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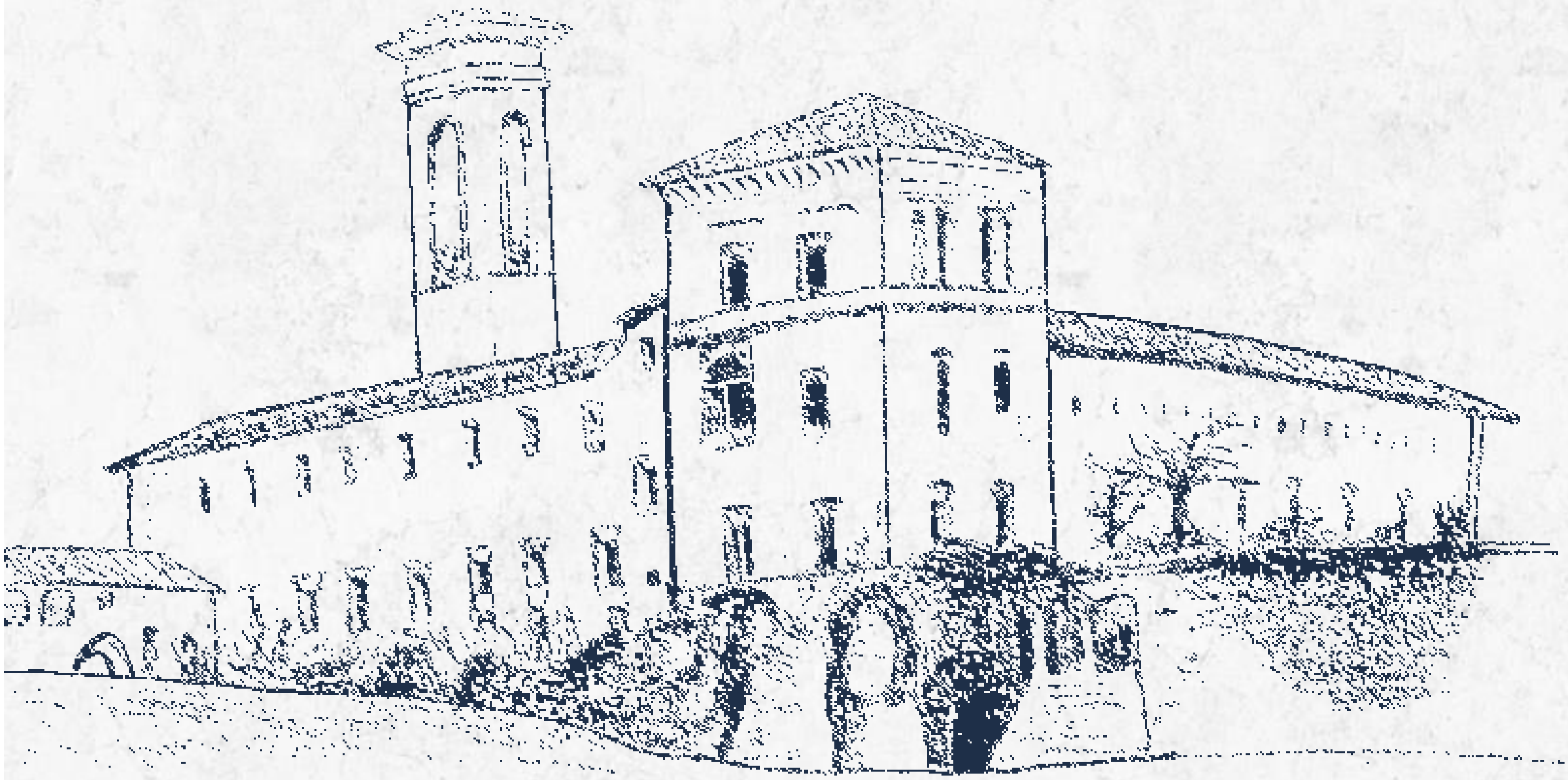

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Trade Unions, Vocational Education and Workplace Training: International Trends

Russell D. Lansbury[1]

1. Introduction

This paper seeks to address the issue of international trends in how trade unions are seeking to engage with workplace training and skills development. It begins with a discussion of the importance of skills development to economic and social development and examines the changing nature of skills and forms of vocational education and training (VET). The paper introduces the concept of varieties of capitalism (VoC) and examines its utility for comparing the roles of unions in VET within both liberal and coordinated economies. There are also varieties of union approaches to their role as interest organisations serving their membership constituencies, which impacts on how they approach issues related to skills development. The paper also examines challenges for unions in relation to VET in their interaction with employers, particularly in relation to union 'voice' in decision-making regarding training and skills development. Finally, there are four case studies which examine unions and VET in Germany, Norway, Canada and the UK.

[1] Russell D. Lansbury is Emeritus Professor in Work and Organisational Studies at the University of Sydney, Australia. His email is Russell.lansbury@sydney.edu.au. This is a revised version of a keynote paper for the 17th anniversary conference of the Korean Research Institute for Vocational Education and Training (KRIVET) in Seoul in 2014. The author wishes to thank Richard Cooney for his valuable advice. I have drawn liberally on case studies from the book by Richard Cooney and Mark Stuart: *Trade Unions and Workplace Training: Issues and International Perspectives*, Routledge, London 2012.

2. The Importance of Skills Development

There is widespread consensus regarding the economic importance of skills. In 2010 the G20 pledged to support training policies and systems to foster 'strong, sustainable and balanced growth' (ILO, 2010). The G20 advocated a broad definition of training and skills covering the full sequence of life stages: from basic education to lay the foundation for employability, followed by initial training to provide core work skills and competencies to facilitate the transition from school to work and lifelong learning to maintain skills and competencies as work, technology and skill requirements change.
The G20 advocated the development of institutions involving employers and workers and their representative organisations to ensure that training remained relevant and that training costs and productivity gains would be shared equitably. Evidence from the European Commission shows that a 1 per cent increase in training days leads to a 3 per cent increase in productivity and that the share of overall productivity growth attributable to training is approximately 16 per cent.
Establishing solid bridges between vocational education, training and skills development and the world of work, increases the likelihood that workers will acquire skills which meet the demands of labour markets, enterprises and workplaces in a variety of economic sectors and industries. Evidence indicates that a combination of a good basic education with appropriate training will:

- Empower people to develop their full capacities and take advantages of opportunities.
- Raise productivity of both workers and enterprises.
- Boost innovation and development.
- Encourage investment and job growth lowering unemployment and under employment.
- Expand labour market opportunities and reduce social inequalities.

The OECD Skills Strategy, which was promulgated in 2012, advocated an integrated, cross-government approach to help countries invest in skills in a way that would transform lives and drive economies, by undertaking the following actions:

- Develop the right skills to respond to the needs of the labour market.
- Ensure that where skills exist they are fully utilized.

- Help young people to gain a foothold in the labour market to make best use of their skills.
- Stimulate high-skilled and high value-added jobs to compete more effectively in the global economy.
- Exploit linkages across policy fields to ensure efficiency and avoid duplication of effort.

The ILO has also emphasized the importance of social dialogue and collective bargaining for skills development and workplace learning. It has developed a number of case studies through the Skills and Employability Department. One example is a transnational agreement between Thales, which produces IT systems for the defence industry, and the European Metal Workers Federation (EWF) on training and related matters. The agreement includes a series of 'social indicators' to monitor the percentage of employees attending training programs, the average hours of training and other relevant measures (ILO, 2012).

3. The Changing Nature of Skills and the Roles of Unions

Skills are difficult to define as concepts and the conceptualization of skills is constantly changing. While traditional skilled trades may be characterized as having 'hard' skills related to technical aspects of work, which were employed in manufacturing, greater emphasis is now being placed on 'soft skills', such as communication and problem solving (Grugulis, 2006). Furthermore, changes in work roles mean that some jobs retain an emphasis on specialist skills while others require more generalist skills which have more breadth than depth.
There have been many attempts to define skills and how they are changing. Adler (1986) examined the changing nature of skills in manufacturing and identified three categories: 'task responsibilities' for the integrity of the manufacturing process, 'abstractness of tasks' describing mental elements of what were previously seen as manual tasks and 'systemic interdependence of tasks' in manufacturing with enhanced product flow such as just-in-time. In a similar fashion, Conti and Warner (1997) developed a four level classification of skills revolving around the use of social, technical, diagnostic, coping and discretionary skills.
IT services provide an example of rapid change in the nature of skills required to perform certain functions. Although the IT industry has been in existence for several decades, the pace of technological change is such that IT workers need to continuously upgrade their skills and knowledge

to remain relevant. While it was possible in the past for some IT skills to be acquired on the job, the increasing technical complexity of IT has meant that a university degree (or even post graduate degree) in now required to gain an entry level job in the industry.
The changing nature of skills provides difficulties for some unions whose membership rules have been based around historical demarcations between certain skills or crafts and between skilled and unskilled work. As Cooney (2012) points out, 'unions need a definition of skills so that their members can be trained for skills, assessed for skills and then put onto appropriate classification scales and pay rates'. Unions representing skilled workers have played a major role in regulating entry to certain occupations by enforcing certain levels of knowledge required through apprenticeships and other forms of training. These have often been embedded as rules within collective agreements and awards. However, as Cooney notes 'the emerging IR of skill thus become complex and contested matters that are not always resolved simply through industrial agreement' (Cooney, 2010).

4. Initial and Continuing Forms of Vocational Education and Training (VET)

Unions have traditionally focused on initial forms of VET which are concerned with entry level training and the attainment of basic qualifications through apprenticeships. Yet studies of economic returns to VET reveal that the acquisition of lower level skills confers fewer advantages in terms of earnings growth than those which are at intermediate or higher levels (Long and Shah, 2008). But unions have less influence over continuing forms of VET because this tends to be regarded as an area of managerial prerogative in which unions play a limited or marginal role.
As noted by Cooney and Stuart (2012), it is the kind of training and the level of training which matters. They argue that continuing VET is becoming more important for workers because of changed labour market conditions flowing from neo-liberal economic policies, the decline of manufacturing and public sector employment, the rise of part-time, contract and casual labour and the shifting of risk from firms and the state to households and individuals. All of these changes mean that it is increasingly difficult to find a job without skills and qualifications which match the current demands.

Employees have an interest in structured and sequential training which provides opportunities for them to move from lower to higher skill levels. Employers are interested in their employees having firm-specific skills rather than generic skills which make them attractive to other employers. Yet some unions are seeking to negotiate for their members to gain more continuing training in broader skills which will give them a wider range of opportunities to gain better paying jobs. Furthermore, some employers see the advantage of having employees who are multi-skilled and flexible and able to provide their organisations with greater value.

5. Varieties of Capitalism and VET

Studies of trade unions and workplace training, such as that by Cooney and Stuart (2012), which compare systems of national skill formation, have utilized the 'varieties of capitalism' (VoC) approach developed by Hall and Soskice (2001). The VoC approach places collective bargaining and vocational training systems in a broader political and economic context, showing 'the linkage between the quality of vocational training and how this shapes, and is shaped by, the industrial structure, product markets and innovation systems' (Toner, 2013).
Drawing on what they describe as 'the new economics of organisation', Hall and Soskice argue that in market economics, firms are faced with a series of coordination problems both internally and externally. They focus on five spheres of coordination that firms must address:

- Industrial relations.
- Vocational education and training (VET).
- Corporate governance.
- Inter-firm relations.
- Relations with their own employees.

These spheres are inter-related so Hall and Soskice situate VET within the context of these other organizational functions and activities. They argue that it is possible to identify two institutional equilibria (or solutions) to these coordination problems that produce superior economic outcomes. Liberal market economies (LMEs) are those in which firms rely on markets and hierarchies to resolve the coordination problems which they face. LMEs are therefore likely to be characterized by, among other things:

- Well- developed capital markets.
- 'Outsider' forms of corporate governance.
- Market forms of industrial relations involving relatively few long-term commitments by employers to workers.
- The use of market mechanisms and contracts to coordinate their relations with supplier and buyer firms.

The United States is a prime exemplar of the LMEs but it is joined by the UK, Canada, Australia and New Zealand, all of which are predominantly Anglo-Saxon and have common law systems
The second variety of capitalism, identified by Hall and Soskice, is coordinated market economies (CMEs) in which firms make greater use of non-market mechanisms to resolve coordination problems internally and externally. In comparison with LMEs, CMEs are more likely to be characterized by:

- Patient forms of capitalism.
- Insider forms of corporate governance.
- Industrial relations systems based on bargaining and which reflect a long term commitment to employees.
- Non-market mechanisms such as industry associations, to coordinate relations between firms within and across industries and sectors.

