that the resulting collective agreement reflects the genuine will of the employees concerned[18].

2.4. Union Law

Regarding EU law, the key provision is contained in Article 28 of the EU Charter of Fundamental Rights, which guarantees the right to collective bargaining and the right to take collective action. These rights are granted to trade unions, but also extend to other representative bodies, including "practitioners and employers or their respective organisations". According to the Court of Justice of the European Union (CJEU), while social partners are not public law entities, they may be able to implement EU acts through collective agreements. However, such agreements must pursue legitimate objectives. In the event of a conflict with the prohibition of discrimination, the

[16] Matica Hrvatskih Sindikata v. Croatia, *application no. 116/2015, pars. 59 and 80.*

[17] Articles L. 2232-21 to L. 2232-29-2 of the French Labour Code. The amendment was made by Act No. 2018-217 of 29 March 2018.

[18] Matica Hrvatskih Sindikata v. Croatia, *application no. 116/2015, pars. 59 and 80.*

measures adopted must be necessary and proportionate to achieve the intended objective[19].

The CJEU has interpreted that both collective agreements and collective actions, such as strikes, fall within the scope of EU law[20]. However, it further held that although these are fundamental rights, they are subject to limitations imposed by EU law[21].

Primary EU law provides for the involvement of representative trade unions, and a specific methodology has been developed to identify them, although this is not explicitly outlined in primary law. Representative organisations are understood as trade unions with an EU dimension, which are involved in collective bargaining within their country and are relevant to specific sectors. However, a *numerus clausus* applies in some cases, meaning that only one trade union may be identified as representative for each country[22]. Thus, there is a tradition in EU law of reviewing the representativeness of trade unions in relation to Article 154 TFEU. This review is carried out by Eurofound, and it was conducted in 2023 for sectors such as inter-sectoral social dialogue, the woodworking industry, the furniture industry, and professional football[23].

Regarding secondary legislation, mention should be made of Directive 2001/86/EC, which supplements the Statute for a European Company concerning employee involvement. This directive provides for the establishment of a special negotiating committee to ensure the exercise of employees' collective rights. However, the Directive does not specify the procedure for determining which employee representative will nominate members of the special negotiating committee or the criteria for their selection. It does, however, regulate the primacy of employee representatives over the election process, stating: "Without prejudice to national legislation and/or practice laying down thresholds for the establishment of a representative body, Member States shall provide that employees in undertakings or establishments where there are no employee representatives, through no fault of their own, have the right to elect or appoint members of the special negotiating body". Notably, there is no provision granting the employer the right to designate an employee representative.

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[19] Cf. CJEU decision in Case C 447/09 Reinhard Prigge and Others v Deutsche Lufthansa AG.

[20] Cf. CJEU Decision C-438/05, par. 37

[21] Cf. CJEU Decision C-438/05, par. 44.

[22] Rego, R., & Espírito-Santo, A. (2023). Beyond density: Improving European trade unions' representativeness through gender quotas. European Journal of Industrial Relations, 29(4), 415-433.

[23] Eurofound (2023), Representativeness of the social partners in European cross-industry social dialogue, Sectoral social dialogue series, Dublin.

Finally, reference should be made to Directive 2022/2041, which requires Member States to promote the ability of the social partners to negotiate collective agreements. This Directive led to amendments in Article 24 of the Labour Code. However, it does not provide further regulation regarding the determination of representativeness.

3. National Approaches

The trend in recent decades has been to regulate the freedom of trade union association within the constitutional provisions of national states. This is exemplified by Article 27 of the Czech Charter of Fundamental Rights and Freedoms, Article 39 of the Italian Constitution, Article 3(3) of the German Basic Law, Articles 12 and 59 of the Polish Constitution, and Articles 36 and 37 of the Slovak Charter of Fundamental Rights and Freedoms[24], among others. All these provisions guarantee the right of workers and employers to form and join their organisations. Only the Italian Constitution explicitly requires trade unions to undergo a registration procedure; however, the provision under Article 39 of the Italian Constitution has yet to be implemented. Consequently, in Italy, the activity of trade unions is covered by Article 39, § 1, which guarantees the freedom to establish and join a trade union. Thus, Italian trade unions are private, non-recognised associations, and the collective agreements they conclude are not universally applicable[25]. The Slovenian Constitutional Court has expressly confirmed the right of the Slovenian legislator to regulate the obligation for a trade union to register in the relevant register[26]. Similarly, Czech and Polish legislation sets forth a registration procedure for trade unions.

Scholarly discourse has previously divided legal orders regarding the representativeness of trade union organisations into two categories: open or closed systems. Some legal systems avoid strict regulation of trade unions altogether. In contrast, open legal systems allow for an examination of whether a trade union has the highest number of members. In legal systems without precise regulations on representativeness, it is very difficult to measure anything. Closed legal orders do not offer this possibility; instead, certain trade unions or associations are declared representative without further consideration. Notably, some previously closed legal systems, such as France,

[24] Cf. Articles 54 to 57 of the Portuguese constitution, Article 41 of the Romanian constitution, Article 77 of the Slovenian constitution, and Articles 281 and 371 of the Spanish constitution. Cf. Ribeiro, A.T. *The Scope of Representation of Trade Unions in Portugal: A New Reality? In: E-Journal of International and Comparative LABOUR STUDIES*, Volume 12 No. 03/2023, p. 82 et seq.

[25] See, for example, Treu, T. Labour law in Italy 2023. Wolters Kluwer.

[26] Decision of the Constitutional Court of Slovenia of *5 February 1998, Case No. U-I-57/95.*

have transitioned to open ones. Open legal systems must establish methods for quantifying the number of members in a particular trade union[27].

In Czech case law, the employer has the right to know which trade union is representative, a principle not unique to Czech law. The German Constitutional Court[28] also holds that such a restriction follows from the nature of property protection and is required by constitutional law.

Generally speaking, legal systems in countries such as Germany, Ireland, Portugal, and Sweden[29] oppose explicit regulation of representativeness. In these jurisdictions, the legitimising factor is not based on counting members. Instead, other criteria, such as tradition (e.g., Belgium), the sectoral principle (e.g., Denmark and partially Austria[30]), or the success in the collective bargaining process, materialised in the conclusion of a collective agreement (e.g., Germany and Sweden), determine representativeness. In these systems, only trade unions are granted the right to collective bargaining. However, in Germany and Sweden[31], an employer can negotiate a collective agreement with any active trade union in their company. Moreover, the German Supreme Court recently reconsidered its case law and accepted that an employer may negotiate multiple collective agreements with various trade unions. This contrasts with the previous rule that employers were, in principle, bound by only one collective agreement[32]. The implementing regulation can be found in Article 77(3) of the Act on Co-Determination in the Workplace[33]. Although German works councils may negotiate certain agreements, these may not exclude or replace the collective agreement. Under German law, the negotiation of a collective agreement is considered a sign of a trade union's representativeness. In contrast to Czech tradition, a trade union with fewer members in Belgium can still be recognised as representative[34].

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[27] Cf. Prigge, W.-U. (2001). Gewerkschaftliche Repräsentativität in pluralistischen Systemen: Belgien und Frankreich. Industrielle Beziehungen: Zeitschrift für Arbeit, Organisation und Management, 8(2), pgs. 200-220.

[28] For example, the German Federal Constitutional Court decision of *3 January 1979, Collection of Decisions* No. 50, p. 90.

[29] Under Swedish legislation, the trade union is the sole representative of the employees.

[30] In Austria, the chambers (German: Arbeiterkammern), whose membership is compulsory, are the only ones that can represent employees before labour courts and specialised courts for social security benefits.

[31] The German prerogative reserved to the trade union only is called Tariffähigkeit. Waas, B. *Who is allowed to represent employees? The capacity to bargain collectively of trade unions* in Davulis/Petrylaite (ed.). *Labour Market of the 21st century: Looking for flexibility and security, Vilnius*, 2011, p. 164.

[32] BGB decision of 7 July 2010, Case No 4 AZR 549/08.

[33] Cf. Article 6 of the Act on Co-Determination in the Workplace. In German Betriebsverfassungsgesetz as amended by 1 Act of 19 July 2024 (BGBl. 2024 I Nr. 248).

[34] Cf. Article 6 of the Act of 5 December 1968 on collective agreements and joint committees.

However, other states also lay down legal requirements for a trade union to emerge at the employer level and, therefore, establish a certain number of members to be recognised as a trade union or representative trade union. In these legal systems, trade unions are defined by both material and formal characteristics. In terms of numbers, the limit on the number of employees required is the lowest under Slovak legislation, which requires only two trade union members. Czech regulation sets the limit at three employees, while Polish regulation requires at least 10 employees. The English regulation sets a limit of 10% of the members in the unit formed for collective bargaining purposes. The French regulation grants the right to appoint an employee representative for employers with 50 or more employees, but this applies within a specific electoral unit[35].

In the UK, there is a process for the voluntary and compulsory recognition of the existence and operation of a trade union. For statutory recognition of a trade union, membership of at least 10% of the employees in the relevant constituency (with a minimum of 21 persons) is required. The Central Arbitration Committee verifies the number of members of the trade union[36].

Austrian law also provides for the representativeness of trade unions, and these rules are applied, for example, in the inter-union collective agreement of 13 April 1999, the collective agreement for public schools of 23 February 2000, and the collective agreement of 4 October 2016 for the bargaining area of sanitary workers[37].

In Slovak law, whether a trade union is active at the employer level is decided by an arbitrator in the event of a dispute. If the parties to the conflict cannot agree on the appointment of an arbitrator, the Slovak Ministry of Labour appoints the arbitrator upon either party's proposal[38].

3.1. French Measurement of Representativeness and, in Particular, Influence

Since 2008[39], seven criteria have been required for achieving representativeness

[35] Article L. 2143-3 of the French Labour Code.

[36] The CAC is the body of the Department for Business & Trade Arbitration.

[37] For participation in contract negotiations, trade unions whose membership in their respective bargaining areas reaches the prescribed minimum percentages (10% or 5%) shall be considered representative. The representativeness of unions shall be determined as of 30 November of each year, based on union dues collection authorisations submitted to the Governing Body.