Germany is the prime exemplar of a CME as are other northern European countries such as those in the Nordic region.
The VoC approach is relevant to the examination of labour unions and skills development when comparing different countries for several reasons. First, many of the coordination problems on which the VoC model focuses have long been of concern to industrial relations actors, such as unions, as well as involving issues such as skill development. Second, it suggests that it is not possible to fully understand issues such as the role of unions in skill formation without placing them in a wider context. Third, it focuses on the interconnections between institutional arrangements. Hence, it highlights how the erosion of employment protections in CMEs has undermined the effectiveness of vocational training systems which play such an important role in making these economies economically competitive.
The VoC approach has attracted a number of criticisms. One general complain is that two varieties of capitalism is too limited (Allen, 2004). Based on an analysis of OECD countries, Amable (2003) proposed five categories of capitalist systems, as follows: market-based (incorporating

most of the English speaking countries), social democratic (typified by the Nordic countries), Mediterranean (including Greece, Italy, Spain and Portugal), continental Europe (the bulk of the other European countries) and Asian (Japan and South Korea).
This is similar to an earlier and simpler classification suggested by Crouch (1993) who distinguished three modes of interest intermediation: contestation, pluralistic bargaining and neo-corporatism. Crouch further divided the corporatist category into 'extensive neo-corporatism (where there are strong and centralized unions) and 'simple corporatism' (where the unions are relatively weak but endowed with a strategic capacity).
Peck and Theodore (2007) introduced the concept of 'variegated capitalism' in order to provide a more dynamic analysis of capitalism and its restructuring in contrast to the bipolar approach of the VoC. They placed greater emphasis on economic factors and less on regulatory structures which shape employment relations. Their approach is useful in showing how national economies relate to each other and not simply how they can be compared. Howell (2003) found the VoC model too deterministic and permitting too little scope for other factors to play a role in determining outcomes. Wailes (2007) argued that the VoC approach is based largely on the concept of a closed economy, in which institutions have autonomous effects within national boundaries, and ignores in which international factors play in a global context.
Nevertheless, the VoC approach offers a useful framework for the comparative analysis of labour unions and skills development within a global context. The VoC approach shows how the quality of VET is shaped by the industrial structures, product markets and innovation systems as well as by the role of labour unions at the national, industry and workplace levels.

6. Varieties of Unions and VET

Labour unions have been described as 'intermediary organisations' (Muller-Jentsch, 1985) in which their main task as collective actors is to 'deploy workers' collective resources in interaction with those who exert power over them' (Hyman and Gumbrell-McCormick, 2013). Hence it is impossible to view unions in isolation from their surrounding relationships. There are at least four main types of relationships which unions have with others: their own members and constituents, employers, governments and civil society (or public opinion).

There are three 'ideal types' of trade unionism which have been identified by Hyman (2001). The first category was identified in the early writings of the Webbs (1894) who conceived of trade unions as 'interest organisations representing occupationally based membership constituencies'. Later, this approach became the basis of 'business unionism' in the US, under Samuel Gompers as leader of the American Federation of Labor, and it came to characterize the dominant form of unionism in Anglo-Saxon countries. However, this form of unionism has proven to be very vulnerable with erosion of traditional strongholds of unionism, such as manufacturing, and the growth of precarious forms of employment. Under business unionism, individual unions paid attention to skills development but only in relation to their members' immediate employer. With the failure of business unionism to thrive in the current era, some unions have turned towards acting more as political pressure groups and social mobilization around particular issues.

A second category is 'social movement unionism' in which unions become part of a broader political movement, often associated with radical causes. There is, of course, a long tradition of unions defining their role as part of reformist or revolutionary movements, particularly in third world countries where unions have often been banned. There are individual unions or groups of unions in southern European countries, such as France and Italy, which have been closely associated with the Communist Party, particularly at times of social and political upheaval. In South Africa, the union movement was part of the struggle against apartheid and the election of the first ANC led government. However, unions often find it difficult to adjust from being part of a social movement to taking on more traditional roles once political changes have been achieved. Social movement unions tend to see skills development as simply part of a broader campaign to raise educational standards.

Finally there is 'corporatist unionism' in which labour unions are 'social partners' with employers and government in national socio-economic development. In Europe, there are both Catholic strands of this type of unionism as well as social democratic traditions which are embedded in the corporatist model. The Nordic unions embody strong elements of the social partnership approach to corporatism, particularly in Sweden, where the unions agreed to wage restraint in return for egalitarian social and wage policies involving both the employers and the social democratic government from the 1930s. The German system of co-determination and works councils are also an example of corporatism. In the Nordic and German corporatist systems, unions have taken an active approach to training and skills development in which they have shared responsibility with employers for the design and implementation of comprehensive systems of skills development. However, the retreat from the welfare state by governments in these countries in recent decades, as well as more assertive employers, has made it more difficult to sustain corporatist unionism.

Whether these three types of unionism will be applicable to the newly industrializing countries of Asia, Latin America and Africa is yet to be seen. A number of factors have influenced how these approaches to unionism evolved including: historical background, the nature and timing of economic development, the process of political democratization, the emergence of economic and political institutions and the character of civil society (including the importance of religious and ideological divisions).

7. Trends in Labour Union Density and Collective Bargaining

Unions in most industrialised countries have experienced a decline in membership in recent decades, although some more than others. As shown in Table 1, there are differences between union density (the proportion of the workforce who are union members) and collective bargaining coverage (the proportion of the workforce whose terms and conditions of work are determined by collective agreements). In general, unions in liberal market economies such as the US and UK have experienced some of the sharpest falls in membership over the past thirty years, although in Canada union membership has remained quite stable. Unions in coordinated market economies have fared much better, but there are also differences between countries within each category.

The difficulty interpreting the significance of union statistics can be illustrated by the case of France. While only 8 per cent of the workforce in France belongs to a union, 90 per cent are covered by collective agreements. Furthermore, while unionization in France has fallen considerably since 1980, the proportion of the workforce with bargaining coverage has actually increased. The level of support for unions in France may be assessed more accurately by the proportion of people voting in union elections and willing to follow when the unions call for strike action.

Table 1. Trade Union Density and Collective Bargaining Coverage: Selected Countries 1980 and 2010

	Union Density		Bargaining Coverage	
	1980	2010	1980	2010
Sweden	78	69	85	91
Germany	35	19	78	62
Belgium	54	52	97	96
UK	51	27	70	33
USA	22	11	26	13
Japan	31	19	28	16

Source: Hyman, R. and Gumbrell-McCormick, R. (2013) 'Collective representation at work'. In: C. Frege and J. Kelly, *Comparative Employment Relations in the Global Economy*. Routledge, London, p.56.

Trade unions in Sweden have among the highest levels of both membership density and collective bargaining coverage in the world, yet the proportion of the workforce who are union members declined quite markedly between 1980 and 2010. The Swedish unions drew strength and support from Social Democratic governments which held office from the 1930s to the 1970s and for most of the time since then. Sweden also benefited from a strong centralized trade union movement with close ties to the Social Democrats which provided opportunities for the unions to be represented in a wide range of institutions. Although the unions encouraged active participation by members in their governance, the central union confederations maintained considerable power over affiliates and enforced strong discipline over union behaviour. In concertation with employers and in political exchange with government, the Swedish unions agreed to wage moderation and restrictions on industrial disruption in exchange for economic growth and welfare benefits, both from employers and government. In addition to collective bargaining, unions play important roles in employee representation at the company and workplace level in many European countries.

In Germany, the rights assigned to employee representatives (not only unions) are among the strongest in the world. Under the 'dual system' of representation, the German trade unions have the right to bargain collectively over the terms and conditions of employment and a monopoly of the strike weapon, while establishing mechanisms of 'co-determination' in individual companies. Furthermore, in all but the smallest companies there is a requirement to establish a works council. In all firms with over 2,000 employees, workers are represented on a supervisory board. Hence employees are represented via a combination of works councilors as well as union officials. It should be noted, however, that in many small firms, employees have not opted to have a works council so that the proportion without them is growing.

8. Challenges to the Unions in Relation to VET

In many countries, unions are finding it difficult to advance their interests in VET during a period of time when their power and influence is declining, governments are limiting or reducing their investment in VET and leaving it to the private sector and employers are less interested in supporting broad based or generic VET and more focused on training which will address their specific organizational needs.

Cooney and Stuart (2012) note three key challenges which unions face when seeking to pursue an agenda around employee skill development. First, the issue of VET is beyond the scope of issues on which employers are willing to bargain with labour unions. The former 'pluralistic compromise' which unions forged with employers and governments has faded along with union power and authority. While unions may regard increased interest and involvement in skills development as enhancing their legitimacy, this is being thwarted by reluctance by employers and government to grant unions a broader role.

The second challenge for unions is the 'collective good' problem. Without pressure from the state or labour unions, employers will tend to under-invest in skills development because workers who have received training are free to leave and join competitors who have not contributed to the cost of this investment. In CMEs such as Germany and the Nordic countries, where unions are stronger and have a broader skills agenda, and the state takes a more active role in VET, there tends to be a higher level of institutionalization and investment in general skills development. By contrast, LMEs such as the UK and Canada, where unions have been weaker and government has taken a more passive role in regard to VET, there has been concern about the decline in skilled workers due to lack of investment. According to Regini (1995: 192), it is necessary 'that the VET system should be highly institutionalized, with appropriate legislation and strong trade unions which oblige firms to pursue collective long-term interests'.

The third challenge is the manner of union engagement in skills development. Unions which use training to challenge managerial prerogatives are likely to face strong resistance from employers. Hence, many unions seek to advocate cooperation with employers in training as an area of mutual gains which benefit all parties. This approach is likely to be more effective in CMEs, where there is greater acceptance of social partnership in matters such as skills development, than LMEs where the relationship between labour unions and management is more antagonistic. Hence, the challenge for unions is how they 'craft' their involvement in skills development in order to engage employers in cooperative ventures.

9. Varieties of Interest between Unions and Employers Regarding Training

Unions and employers share common interests in ensuring that workers have access to skills development but they often diverge as to how this objective is to be achieved. Unions are driven by their representation of members' interests in obtaining training in skills which will lead to career development opportunities and enhance their employability. For workers, education and training is a 'labour market good' which they hope will improve their opportunities in labour markets both internal and external to the firm. Hence, workers are generally more interested in certifiable knowledge and transferable skills and less interested in on the job training which is informal and provides only firm-specific skills.

Unions are also interested in training as an 'industrial issue' which they can pursue with employers and benefit their members, not only in terms of increased skills but also for which higher levels of pay can be obtained. Hence, unions will press their claims with employers on behalf of their members for skill recognition, payment for skills acquired and access to training arrangements. Trade unions have long been engaged in the provision and regulation of entry-level training to apprenticeships for skilled workers. But unions have also become more interested in continuing training beyond traditional trade training and have sought influence over a broader range of training-related interests.

Employers have less interest in the development of general skills, which they regard at the preserve of the state and the responsibility of individuals. As employers are focused on the success of their business, they are more interested in the development of firm-specific skills that are closely related to the nature of their business, the technologies which are used, the business processes and the design of the work to be undertaken.

Employers are concerned to achieve a return on investment which they make in skills development and the benefits to the firm. However, employers may also regard training as a motivating factor which will increase employee loyalty and enhance the retention of workers with their firm. Hence, employers tend to regard training and skills development as a 'competition good' which will improve internal efficiency and labour productivity to achieve business goals.
The problem for unions when negotiating with employers over skills development and training is to identify common ground and convert the process from one of 'distributive bargaining' to 'integrative bargaining' in which both parties can enhance their interests. While managerial prerogative may be a more difficult issue to deal with in LMEs, this can also be a problem, in CMEs where training is regarded differently by employers and unions. The integration of interests between the parties is likely to be achieved more effectively where the state provides a framework of regulation for new forms of entry level training as well as forming of ongoing or continuing training which benefits workers.

10. Employee Voice, Partnership and Training

Cooney and Stuart (2012: 9) argue that the exercise of employee voice should lead to 'the creation of training arrangements that are acceptable to the majority of employees and so enhance the prospects of broad participation in training'. Employee voice is seen as significant for the identification of key benefits to training that are seen by employees:

- Do employees value training that leads to greater transferability of the skills acquired?
- Are they interested in training because of the career opportunities which it offers in the future?
- Or are they more interested in the direct benefits of pay progression?

Employee voice which addresses the concerns of workers in relation to skills development is more likely to be valued by employees and to increase the levels of employee participation in training.
One means of providing for greater employee voice and engagement in skills development is the creation of formal and informal partnerships between unions and employers in relation to training activities. These are more likely to be effective in CMEs where the mechanisms for social

partnership are already established. Hence, in the German industrial relations system, unions are able to access social partnership institutions to reach peak level agreements at the industry level over basic rights and principles concerning training arrangements.

At the enterprise level, works councils can offer to facilitate the implementation of such agreements. However, it is also possible to forge more informal agreements in LMEs at the local or enterprise level between employees and their representatives with management on training arrangements. Within the European Union, there has been the development of life-long learning policies which are dependent on a series of building blocks, such as 'partnership working' which reflect the 'shared benefits of, and responsibility for, life-long learning' (Stuart, 2007). These partnerships are not confined to employers and unions but can also involve local level bodies and broader multi-level governmental agencies. The previous Blair Labor government in Britain sought to advance these kinds of partnerships in regard to training and skill development arguing that learning is a 'natural issue for partnership in the workplace between employers, employees, and their trade union' (DfEE, 1998: 35).

By stimulating debate about life-long learning and the importance of skills development not only for economic development but also for enhancing the well-being of citizens, unions can broaden the agenda for a broader social dialogue between government, employers and the broader community. As noted by Cooney and Stuart (2012: 12), labour unions may find other ways of engaging with training systems: 'such as becoming training providers and participating in middle-level institutions that regulate training'. However, to achieve this outcome may require the development of new institutional forms in order to provide a long-term role for unions and other community based organisations in the design and implementation of a significant program for VET and skills development.

11. Case Study of Germany: Union-Employer Engagement in VET

Germany provides an excellent example of multi-level union engagement with VET, both in setting industry level frameworks and implementing a social partnership model of skilled training at the local or enterprise level. As outlined by Trappmann (2012), German unions play a significant role in the VET system, securing the rights of employees to high quality skills training. But there is still a contest between employers and unions over the provision of education and training. While there are legal requirements for employers to consult with unions and works councils over training

arrangements, there are collectively bargained agreements between unions and employers at both the industry level as well as with individual firms.
Under the 'dual system' of industrial relations in Germany, unions play a significant role in apprenticeship and other forms of initial skills development. However, unions have been campaigning for a greater role in continuing forms of training. Works councils have authority to negotiate over continuing training but they have only recently become more active in this area which has previously been regarded as a preserve of management prerogative. A new federal law is regulating time off for continuing training, career development, counseling and the certification of continuing forms of training. Unions have also begun to train their own workplace learning representatives and provide career advice to their members. Yet it appears that the German system of 'partnership-based regulation' of VET, is under threat due to employer resistance.
Unions have engaged in political campaigning to place pressure on employers to increase their investment in skill development and to improve the quality of continuing training, but these have had limited success. Unions are concerned about plans by government to 'modernise' the VET sector, including reduced provisions for apprenticeships, and the potential withdrawal of employer support for the existing system. Hence, unions need to maintain and increase their pressure on government and employers to support a multi-level approach to skill development which involves all the social partners. According to Trappmann (2012: 120): 'the toughest challenge for unions is to get employers back into social partnership… Nothing less than a new compromise between labour, employers and the state is needed in the area of skill provision'.
A survey of VET at an enterprise level in Germany revealed no convincing evidence that membership of employer associations and high union density influenced training expenditure by larger German firms (Croucher and Brookes, 2009). However, the authors concluded that unions and employer bodies may have a positive impact on training efforts through their wider political activities supporting VET institutions. They also concluded that subsidies by the state may play a greater role in stimulating VET than previously acknowledged.

12. The Case of Norway: Trade Unions and Life-Long Learning

Norwegian unions have led a long and successful campaign to influence public policies and practices in the area of continuing training and education. Following the intervention of the state, the 'Norwegian

Competence Reforms' were introduced in the late 1990s following successful union pressure for a statutory right to study leave for employees and the certification of skills gained at work. However, the unions failed to get employers to fund the right to study leave and conflict over financing has continued.

The motivation for the Norwegian Competence Reforms was concern about the increase of social exclusion for low-skilled and poorly qualified workers as a result of social, technological and work design changes. As noted by Teige and Stuart (2012: 127): 'the learning agenda was seen as a way for the LO (the Norwegian Confederation of Trade Unions) to look after and retain a sizeable membership base'. The promotion of learning and skill development was also influenced by the fact that the unions had agreed to wage moderation with the employers and were looking for other issues over which to bargain on behalf of their members.

The social partners in Norway have a history of cooperation, particularly in matters of education and training. During the 1990s, following criticisms of the VET system in Norway as being old fashioned and inconsistent, the unions, employers and government agreed to develop a new educational and training program. Launched in 1994, 'Reform 94' gave citizens born after 1978 a statutory right to at least three years of education and training (including an apprenticeship) leading to a vocational certificate of high school diploma. There was also a major expansion of the VET system to bring Norway onto the path of a high skilled, high value-added economy (Payne, 1996). A central part of the reforms was to stimulate life-long learning so that Norwegians would acquire and maintain high levels of skill and knowledge to equip them for their work and careers.

By contrast, the partial failure of the Competence Reforms of the late 1990s was due to lack of consensus and agreement among the social partners on the full 'package' of reforms. While the employers conceded the right for employees to take educational leave, they were not prepared to finance it (Bowman, 2005). Furthermore, while the reform program was seen as the creation of the Norwegian LO, the unions were divided on the value of life-long learning as a bargaining issue. In addition, the degree of support among local trade union members at the branch level was weak. There was a failure of the LO leadership to persuade constituents that wage claims should be moderated and emphasis placed on gaining employer funding for a life-long learning program.

Nevertheless, the Competence Reforms did achieve a number of benefits for workers. A series of governmental projects were initiated which expanded educational and training opportunities at the workplace level. A Competence Building Program was implemented with the workplace as a learning centre. No formal and informal skills were documented and recognized as a means of entrance to upper secondary level and higher education. Internationally, Norway (along with Canada) leads the world in post secondary educational attainment and features among the highest rates of participation in work- based training (Sawchuk, 2008: 55).

13. The Case of Canada: Weak Institutional Support for VET

Like many other LMEs, Canada has a relatively weak institutional framework in regard to the regulation of training. Although Canadian unions have had a long history of interest and campaigning for a greater role in training policies, this has remained the preserve of managerial prerogative. Employers have mainly focused on internal training and skill development which address the needs of the firm. This has resulted in under-investment in training resulting in continual skills shortages. Charest (2012: 61) argues the skills problem in Canada will not be resolved without some form of collective regulation but the federal and state governments are primarily concerned with 'informational and promotional' activities.

Labour regulation in Canada is mainly the responsibility of the provinces, although the federal government intervenes for that part of the workforce (approximately 10 per cent) which is under its jurisdiction. Workforce training is an ambiguous field in terms of the division of responsibilities and the federal government does intervene when it deems necessary. It pays lip service to the notion that skills development is a precondition for national economic development but does little to support it. The Canadian government, for example, has not ratified the ILO convention (number 140) which grants workers the right to educational leave.

During the 1990s, the Federal government suggested to the unions and employers that new institutions of 'concertation' be established at the sectoral level in order to support the development of workplace training (Gunderson and Sharpe, 1998). As a result, a number of 'sector councils' were created covering several economic sectors. The sector councils are bipartite committees with employer and worker representatives. They seek to encourage skills development by supporting management practices within enterprises and helping them to meet their human resource needs. About thirty -three sector councils currently cover 25-30 per cent of the labour market. Canadian unions have actively supported the creation of sector councils as a forum of representation of workers' interests but not as a substitute for collective bargaining by unions.

The cornerstone of the industrial relations system in Canada is collective bargaining and since the 1990s training has figured more prominently as an issue in negotiations between unions and employers. By the early 2000s, about two thirds of collective agreements in Canada contained a clause relating to education and training. However, given the decentralized nature of collective bargaining in Canada, there is considerable variation between provinces. In the case of Quebec, about 50 per cent of collective agreements contain a clause on training and about half of these provide for the existence of a joint labour-management committee on training. This represents a major increase from previous decades. However, employers generally regard training as a managerial prerogative and unions have few 'levers' to enforce agreements on training or to promote social dialogue on this issue.

A Federal Labour Standards Review Commission (Arthurs Report) in 2006 called on the Canadian government to 'develop a comprehensive strategy for funding, designing and ensuring the delivery of training and educational programs to support the ability of workers and enterprises… to participate fully and effectively in today's knowledge-based economy' (p.259). The Report made the specific recommendation that the federal government 'should review all potential means of providing resources to support training and life-long learning including, but not limited to, a payroll levy, tax credits, learning accounts, supported by contributions from workers and employers, labour-management partnerships and income replacement schemes' (p.260).

It remains to be seen whether a future Canadian government will act upon the recommendations of the Arthurs Report and take more concrete action to promote cooperation between employers and unions on training. Canadian governments tend to leave it to the parties to negotiate these issues and to do so at the provincial rather than national level. There are no indications that the Canadian system is likely to move to a more regulated system of VET which will give unions a stronger institutional role.

14. The Case of the UK: Towards Limited Social Partnership with VET

Under the previous Blair Labour government, the UK took some significant initiatives to improve VET and to involve the trade unions in skills development. However, as outlined by Clough (2012), 'New Labour' retained many of the traditions of voluntarism which characterized previous policies towards VET. While there was an attempt to adopt aspects of social partnership in relation to workplace training, this was informal and without strong commitment by the parties.

Following the election of the Labour government in 1997, increased recognition was given to trade unions as stakeholders in learning and skills policies. New Labour sought to integrate employment and skills issues with concepts of employability and social exclusion. It promoted greater partnership between employers and unions in relation to VET and enhanced the unions' capacity to engage with these issues. However, the government eschewed any statutory obligations on employers to train their employees through, for example, the reintroduction of industry training levies. Nevertheless, the government gave positive assistance to the union movement through the establishment of the Union Learning Fund (ULF) and the development and statutory recognition for Union Learning Representatives (ULRs) and supported the setting up of Union learn, an organization within the Trades Union Congress (TUC) to support union learning activity.

One of the first initiatives of the Blair Labour government was the publication of a Green Paper, *The Learning Age*, which set out a broad vision of 'a culture of learning to help build a united society, assist in the creation of personal independence and encourage our creativity and innovation' (DfEE, 1998: 35). The paper noted the valuable contribution made by trade unions to workplace education and their role in reaching workers who were often excluded from employer provision or had unsuccessful experiences of formal education.

In 1998, the DfEE established the Union Learning Fund (ULF) to promote trade union innovation in workplace learning. Later, Union Learning Representatives (ULRs) were given the rights to time off to perform their duties under provisions of the Employment Act 2002.

During its period in office, the Labour government established new machinery to deliver a VET system designed to meet employer demand for training. It also delivered individual entitlements to learning. A Learning and Skills Council (LSC) was established in 2001 not only for the funding and quality control over Training and Enterprise Councils (TECs) but also with responsibilities for further education colleges and local authority adult learning, as well as sixth form provisions. The then TUC general secretary was appointed vice chair of the LSCE and chair of its Adult Learners Committee. A joint working group was established between the Confederation of British Industry (CBI) and the TUC to make recommendations on skills policy, but the CBI was opposed to any social dialogue/social partnership model based around the European model.

While considerable progress was made during the early years of the Labour government in promoting greater union involvement in VET, albeit with rather passive support from the employers, a subsequent report by the Treasury, chaired by Lord Leith, was less encouraging of social partnership approach to training (HM Treasury, 2006). The Leith Report took a more utilitarian approach with an emphasis on skills for productivity and employability and had less appeal to the union movement. It sought to 'depoliticize the skills agenda by securing a broad political and stakeholder consensus', although it proposed to 'strengthen the employer voice through the creation of an employer-led Commission for Employment and Skills… within a framework of individual rights and responsibilities'. This Report marked a shift from a tripartite approach to training and skills to one which gave greater emphasis to individual employees and employers.

Research on training and skills development in the UK, however, has shown the positive benefits of union involvement. An analysis of the Workplace Employment Relations Survey (WERS) revealed a positive relationship between trade union presence and training (Stuart and Robinson, 2007). Similarly, results from the Employers' Manpower and Skills Practices Survey (EMSPS) showed that recognition of a union has a positive significant influence on training intensity for workers in a range of occupations (Green et al., 1996). Hence, the role of unions and ULRs as partners in delivering positive outcomes for skills development has been established and the Conservative led coalition government has maintained support for most of the measures introduced by the previous Labour regime.

The contrast between skills training in the UK with other European countries with a more coordinated market approach is exemplified by the building trades, such as bricklaying. A study by Clarke (2011) compares the weak employer/trade-based regulation in the UK compared with Germany, the Netherlands and France where training and qualifications are embedded within an industry framework and underpinned by social partnership and sector-wide collective agreements. In these countries, VET is part of the general education system and based on a 'multidimensional notion of competence integrating knowledge, practical know-how and personal and social abilities' (Clarke, 2011: 19).

A critical view of union involvement in workplace learning and skills in the UK has been expressed by McIlroy (2008) who reviewed the role of trade unions during the decade of 'New Labour' from 1997 to 2007. While the Union Learning Fund, supported by the Blair Labour government, provided the Trades Union Congress (TUC) with an new 'secondary function', McIlroy argued that the government's policies in this area were

more strongly influenced by the employer bodies than by the TUC. Furthermore, McIlroy remained skeptical that involvement in workplace learning activities stimulated union revitalization and noted that the Blair government was not willing to 're-regulate skills development or legally endow unions as bargainers for skills (McIlroy, 2008: 305).
While unions gained a stronger role in VET during the previous Labour government's term in office, the model for skills development was an individualistic rather than a collective one. While the unions gained a stronger voice in training issues, the system was designed primarily to meet employer demand for a more highly skilled workforce and not expanding collective bargaining by unions over learning and skills. There was no devolved decision making about training to social partner organisations and little social dialogue. The government and its agencies took a stronger role in promoting training and skills development and the system was reliant on this support. Without the establishment of independent institutional funding it is uncertain whether the momentum for skills training would continue if government policies change. Hence, the lack of a strong social partnership underpinning VET means that the future is uncertain.

15. Conclusions

The transformation of work and labour markets during recent decades, as well as political and social changes, have created a more complex and difficult environment for trade unions and labour movements. Within mature industrial economies, structural changes have meant that many of the sectors from which unions traditionally drew their membership have declined. Hence, with the demise of employment in manufacturing, once the heartland of unionization, trade unions have seen their membership shrink and their base shift to the public sector and services. In newly industrialised economies, where manufacturing is growing, unions have struggled to gain a foothold or to expand to other sectors. Political factors have also played a role in limiting the growth of unions in some of these countries where governments are opposed to the emergence of independent trade unions which might threaten the status quo. In all countries, especially with the advent of globalization, workers require higher levels of education and skills in order to obtain jobs, develop careers and secure their long term future. A number of factors inhibit people obtaining the skills they need in increasingly competitive labour markets in which jobs may be scarce. These include industrial restructuring, technological changes, the need for greater labour mobility and the demise of the job security. Employers demand greater 'flexibility' from workers in terms of their skills and availability. Jobs which were previously secure are being replaced by casual, part-time and contract work which is for fixed term periods.