[38] Act 76/2021 Coll. And Section 230a of the Slovak Labour Code. In Slovak: Zákon č. 76/2021 Z.z. a ust. § 230a zákonníka práce.

[39] Until then, the five unions—the CGT, CGC, FO, CFTC, and CFDT—were simply considered representative. The other unions were obliged to prove their representativeness.

under French law, such as respect for the values of the Republic[40], independence[41], existence for at least two years[42], influence, number of members, amount of dues, and the so-called share of votes[43]. The criteria relating to respect for the values of the Republic, independence, and financial transparency must always be met and assessed independently. The other criteria relating to influence, membership and contributions, length of existence, and share of votes are subject to a comprehensive overall assessment[44]. Only representative trade unions have certain rights, particularly the right to bargain collectively. Of course, a trade union can also lose its status as the organisation with the most members.

This means that once these criteria are fulfilled, they are considered met throughout the electoral cycle. However, a trade union's representativeness is not a homogeneous concept but is demonstrated in varying quality and quantity at company, sectoral, group, national, and inter-sectoral levels[45].

The impact of the union is monitored and measured by the activities carried out by the union and the experience of its activities. The effect of all activities, including those within a trade union federation that the trade union has subsequently left, is assessed. As regards the number of members and dues, the number of members is evaluated by the number of employees in the plant or part of the plant. However, the Labour Code does not set a minimum level of contributions. Nevertheless, according to case law, the contributions must be significant in financing the trade union's activities.

The most controversial but essential criterion regarding representativeness is

[40] Respect for republican values includes freedom of expression, political, philosophical, and religious freedom, as well as the rejection of discrimination, fundamentalism, and intolerance. French case law holds that "a trade union that praises discrimination based on an employee's origin does not respect these values," as the Court of Cassation ruled on 9 September 2016, Case No. 16-20.605.

[41] The criterion of financial transparency allows for verification of the use and origin of funds. To this end, the law requires trade unions to produce and publish accounting documents as evidence of this criterion. The Court of Cassation has expressed the legal opinion that the publication of accounting documents solely on a trade union's public Facebook page is insufficient, cf. Court of Cassation decision of 13 June 2019, Case No. 18-60.030.

[42] This criterion aims to prevent the formation of new trade unions immediately before elections. A trade union must have existed for at least two years in the sector and in the area.

[43] Participation in formalised elections to the social and economic committee (comité social et économique), as well as at the various chambers and other events, is used for measurement. Cf. Article L. 2121-1 of the French Labour Code.

[44] See the decision of the Court of Cassation of 29 February 2012, Case No. 11-13.784.

[45] Thus, a trade union is considered representative in a factory or sector if it meets the above criteria and receives at least 10% of the votes cast in the first round of the last election of employee representatives. The percentage of votes is measured every four years at the time of the election.

the number of votes of the trade union. The share of votes is calculated based on the votes obtained by each trade union in the elections to the works councils. It is determined according to the level considered—company, sectoral, or inter-sectoral. Representativeness of trade unions in a sector means that a trade union must obtain at least 8% of the votes cast to be considered representative[46].

3.2. Czech Regulation

The Czech Constitutional Court stated, "If collective bargaining is to be a mechanism of social communication and democratic procedural resolution of potential conflicts threatening internal peace, then it is also linked to the requirement of legitimacy (representativeness)"[47]. Thanks to this intervention by the Constitutional Court, the representativeness of a trade union has been, and continues to be, addressed in Czech law in the case of an extension of a higher-level collective agreement. In this context, the relevant higher-level trade union body in a given sector acts on behalf of the largest number of employees[48]. In addition to this arrangement, representativeness has remained regulated in Czech collective labour law in the case of European companies[49] and the Insolvency Act[50]. In both cases, the legitimisation of the trade union organisation through the majority is again required[51]. The interpretation of the European company regulation is somewhat more complex, where the legislator has even attempted to regulate the weight of the trade union's vote[52].
According to the traditional Czech notion of representativeness in company collective bargaining, an association of three employees in an employment relationship is sufficient for a trade union to operate within an employer. This is not unusual in Europe, where other countries have traditionally resisted greater legal regulation of employee representatives. Previous Czech practice of

[46] The Court of Cassation has held that a trade union that is not representative at the beginning of an election because it did not participate in the election cannot become representative during the same election cycle by joining an organisation that has already achieved representativeness at the beginning of the election, even if that organisation is not representative.
[47] Constitutional Court judgment of 11 June 2003, Pl. ÚS 40/02.
[48] Cf. decision of the Municipal Court in Prague, No. 14 A 80/2017-43 and the Municipal Court in Prague, 14 A 64/2017-66.
[49] Cf. Section 55(4) of Act No. 627/2004 Coll. on the European Company.
[50] Under Section 67 of Act No.182/2006 Coll., the Insolvency Act, as amended, provides that "*If several trade unions operate side by side at the debtor, the trade union with the largest number of members or the association of trade unions with the largest number of members shall have this right, unless the trade unions operating at the debtor agree otherwise.*"
[51] Thus, a trade union with a simple majority of employees is representative.
[52] Cf. Section 55(4) of Act No. 627/2004 Coll. on European Companies, as amended.

small, essential trade union organisations, while sometimes impractical, has been in line with international law[53]. Nevertheless, legal practice has brought several complications, and the legislator addressed them by amending the Labour Code.

The Czech legislator adopted a procedure whereby, if trade unions do not unite on collective bargaining, they are obliged to inform the employer within 30 days of the commencement of such negotiations[54]. The employer will then designate the trade union organisation or organisations with the largest number of members. The key question in this new arrangement is how the employer repeatedly determines which union, or group of unions, has the largest number of members. Moreover, the employer will need to have this knowledge at a specific time, likely at the start of, and during, collective bargaining, in order to properly prepare for future collective bargaining developments and alternatives. He will then have to repeat this procedure in every collective bargaining session if it is conducted again in the years to come[55].

The courts have repeatedly mentioned in case law that an employer can undoubtedly invite a trade union to have the number of its members verified by a notary public or a lawyer. However, there is a fee for this service that must be paid. If the employer refuses to pay the costs of the notary or lawyer, this may be a problem for the trade union. In addition, it should be noted that in the Czech Republic, a tradition of employer donations has developed, to which not all trade unions operating in the same establishment are entitled. Thus, one can imagine that by repeatedly asking for proof of membership through paid services, an employer could effectively exclude from negotiations a union that does not have adequate financial resources to satisfy the employer's demands[56].

Leaving aside these practical problems of ascertaining the number of members of a particular trade union, the amendment to the Czech Labour Code poses a more general question concerning verification: Should the employer decide on

[53] For example, the interpretative practice of Article 6 of the European Social Charter has supported the functioning of trade unions as representatives of employees.

[54] The question of application remains to be resolved as to whether the courts will consider this notification a legal act, and thus require written agreement by all trade unions that they have not reached an agreement, or whether only a notification by some trade unions will suffice. In the first case, one trade union refusing to agree would block even the solution provided in section 24(3) of the Labour Code.

[55] Security guards escorted the author out of a meeting of the European Works Council, to which he was invited to be an expert on a trade union not recognised by his employer, an international IT corporation. The listed company then selectively asked this particular trade union to provide proof of membership.

[56] If at least three trade union members do not want to come forward and declare themselves members of a particular trade union, then the employer requires, for example, that a notary verify the number of employees. Still, the employer does not want to pay the costs associated with this verification. Act No. 120/2025 Coll forbade this practice.

the largest trade union? If we look at the Austrian, English, French, or Slovak legislation, we do not find any authorisation for the employer to do so. Nor can we take inspiration from the otherwise very liberal national legislation of the USA because such legislation would probably run up against federal constitutional limits.

4. Conclusion

The development of collective labour law is significantly influenced by local traditions and historical developments, leading to regional differences in how representativeness is determined. In most democratic countries, a genuine trade union is active in protecting the rights of employees, not overburdening the employer, operating according to its statutes, and conducting constructive collective bargaining with the employer. The criteria must be capable of identifying a representative trade union, especially in situations where multiple trade unions exist within a single employer.

A trade union is a corporation, and its legitimacy has always, and continues to, derive from the association of its members. More members equate to more political power, as well as more funds from membership dues. When multiple trade unions operate within an employer, it is crucial to identify a representative trade union to negotiate collectively at the company level. In a democratic society, the majority principle makes sense, provided that it is verifiable and demonstrable that the majority has expressed its will—that is, a specific trade union or group of trade unions represents a significant portion of the workforce. Examples from other countries support this approach, where representative trade unions are favoured over non-representative ones in open legal systems.

The principle of representativeness has traditionally been seen in the Czech Republic[57], as well as abroad, as a safeguard against the abuse of law by trade unionists. However, it should not be used as a tool to enforce a uniformity of views or representatives. Some countries have had negative experiences with this during the Nazi and Communist periods. The ECtHR has rejected the principle of parity, meaning the mandatory representation of all trade unions, as a criterion for representativeness.

With the enactment of Act No. 230/2024 Coll., the Czech legislator addressed the issue of trade union representativeness to promote collective bargaining. From the perspective of international regulation, a simple majority of the employees represented is an acceptable criterion for representativeness,

[57] Cf. Constitutional Court *judgment of 5 October 2006, Pl. ÚS 61/04*, par. 47. Supreme Administrative Court *decision No. 1 Ads 72/2018-46*.

provided that such a criterion is discussed with the most representative trade unions and employers' associations, and is established in advance through binding law. The requirement for a simple majority of employees is not unconstitutional, even according to Czech case law, and it is also recognised abroad. Therefore, the solution introduced by the amendment to the Labour Code, as set out in the new wording of Section 24(4), can be identified as one possible approach. However, it would be more common to link the designation of a representative trade union to the conclusion of a collective agreement, rather than pre-selecting a suitable contracting party.

Moreover, the legislator has left the determination of the procedure for how the employer will verify the number of trade union members to practice. From an international perspective, the Czech legislator's lack of clarity on this matter cannot be considered appropriate or beneficial. If the legislator genuinely wants to aid collective bargaining, the procedure for verifying the number of employees in each trade union should be regulated, including the method and the period for which this verification is applicable. There are enough foreign models and experiences to draw from. A particularly elegant approach is the Slovak regulation, which uses an arbitrator, or the French model, which allows the court to make the decision[58].

Therefore, although the number of affiliated workers is undoubtedly an important quality, other conceptions of trade union representativeness can be found in foreign legislation. For example, in German law, following the Second World War and under pressure from the American, British, and French occupying forces, a dual system of representation was intentionally created, with works councils and trade unions as two distinct representatives of employees who must complement each other. Sectoral affiliation can also serve as a legitimising factor, as seen in Denmark, Germany, and Sweden, where there is a strong tradition of high unionisation. Another well-known factor is union-wide or constituency-based elections. In France, legislation allowed for the recognition of a trade union organisation by a decision of a specific body. In Sweden and Germany, the employer selects the trade union when concluding a collective agreement. However, in these systems, the legitimacy of a trade union is not determined solely by the employer's decision about which union is representative.

[58] Such a procedure would also help the Czech mediation and arbitration system, which is in poor shape. For all the application problems, let us mention the low number of disputes resolved by arbitrators in the Czech Republic.

From Means-Tested Assistance to the Insurance Principle: There and Back Again

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Abstract. This article examines the historical shift in Britain from means-tested assistance to the insurance principle, beginning with the early 20th-century Poor Law crisis. The 1911 National Insurance Act laid the foundations later expanded by the Beveridge Report and post-WWII Labour legislation, marking a move towards universalism in social policy. However, by the late 1950s and early 1960s, legal reforms – such as the decline of flat-rate contributions and the return to means-testing – foreshadowed the emerging crisis of the Welfare State. This legal-historical analysis offers insights into welfare legislation's evolution and its relevance to current policy challenges.

Keywords: *Means-tested assistance; Insurance principle; Social security; Welfare State; Twentieth-century Britain.*

1. Introduction

This article provides an overview of the historical relationship between means-tested assistance and the insurance principle in Britain. It also highlights the significance of this relationship, which helped shape the British welfare model and influenced key elements of legal, administrative, and social security law. The analysis is structured in three parts.

The first section explores the crisis of the Poor Law in the early twentieth century and the emergence of the insurance principle through the 1911 National Insurance Act. This marked a pivotal shift from means-tested assistance to contributory insurance, laying the foundations of the welfare model.

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The second section examines the consolidation of the insurance principle, particularly during the inter-war period, culminating in the 1942 Beveridge Report and the 1948 Welfare State reforms. From this perspective, the insurance principle is presented as central to the development of universalism in social policy.
The third section addresses the crisis of the Beveridge model. It traces the post-war trajectory of the welfare system, focusing on the decline of the flat-rate contribution model from the 1950s and the gradual reintroduction of means-tested assistance. This return to means-testing anticipated key features of the Welfare State's subsequent crisis.
By analysing these historical developments, the article offers insights into the enduring relevance of the relationship between insurance and assistance. As discussed in the conclusion, understanding this evolution is crucial to grasping contemporary challenges – particularly the need to establish a normative framework that places solidarity at the core of the modern legal order. While historical in focus, the article underscores the value of historical analysis in addressing deeply rooted legal and social dilemmas today.

2. From Means-Tested Assistance to the Insurance Principle

At the turn of the twentieth century, social welfare policy in Britain remained rooted in the central tenets of the Poor Law[1]. In accordance with the dogma of self-help[2], Poor Law principles, as is well known, linked assistance to the stigma of social exclusion, compelling individuals to rely solely on their own resources. The legitimacy of a claim to assistance was established through the harsh conditions of the workhouse, deliberately made less attractive than even the lowest-paid employment – a reflection of the 'less eligibility' principle[3]. Legally, this was reflected in the near-complete prohibition of 'outdoor relief' under the 1834 Poor Law Amendment Act[4]. This Act confined the poor to

[1] The (Old) Poor Law model of Poor Relief Act [1601], 43 Eliz. 1, c. 2 was reorganised by the (New) Poor Law (Amendment) Act [1834], 4 & 5 Will. 4, c. 76.
[2] S. Smiles, *Self-help; with Illustrations of Character and Conduct*, London, John Murray, 1859.
[3] See the two volumes B. Webb, S. Webb, *English Poor Law History* [1927-1929], London, Frank Cass, 1963. See also D. Roberts, *Victorian Origins of the British Welfare State*, New Haven, Yale University Press, 1960; K. Laybourn, *The Evolution of British Social Policy and the Welfare State*, Keele, Ryburn, 1995, 15-94; L. Charlesworth, *Welfare's Forgotten Past: A Socio-legal History of the Poor Law*, London-New York, Routledge, 2010, 1-34. For an international perspective, G. V. Rimlinger, *Welfare Policy and Industrialization in Europe, America, and Russia*, New Jork, Wiley & Sons, 1971.
[4] The Act's purpose was to repeal the 1795 Speenhamland system, which established an outdoor relief of monetary assistance administered by parishes and aimed at supplementing

institutional care, depriving them of civil and political rights and segregating them from wider society.

Over time, the dominance of these principles gradually weakened. During the Victorian era, the prohibition of outdoor relief became increasingly subject to exceptions, which grew in number, scope, and inconsistency[5]. Simultaneously, a parallel expansion of social services and industrial legislation outside the Poor Law framework laid the groundwork for a transition from individualism to legal collectivism[6]. By the late nineteenth century, this shift was evident in educational reforms[7], the enhancement of municipal services[8], the rise of trade unions, and advancements in labour legislation[9]. Furthermore, pioneering studies on poverty supported calls for a radical overhaul of the assistance model[10]. It was in the Edwardian era that these ideas gained momentum, bolstered by the social reform proposals of Fabian socialists and New Liberal thinkers[11].

The findings of the Royal Commission on the Poor Laws (1905–1909) clearly demonstrated an emerging consensus on the need to move away from the

insufficient family wages. See especially K. Polanyi, *The Great Transformation*, New York-Toronto, Farrar & Rinehart, 1944, 77-85.

[5] Since the mid-nineteenth century exceptions had been allowed on an increasingly discretionary basis. One thinks of the 'sudden and urgent necessity' clause. See W. H. Beveridge, *Unemployment: A Problem of Industry*, London, Longmans, 1909, 150-157.

[6] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, London, Macmillan, 1905. Throughout the Nineteenth-century, the New Poor Law constituted a model that inspired a significant administrative interventionism on which recent historiography has often dwelt. See O. MacDonagh, *The Nineteenth-Century Revolution in Government: A Reappraisal*, in *The Historical Journal*, 1, 1, 1958, 52-67 and H. Parris, *Constitutional Bureaucracy*, London, Allen and Unwin, 1969.

[7] Consider the reforms from *Elementary Education Act* [1870], 33 & 34 Vict., c. 75 to *Education Act* [1902], 2 Edw. 7, c. 42.

[8] Note the development since the *Local Government Board Act* [1871], 34 & 35 Vict., c. 70.

[9] *Trade Union Act* [1871], 34 & 35 Vict., c. 31*; Employers' Liability Act* [1880], 43 & 44 Vict., c. 42; *Workmen's Compensation Act* [1897], 60 & 61 Vict., c. 37. See D. Brodie, *A History of British Labour Law. 1867-1945*, Oxford-Portland, Hart, 2003, 1-117.

[10] See C. Booth, *Life and Labour of the People*, London, Williams and Norgate, 1889-1903, and the first survey of B. S. Rowntree, *Poverty: A Study of Town Life* [1901], London, Macmillan, 1903.

[11] See J. A. Hobson, *The Crisis of Liberalism* [1909], Brighton, Harvester Press, 1974 and L. T. Hobhouse, *Liberalism* [1911], London, Williams & Norgate, 1919: Mainly inspired by T. H. Green's common good, they both developed a dialogue with socialist culture. See M. Freeden, *The New Liberalism: An Ideology of Social Reform*, Oxford, Oxford University Press, 1978; J. Harris, *Political Thought and the Welfare State 1870-1940: An Intellectual Framework for British Social Policy*, in *Past and Present*, May, 1992, 116-141; D. Weinstein, *Utilitarianism and the New Liberalism*, Cambridge, Cambridge University Press, 2007. On these legal mediations under the banner of a «progressive thought» and an «evolutionary social theory», see M. Loughlin, *Public Law and Political Theory*, Oxford, University Press, 1992, 105-125.

stigma and selectivity embedded in the Poor Law, towards a more inclusive welfare system[12]. Although the Commission issued both Majority and Minority Reports[13], it was unanimous in rejecting the core Poor Law principles, which had historically linked welfare assistance with the loss of civil and political rights. In an increasingly industrialised society, poverty was being reinterpreted not as a personal failing but as a structural problem[14].

This change in legal thinking was evident in the reforms implemented by the New Liberal governments of 1906–1914. A general legal trend was the establishment of social services independent of the Poor Law[15]. This «continuous series of departures from the principles of 1834»[16] was reflected across key areas of social legislation.

The Old Age Pensions Act of 1908, introduced by the Asquith government, exemplified this shift. Though modest in benefit and subject to stringent means-testing[17], the Act was significant[18] in granting state pensions on a national basis, breaking from local administration and Poor Law scope. The pension was paid in cash and could be collected from post offices – thus embodying the «right to receive an old age pension»[19] rather than a discretionary handout. While certain elements retained Poor Law characteristics, Section 1 of the Act marked a notable departure, affirming: «The receipt of an old age pension under this Act shall not deprive the pensioner of any franchise, right or privilege, or subject him to any disability».

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[12] *Report of the Royal Commission on the Poor Laws and Relief of Distress* [Cd. 4499], 1909.

[13] Suggesting greater public interventionism, the Minority Report was opposed to the Majority's support for voluntary philanthropy.

[14] See A. Briggs, *The Welfare State in Historical Perspective*, in *Archives européennes de sociologie*, II, 1961, 221-258.