Governments are aware of the need to raise the level of education, provide people with longer periods of schooling, ensure that there is adequate training for those entering the workforce and continuing training and development over the course of people's careers. Yet the cost of vocational education and training (VET) is increasing and both individuals and employers are being required to meet these costs from their own resources. Hence VET, as well as all other forms of education and training, has become a mixture of public and private goods, the cost of which has to be shared between various parties.

Trade unions are struggling to find a role in the changing world of work and skills requirements. In coordinated market economies (CMEs) where there is a stronger tradition of social partnership, shared responsibilities for VET have been taken by government, employers, unions and individuals. But even in Germany and the Nordic countries with a long tradition of social partnership, there is growing resistance by employers to meet the costs of VET, except where these coincide with their own priorities. In liberal market economies (LMEs) such as the UK and Canada, unions have generally failed to establish partnerships with employers in relation to training which is seen as a managerial prerogative. Governments in LMEs have recognized the need to greater investment in VET but have been reluctant to establish and fund independent institutions or legislate to ensure that employers and unions take responsibilities for training and skills development.

While unions in many countries recognize the importance of VET and have sought to make skills formation and training part of their bargaining agenda, they have found it difficult to make substantial progress. At best, unions have been able to forge partnerships with employers and have persuaded governments to introduce legislation to institutionalize support for VET. However, with governments introducing austerity budgets and employers becoming more resistant to new taxes, there are formidable challenges for unions to achieve significant changes in VET and to gain greater influence in policy formation and implementation.

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The Environmental Revolution: But does Labour Reap the Benefit from Green Jobs?

Jayesh Dsouza*

A green economy should be one that is sustainable in two ways: for the environment itself, of course, but also in terms of people's ability to live at a decent material standard and to enjoy basic rights and opportunities at their workplaces[1].

I. Introduction

Not too long ago, the green job movement was expected to be a boon to the economy. It was expected to create an abundance of jobs and improve the well-being of green job labourers by affording them a higher standard of living. But this does not seem to have fallen in place quite as expected. The economic recession, generally, left in its wake a beleaguered workforce whose standard of living was affected by the prevailing conditions. Although the government's economic stimulus package did provide a boost to existing conditions, this was short-lived. The green job movement has had to address other issues besides the recession. There has been some technical wrangling as to what exactly constitutes a green job. This study begins with a definition of green jobs. It focuses on California which is considered the leader in green job creation. Through interviews with experts in the state, this study asks one of the quintessential questions of the green job movement: do green jobs provide labour with an acceptable of living?

* Jayesh D'Souza is a doctoral graduate in Public Administration from Florida International University.

[1] Jon T. Geenen, *Journal Sentinel Online*, June 10, 2008.

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1. Defining Green Jobs

Green jobs run through the gamut of industries from construction to manufacturing to the oilsands. A report by the Canada-based Pembina Institute asks the following questions in seeking to define green jobs: what sectors are green enough, which workers within a sector are green, what fraction of a worker's time needs to be green to count as a green job and what is the level of quality for it to be considered green (Demers 2011). In *A Green Career Pathways Framework: Postsecondary And Employment Success For Low-Income, Disconnected Youth*, The Corps Network defines green jobs as those that contribute to meeting the goal of achieving environmental sustainability whether new jobs or through retooling of existing occupations (Grobe, O'Sullivan, Prouty & White 2011). New jobs are those like solar panel installers while modifications of existing jobs include construction workers who improve the energy efficiency of buildings by using the newest green building technologies. Some experts have expressed serious reservations about the narrow definition and focus of green jobs. Chris Benner at the University of California, Davis states that the definition of green jobs has been inconsistent and narrow in scope (e.g. jobs in renewable energy and energy efficiency industries, plus maybe recycling). The main point, Dr. Benner feels, is that energy and the environment are important in all jobs and all economic activity and we should be finding ways to promote a green economy in all aspects of our economic activity and in all jobs.

This paper assumes a broad definition of green jobs as all those jobs that are related to energy and the environment. It discusses green jobs that pertain to the clean energy, energy efficiency and renewable energy sectors. It touches on social justice theory and elicits experts' opinions on key issues in the green job labour movement. There is particular emphasis on green jobs in California, considered a leader in the green job movement in the United States. This is explained in the next section.

2. California and the Green Job Movement

Of the 2.7 million jobs in the clean energy economy in the U.S., 338,445 are in California, the most of any state. These jobs have also proved to be the most resilient during the recent economic downturn (Muro, Rothwell & Saha 2011; Pollack 2012). While the rest of California's economy registered a decrease of 7 percent in employment during this time, green manufacturing jobs in the state increased by 1 percent (BlueGreen

Alliance 2012). A report by the Center on Wisconsin Strategy credits the state's strong policy and investment base for this which has resulted in efficiency gains and energy savings, "*The Recovery Act* provided a big new funding source for energy efficiency, but one that added to an already strong base of state and ratepayer funds. California policymakers already had significant experience with energy efficiency industries and markets, and had a long-term orientation to their development that extended well beyond the three-year spend-out of ARRA funds (White, Dresser & Rogers 2012)." A report by the local community organization, Next 10, attributes California's success on the green job front to the creation of an incentive and funding structure by the state government directed to vital research and development, and promotion of the application of new clean green energy technology (Perry 2009).

California lawmakers have also been active in the green movement. California's Global Warming Solutions Act, AB 32, aimed at reducing greenhouse gas emissions, is another example of the state government's commitment. Proposition 39 would require lawmakers to allocate up to $550 million per year for five years for energy efficiency and clean energy projects in California's public schools, community colleges, universities, and other public facilities. This proposition is covered by prevailing wage legislation and therefore is set up to create good jobs with benefits. An important goal of Proposition 39 is to provide job opportunities and funding for workforce development programs to train disadvantaged youth, veterans, and other workers in California. Not all of the new jobs created by Proposition 39 investments are accessible to disadvantaged workers since many of the jobs require specific skills and experience. Besides a proactive government, California has an involved populous that generally favors products and services that create minimal impact on the environment. Additionally, green businesses have been at the forefront of meeting consumers' demands for everything from solar panels to environmentally-certified building materials (Zabin and Scott 2013).

Community organizations and local educational institutions have been instrumental in the push for green job advancement in California. The Los Angeles Alliance For A New Economy (LAANE) is one such community organization. Its focus has centered around building labour-environmental community coalitions and creating good middle class jobs. Its advocacy responsibilities include working with utilities, namely, the Los Angeles Department of Water and Power to invest in energy efficiency and renewable energy by doubling its budget for energy efficiency programs. This is particularly needed in Los Angeles which has seen the proliferation of low-paying jobs. Working Partnerships is another such organization that builds partnerships with community, labour and faith groups to improve the lives of working families in the Silicon Valley. Strategic Concepts in Organizing & Policy Education (SCOPE) has a similar mission and focuses on unionization, sustainability and assisting lower income communities of color. It also conducts employer-paid training for green jobs. Global Green USA's mission is to foster a global value shift to create a safe and sustainable future. In doing so, it aims to reconnect people with the environment, create green jobs, increase social equity, and inspire people to take meaningful individual action. Universities have also contributed to the green job movement by promoting energy efficiency. The California Lighting Technology Center at the University of California, Davis is responsible for accelerating the development and deployment of energy-efficient lighting and day-lighting technologies. The Donald Vial Center on Employment in the Green Economy at the University of Berkeley works to promote the green economy in California by carrying out research related to the labour markets, workforce development and workforce policy and by engaging with policymakers and advocacy groups to provide technical assistance and education.

This intricate network of advocacies in California shares a common goal: to advance the green job movement and improve the welfare of 'green' labour. Since much of these efforts focus on the energy industry, this next section discusses on the clean energy, energy efficiency and renewable energy sectors of the resources industry.

3. Clean Energy, Energy Efficiency and Renewable Energy

The energy industry is paramount to today's economy in a number of ways. A report by the Economic Policy Institute claims that utility jobs tend to be over 50 percent more green intensive than any other sector (Pollack 2012). The building industry, whether it be new construction, weatherization or retrofitting, plays an important role in the green job movement. A report by the Center On Wisconsin Strategy elaborates on this point, "We have long argued that the construction industry, the keystone for building energy efficiency, is an overlooked area with potentially decent jobs and clearly articulated training pathways organized on a classic earn and learn model — registered apprenticeship. Building relationships with community-based organizations and improving access to and retention in the building trades for low-skill, low-income workers is a strategy that makes sense (White, Dresser & Rogers 2012)."

Much of the focus, over the last few years, has been on energy efficiency upgrades of homes around the country. The aforementioned study found that the 100 million plus homes in the U.S. account for roughly 23 percent of the country's energy use and carbon dioxide pollution. The purpose of retrofitting them is to reduce global warming and produce energy savings. Economically, it benefits consumers (by lowering energy costs) and workers with a lower level of education by creating jobs since it is labour-intensive (White, Dresser & Rogers 2012). A report by the Center For American Progress backs this up stating that retrofitting just 40 percent of the residential and commercial building stock in the United States would generate as much as $64 billion a year in cost savings for U.S. ratepayers (Hendricks, Campbell & Goodale 2010).

García-Alvarez and Varela-Candamio delineate innovative mechanisms such as feed-in-tariffs and government finance mechanisms like environmental tax penalties or the incentive of lower taxes to encourage renewable energy (Garcia-Alvarez & Varela-Candamio 2012).

Energy efficiency and renewable energy are both crucial to the green job movement and work effectively, in tandem, to produce green job growth and energy savings. A report by the Energy and Resource Group at the University of Berkeley outlines the importance of renewable energy, "...placing support for renewables in a broader context of support for clean energy measures, including energy efficiency and sustainable transportation will greatly augment economic and employment benefits." The report cites the example of a consumer installing a solar PV system and retrofitting his home to be energy efficient. Research has shown that complementary policy measures for both energy efficiency and renewable energy are required to achieve these goals. One study found that such a policy involving federal investment of $300 billion made over 10 years to increase energy diversity, investment in industries of the future, high performance building promotion, and to rebuild public infrastructure was projected to create half a million jobs in the renewable energy sector alone and 3.3 million jobs overall. Kammen, Kapadia & Fripp (2004) emphasize the advantages of the shift from fossil fuels to renewable energy, "Embedding support for renewables in a larger policy context of support for energy efficiency, green building standards, and sustainable transportation will greatly enhance net positive impacts on the economy, employment and the environment."

Investment in 'green' energy underscores its potential importance and relevance to economic growth. While its advancement has garnered the attention of policy-makers, more work is needed on the labour front in terms of developing policies and strategies for the betterment of the green job worker.

II. Conceptual Framework

While this study mainly focuses on the standard of living of workers in green jobs, the broader theme of this study is socio-economic justice. There are a number of theories that have contributed to the foundation of labour law chief among those being social justice theories. Jost and Kay (2010) define social justice as a cluster of measures that control political and other decision-making with regard to preserving the basic rights, liberties, and entitlements of individuals and groups. From a labour perspective, these address issues such as the minimum wage, safety regulations, maximum hours of work, the outlawing of discrimination against particular groups, and the recognition of trade unions for the purpose of collective bargaining. There are a number of social theorists who have laid the groundwork for modern labour law. These include:

1. John Stuart Mill
Utilitarians like John Stuart Mill (2002) advocated equal opportunity for all 'admitting no power or privilege on the one side, nor disability on the other.' Ho (2011) contends that Mill's utilitarianism was actually a standard of morality where the ultimate goal was the happiness of the greatest number of people. He called for the accommodation of minorities so that the majority would not end up being a dictatorship. An example of utilitarianism in today's working world is equal rights for women and minorities.

2. John Rawls
The premise behind Rawls' *Theory of Justice* is that social justice is achieved by first correctly organizing society's major institutions as this determines how basic rights, opportunities,
income and wealth are distributed. Croucher, Kelly & Miles (2012) discuss the Rawlsian concept of social contract and describe collective bargaining as a tool that would help parties to such a contract agree on the rules that would benefit both sides. This involves reflective equilibrium where a consensus is reached through dialogue and mutual judgement. While inequalities in pay are acknowledged, the less privileged are protected.

3. Stephen Leacock

Leacock urged governments to extend social reforms, such as the minimum wage and unemployment insurance, without pushing the industrial machine to its breaking point. While establishing and raising the minimum wage was, for a long time, considered an economic impossibility, Leacock proclaimed that the minimum wage law should be a part of the code of every community, "The wage as paid becomes a part of the conditions of industry. It is probable that at any particular time and place, the legislative minimum wage cannot be very much in advance of the ordinary or average wage of the people in employment. But its virtue lies in its progression. The modest increase of to-day leads to the fuller increase of to-morrow. Properly applied, the capitalist and the employer of labour need have nothing to fear from it. Its ultimate effect will not fall upon them, but will serve merely to alter the direction of human effort (Leacock 1920)."
Based on the foundation of these theoretical perspectives, the crux of the next section of the paper will focus on the impact of green jobs on women and minorities, collective bargaining (unions), wages and worker benefits.

III – Methodology

The study uses both primary and secondary data to answer the research question. These include both American and foreign sources such as government documents, academic publications and research studies from community organizations and academic research centers. It then deploys responses from telephone interviews with experts in California to probe findings from the literature review and provide recommendations from them. These experts include Goetz Wolff at the University of California, Los Angles, Carol Zabin from University of California, Berkeley Labour Center, Jessica Goodheart from the Los Angeles Alliance For A New Economy, Louise Auerhahn from Working Partnerships USA, Walker Wells at Global Green USA and Elsa Barboza from Strategic Concepts in Organizing & Policy Education. The questions were based on the green job movement in California:

1. What are the impediments to the creation of green jobs? How can these be overcome?
2. How have green jobs changed organizations' approach to training?
3. What changes have green jobs brought to unionization?
4. How have green jobs impacted the lives of labour in terms of:

i) health insurance coverage and compliance with safety laws; ii) wage theft prevention/minimum wage increase/living wage provision; and iii) affordable housing availability and better transportation?