[15] See M. Bruce, *The Coming of the Welfare State*, London, Batsford, 1968; J. R. Hay, *The Origins of the Liberal Welfare Reforms. 1906-1914*, London, Macmillan, 1975; the last part of E. J. Feuchtwanger, *Democracy and Empire: Britain, 1865-1914*, London, Edward Arnold, 1985 and J. Cooper, *The British Welfare Revolution, 1906-14*, London, Bloomsbury Academic, 2017.

[16] B. Webb, S. Webb, *English Poor Law History*, cit., 547. Similarly, D. Fraser, *The Evolution of the British Welfare State. A History of Social Policy Since the Industrial Revolution*, London, Macmillan, 1973. See also G. R. Boyer, *The Winding Road to the Welfare State. Economic Insecurity & Social Welfare Policy in Britain*, Princeton, Princeton University Press, 2019.

[17] See B. B. Gilbert, *The Evolution of National Insurance in Great Britain: The Origins of the Welfare State*, London, Michael Joseph, 1966, 159-232; D. Collins, *The Introduction of Old Age Pension in Great Britain*, in *Historical Journal*, VIII, 1965, 246-259; A. I. Ogus, *Great Britain*, in (ed.) P. A. Köhler, H. F. Zacher, *The Evolution of Social Insurance. 1881-1981*, London, Frances Printer, 1982, especially, 150-187. More generally, H. Heclo, *Modern Social Politics in Britain and Sweden. From Relief to Income Maintenance*, New Haven, Yale University Press, 1974, 158-178.

[18] See P. Thane, *Non-contributory versus Insurance Pensions 1878-1908*, in (ed.) Id., *The Origins of British Social Policy*, London, Croom Helm, 1978, 84-105.

[19] *Old Age Pensions Act* [1908], 8 Edw. 7, c. 40, s. 1.

This move away from a welfare policy restricted to the poor was echoed in legislation on child welfare[20], public employment services, improved workers' compensation, the establishment of labour exchanges, and the introduction of a minimum wage for selected occupations[21].

However, it was the 1911 National Insurance Act – providing insurance against illness and unemployment – that marked a decisive shift from means-tested assistance to contributory benefits[22]. The Act consisted of two parts.

Although inspired by Bismarckian social insurance[23] and partly shaped by paternalistic[24] and imperialist[25] aims, Part I[26] (National Health Insurance) introduced provisions that opposed the stigma of the Poor Law[27] and promoted a more inclusive model. While hospital care remained outside its remit[28], the scheme entitled most workers to medical benefits and general practice care, funded through a tripartite contribution system involving the employee, employer, and the State[29]. This structure reflected a growing sense of shared social responsibility, with the State acting as both guarantor and financier of the scheme. The flat-rate contribution model – offering equal benefits for all regardless of income – symbolised a baseline of subsistence welfare and established a clear legal distinction between contributory insurance and residual means-tested assistance.

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[20] *Education (Provision of Meals) Act* [1906], 6 Edw. 7, c. 57; *Education (Administrative Provisions) Act* [1907], 7 Edw. 7, c. 43; *Children Act* [1908], 8 Edw. 7, c. 67; *Education (Provision of Meals) Act* [1914], 4 & 5 Geo. 5, c. 20.

[21] In addition to *Workmen's Compensation Act* [1906], 6 Edw. 7, c. 58, the Board of Trade headed by Churchill introduced – with the help of William Beveridge who was working as a civil servant – the *Labour Exchanges Act* [1909], 9 Edw. 7, c. 7 and *Trade Boards Act* [1909], 9 Edw. 7, c. 22. Both Acts were crucial in dismissing the sanctity of laissez-faire.

[22] See L. G. Chiozza Money, *Insurance vs Poverty*, London, Methuen, 1912.

[23] See E. P. Hennock, *British Social Reform and German Precedents. The Case of Social Insurance 1880-1914*, Oxford, Clarendon Press, 1987.

[24] See H. BELLOC, *The Servile State*, London-Edinburgh, T.N. Foulis, 1912.

[25] Consider that the *Report of the Inter-departmental Committee on Physical Deterioration* [Cd. 2175], 1904 seemed to be concerned about health mostly to ensure army efficiency. See also G. R. Searle, *The Quest for National Efficiency: A Study in British Politics and Political Thought*, *1899-1914*, Oxford, Blackwell, 1971.

[26] *National Insurance Act* [1911], 1 & 2 Geo. 5, c. 55, s. 1-83.

[27] R. W. Harris, *National Health Insurance in Great Britain. 1911-1946*, London, Allen & Unwin, 1946, 38-94; D. C. Marsh, *National Insurance and Assistance in Great Britain*, London, Pitman, 1950, 28-38.

[28] B. Webb, S. Webb, *The State and the Doctor*, London, Longmans, 1910: Apart from the hospitals of private associations (pp. 130-153), public medical care remained divided between the treatments that were offered by local authorities (pp. 154-210) and those still regulated by the Poor Law (pp. 14-129). See also B. Abel-Smith, *The Hospitals, 1800-1948: A Study in Social Administration in England and Wales*, London, Heinemann, 1964.

[29] 4, 3 and 2 pence, respectively.

Conversely, Part II[30] (Unemployment Insurance) applied a similar contributory structure but was limited to certain occupations prone to cyclical unemployment[31]. Despite its narrow scope, it marked the first national European scheme for unemployment protection, challenging laissez-faire orthodoxy[32] and positioning Britain as the first country to offer statutory cover for the major risks of industrial society: workplace injury, old age, illness, and unemployment[33].

By combining their effects, the two parts of the 1911 Act redefined the State's responsibilities, expanding public expenditure, increasing redistributive efforts, and strengthening the role of centralised national social services. Sociologically, these developments represented the institutionalisation of social rights, potentially «just as valid as the rights of person or property»[34]. Legally, the contributory principle was the key mechanism for implementing broader social policy goals.

The introduction of a tripartite scheme reflected not only higher public spending but also a new fiscal strategy. While the flat-rate principle lacked direct redistributive intent, it was closely tied to the broader tax reforms introduced in Lloyd George's 1909 "People's Budget"[35], which aimed to increase taxes on the wealthy. This budget triggered a constitutional crisis resolved only by the 1911 Parliament Act after significant political confrontation and the intervention of King George V[36]. The National Insurance Act, by facilitating greater redistribution through social benefits and taxation, aligned with this broader fiscal vision.

The practical implementation of the contributory principle paralleled several key administrative transformations, all contributing to the growth of State services:

a) Compulsory Participation: While compulsory insurance was not novel in

[30] *National Insurance Act* [1911], 1 & 2 Geo. 5, c. 55, s. 84-107.

[31] See B. B. Gilbert, *The Evolution of National Insurance in Great Britain,* cit., 233-288 and J. Fulbrook, *Administrative Justice and the Unemployed*, London, Mansell, 1978, 130-141.

[32] See K. Middlemas, *Politics in Industrial Society. The Experience of British System Since 1911*, London, A. Deutsch, 1979, 27-67.

[33] S. Kuhnle, A. Sander, *The Emergence of the Western Welfare State*, in F. G. Castles (et al.), *The Oxford Handbook of the Welfare State*, Oxford, Oxford University Press, 2012, 63-82. See also B. Aguilera-Barchet, *The Law of the Welfare State*, in (ed.) H. Pihlajamäki, M. D. Dubber, M. Godfrey, *The Oxford Handbook of European Legal History*, Oxford, Oxford University Press, 2018, 1000-1024.

[34] L.T. Hobhouse, *Liberalism* [1911], London, Williams & Norgate, 1919, 159. See also L.T. Hobhouse, *The Historical Evolution of Property, in Fact and in Idea*, in *Property. Its Duties and Rights,* London, MacMillan, 1913, 1-31.

[35] See W. Churchill, *Liberalism and the Social Problem*, London, Hodder and Stouhton, 1909.

[36] *Parliament Act* [1911], 1 & 2 Geo. 5, c. 13.

continental Europe, its adoption in Britain – a country with a strong tradition of voluntary and philanthropic welfare – marked a significant innovation. Under the new system, only government-approved societies could participate, and a clear distinction was drawn between the new 'approved societies' and traditional friendly societies'. The shift to compulsory provision thus signalled the replacement of voluntary initiative with public service[37].

b) Administrative Centralisation: Although centralisation dated back to the 1834 Poor Law, the national character of the 1911 scheme further concentrated powers and responsibilities. The Act aimed to overcome the traditional fragmentation of social welfare and localism by introducing a national minimum standard of benefit[38].

c) Expansion of Regulatory Power: The scale and complexity of the scheme necessitated new administrative mechanisms. The National Health Insurance Commission and the Board of Trade were empowered to issue regulations «for any of the purposes» of the Act[39]. As A.V. Dicey noted in his 1914 edition of *Law and Public Opinion*, this represented «probably the widest power of subordinate legislation ever conferred by Parliament upon any body of officials»[40]. Bureaucratic administration grew in parallel, with civil servants playing an increasingly central role[41].

d) Establishment of Administrative Tribunals: Dispute resolution mechanisms under the Act are often seen as the origin of modern administrative tribunals[42].

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[37] See G. Finlayson, *Citizen, State, and Social Welfare in Britain 1830-1990*, New York, Oxford University Press, 1994, especially pp. 19-107, and generally B. Fraser Brockington, *A Short History of Public Health,* London, J. & A. Churchill, 1966, 34-52.

[38] On the directions of compulsory and administrative centralisation, G. F. Ferrari, *La sicurezza sociale in Gran Bretagna*, in *Rivista trimestrale di diritto pubblico*, 3, 1981, 936-1001.

[39] *National Insurance Act* [1911], 1 & 2 Geo. 5, c. 55, s. 65 and 91.

[40] A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century*, London, Macmillan, 1914, XL. On the delegated legislation emergence, it is historically essential C. T. Carr, *Delegated Legislation. Three Lectures*, Cambridge, University Press, 1921.

[41] W. J. Braithwaite, *Lloyd George Ambulance Wagon. The Memoirs of W. J. Braithwaite, C. B.,* London, Cedric Chivers, 1957, 259-306. About civil service constitutional role, see the essays in *The Development of the Civil Service*, London, P.S. King, 1922. See also H. R. G. Greaves, *The Civil Service in the Changing State*, London, Harrap, 1947; T. Rosamund, *The British Philosophy of Administration. A Comparison of British and American Ideas 1900-1939*, London, Longman, 1978; R. Davidson, R. Lowe, *Bureaucracy and Innovation in British Welfare Policy 1870-1945*, in (ed.) W. J. Mommsen, *The Emergence of the Welfare State in Britain and Germany. 1850-1950*, London, Croom Helm, 1981, 263-295.

[42] J. A. G. Griffith, H. Street, *Principles of Administrative Law*, London, Pitman, 1952; S. A. De Smith, *Judicial Review of Administrative Action*, London, Stevens, 1959; H. W. R. Wade, *Administrative Law*, Oxford, Clarendon Press, 1961; H. Street, *Justice in the Welfare State*, London, Stevens, 1968; K. Bell, *Tribunals in the Social Services*, London, Routledge & Kegan Paul, 1969; R. E. Wraith, P. G. Hutchesson, A. Macdonald, *Administrative Tribunals*, London, Allen & Unwin,

Dicey, revising his earlier scepticism, acknowledged that the Insurance Act had created «a system bearing a marked resemblance to the administrative law of France»[43].
In sum, the transition from means-tested assistance to a contributory national insurance model prior to the First World War signalled not only a more inclusive social policy but also the advent of a new redistributive and administrative order. The contributory principle, as embodied in the 1911 National Insurance Act, played a central role in reshaping the legal system and redefining the social responsibilities of the State.

3. Beveridge Model Achievements

The impact of the First World War was the single most crucial turning point for the growth in public spending and the increase in the State's redistributive efforts. The global conflict overcame nineteenth-century ideas and paved the way for the modern State[44].
Further theoretical innovations occurred during the interwar period. The new Keynesian economics overruled the former laissez-faire theory[45]. In a sense, political theory was perfecting the mediation between liberalism and socialism[46]. A new legal philosophy supporting the positive duties of the State

1973; L. Mannori, B. Sordi, *Storia del diritto amministrativo*, Roma, Laterza, 2001, 428-440; C. Stebbings, *Legal Foundation of the Tribunals in Nineteenth Century England*, Cambridge, Cambridge University Press, 2006, 273-329; C. Harlow, R. Rawlings, *Law and Administration*, Cambridge, CUP, 2009.

[43] A. V. Dicey, *Lectures*, cit., XLIII. These arguments were confirmed in *The Development of Administrative Law in England*, in *Law Quarterly Review*, XXXI, 1915, 148-153. See also S. Cassese, *Albert Venn Dicey e il diritto amministrativo*, in *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 19, 1, 1990, 5-82; B. Sordi, *Révolution, Rechtsstaat and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe,* in (ed.) P. Lindseth, S. Rose-Ackerman, *Comparative Administrative Law*, Northampton, Edward Elgar, 2010, 23-36; B. Sordi, *Diritto pubblico e diritto privato. Una genealogia storica*, Bologna, Il Mulino, 2020, 58-62.

[44] For an international perspective, see the first pages of E. J. Hobsbawm, *Age of Extreme. The Short Twenty Century 1914-1991,* London, Abacus, 1995 and C. S. Maier, *Leviathan 2.0: Inventing Modern Statehood*, Cambridge, Harvard University Press, 2014. For British history, P. Clarke, *Hope and Glory. Britain 1900-1990*, London, Penguin books, 2004. Considering social policy matters, J. E. Cronin, *War, State and Society in Twentieth-Century Britain*, London and New York, Routledge, 1991, 1-17; M. J. Daunton, *Payment and Participation: Welfare and State-Formation in Britain 1900-1951*, in *Past and Present*, 1996, 169-216; F. Nullmeier, F. X. Kaufmann, *Post-War Welfare State Development*, in F. G. Castles (et al.), *The Oxford Handbook of the Welfare State*, Oxford, Oxford University Press, 2012.

[45] J. M. Keynes, *The End of Laissez-Faire*, London, Hogarth Press, 1926.

[46] R. H. Tawney, *Equality*, London, Unwin, 1931.

was envisioned[47]. Consequently, the very first proposals for administrative law challenging the hegemony of Diceyan Rule of Law were born[48].

However, upon closer examination of social policy legislation, the interwar period, despite its impressive theoretical innovations, appeared to be largely a consolidation of trends already initiated by the National Insurance Act of 1911[49].

This was demonstrated by Neville Chamberlain's Widows', Orphans', and Old Age Contributory Pensions Act of 1925[50]. For those already covered by National Health Insurance and subject to compulsory contributions, the 1925 Act introduced the right to receive a pension at the age of sixty-five, along with provisions for widows and children of deceased workers. The enactment of the contributory pension completed the insurance scheme and was a legal refinement of its guidelines, thus filling the pre-war gap in social security law. National Health Insurance served as the core of this model. Based on the former contributory scheme, pensions were finally recognised.

Arguably, the most significant interwar innovations concerned unemployment. Extended across the entire munitions industry during the war[51], the Unemployment Insurance Act of 1920 made contributions compulsory for all workers, except those with high incomes or in specific, expressly stated categories[52]. The legal principle of 1911 was reversed: the general rule became being insured, whereas being uninsured became the exception. With a workforce coverage similar to that of National Health Insurance, contributory unemployment benefits lost their original experimental nature and became a hallmark of British social security law.

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[47] See at least H. J. Laski, *Studies in the Problem of Sovereignty*, New Haven, Yale University Press, 1917; *Authority in the Modern State*, New York, Yale University Press, 1919; H. J. Laski, *Grammar of Politics* [1925], London, Allen & Unwin, 1938, 151.

[48] See W. A. Robson, *Justice and Administrative Law. A Study of the British Constitution* [1928], London, Stevens & Sons, 1951 and W. I. Jennings, *The Law and the Constitution* [1933], London, University of London Press, 1948.

[49] T. H. Marshall, *Social Policy in the Twentieth Century*, London, Hutchinson, 1975, 67. See the essays in (ed.) W. A. Robson, *Social Security*, London, Allen & Unwin, 1948. About the transformations of the interwar period, see W. G. Runciman, *Relative Deprivation and Social Justice. A Study of Attitudes to Social Inequality in Twentieth-Century England*, London Routledge, 1966; M. A. Crowther, *Social Policy in Britain 1914-1939*, London, Macmillan, 1988; A. Digby, *British Welfare Policy: from Workhouse to Workfare*, London, Faber and Faber, 1989, 48-63.

[50] *Widows', Orphans' and Old Age Contributory Pensions Act* [1925], 15 & 16 Geo. 5, c. 70. See D. C. Marsh, *National Insurance and Assistance in Great Britain*, London, Pitman, 1950, especially, 39-59. On the complexity of that period, especially considering the events of the 1925 Churchill Budget and the subsequent protests culminating with 1926 general strike, see P. Thane, *Foundations of the Welfare State*, London-New York, Longman, 1996, 129-210.

[51] *National Insurance (Part II) (Munition Workers) Act* [1916], 5 & 6 Geo. 5, c. 20.

[52] *The Unemployment Insurance Act* [1920], 10 & 11 Geo. 5, c. 30.

Nonetheless, it quickly became apparent that public responsibility for unemployment would be difficult to implement. In response to the economic instability of 1921, the Geddes Report recommended widespread reductions in welfare spending, revealing strong opposition to the realisation of a proper Welfare State[53]. In this context, it is worth noting that many Unemployment Acts amended benefits almost annually throughout the entire interwar period. Amidst trade union uprisings, these Acts aimed to establish new criteria for obtaining 'uncovenanted benefits', later termed 'extended' and then 'transitional' – i.e., benefits granted exceptionally beyond the basic scheme's duration, though subject to means-testing[54].

The most relevant legal-historical aspect is the unremitting weakening of the clear separation between contributory insurance and social assistance envisioned by the 1911 Act. This trend highlighted the difficulties with the contributory principle and the persistence of means-tested assistance, which was still regarded as a fundamental tool for alleviating destitution.

Despite the terminal decline of the Poor Law – resulting from the abolition of workhouses and the Board of Guardians under the 1929 Local Government Act[55] – the use of means-tests increased during the Great Depression. The economic slump and the constitutional crisis in the summer of 1931 led to many restrictions on means-tested benefits, following the May Report recommendations[56]. During this period of mass unemployment, the 'household means-test' often involved significant intrusion into citizens' private lives by measuring entire family assets[57].

The Unemployment Act of 1934 attempted to address the chaotic overlap between assistance and insurance[58]. On the one hand, it established an Unemployment Insurance Statutory Committee responsible for administering

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53 *First Interim Report of Committee on National Expenditure* [Cmd. 1581], 1922.

54 W. H. Beveridge, *The Past and Present of Unemployment Insurance*, London, Oxford University Press, 1930, 15-47; A. Crew, R. J. Blackham, A. Forman, *The Unemployment Insurance Acts, 1920-1930*, London, Jordan & Sons, 1930; M. B. Gilson, *Unemployment Insurance in Great Britain*, London, Allen & Unwin, 1931. See also N. Harris, *Social Security Law in Context*, Oxford, Oxford University Press, 2000, 67-86.

55 *Local Government Act* [1929], 19 Geo. 5, c. 17 and *Poor Law Act* [1930], 20 Geo. 5, c. 17. See also M. A. Crowther, *The Later Years of the Workhouses 1890-1929*, in (ed.) P. Thane, *The Origins of British Social Policy*, London, Croom Helm, 1978, 36-55.

56 *Report of Committee on National Expenditure* [Cmd. 3920], 1931.