5. How have green jobs affected minority and women workers/workers from low income communities?
6. What effect have green jobs had on economic recovery, that is, has it had made a difference to aggregate employment?
7. How would you rate the investment in green jobs? How would you evaluate the return on this investment?

The data analysis software, NVivo, was used to conduct an analysis of the responses which leads to the next section.

IV. Analysis of Results

The industrial shift to a low-carbon and resource-efficient economy was expected to result in an increase in the number of green economic activities and environmental services like reforestation and waste management. In order for this shift to yield green job growth, an OECD report recommends the compensation of workers, who are moving from declining to growing firms, with income and employment security, the development and promotion of eco-innovation through education and training, and the creation of a conducive tax and benefit system to better support employment (Organisation For Economic Cooperation and Development 2012). Rosemberg (2010) adds that such policies must be put in place early in the transition to green jobs with the involvement of the labour force. Stillwell and Primrose (2010) argue in favor of government action in this regard, "...such green jobs are not natural, inevitable phenomena that arise from laissez-faire market principles. Rather, their growth is facilitated by government policies that support the restructuring of economic and industrial processes to achieve ecological ends. It is therefore pertinent to ask what is currently being done and how the potential for marrying job creation with ecological goals could be expanded in particular sectors and regions."

There are many factors that determine the sustainability of the green job movement and the quality of the green workforce. These are discussed next.

1. Training

Training is vital for those employed in green jobs. Some of the experts interviewed for this study felt industries are now carrying out their business in a greener way through the work of carpenters, electricians etc. and this has to be integrated into the training of these professionals.
Take the construction industry, for example. Certifications are essential for those working in green building jobs. According to an estimate by the Sustainability Education and Economic Development (SEED) Center, green buildings will support nearly 8 million workers in a range of occupations including construction managers, carpenters, electricians, architects, truck drivers and cost estimators, among many others (Younger 2012). McCoy, O'Brien, Novak and Cavell (2012) stress the importance of hands-on and on-the-job training. They also suggest green job training include other members of the organization such as finance, marketing, accounting, and management professionals. They emphasize the need for organizations to go beyond credentials by creating performance standards. In California, training is essential under Title 24 to achieve building efficiency standards.
A couple of the experts interviewed cited the Utility Pre-Craft Traineeship at the Los Angeles Department of Water and Power (LADWP) as a well-developed traineeship for green job workers. The duration of this program is 18 months. During this time, trainees receive general training in LADWP procedures and job-specific training that includes extensive instruction on safety, appropriate work procedures, and relevant policies. It pays a living wage of $16 per hour as well as health benefits. The goal of the program is to meet current staffing needs and also to create a pool of workers to replace retirees. Trainees are members of IBEW Local 18 union and are given the opportunity to pass the civil service exam in order to stay with the Department (Strathmann 2012).
Besides training, education is instrumental in developing a good quality green workforce. Younger (2012) quotes a McGraw-Hill Construction study to re-affirm this point, "Training is essential for getting and maintaining green jobs; 30 percent of green job workers say they needed additional training when they started, and most report that formal education and training programs will continue to be needed." With the assistance of grant money, community colleges across the country have begun offering certificate programs for various green jobs. Besides this, non-profit community-based and for-profit institutions now offer workforce-development programs. Potts (2010) notes that these programs have suffered from a lack of demand and a lack of training standards.

2. Equal Opportunities for All

Green jobs are expected to create unprecedented opportunities for workers from low-income communities, women workers and workers from ethnic minority backgrounds. Green jobs also open the labour market to more workers without a college degree. Workers with different educational backgrounds can avail of green jobs depending on the nature of work. Workers at a lower educational level have more access to jobs within greener industries. A report by the Economic Policy Institute provides a reason for this, "Nevertheless, education has played a role in the increasingly divided economy. For example, in 1979 wages for workers with a college degree were 40 percent higher than the wages for those with only a high school degree. By 2011, this pay disparity had risen to 76 percent (Mishel et al. 2012). If we want economic policy to work for the nearly 70 percent of American workers without a four-year college degree (U.S. Census Bureau 2012), green investments offer an option (Pollack 2012)." In the same vein, one expert disclosed that green jobs, such as those created by the Los Angeles Department of Water and Power, provide hope to lower income communities. The bottom line is the provision of a living wage, public sector, unionized job with a pension. The experts interviewed generally pointed out that green jobs have certainly benefited minorities and women. There are many organizations that have helped facilitate this such as the Los Angeles Black Worker Center (BWC) in Los Angeles. Its mission is to increase access to quality jobs, reduce employment discrimination, and improve industries that employ Black workers. Among the many goals of the center is the promotion of economic and racial justice for all of Los Angeles. This includes developing policies and corporate practices that advance equality in the labour market and decent jobs in the Black community. One of the experts interviewed noted that the Los Angeles public sector has been involved in outreach work with the junior colleges in the city to reach out, inform and train workers from these communities.

Hemmati (2009) calls for strengthening the involvement of women in climate change in order to achieve gender equity and for drawing upon the expertise of women in the decision-making process, "Climate change is the crucial issue today, a fact that is becoming more apparent
every year. We will not be able to master the huge challenges associated with climate
change without ensuring justice and there is no true justice without gender justice." An expert interviewed for this study stated that green jobs have

generally been male dominated but the composition of training programs is gradually changing with the entry of women.

3. Investment

The main opportunity for investment in green jobs is in the reduction of energy use in new and existing buildings. While residential and commercial buildings are responsible for 40 percent of all U.S. energy consumption, the industrial and technology sectors account for 70 percent of it. By renovating buildings in order to make them more energy efficient, the retrofitting industry would provide employment for skilled workers such as labourers, electricians, sheet metal workers, engineers, and architects. When energy efficiency retrofits are combined with renewable energy, such as solar and geothermal systems, it is expected to create even more direct jobs in manufacturing and installation in an effort to pump clean power back into the grid. A report by the Apollo Alliance shows the importance of both public and private investment, "Expanding public and private investment in energy efficiency and distributed power is the cheapest, fastest way to reduce rising energy costs, curb greenhouse gas emissions, and create a new generation of high quality green-collar jobs. We need to move our building sector into the clean energy future by adopting aggressive efficiency standards for new and existing buildings, and by providing resources to homeowners and the public and private sectors to meet and exceed these standards (Apollo Alliance 2008)." The public sector can provide an impetus to green job creation by promoting green infrastructure investment and even directly financing infrastructure projects such as power grids to promote new renewable energy sources. The private sector has an equally important role to play by injecting much-needed investment capital, providing the benefits of a more competitive environment and supporting the operational performance of government-run utilities with technological and managerial expertise (OECD draft 2012).

Some of the experts that were interviewed felt that overall, investment in green jobs has been good especially in California. One of the experts felt that the return on investment has to be evaluated in due course by also taking into account social costs and benefits. Another expert felt that indicators such as the number of green jobs created, the level of training and the ability to connect to lower-income communities should be used to evaluate performance and determine the return on investment. One expert disclosed that a million dollars of investment results in 6-10 green jobs. Experts also acknowledged the contribution of the *American* Recovery *and Reinvestment* Act to the green job movement. The California Advanced Lighting Controls Training Program (CALCTP), which has benefitted from this investment, is a statewide initiative aimed at increasing the use of lighting controls in commercial buildings and industrial facilities.

4. Unions

Collins, Bray and Burgess (2010) credit the shift towards sustainable production systems and green jobs to the efforts of unions. Byrd and Widenor (2011) also see the importance of unions in the proliferation of green jobs. They contend that through vigorous lobbying, unions have been able to secure funding of clean energy projects, specifically, for on-the-ground green jobs creation and training. In California, the Swanton Berry Farm, became the first organic farm to have a union contract. The result is better conditions for workers where they are paid an hourly wage, receive health insurance, a pension plan, paid vacation, and paid holidays. They are also automatically set up to earn a financial stake in the company via an Employee Stock Ownership Plan.
Daruwala (2011) touts the advantages of union support in creating good quality green jobs as well as the efforts of community organizations such as Blue Green Alliance and Apollo Alliance which specialize in, in her words 'repainting union jobs green.' However, Obach (2004) warns, "Labour unions and environmental movement organizations are among the most powerful social movement sectors in the United States. When they are capable of acting together they can advance policies that protect both working people and the natural environment. Yet divisions between these two actors can yield environmental devastation and attacks on the interests of workers and their unions. The creation of a just and sustainable economy depends on the ability of these two social movement sectors to come together to advance this common goal."
The experts interviewed generally felt that the green job movement has helped create awareness of the significance of unions. A green job is not necessarily a good quality job but the collective bargaining power of unions can help change this. The union of electrical workers called The Brotherhood Of Electrical Workers is one such example. Yet, there is a long way to go. There have been some unionized jobs created in big solar farms but very few, if any, in the renewable energy and energy efficiency sectors. Only some of the work that is contracted out has been unionized.

Gregory et al. (1999) points out that the extent of union involvement in environmental protection is limited as evidenced in organizations such as the World Wildlife Fund, Greenpeace and Friends of the Earth which "together with green initiatives from other 'new social movements', have built a new policy field to which the unions, in the main, do not belong...The extent to which unions can become part of this environmental corporatism is likely to depend on the issues to which they commit themselves and the transparency and force of their shift towards an economic model which promotes sustainability as the domain objective".

5. Impact of the Recession

In order to counter the recession, presidential candidate, Barack Obama, committed to a clean-energy plan that included biofuels, hybrid cars, low-emission coal plants, and renewable sources such as solar and wind that was anticipated to create 5 million green jobs. *The American Recovery and Reinvestment Act of 2009* earmarked $90 billion for projects involving wind farms, solar installations, natural gas fueling stations, biofuel research, and a $5 billion weatherization project for low-income homes. This was expected to give a boost to construction and other jobs related to these projects (Boudway 2012). While it is difficult to predict the exact amount of green jobs created, anecdotal evidence suggests some jurisdictions have put these funds to good use (Mayrl & Mattera 2010). According to a Brookings Institution study, the green economy grew faster than the rest of the U.S. economy during the recession, at a rate of 8.3%. Those sectors that grew fastest were solar thermal, the wind power industry, solar PV and biofuels. Moreover, these provide more opportunities and better pay for low-skilled workers. In California, these jobs have proved to be more resilient to the economic downturn (Muro, Rothwell & Saha 2011).
Some of the experts interviewed felt that green jobs have not led to economy recovery. Only about 10,000 jobs have been created in California during this period compared to 300,000-400,000 jobs lost in construction and the carbon reduction industries (Mattera 2009). Some of the experts spoke about the benefits of *The Recovery Act* which resulted in the creation of short-term specialized jobs and also invested in training to teach workers the skills required in emerging industries such as energy efficiency and renewable energy. The consensus among the experts was that the economic recovery package has been helpful. Investment in

building retrofits, for example, have resulted in keeping building costs down and the money saved can now be used for other purposes.

6. Standard of Living for Workers

For the purpose of this study, the provision of health insurance, affordable housing and a living wage constitute worker standard of living. Each of these are detailed below.
i) Health insurance is a necessary benefit for society. Research shows that the uninsured have shorter life-spans than the insured for a number of reasons. They are more susceptible to diseases due to irregular screenings which presents difficulties in monitoring chronic conditions such as diabetes. Shorter life spans result in tens of billions in lost health capital every year. The costs of the uninsured are transferred to society through lower worker productivity. Research has shown that the benefits to society of having more healthy individuals outweigh the costs of providing health insurance whether it is public or private. Another study advises, "The disparity in care between the insured and uninsured violates principles of democracy and equality and should not be financed by public dollars (Eisenhauer 2006)."

On a different note is the safety of workers in green jobs. A report by the European Agency For Safety And Health At Work discusses how this can be accomplished, "With regard to prevention, at the workplace level, risk assessment remains the key to devising adequate prevention measures that take into account the specificity of the green job considered and the workers involved." With rapidly changing technologies used in the workplace, the report recommends input from technical staff to establish suitable occupation safety and health strategies and policies (Bradbrook, Duckworth, Ellwood, Miedzinski, Ravetz & Reynolds 2013). One such example is the UCLA Labour Occupational Safety and Health Program provides worker education and training in Southern California.

ii) Wage theft occurs when wages are not paid to workers that are legally owed to them and assumes different forms such as not paying workers for overtime or paying them less than the minimum wage. Illegally deducting money from workers' pay checks, paying them late, or simply not paying them at all also constitute wage theft. Besides robbing workers of much needed income, wage theft also results in loss of tax revenue for the state or county (Hernandez & Stepick 2012). Wage theft often prevents workers, especially low-income workers, from earning a living wage.

iii) Affordable housing for workers is also of utmost importance for worker well-being and the government could play a role in shaping policies for its provision. Geography plays an crucial role in this process since geographic areas such as cities, neighborhoods and block groups vary widely in their ability to provide affordable new housing. Generally, a unit is considered affordable if no more than 30% of the household's monthly income is needed to cover monthly housing costs (Feldman & Nissen 2006).