57 N. Branson, M. Heinemann, *Britain in the Nineteen Thirties*, New York, Praeger, 1971, 27-57.

58 W. I. Jennings, *The Poor Law Code, and the Law of Unemployment Assistance*, London, Charles Knight, 1936 (second edition, originally published 1930). See J. Fulbrook, *Administrative Justice and the Unemployed*, London, Mansell, 1978, 159-171 and T. Lynes, *Unemployment Assistance Tribunals in the 1930s*, in (ed.) M. Adler, A. Bradley, *Justice, Discretion and Poverty. Supplementary Benefit Appeal Tribunals in Britain*, Abingdon, Professional Books, 1982, 5-31.

unemployment insurance. On the other hand, it created the Unemployment Assistance Board, which managed welfare benefits for the unemployed not covered by insurance. A national means-test was introduced for the latter group, thereby providing uniform procedures in an attempt to reduce administrative discretion. However, the reform proved ineffective due to widespread protests and hunger marches in depressed areas[59]. Public indignation erupted when – in order to ensure uniformity in assistance – benefits were reduced in districts that had previously applied the means-test less stringently[60].

In the context of the Second World War and a growing climate of social solidarity[61], the Beveridge Report proved to be the only effective instrument for planning legislative reorganisation[62]. As a leading expert on social policy, William Beveridge based his *Social Insurance and Allied Services* Report on principles utterly opposed to those underpinning the Poor Law[63]. In contrast to the stigma and selectivity of means-tested assistance, the Beveridge Plan presented an inclusive and universalist blueprint aimed at protecting citizens 'from cradle to grave'[64].

The hostility towards the means-test was evident in the three «guiding

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[59] *Unemployment Assistance (Temporary Provisions) Act* [1935], 25 & 26 Geo. 5, c. 6 and *Unemployment Assistance (Temporary Provisions) (No. 2)* [1935], 25 & 26 Geo. 5, c. 22.

[60] W. G. Runciman, *Relative Deprivation and Social Justice. A Study of Attitudes to Social Inequality in Twentieth-Century England*, London Routledge, 1966; see the chapter about «the historical background». The means-test will be amended by *Determination of Needs Act* [1941], 4 & 5 Geo. 6, c. 11.

[61] See R. M. Titmuss, *Problems of Social Policy. History of the Second World War. United Kingdom Civil Series*, London, HMSO and Longmans, 1950. See also P. Addison, *The Road to 1945. British Politics and Second World War,* London, Quarted Books, 1977. For a different perspective, K. Jefferys, *British Politics and Social Policy During the Second World War*, in *Historical Journal*, 30, 1, 1987, 123-144.

[62] J. Harris, *William Beveridge: A Biography*, Oxford, Oxford University Press, 1977.

[63] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942. See G. D. H Cole, *Beveridge Explained. What the Beveridge Report on Social Security Means*, London, The New Statesman and Nation, 1942. See also B. Abel-Smith, *The Beveridge Report: Its Origins and Outcomes* and P. Baldwin, *Beveridge in the Long Durée*, both in (ed.) J. Hills, J. Ditch, H. Glennerster, *Beveridge and Social Security: An International Retrospective*, Oxford, Clarendon Press, 1994.

[64] The Plan consisted of fighting the 'five giants', i.e., by the attack «upon the physical Want with which it is directly concerned, upon Disease which often causes that Want and brings many other troubles in its train, upon Ignorance which no democracy can afford among its citizens, upon the Squalor which arises mainly through haphazard distribution of industry and population, and upon the Idleness which destroys wealth and corrupts men, whether they are well fed or not, when they are idle». *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942. See N. Timmins, *The Five Giants*: *A Biography of the Welfare State*, London, William Collins, 2017.

principles» of the Report: the wartime context (the first) enabled the envisioning of revolutionary reforms grounded in unprecedented comprehensiveness (the second), ultimately establishing a national minimum of social welfare that did not compromise voluntary action (the third)[65].
The same hostility appeared in the Report's three «assumptions»: family allowances (assumption A), the National Health Service (B), and full employment (C). These assumptions reflected the ambition to frame rights for all citizens[66]. In particular, the National Health Service became the most visible symbol of social policy universalism. Its free-of-charge nature clearly exemplified the aversion to means-testing. This objective was also reflected in the three «methods» of the plan[67]. First, the new National Insurance was to be firmly based on a reaffirmation of the contributory principle:

> The first view is that benefit in return for contributions, rather than free allowances from the State, is what the people of Britain desire. This desire is shown both by the established popularity of compulsory insurance, and by the phenomenal growth of voluntary insurance against sickness, against death and for endowment, and most recently for hospital treatment. It is shown in another way by the strength of popular objection to any kind of means test[68].

Indeed, the decision to maintain the flat-rate contribution shaped much of the plan. As Beveridge pointed out: «The first fundamental principle of the social insurance scheme is provision of a flat-rate of insurance benefit, irrespective of the amount of the earnings», which distinguishes «Britain from the security schemes of Germany, the Soviet Union, the United States and most other countries»[69]. The flat-rate principle, inherited from the National Insurance Act of 1911, aligned with the guiding principles of the plan. It was consistent with the vision of a universalist system promising equal benefits for all workers and for all social risks[70], and equivalent to a welfare national minimum intended to

[65] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942, 6-7, par. 7-9.
[66] Ibid., 154-165, par. 410-443. Originally named «maintenance of employment», Assumption C will be the specific subject of W. H. Beveridge, *Full Employment in a Free Society*, London, Allen & Unwin, 1944.
[67] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942, 120-121, par. 302.
[68] Ibid., 11-12, par. 21.
[69] Ibid., 121, par. 304.
[70] In order to identify exceptions to this key rule, Beveridge pointed out six categories: Employees, others gainfully occupied, housewives, others of working age, below working age, retired above working age. Ibid., 122-137, par. 310-353.

endure: «indefinitely without means test, so long as the need continues»[71].
The flat-rate principle also influenced the number of benefits. As earnings-unrelated contributions were financially limiting, benefits had to be set at an "adequacy"[72] level close to subsistence. For the same reasons, the flat-rate contribution necessitated clear fiscal progressivity – a feature well suited to the wartime context, during which, as in the First World War, income tax increased substantially.
Second, National Assistance was to be residual, a merely «subsidiary method»[73]. Essentially, it was to be limited to those unable to work[74]:

> The State cannot be excluded altogether from giving direct assistance to individuals in need, after examination of their means. However comprehensive an insurance scheme, some, through physical infirmity, can never contribute at all and some will fall through the meshes of any insurance [...]. But the scope of assistance will be narrowed from the beginning and will diminish throughout the transition period for pensions. The scheme of social insurance is designed of itself when in full operation to guarantee the income needed for subsistence in all normal cases[75].

This stemmed also from the need to avoid overuse of assistance, which might undermine the «full use of the voluntary action»[76].
Third, since the State only guaranteed the national minimum, voluntary insurance was to be encouraged for benefits «beyond subsistence level»[77]. The plan aimed to protect only essential needs to prevent the risks of clientelism and bureaucratic sclerosis.
It must be acknowledged, however, that the Beveridge Report did not propose a wholly universalistic model of welfare, primarily because it required, as noted, the creation of a residual assistance scheme. It also failed in providing sufficient social protection for unmarried women[78]. From a broader historical

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[71] Ibid., 122, par. 307. This proposal will not be implemented after the war because it is considered utopian even by Labour: N. Timmins, *The Five Giants*: *A Biography of the Welfare State*, London, William Collins, 2017, 58-59.
[72] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942, 122, par. 307.
[73] Ibid., 12, par. 23.
[74] See M. P. Hall, *The Social Services of Modern England* [1952], London, Routledge & Kegan Paul, 1953, 26-49.
[75] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942, 12, par. 23.
[76] W. H. Beveridge, *Voluntary Action. A Report on Methods of Social Advance*, Allen & Unwin, London, 1948, 266.
[77] *Report of the Inter-Departmental Committee on Social Insurance and Allied Services* [Cmd. 6404], 1942, 143, par. 375.
[78] J. Harris, *William Beveridge*, cit., pp. 406-407.

perspective, however, the push towards universalism in social policy emerges as a defining development. Despite the rejection of certain Beveridgean proposals, this shift towards social universalism took form within a few years.
While the 1944 Education Act and the 1945 Family Allowances Act were enforced by Churchill's government[79], the Report's proposals were largely implemented by Labour after the war. The Attlee government's National Insurance Act of 1946 introduced a comprehensive scheme to cover all major social security risks[80]. This Act was linked to the National Insurance (Industrial Injuries) Act[81], which repealed earlier legislation dating back to the Workmen's Compensation Act of 1897[82], addressed legislative backwardness, and created a national compulsory scheme in this area. The 1946 National Health Service Act[83] – originally intended to be completely free of charge – and the 1948 National Assistance Act[84] completed the model[85].
While the NHS arguably represented the most remarkable innovation, breaking with previous tradition through its unprecedented universalism[86], the National Assistance Act also carried significant symbolic weight, as it formally abolished the Poor Law system. As stated in Section 1: «the existing poor law shall cease to have effect».

4. From the Insurance Principle to Means-tested Assistance

[79] *Education Act* [1944], 7 & 8 Geo. 6, c. 31 and *Family Allowances Act* [1945], 8 & 9 Geo. 6, c. 41.
[80] *National Insurance Act* [1946], 9 & 10 Geo. 6, c. 67.
[81] *National Insurance (Industrial Injuries) Act* [1946], 9 & 10 Geo. 6, c. 62; *New Towns Act* [1946], 9 & 10 Geo. 6, c. 68.
[82] *Workmen's Compensation Act* [1897], 60 & 61 Vict., c. 37. See P. W. J. Bartrip, *Workmen's Compensation in Twentieth Century Britain: Law, History and Social Policy*, Aldershot, Avebury, 1987.
[83] *National Health Service Act* [1946], 9 & 10 Geo. 6, c. 81.
[84] *National Assistance Act* [1948], 11 & 12 Geo. 6, c. 29.
[85] To understand Labour welfare policy, see *Trade Disputes and Trade Unions Act* [1946], 9 & 10 Geo. 6, c. 52; *Town and Country Planning Act* [1947], 10 & 11 Geo. 6, c. 51; *Children Act* [1948], 11 & 12 Geo. 6, c. 43; *Legal Aid and Advice Act* [1949], 12, 13 & 14 Geo. 6, c. 51; *Housing Act* [1949], 12, 13 & 14 Geo. 6, c. 60. See H. Glennerster, *British Social Policy Since 1945*, Howard Oxford Cambridge, Blackwell, 1995 and R. Lowe, *The Welfare State in Britain Since 1945*, London, MacMillan, 2005.
[86] On NHS creation, H. Eckstein, *The English Health Service: Its Origins, Structure, and Achievements*, Cambridge, Harvard University Press, 1958; J. S. Ross, *The National Health Service in Great Britain. An Historical and Descriptive Study*, London, Oxford University Press, 1952; J. Willcoks, *The Creation of the National Health Service*, London, Routledge & Kegan Paul, 1967. See also V. Navarro, *Class Struggle, the State and Medicine: An Historical and Contemporary Analysis of the Medical Sector in Great Britain*, New York, Prodist, 1978; S. Iliffe, *The NHS. A Picture of Health?*, London, Lawrence & Wishart Limited, 1983; M. Rintala, *Creating the National Health Service: Aneurin Bevan and the Medical Lords*, Portland, Frank Cass, 2003; R. Klein, *The New Politics of the NHS. From Creation to Reinvention*, Abingdon, Radcliffe, 2010, 1-30.