Some of the experts interviewed felt there was no concrete progress made with regard to improved health care, better opportunities for affordable housing or raise in the minimum wage for workers as a result of the green job movement. But there was some impact on wage theft. Some of the work brought in-house through the greening of jobs, has prevented wage theft, felt an expert.

V. Discussion

The growth in green jobs has been affected by a number of factors. First of all, only five percent of the country's energy is from renewable sources. Secondly, cheap energy prices compound the problem because it results in a lower profit margin for suppliers. Thirdly, many private sector companies have still not found their footing in the aftermath of the recession. This has prevented them from taking risks especially in new industries like the alternative energy sector. Manufacturing job losses and a drop in turbine installations are some of the direct consequences of the recession. Hence, those facilities producing primary turbine parts, like blades or towers, are operating below capacity and are therefore, will hire fewer wind technicians in the near future. All this has subdued the market for green energy and adversely affected demand for it (Potts 2010).
While the federal government's stimulus plan aided green job growth, its projections were not met. A study by the Government Accountability Office revealed that the Department of Labour was forced to initiate training programs for green jobs prior to determining the scope of and demand for such jobs. It spent about $500 million in stimulus funds to support more than 100 training programs across the U.S. It did achieve some level of success as the number of participants exceeded

expectations. On the other hand, when 60 percent of training programs had ended, only 55 percent of participants were placed into jobs (Yehle 2013). It has been suggested that this stimulus money would have been better spent if directed towards struggling companies who would employ those being trained in green jobs (Younger 2012). The push towards green jobs has to come from a number of fronts. Hess (2012) presents a scenario in which, if by 2038, 40 percent of energy in the U.S. would come from renewable sources, there would be a 35 percent reduction in electricity consumption due to retrofitting and 30 percent of transportation would use alternative fuels, then green job growth, under these conditions, would constitute 10 percent of all new jobs.

Workers are the ones who reap the benefits when more good quality green jobs are created. The experts interviewed for this study provided solutions to remove the barriers to green job creation. One of the interviewees felt that economic rewards should be provided to corporations as an incentive to create green jobs. Public policies must play a role in the green job movement in creating standards and re-arranging power due to the profit-seeking motivation of corporations. Another interviewee felt that the creation of green jobs depends on the amount of investment and meeting renewable energy goals. However, it creates a barrier when people across the political spectrum don't believe in climate change. A third interviewee opined that there is an opportunity to create green jobs in transportation. At the moment jobs are becoming green rather than new ones being created. More money is needed for green industries to grow such as for retrofitting.

The state government of California has set ambitious goals for energy efficiency in buildings. Yet another interviewee asserted that there was a lot of excitement about green jobs but it didn't create the expected results. But the increased interest should be used as a chance to create better training and apprenticeship opportunities for workers. Overall, the impact has been positive but small. There has been a lot of 'fluff and cheerleading' but the task at hand is to build models for the green job movement that are going to work. It takes a lot to time and effort to create a good model like the one created by the Department of Water and Power. Another interviewee opined that it is time to move from green jobs created by government subsidies to those that are created by the market. When government funding is involved, there is an expectation from unions that the resulting jobs will be unionized. Therefore, workers will be paid at the prevailing wage which is a higher wage resulting in fewer green jobs created. This is not the case when funding is received from private sources. The private sector has had minimal involvement in

training which has been put in place by labour organizations and junior colleges. There is much potential for green job creation in energy retrofits. More importantly, the focus should be raising the standard of living of green jobs workers. This can be done by providing suitable benefits for workers such as health care and safety, affordable housing and transportation, and a living wage. When it comes to health care coverage, California has taken the lead in extending coverage to low-income workers. President Obama's *Affordable Care Act* (ACA) stipulates that employers hiring 50 or more workers who work at least 30 hours/week on the job must offer health benefits coverage or pay a penalty. California was among the first states with a state-based health insurance exchange under the ACA. This exchange, Covered California, is a virtual marketplace that provides citizens and legal immigrants the option to purchase subsidized health insurance if they earn up to 400% of the federal poverty line. The criterion for those who fall under this plan is that they should not have access to affordable employment-based coverage nor should they be eligible for Medi-Cal or other public coverage. Covered California health plans are also available to small employers through the Small Business Health Options Program (SHOP). This represents a significant increase in coverage with minimal cost to the state. An effective outreach strategy will only increase the number of those enrolled in this plan (Lyte et al. 2013).
Better affordable housing options can be offered to workers through increased funding, better land use regulations and innovative programs. Options to fund affordable housing include a county-wide jobs-housing linkage fee which is levied on new commercial, industrial, and retail development to build affordable housing for the jobs created by new development. Other funding options include a housing trust funded by a permanent local revenue source and by private funding if this is not feasible. In selecting suitable sites for affordable housing, the selection process should consider a number of factors with access to transportation being the chief among them. As part of a city's smart growth strategy, keeping equity in mind, reform efforts could include the selection of adequate sites, overlay zoning that offers incentives for higher density affordable housing development and stronger inclusionary zoning ordinances which requires higher in-lieu fees from developers who opt out of building affordable units on-site. Innovative programs such as state-chartered limited equity co-ops (LECs) that offer the possibility of homeownership, where members can take advantage of mortgage interest and property tax deductions from their federal income taxes, can also be explored (Rhee 2003).

One way to ensure a living wage for workers is for cities to attach wage standards to their economic development subsidies. These can be done through community benefits agreements or by enforcing prevailing wage laws such as business assistance living wage laws. These require businesses receiving public subsidies to pay workers wages above the poverty level. While these standards have been successful, critics claim that they prevent businesses from hiring more workers. Thus, they help some workers at the cost of hurting others. There are those who also claim that labour standards attached to business agreements deter investors by sending them an anti-business message. Advocates claim that these do not impact economic development outcomes and wage standards can be used as a tool to create jobs of greater quality without sacrificing jobs (Lester & Jacobs 2010).

VI. Conclusion

The green job movement hasn't come very far and in some jurisdictions, it is at the very beginning of its creation. There are, of course, exceptions to this. California has been a befitting example of fostering a culture conducive to the growth of green jobs through favorable public policies, adequate investment and governmental incentives for investment, the promotion of green energy technology and environmentally-conscious residents. The question, in this case, is whether and how this can be sustained. This certainly seems to be a challenge especially in the clean energy, renewable energy and energy efficiency sectors. Besides building weatherization and retrofitting, there is little growth in other sectors of the energy industry. Additional investment is needed and a lot of it – as one expert pointed out a million dollars of investment only creates 6-10 jobs. Given the low prices of energy, energy suppliers are unlikely to make such an investment and risk running at a loss.

Not all in this study proved negative about green jobs. The green economy grew faster than the rest of the U.S. economy during the recession. In California, green jobs created in sectors such as biofuels were more resilient to the economic downtown. However, compared to the number of jobs lost in the state, the impact of green job growth was miniscule. In some ways, the impact of the recession advanced the progress of the green job movement. The stimulus package allowed the private sector to use its money to make other investments but several questions still persist. How will green job growth be affected once the stimulus money is spent? With its sole focus on profit margins, can the private sector be relied on to invest in green job growth? Can the public-private sector reach an agreement on the co-promotion of green jobs? In some ways, the impact of the recession also impeded progress in the green jobs movement. Those jobs created with the stimulus money were unionized and therefore, paid at a higher wage which resulted in fewer jobs created, this study found.

This study has, to a certain extent, proved that the future of green jobs in the clean energy, energy efficiency and renewable energy sectors of the energy industry is up in the air. The success of the green job movement here will depend on two factors – how much can green jobs grow in the future and how they will affect the standard of living of workers. This paper has already discussed the former. Workers' standard of living will be influenced by the level of training, the collective bargaining power of unions, opportunities for minorities, women and low-income workers. Training programs will have to be catered to the demands of the job market and meet established standards. While the influence of unions does not benefit every green endeavor, this study cites proof that unionized jobs have led to enhanced benefits for green job workers. Increased opportunities for low-income, women and minority workers in the workforce are dependent on green job growth. The more green jobs created, the more work opportunities for these sections of the population.

The social justice theories of Mills, Rawls and Leacock address ways to raise the standard of living of workers. Several of these apply to the context of green jobs. In keeping with the philosophy of these theories, states should find innovative ways to cater to the health and safety of workers, ensure the prevention of wage theft and provide them with a living wage, and satisfy their affordable housing needs. States like California have made a concerted effort to do so. This paper has listed a number of ways how this can be accomplished. Now is the time for other jurisdictions to follow suit in achieving the growth and sustainability of green jobs and a higher standard of living for the green job worker.

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Regionalisation of Labour Law in Africa: The OHADA Project

Philippe Auvergnon *

The regionalisation of labour law can be conceived as the implementation of labour rules and institutions that are specific to a group of States from one part of the world. Although this phenomenon is quite distinct from that of labour law universalisation, it is not necessarily in contradiction with it. Universalisation is promoted and conducted essentially under the aegis of the International Labour Organisation. Via ratifications of its conventions and the application of its recommendations, significant moves are being made towards harmonisation between the labour laws of Member States.

In the case of Africa, leaving aside the period when rules were applied that were specific to the various colonial areas or "empires",[1] developments in labour law post-independence have been influenced more by universalism than by regionalism. In a way, the process has been much the opposite, for example, of the development of Community social law within the European Union. Although there was a sort of harmonisation of labour legislations in the final quarter of the 20th century, with the application of "structural adjustment plans" and "forced" revision of many labour codes or legislations, this was very much driven by the international context and pressures from "donors" (World Bank, IMF) and in no way by any regional will to proceed in such a way.

* Director of Research at the National Centre for Scientific Research (CNRS), Centre for Comparative Labour and Social Security Law, Bordeaux University (France).

[1] *Cf. inter alia,* the survey of labour regulations in Africa in Belgian, British, French and Portuguese "territories" ("Les problèmes du travail en Afrique", ILO Geneva 1958, 791 p.)

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However, the question of labour law and social protection is present in many national Constitutions[2] and Declarations of Rights, such as the African Charter on Human and Peoples' Rights[3] or the Charter of Fundamental Social Rights in the Southern African Development Community.[4] The precise question of labour law harmonisation, meanwhile, has been raised by economic integration projects. Although such undertakings obviously place the emphasis on rights of an economic nature (Customs regulations, taxation, protecting free competition, etc.), the creation of a "Customs union" or "common market" necessarily implies free movement not only of goods, but also of people. On this point, it can be noted that the African Economic Union Treaty (AEU) expresses the commitment of the 51 Member States to take the necessary individual measures, on bilateral or regional levels, to move gradually towards the free movement of people.[5] The Founding Treaty of the Economic Community of Central African States (ECCAS) also makes provision, among its objectives, for the gradual removal of obstacles to the free movement of people, goods, services and capital, and for the right of establishment.[6] The Treaty of the Economic Community of West African States (ECOWAS) is much more explicit, asserting that "Member States undertake to (…) harmonise their labour laws and social security regulations".[7] The West African Economic and Monetary Union

[2] In reality, it is usually in the lists of entitlements in the constitutions or in their preamble that "labour law" is found (e.g. Ivory Coast, Congo, Senegal, etc.)

[3] Charter adopted in 1981 by the Organisation of African Unity, now the African Union (*Cf. inter alia*, the recognition of the freedoms of association (art.10), of assembly (art. 11) of movement (art. 12) and that of the right to work and to equal pay for equal work (art. 15).

[4] Charter adopted in 2003 by Angola, Botswana, DR of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe.

[5] At the initiative of the OAU, the Treaty establishing the AEC was signed on 3 June 1991 in Abuja (Nigeria). It came into force on 12 May 1994.

[6] Art. 4-1, e of the Founding Treaty of the ECCAS of 18 October 1993. The ECCAS comprises the following countries: Angola, Burundi, Cameroon, the Central African Republic, Congo, Gabon, Equatorial Guinea, Rwanda, Sao Tome and Principe and Zaire (currently named the Democratic Republic of Congo). The Treaty establishing the Economic and Monetary Community of Central Africa of 16 March 1994 between six countries (Cameroon, Central African Republic, Congo, Equatorial Guinea and Chad) makes no reference to the free movement of people. This subject seems much more sensitive in Central Africa than in West Africa.

[7] Art. 61, 2, b of the Founding Treaty of ECOWAS of 28 May 1975, as revised on 24 July 1993. ECOWAS includes the following countries: Benin, Burkina Faso, Cape Verde,

(WAEMU) Treaty, meanwhile, states that "subject to those limitations justified on grounds of public order, public safety and public health, the nationals of one Member State shall benefit throughout the territory of the Union from freedom of movement and residence, which shall imply: the abolition of any discrimination based on nationality between the nationals of Member States, in their search for or exercise of their employment, except for civil service jobs."[8]

That economic integration projects should bring with them a will to harmonise part of labour law is in no way surprising. What appears more original, running parallel to this phenomenon, is the development in Africa of "integration via norms". Rather than harmonisation, this has seen the unification of certain laws: intellectual property law,[9] insurance law[10] and banking law.[11] It will be noted that all these laws relate to trade and business.[12] Social security[13] and social welfare law can also be added to this list.[14] The "Treaty of Harmonisation of Business Law in Africa"[15] is part of this movement. It states that it is pursuing this objective by "the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by

Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo.

[8] Art. 91 paragraph 1 of the WAEMU Treaty of 14 November 1973 after its revision of 29 January 2003. The WAEMU includes the following countries: Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal, Togo.

[9] *Cf.* the African Regional Intellectual Property Organisation (ARIPO) created in Bangui on 2 March 1977.