The Acts based on Beveridge's proposal came into effect on the 'appointed day' of 5th July 1948. Marking the beginning of the «Welfare State»[87] and of a completely new legal order founded jointly on civil, political, and social rights, this moment represented an attempt to create an effective «social citizenship»[88]. The concept of social citizenship constitutes a significant legal innovation from a descriptive perspective. It represents a reversal of Henry Sumner Maine's movement «from status to contract»[89], thereby establishing the conditions for a return to status and a new material conception of equality before the law. Social citizenship also illustrates an effort to ground civil, political, and social rights on the same sociological foundation, thus envisioning a process of their progressive legal equalisation.

In the context of the nationalisation of new public services – which challenged private law constitutionalism and the conception of law as an individualistic tool for preventing the abuse of administrative power[90] – social 'rights' appeared to become citizenship rights, rather than mere 'concessions' made to poorer citizens on the basis of means-tests.

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[87] The modern understanding of the term 'Welfare State' is usually attributed to W. Temple, *Citizen and Churchman*, London, Eyre & Spottiswoode, 1941. The commonly accepted Welfare State definition is that of A. Briggs, *The Welfare State in Historical Perspective*, in *Archives européennes de sociologie*, II, 1961, 228. For an international perspective, J. Alber, *Vom Armenhaus zum Wohlfahrtsstaat: Analysen zur Entwicklung der Sozialversicherung in Westeuropa*, Frankfurt, Campus, 1982; D. E. Ashford, *The Emergence of the Welfare States*, Oxford, Blackwell, 1986; G. A. Ritter, *Der Sozialstaat. Entstehung und Entwicklung im internationalen Vergleich*, München, R. Oldenbourg, 1991; M. Ferrera, *Modelli di solidarietà: politica e riforme sociali nelle democrazie*, Bologna, Il Mulino, 1993. For its legal historical meaning, see generally the last pages of P. Grossi, *A History of European Law*, Chichester, Wiley-Blackwell, 2010.

[88] T. H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge, Cambridge University Press, 1950. See also A. Giddens, *T. H. Marshall, the State and Democracy*, in (ed.) M. Bulmer, A. M. Rees, *Citizenship Today. The Contemporary Relevance of T. H. Marshall*, London, UCL Press, 1996. See, generally, P. Costa, *Civitas. Storia della cittadinanza in Europa. 4. L'età dei totalitarismi e della democrazia*, Roma, Laterza, 2001 and L. Pacinotti, *L'ingranaggio della cittadinanza sociale. Il Welfare State britannico tra National Insurance e National Health Service*, Milano, Giuffré, 2023.

[89] H.S. MAINE, *Ancient Law* [1861], Boston, Beacon Press, 1963.

[90] Reacting to F. A. Hayek, *The Road to Serfdom,* London, Routledge, 1944, see H. Finer, *Road to Reaction*, London, Dennis Dobson, 1945, B. Wootton, *Freedom Under Planning*, Chapel Hill, The University of North Carolina Press, 1945 and T. H. Marshall, *Citizenship and Social Class and Other Essays*, Cambridge, Cambridge University Press, 1950. The debate also involved more legal-oriented authors: see A. T. Denning, *Freedom Under Law* [1949], London, Stevens, 1986 and W. G. Friedmann, *Law and Social Change in Contemporary Britain*, London, Stevens, 1951. See also G. W. Keeton, *The Twilight of the Common Law* [1949], in Id., *The Passing of the Parliament*, London, Ernest Benn, 1952, pp. 1-12 and the essays in M. Ginsberg (ed.), *Law and Opinion in England in 20th Century*, London, Stevens, 1959.

However, difficulties in implementing this general legal project soon emerged[91]. Both Labour and the Conservatives breached the universalism of the Beveridge model, with the National Health Service Acts of 1951 and 1952 introducing the first charges[92]. Regarding the specific topic of this article, it is particularly notable that there was a «reappearance of the means test»[93], since section 4 of the 1951 National Health Service Act provided for charges to be paid by the means-tested National Assistance Board in certain cases as determined by the law.

As austerity gave way to the emergence of an affluent society, the Beveridge model proved increasingly inadequate in meeting consumers' expectations[94]. In the context of continuous (though not excessive) inflation, debates arose concerning the inadequacy of flat-rate benefits. Across party lines, proposals emerged advocating the introduction of additional benefits to supplement the low basic pension. While maintaining the flat-rate scheme to cover basic needs, the National Insurance Act of 1959 introduced a graduated pension, financed through additional contributions linked to workers' earnings[95]. Despite the option of 'contracting out', one can observe here the origins of a progressive shift from flat-rate to earnings-related benefits[96] – an overall process that would be completed with the Social Security Act of 1975[97].

Simultaneously, as the number of National Assistance recipients gradually increased, a 'rediscovery' of poverty became visible as early as the 1960s[98].

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[91] About this socio-economic scenario, R. Eatwell, *The 1945-1951: Labour Governments*, London, Batsford Academic, 1979; K. O. Morgan, *Labour in Power. 1945-1951*, Oxford, Oxford University Press, 1984; A. Cairncross, *Years of Recovery*: *British Economic Policy 1945-51*, New York, Methuen, 1985; T. E. B. Howarth, *Prospect and Reality: Great Britain 1945-55,* London, Collins, 1985; P. Calvocoressi, *The British Experience. 1945-1975,* Harmondsworth, Penguin Books, 1978; C. D. Barnett, *The Audit of War: The Illusion & Reality of Britain as a Great Nation*, London, Macmillan, 1986.

[92] *National Health Service Act* [1951], 14 & 15 Geo. 6, c. 31 and *National Health Service Act* [1952], 15 & 16 Geo. 6 & 1 Eliz. 2, c. 25.

[93] I. MacLeod, J. E. Powell, *The Social Services. Needs & Means*, London, Conservative Political Centre, 1952, 30-32.

[94] J. K. Galbraith, *The Affluent Society*, New York-Toronto, The New American Library, 1958. For the British context, see C. A. R. Crosland, *The Future of Socialism*, London, Cape, 1956. See also R. Plant, *Supply Side Citizenship?*, in *Journal of Social Security Law*, 6, 3, 1999, 124-136.

[95] *National Insurance Act* [1959], 7 & 8 Eliz. 2, c. 47.

[96] See V. George, *Social security. Beveridge and After* [1968], London, Routledge, 2019 and T. Wilson, D. Wilson, *Beveridge and the Reform of Social Security – Then and Now*, in *Government and Opposition*, 28, 3, 1993, 360-363. See also S. Giubboni, *Il finanziamento della sicurezza sociale in Gran Bretagna*, in *Giornale di diritto del lavoro e di relazioni industriali*, 61, 1994, 101-141.

[97] *Social Security Act*, 1975, c. 14.

[98] B. Abel-Smith, P. Townsend, *The Poor and the Poorest*, 1965. See J. H. Veit-Wilson, *Condemned to Deprivation? Beveridge's Responsibility for the Invisibility of Poverty*, in (ed.) J. Hills, J. Ditch, H.

Confronted with the dilemma of relative poverty[99], it was suggested that the means-tested assistance model required comprehensive reform. As is well known, the Ministry of Social Security Act of 1966 recognised extensive supplementary benefits and marked the progressive revival of means-tested assistance[100]. In practice, this measure can be regarded as the definitive abandonment of the Beveridgean welfare model. The Act established means-tested supplementary benefits payable to individuals with low incomes. The clear separation between assistance and contributory social security – strenuously defended by Beveridge and articulated in his plan as an expression of the guiding principles, assumptions, and methods outlined above – was thus repudiated[101].

In some respects, the crisis of flat-rate contributions and the return to means-tested assistance appeared interconnected. Both developments revealed the difficulty of financing increasing public expenditure solely through general taxation. This situation led to a preference for schemes with greater redistributive effectiveness, such as charges, graduated benefits, or means-tested assistance. Focused on the poorest, and designed to compensate for the tax system's inability to meet the growing demands of social benefits and national expenditure, selective assistance inevitably proved more redistributively effective than the universalism of social rights. In response to the tax-welfare backlash, governments began employing social welfare schemes as instruments to contain the rise in income tax, thereby mitigating public discontent and protest phenomena[102].

Glennerster, *Beveridge and Social Security: An International Retrospective*, Oxford, Clarendon Press, 1994.

[99] See P. Townsend, *The Meaning of Poverty*, in *British Journal of Sociology*, 13, 1962, 210-227 and Id., *Poverty in the United Kingdom. A Survey of Household Resources and Standards of Living*, Harmondsworth, Penguin Books, 1979. See also the criticism of T. H. Marshall, *Poverty or Deprivation*, in *Journal of Social Policy*, 10, I, 1982, 81-87.

[100] See N. Harris, *Social Security Law in Context*, Oxford, Oxford University Press, 2000, 87-117. See also N. Wikeley, *Social Security Appeals in Great Britain*, in *Administrative Law Review*, 46, 2, 1994, 183-212; N. Wikeley, A. I. Ogus, E. M. Barendt, *The Law of Social Security,* London, Butterworth, 5th ed, 2022, 1-6; T. PROSSER, *Law and the Regulators*, Oxford, Clarendon Press, 1997.

[101] R. Lowe, A *Prophet Dishonoured in His Own Country?*, in (ed.) J. Hills, J. Ditch, H. Glennerster, *Beveridge and Social Security: An International Retrospective*, Oxford, Clarendon Press, 1994, 118-133.

[102] See H. Glennerster, *Paying for Welfare*, Oxford, Basil Blackwell, 1985 and the last part of G. C. Peden, *The Treasury and British Public Policy: 1906-1959*, Oxford, Oxford University Press, 2000. See also C. Sandford, *Taxation and Social Policy: An Overview* and K. Judge, *Beveridge: Past, Present and Future*, both in (ed.) C. Sandford, C. Pond, R. Walker, *Taxation and Social Policy*, London, Heinemann, 1980, 1-12 and 171-189, respectively.

4. Conclusion

The crisis of the Beveridgean insurance principle and the subsequent rediscovery of means-tested assistance can be seen as legal elements exemplifying a broader historical process. The revival of means-tested assistance led to a further transformation in legal theory, just as the initial shift from the insurance principle to means-tested assistance had done throughout the twentieth century. New lines of thought emerged, containing in embryo the potential to fracture the Welfare State consensus[103]. Among conservative philosophers[104], there was a growing acceptance of means-testing, accompanied by criticism of the bureaucratic inefficiencies associated with comprehensive social services. However, the complaint against the «inherently totalitarian» nature of the Welfare State had already been voiced by Labour thinkers[105].

It is true that an international convergence towards human rights was taking shape[106]. Furthermore, a surge in public expenditure, an increase in administrative regulations, and a definitive transition to a mixed economy tended to soften the long-standing dichotomy between law and social policy, thereby promoting a gradual shift from discretion to legalism[107]. Alongside the expansion of State planning and social spending, however, the debate between selectivity and universalism had already become pronounced. These two opposing positions were championed respectively by the (Hayek) Institute of Economic Affairs and Richard Titmuss[108].

In light of the historical trajectory outlined above, the crisis of the insurance principle also appears to have provoked a broader dilemma regarding

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103 This historical interpretation could be probably traced back to P. Addison, *The Road to 1945. British Politics and Second World War,* London, Quarted Books, 1977. See also D. Gladstone, *The Twentieth-Century Welfare State*, London, Macmillan, 1999.

104 Philosophically, it is assumed that this direction started with I. Berlin, *Two Concepts of Liberty* [1958], in (ed.) H. Hardy, Liberty, Oxford, Oxford University Press, 2002 and F. A. Hayek, *The Constitution of Liberty*, Chicago, University of Chicago Press, 1960.

105 R. H. S. Crossman, *Socialism and the New Despotism*, in *Fabian Tract*, 298, 1956, 24, recasting the legal categories of Lord G. Hewart, *The New Despotism*, London, Benn, 1929.

106 D. Kennedy, *Three Globalizations of Law and Legal Thought*, in (ed.) D. Trubek, A. Santos, *The New Law and Economic Development: A Critical Appraisal*, Cambridge, Cambridge University Press, 2006, 19-73.

107 J. T. Winkler, *The Political Economy of Administrative Discretion*, in (ed.) M. Adler, S. Asquith, *Discretion and Welfare*, London, Heinemann Educational Books, 1981, 82-134 e M. Adler, *The Justice Implications of 'Activation Policies' in the UK*, in (ed.) T. Erhag, S. Stendahl, and S. Devetzi, *A European Work-First Welfare State,* Göteborg, Centrum för Europaforskning, 2008, 95-131.

108 R. M. Titmuss, *Commitment to Welfare,* London, Allen & Unwin, 1976, 113-152. See also B. Jackson, *Richard Titmuss versus the IEA: The Transition from Idealism to Neo-Liberalism,* in (ed.) L. Goldman, *British Social Policy*, in *Welfare and Social Policy in Britain Since 1870. Essays in Honour of Jose Harris*, Oxford, Oxford University Press, 2019, 147-161.

universalism in social policy. This process culminated in the completion of a cycle moving from means-tested assistance to the insurance principle, only to return once again to means-tested assistance. While the universalism of the Beveridge model was grounded in the insurance principle, as opposed to the strict selectivity of the Poor Law code, the return to means-tested assistance reflects a broader crisis in the universalism of social rights. For these reasons, the crisis of the insurance principle and the subsequent reversion to means-tested assistance may be regarded as historically significant developments. They illustrate the gradual erosion of universalism and, in turn, allow us to identify key features marking the crisis of the Welfare State.

Undoubtedly, these trends – using Titmuss's categories – were further intensified by the Welfare State crisis during the neoliberal era. Its aftermath allowed for the emergence of a shift from an «institutional-redistributive» model, primarily grounded in Keynesian economics and Beveridgean social policy, to a «residual» one based on means-testing and free market predominance – with almost mirror-like dynamics[109].

However, as this article has demonstrated, the origin of this process can be traced back to the initial shift from the insurance principle to means-tested assistance. This transition was already underway at the turn of the 1950s and 1960s, during a period of substantial bureaucratic expansion and growing public expenditure that reflected a model of social policy markedly different from that later advocated by neoliberals. From this perspective, the gradual shift from the insurance principle to means-tested assistance reveals that the Welfare State crisis cannot simply be attributed to the post-1980s strategies of privatisation and retrenchment. Especially from a legal standpoint, the contemporary dimension is far more complex[110]. The crisis is also rooted in the proliferation of citizens' rights and claims, the structure of fiscal distribution, and the financing of social expenditure, all situated within a broader public-private moral duty and an enduring historical relationship deeply embedded in

[109] R. M. Titmuss (et al.), *Social Policy. An Introduction*, London, Hyman, 1974, 30-32. Titmuss divides between an «Institutional redistributive model of social policy» (organised through comprehensive social services with strongly redistributive taxation), an «Industrial achievement-performance model» (in which social benefits are linked with employment), and a «Residual welfare model» (in which the State aims at leaving full freedom to the market forces). The UK seems a forerunner even using 'decommodification' (G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Cambridge, Polity, 1990), thereby distinguishing between liberal, conservative and social democratic welfare models. As D. Garland, *The Welfare State. A Very Short Introduction*, Oxford, University Press, 2016 claimed, the British experience – albeit complex to classify – seems to offer a paradigm of the shift from post-WWII universalism to the residual model.

[110] See N. Harris, *Law in a Complex State. Complexity in the Law & Structure of Welfare*, Oxford, Hart, 2013.

the cultural discourse upon which the law continuously draws.
As noted in the introduction, although the primary objective of this study has been historical, the trajectory traced here may prove useful in understanding certain current issues. History and its intricate interactions can offer valuable insights for contemporary legal scholarship. By examining the shift back towards means-tested assistance and thereby highlighting some dimensions of the Welfare State crisis, European jurists may gain a deeper understanding of the complexities of present-day challenges. Legal scholars can recognise that the crisis of the contributory principle and the re-emergence of means-tested assistance – reflecting a broader and ongoing crisis in the universalism of the welfare model – are deeply rooted in complex historical developments.
A first suggestion arising from this study, which may be of value, is as follows: jurists examining the contemporary legal aspects of welfare should not limit their analysis to events following the oil crises of the 1970s; rather, they should also investigate the internal transformations that occurred during the *Trente Glorieuses*[111]. It is undeniable, as previously discussed, that the crisis of universalism was ultimately sealed by neoliberalism. However, it is equally clear that the roots of this crisis were already visible, as this article has aimed to demonstrate, in the erosion of the Beveridge insurance principle and the subsequent shift towards the rediscovery of means-tested assistance.
A second suggestion, closely connected to the first, concerns the relationship between the legal dimension and collective solidarity. This article illustrates how the insurance principle, when situated within the framework of the national minimum, provided the normative foundation upon which to construct forms of collective solidarity capable of driving a comprehensive evolution within the legal system. The article does not seek to advocate a European return to the Beveridge model – an issue thoroughly explored by various scholars and for which no straightforward solution exists. Rather, it aims – perhaps more profoundly – to emphasise that the universalism set out in the Beveridge Report was directed towards establishing a normatively coherent, comprehensive, well-structured, and technically sound framework to promote solidarity as a fundamental legal value. The universalism of the post-World War II model was not merely aligned with policy objectives. While it certainly aimed to reorganise the administrative system, its deeper intent was to develop a broader vision of the interaction between law and society – a constitutional and legal project upon which to build a new form of (social) citizenship and a new type of (Welfare) State. The universalism of social rights, in a broad sense, sought to encourage solidaristic sentiments within society and

[111] J. FOURASTIE, *Les Trente Glorieuses*: *ou la révolution invisible de 1946 à 1975*, Paris, Fayard, 1979.

among individual citizens, thereby promoting their «right to give»[112], meaning their entitlement (not merely a paternalistic obligation) to contribute or donate. From this perspective, the Beveridgean model may be regarded as a pivotal European landmark, serving as a source of inspiration for post-World War II constitutionalism, notably seen in the French Constitution (1946), the Italian Constitution (1948), and the German *Grundgesetz* (1949). This emerging concept of constitutionalism may be succinctly summarised as a project that, through the value of solidarity, aims to mediate between freedom and equality. It represents a legal framework that simultaneously recognises civil, political, and social rights, emphasising their inherent and indivisible nature. Amid the severe crises of the present – during which calls for reforms rooted in solidarity are intensifying – a common deficiency seems to persist across all European welfare models: the absence of a comprehensive framework capable of reinstating solidarity as a shared citizenship value. The historical path outlined above may prove useful in understanding the necessity of constructing a new normative model suited to contemporary society, while remaining committed to the same essential goal: advancing solidarity as a foundational normative value.

[112] R.M. TITMUSS, *The Gift Relationship: From Human Blood to Social Policy*, London, Allen & Unwin, 1970, pp. 237-246.

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