[10] *Cf.* the Inter-African Conference on Insurance Markets (CIMA) created in Yaoundé on 10 July 1992

[11] *Cf.* the banking laws of the WAEMU and ECCAS.

[12] Those laws are more "technical" in nature than "socially sensitive", such as family law.

[13] *Cf.* The General Convention on Social Security of the Joint Afro-Malagasy Organisation (OCAM). This organisation dating back to 1965 ceased its activities in 1985 and the social security convention signed by its members now seems to be "dormant".

[14] *Cf.* The Inter-African Conference on Social Welfare (CIPRES) set up in 1992 by the same States that were to create the OHADA in 1993. The CIPRES aimed to contribute to rationalising social welfare systems and facilitating harmonisation of national provisions applicable to social security system organisations, including by studies.

[15] The Treaty establishing the OHADA was signed in Port Louis (Mauritius) on 17 October 1993 between the following 14 States: Benin, Burkina-Faso, Cameroun, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. Since then, the following have also become OHADA members: Guinea, Guinea Bissau and the Democratic Republic of Congo (formerly Zaire). OHADA thus comprises 17 States.

encouraging arbitration for the settlement of contractual disputes".[16] Business law is defined as "regulations concerning Company Law, definition and classification of legal persons engaged in trade, proceeding in respect of credits and recovery of debts, means of enforcement, bankruptcy, receiverships, arbitration; are also included the following laws: Employment law, Accounting law, Transportation and Sales laws (…)".[17] To date, nine "Uniform Acts" have been adopted and, for some of them, revised.[18]

As early as 1999, labour law was written into the harmonisation schedule of the OHADA.[19] Aware of the "delicate and complex" nature of the subject, the Council of Ministers[20] asked the Permanent Secretariat "to involve the Ministers for Labour and social partners of the Contracting States in the harmonisation process". In 2001, the International Labour Office, at the request of OHADA, conducted a comparative study of labour laws in the "Contracting States", accompanied by proposals to secure uniform legislation.[21] The principle of drafting a "Preliminary Draft" for uniform acts was adopted, without raising any genuine challenges.[22] The heritage of the 1952 French Overseas Territories Labour Code, common to a large part of the countries in the OHADA area, and convergence via the reforms of national codes under pressure from donors, was seen as factors that could facilitate or even justify harmonisation. The economic and social interest of regionalising labour law prevailed, especially as many eminent African legal experts had long been advocating the need for "a relatively uniform, relatively

[16] Art. 1, Treaty on the harmonisation of business law in Africa (http://www.ohada.com/traite.html)

[17] Art. 2. The OHADA Treaty was revised in Quebec on 17 October 2008, without amending Article 2. (http://www.ohada.com/traite-revise.html ; see: P.-G. Pougoué (dir.). "Encyclopédie du droit OHADA". Ed. Lamy Paris 2012, 2275 p.; Cl. Moore Dickerson (ed.). "Unified Business Laws for Africa. Common Law Perspectives on OHADA", Second edition, IEDP, London 2012, 191).

[18] http://www.ohada.org/actes-uniformes.html

[19] *Cf.* OHADA Council of Ministers meeting in Ouagadougou (Burkina-Faso) on 11 March 1999.

[20] The Council of Ministers is composed of the Ministers for Justice and for Finance of the OHADA Treaty Contracting States. The Presidency is held in turn by each of the States for a one-year term. This body has powers to adopt "uniform acts" (unanimously).

[21] *Cf.* J.-M. Béraud. "Etude préalable à l'adoption d'un Acte uniforme en droit du travail dans le cadre de l'OHADA". ILO Geneva: IFP/Dialogue, 2003,102 p.

[22] *Cf.* G. Minet, C. Vargha. *Perspectives du droit du travail en Afrique : entre la voie de l'OHADA et les recommandations de la Banque mondiale*, Education ouvrière 2006/2-3, n° 143-144, sp. p. 76.

homogenised and sufficiently strong legal order".[23] Some enlightened spirits did raise the question, however, of the scope within which social law should be made uniform.[24]
After a long and complicated elaboration process, a draft uniform act on labour law received the approval, subject to some reservations, of the OHADA National Commissions of the "Contracting States" in autumn 2010.[25] As all OHADA uniform acts require unanimous adoption by the Council of Ministers,[26] the unofficial reluctance of at least one Central African State would seem to explain the fact that the text still remains a draft in 2015. However, if our aim is to study labour law in Sub-Saharan Africa today, the OHADA draft must be taken into account. It is already a benchmark, as seen in recent reforms of national codes, for example.[27] At all events, its content bears testimony to the influence of international trends in labour law (I), as well as to an original normative tradition (II).

I. The Mark of International Trends

The technical and financial support provided by the ILO in elaborating the OHADA draft act is not enough in itself to explain the presence in the first title of the act of the "fundamental rights of the person at work". This "head-on" position indicates not only the importance given to promoting fundamental rights (A), but also the role of points of reference, of keys for reading and therefore interpreting, that they are supposed to fulfil for the text as a whole. In times of free-market economic policies, this recognition of fundamental rights at work is not really in contradiction with the quest to make labour law more flexible (B).

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[23] K. MBaye. *L'unification du droit en Afrique*. Revue sénégalaise de Droit, 1971, n° 10 p. 67.
[24] J. Issa-Sayegh. *Questions impertinentes(?) sur la création d'un droit social régional dans les Etats africains de la zone franc*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999 sp. p. 87 et s.
[25] The National Commissions, "extended" to include representatives of the labour administration and social partners in all the Contracting States, were represented in Lomé from 27 September to 2 October 2010.
[26] *Cf.* Article 8 of the OHADA Treaty: "Adoption of the Uniform Acts by the Council of Ministers requires unanimous approval of the representatives of the Contracting States who are present and who have exercised their right to vote."
[27] While contributing to the process of drafting a uniform act intended to replace a large part of their national laws, a number of States have adopted new labour codes in recent years (Togo 2006, Burkina-Faso 2008 and Niger 2012) or are in the process of doing so (e.g. Benin, Ivory Coast and Guinea Bissau).

A. Promoting Fundamental Rights

The writers of the draft intentionally avoided making any express reference to the conventions considered as "fundamental" by the ILO Declaration of 18 June 1998. The text often comes close to them although, in a way, it still remains short of the Declaration (1). At the same time, that is not all there is to it, in that the text also goes beyond the sole "fundamental rights" referred to in the ILO Declaration (2).

1. Short of the 1998 ILO Declaration

The ILO 1998 Declaration indicates that all Member States have an obligation to respect, promote and realise, in good faith, the following principles: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.[28] What about the OHADA draft?

The principle of the freedoms of association and collective bargaining acknowledged by ILO Conventions Nos. 87 and 98 is stated in Article 5 of the draft. The article emphasises, however, that both "workers and employers" benefit from these freedoms. Somewhat surprisingly, although certainly with the intention of asserting identical rights, the same article states that "employers, workers and their representatives enjoy a right of expression on the content, conditions and organisation of work". The elimination of forced or compulsory labour is stated in Article 3, almost in the same terms as those in ILO Convention n° 29. However, it is not the influence of the 1998 Declaration that should be seen here, but the tradition of absolutely prohibiting forced labour in African national laws and codes, some of them following more particularly the French Overseas Labour Code of 1952.[29] At most, it could be emphasised that in precisely taking up the passage in Convention OIT n° 29 indicating what the term

[28] Declaration on fundamental principles and rights at work, adopted by the ILO on 18 June 1998 (*Cf. inter alia*, J.-M. Servais, La Déclaration adoptée par l'OIT en 1998, nouvelle méthode de régulation?, in Ph. Auvergnon (dir.), Les régulations sociales en devenir, Chronique sociale, Lyon, 2008, p. 186).

[29] *Cf.* Art. 2 of the French Overseas Labour Code (Law of 15 December 1952).

"forced or compulsory labour" does not include, the aim was to "protect" certain legal and socio-cultural particularities.[30]
Concerning the abolition of child labour, Article 4 of the text includes the reference to the age of 15 from ILO Convention n° 138. It also mentions, and fortunately so in light of national realities, the variations provided by the international standard. In addition to this, Article 4 lists the "worst forms of child labour" that are prohibited, using the terms of ILO Convention n° 182.[31] Finally, in line with ILO Convention n° 111, Article 6 of the draft prohibits "any discrimination in employment and working conditions". However, some differences can be noted from the international standard as regards certain grounds or criteria of discrimination, such as the omission of "social origin" but the addition of "ethnic group" and "trade union membership". In addition to this, no mention is made, even implicitly, to Convention n° 100 and to "equal remuneration". Strangely, it is in the heart of the text, in Article 115, that it is stated that "For equal working conditions, qualifications, productivity and service quality, wages shall be equal for all workers, whatever their gender."[32]

2. Beyond the 1998 ILO Declaration

Article 7 of the OHADA draft asserts one right that is missing, astonishingly, from the 1998 Declaration: "All workers are entitled to protection of their health and safety at work". At a time when the ILO, building on the 1998 Declaration, is promoting "decent work", is it not, indeed, an essential right to be able to work in safe, healthy conditions? We know the extent to which this question, for obvious economic but also cultural reasons, is a sensitive one in OHADA countries[33]. Of course, it is physical health and safety that are referred to here in most cases. However, it is also the "fundamental" protection of the psychological or mental dimension of worker health that is intended. Evidence of this is

[30] *Cf.* Art. 2, pt 2 of ILO Convention n° 29 (e.g. minor communal services).
[31] *Cf. inter alia*, P. Kalay, Application de la convention n° 182 de l'OIT en République Démocratique du Congo. Cas des enfants soldats, Editions universitaires Européennes, 2012, 128 p.
[32] *Cf. inter alia,* N. Silue, L'égalité entre l'homme et la femme en Afrique noire francophone. Essai sur la condition juridique de la femme en droit social ivoirien, PhD Thesis, University of Paris Ouest la Défense, 2008, 634 p.
[33] *Cf. inter alia,* Ph. Auvergnon (dir.), Du droit de la santé et de la sécurité au travail en Afrique subsaharienne, Ed. L'Harmattan, Paris, 2014, 282 p.

the fact that the fundamental right asserted in Article 7 is followed in Article 8 by another innovation, prohibiting "any violence resulting from a situation in which the worker is persecuted, threatened or assaulted, mentally or physically, in the execution of the employment contract (…)", and "any moral or sexual harassment at work resulting from abusive and repeated conduct of any origin". It is clearly the person as a "whole" who is being granted a fundamental right to health and safety at work.
Another original contribution of the draft certainly resides in the prohibition, in the "fundamental rights" chapter, of "any discrimination against a worker with a disability or serious illness, in particular HIV, who is fit for employment". Such an assertion bears clear testimony to a determination to take account of certain realities but also, and above all, to reject any exclusion for which there is no objective justification. Given that fundamental rights, including at work, do contribute to the model of society, it is not surprising to see that Article 9 of the draft states that any breaches of those rights "give rise to charges."[34]

B. Making Labour Law More Flexible

The project contains a definition of the term "worker" implying that of the "employment contract". It states (possibly echoing the forced labour of the colonial days?) that this contract is individual and entered into freely." It seems realistic, in light of the usually informal employment relationships, when it states that "the existence of the contract is ascertained, subject to the provisions of this Uniform Act, in the forms the contracting parties choose to adopt". But in reality it makes extensive provision for formal relations. De facto and de jure, the OHADA draft intends to provide workforce management tools for investors, rather than large corporations in fact, by diversifying contract forms (1), offering possibilities for adapting working time (2) and facilitating contract termination (3).

[34] OHADA powers include the definition of criminal qualifications, but it does not have the power to set the applicable sentences. That power remains in the hands of each Member State.

1. Diversified Contract Forms

Unlike French law, but like in Spanish law for example, it is not stated that the common law employment contract is an open-ended one: "the contract may be for a fixed term or open ended".[35] The "normal" contract may therefore be a fixed-term one. When this is the case, the employment relationship is subject to genuine formal requirements. It is drawn up in writing[36] and, in principle, signed for at least two years, renewable once.[37] However, this principle of non-renewal does not apply to a certain number of workers,[38] including workers employed by the day, seasonal workers, workers taken on to carry out work resulting from an exceptional and temporary increase in activity, those employed for the provisional replacement of a worker, or workers in sectors of activity in which it is habitual not to enter into open-ended contracts. If we also note that use of fixed-term contracts is not restricted to precise hypotheses, it will be seen that they can be used very freely and, in certain cases, without any limits (replacements, increases in activity, daily workers, seasonal workers, etc.).

The "part-time contract", meanwhile, is defined by the duration of work, which must be at least one-fifth less than the official or normal working hours. The reference to the former French rules of 1982 is evident here. Whether the contract is open-ended or for a fixed term, it must be in writing and contain a certain number of items of information (qualification, pay, weekly working hours, etc.). Provision is made for the possibility of doing "additional" hours on top of those specified in the contract, subject to the worker's agreement, paid as "normal" working hours and not as "overtime".[39]

Finally, we should note the generalisation, if not the consecration, by the OHADA draft of "temporary agency work",[40] with the existence of a "temporary employment contract entered into in writing between the temporary employment agency and the user company".[41] Unlike fixed-

[35] Art. 11.
[36] Art. 20.
[37] Art. 22.
[38] Art. 23.
[39] Art. 24.
[40] Art. 72.
[41] *Idem.*

term contracts,[42] there are conditions on the use of temporary contracts which "must not have the purpose or effect of filling a position linked to the normal, ongoing activity of the user company on a lasting basis. Workers from temporary employment agencies may only be used for the execution of a precise, temporary task, referred to as an "assignment", particularly in the following cases: replacements of a worker whose employment contract has been suspended; temporary increases in the activity of the company; seasonal work. In no case may the temporary work contract be entered into to replace a worker whose contract has been suspended further to a collective labour conflict or to carry out particularly dangerous work".[43] The temporary contract is in writing and must contain "a precise term" or "be entered into for a minimum term".[44] In all cases, its duration may not exceed two years, renewals included.[45]

2. Adaptations of Working Time

Given the habitual scale of agricultural holdings and the traditional ways in which workers are managed in agriculture, it might be seen as surprising to find annualised working time specified for farms, set at 2,400 hours.[46] Is the aim here to target large companies, and in particular forestry? Whatever the case, it is far from certain that there is any great demand for annualised working time management among most of the agricultural holdings in the African countries concerned here! More generally, certain provisions on working time demand resources and skills that are rarely available in a small or medium-sized company; such is the case of equivalent working hours[47], hours of duty on call[48] and monthly or annual overtime allowances without the authorisation of the Labour Inspector.[49] Other provisions may also appear somewhat "out of synch" with certain socio-cultural realities, such as the notion of hours worked.[50]

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42 The difference in the treatment of these two forms of "precarious" contract reveals different periods in the reworking of the draft and also the variety of experts involved and of the "minds" that made their contributions.
43 Art. 73 of the draft.
44 Art. 75.
45 *Idem*.
46 Art. 81 of the draft.
47 Art. 82.
48 Art. 84.
49 Art. 86.
50 Art. 83.

Mention should also be made of the highly technical nature of certain forms of working time adaptations. It is stated that "To meet the demands of the workers or needs of the company, the employer may depart from the rule after obtaining the opinion of worker representatives, if there are any, and informing the Labour Inspector".[51] While "Each Contracting State sets the terms of application of individualised working hours within the framework of the regulations, collective and branch agreements",[52] it is stated that "Individualised working times may, within the limit of a number of hours set by each Contracting State, cause working hours to be carried over from one week to another, without those hours having an effect on the number and payment of overtime hours, provided that they are the result of a free choice by the worker in question".[53] It is even specified that "Individualised working times may comprise a fixed time to be respected by all workers and a mobile time placed either before or after the fixed time, to allow the worker to choose their times of arrival at, or departure from work freely".[54] Mention could also be made of the provision on the organisation of working hours in the form of a work cycle.[55] We will also note the very free conception of making up any working time lost further to a collective work stoppage[56], on account of the "notably" preceding the indication of the different cases... and therefore allowing, *de facto*, all time to be made up, including for the purpose of limiting the financial effects of any collective conflicts.

3. Facilitating Termination

Regarding economic redundancies, the OHADA draft confirms the abolition of any requirement of authorisation from the labour administration, replacing it by a simple opinion.[57] It also contains a certain number of provisions facilitating terminations by mutual agreement. For instance, the employment relationship may be terminated by "the expression of the common wish of the worker and employer to end the employment contract amicably[58], whether the contract is open-ended or

[51] Art. 87.
[52] *Idem*.
[53] *Idem*.
[54] *Idem*.
[55] Art. 89 of the draft.
[56] Art. 90.
[57] Art. 38.
[58] *Idem*.

for a fixed term".[59] It is also specified that "the economic redundancy procedure is not applicable in the event of an amicable termination agreement freely negotiated between the employer and the worker."[60]
The key variable in facilitating contract terminations certainly remains the question of compliance with proper procedures and of the penalties in the event of unjustified redundancies. On the former point, the draft achieves genuine uniformity, making provision only for the possibility of "damages" and limiting the amount of any such damages: "If the redundancy is made on legitimate grounds but without observing the formal procedure of serving written notice of the redundancy or indicating the grounds, or without the worker having had the possibility of explaining himself or herself, or during their period of leave, this redundancy shall be considered irregular in its form but may not be considered an unfair dismissal. The Labour Tribunal may, however, award the worker compensation for the failure to comply with these rules, although the amount of said compensation may not exceed two months of gross wages".[61] On the second point, that of penalties for any redundancies made on personal or economic grounds that prove to be unjustified, we know that the national laws in question have very largely dropped the sanction of reinstatement, preferring payment of damages in reparation for the prejudice suffered by the employee.[62] Some national laws make provision for a minimum and/or maximum, others neither a minimum, nor a maximum. Judges have been seen to sentence employers who have made unjustified redundancies to very high damages of as much as three or even five years of wages, without any motivation of any kind in terms of the actual prejudice suffered by the employee.[63] In these conditions, visibly seeking to "rein in" the judges, the draft states that the amount of damages may not be less than three months of wages and may

[59] Art. 60 of the draft
[60] Art. 57.
[61] Art. 41.
[62] *Cf.* J.-M. Béraud, *op. cit.*, p. 37 et s.
[63] From the point of view of "securing the business world", it is logical that a ceiling be placed on damages. From the social justice point of view, however, it is more debatable. We should stress that none of the countries concerned has an unemployment benefit system. Workers who are made redundant "unfairly" have no replacement income. Also, "their" wage provides for a family that does not have the limited scope of European families, but often comprises tens of people… It is therefore far from stupid that judges in Africa should decide "in the light of the future rather than of the past" (*Cf. inter alia*, A. Koné, Précarité et droit social ivoirien, PhD thesis, University of Paris Ouest Nanterre La Défense, 2011).

not exceed one month wages per year of service in the company.[64] This is very clearly in line with the "quota restrictions" approach adopted to provide security for employers and other potential investors, without being too restrictive in the framework applied to judges in setting the amounts of damages.

II. Part of a Normative Tradition

The aim here is in no way to claim any return to an improbable "customary labour law". Although we cannot deny the presence of legal phenomena in pre-colonial Africa,[65] historically, labour law is –sometimes, unfortunately, still – an imported product in Africa.[66] The reference normative tradition is primarily that of the old colonial powers, meaning essentially Belgium, France and Portugal for the OHADA area. On this point, it should be emphasised that the roots of current labour laws do not draw on the laws that applied in the colonising States, but on the legislation and regulations that they produced specifically for "their" colonies. Finally, while the legal traditions of the colonial countries have shaped what is essentially a State norm, it has evolved since then in line with the different political histories of the countries after independence. A part of the provisions of the OHADA draft thus refer to a labour law designed to be "progressive" and "protective". Such is the case of the reference to the application of the more favourable norm in social terms (A). It also places original obligations upon employers to respect and provide for the time the worker has for their life outside working hours (B). In line with the different national laws, the draft is attentive to respect for authority and to avoiding conflicts in companies (C).

A. Reference to the More Favourable Norm

In the provision defining what a "branch agreement" or a "collective labour agreement" is, a clear reference is found to the so-called principle

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64 Art. 46 of the draft.

65 *Cf. inter alia*, H. Lévy-Bruhl. *Introduction à l'étude du droit coutumier africain*. RIDC 1956, p. 67-77 ; J. Vanderlinden, Les systèmes juridiques africains, PUF, coll. Que sais-je ?, n° 2103, 1983, 127 p.

66 *Cf. inter alia*, A. Emane. *Le droit du travail à la croisée des chemins : l'exemple du Gabon,* Bulletin de droit comparé du travail et de la sécurité sociale, 1999, p. 154.

of the more favourable norm. Admittedly, it is simply stated that "The branch or collective agreement may contain provisions that are more favourable to the workers than those in the present Uniform Act and the laws and regulations in force in the contracting State",[67] and that "The provisions of branch or collective agreements may not depart from those of public policy".[68] However, it is also stated, regarding the territorial or professional scope of the branch or collective agreement, that "except for clauses to the contrary that are more favourable to workers, an establishment collective agreement cannot depart from a collective agreement of a company to which the establishment is attached", that a "company collective agreement cannot depart from an ordinary or extended branch agreement to which the company is subject" and that a "branch agreement cannot depart from an inter-professional collective agreement".[69] The hierarchy of agreements is thus clearly set out, with the only acceptable exemption being a reference to a provision that is more favourable to the worker.
In these times of economic globalisation and of calls to adapt labour law by means of collective agreements, it might seem astonishing that the OHADA draft should remain true to the old principle of "public social policy" which once prevailed in the countries of mainland Europe but is now being challenged.[70] The absence of any debate on this point during the preparation of the OHADA draft raises questions. It would seem that those drafting the text made the choice, through the harmonisation-uniformity process, to give priority to streamlining and to making individual rights more flexible. The "sacrosanct principles", such as the application of the more favourable norm and collective rights, have not been "attacked", or only a little. Visibly, the aim was to limit the risks of social or political reactions, and in particular not to provoke the trades

[67] Art. 202.
[68] *Idem*.
[69] Art. 202. As a general rule, mention should be made of the few references found in the OHADA draft to this specific feature of certain African national labour laws, the "national inter-professional branch agreement" (*Cf. inter alia*, M. Samb, "La convention collective nationale interprofessionnelle en Afrique noire francophone", Thesis, Dakar University, 1988).
[70] *Cf. inter alia*, the undermining of branch agreements in Germany by the development of atypical company bargaining. From 1982 onwards, meanwhile, French law saw the development of legal possibilities for "*in peius*" exemptions by means of negotiation. Since 2004, inter-professional, branch or company agreements can contain provisions varying entirely or in part from the provisions that are applicable under an agreement covering a broader territorial or professional scope.

unions. We may also wonder, however, whether this "non-discussion" is not a sign of the formal nature of certain parts of the laws of countries in the OHADA area. In this respect, there would appear to be little problem in asserting such a principle given the ineffectiveness of collective bargaining in Africa[71] and the extent of "informal" employment relationships. However that may be, the formal attachment to the principle of applying the more favourable norm and allowing no possibility to negotiate a "less favourable" standard, is the sign of a law that continues to strive to "protect" workers, above all else.

B. "Non-working" Hours

The OHADA draft also displays its protective spirit in very practical terms, by placing transport and travel expenses at the expense of the employer (1). More classically, in principle, it provides a framework for a certain number of absences from work, considering some of them as effective hours worked and thereby implicitly allowing certain socio-cultural particularities to be taken into account (2).

1. The "Positive" Right to Transport Expenses

In the OHADA draft, traces can be found of colonial regulations placing "travel and transport expenses" at the expense of the employer.[72] This is not a formal resurgence. This type of provision is present in some labour codes[73] and is effectively applied to a certain extent. It can be seen as an example of the sometimes very practical nature of African law.[74] It refers to "the travel expenses of the worker, their spouse and minor children"[75]

[71] *Cf. inter alia*, P.-G. Pougoué et J.-M. Tchakoua. *Le difficile enracinement de la négociation collective en droit du travail camerounais*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999, p. 198.

[72] *Cf.* Art. 125 to 132 of the Overseas Labour Code, *op. cit.*

[73] For example, Article 94 of the Cameroon Labour Code, Articles 156 et seq. of the Senegalese Labour Code, Articles L. 164 et seq. of the Malian Labour Code… In general, the branch agreements make provision on this point.

[74] *Cf. inter alia*, G. Chrétien-Vernicos, Introduction historique au droit, Cours Paris 8 University, 2001-2002, sp. p. 70.

[75] It should be noted, however, that the family referred to here is always wisely limited to the children habitually residing with the worker and "his or her" spouse.

and "expenses for transport of their luggage",[76] notably on journeys "from the place of work to the habitual place of residence and vice versa" in the cases of "normal leave, redundancy, termination during the probationary period", but also expiry of a fixed-term contract, except for "gross misconduct by the worker", etc. Some might be surprised by the continuation of such provisions which increase the "social charges" of the employer when the spirit of the draft is very much a free-market one on so many other points. Others will point to certain perverse effects, such as discriminatory recruitment practices.[77] Obviously, the realities will differ from one sub-region to another and even from one country to another. We can also see these provisions as revealing a singular trait of labour relations in Africa, and more particularly the idea that prevails there of the role and obligations of the head of the company, who is more than just a "boss" or an "employer". In many ways, he is a "father" on whom workers rely, but from whom they also expect protection, or at least a certain attention.[78]

This latter type of explanation may help us understand why the OHADA draft provides that "Workers who have finished their service and are waiting for the means of transport designated by their employer to return to their habitual place of residence, receive from their employer an allowance equal to the wage they would have received if they had continued to work,"[79] and that they "continue to be entitled to fringe benefits".[80] Finally, we will note the astonishing provision, and one that is highly revealing of the role of the employer and of the values of society, that in the "case of a death in the place of work of a displaced worker or of a member of the family whose journey was at the expense of the employer, repatriation of the body to the habitual place of residence is at the expense of the employer".[81] This is an undeniable example of the

[76] Art. 106 of the draft act.

[77] According to Labour Inspectors, as these provisions are somewhat effective in Senegal, employers today would seem to take care to ensure that they employ only workers who do not need to travel

[78] *Cf. inter alia*, O. Sidibé, *Réalités africaines et enjeux pour le droit du travail*. Bulletin de droit comparé du travail et de la sécurité sociale, 1999, p. 130 et s.

[79] Art. 107 of the draft.

[80] *Idem*. It is stated, however, that in order to benefit from this provision, the worker must make a "written request" within "a period of three months as of termination of his or her contract" (*Cf.* Article 107). It is not certain that such a procedure corresponds to the way in which such problems are really dealt with in practice...

[81] Art. 108 of the draft.

adaptation and integration of labour law in relation to major socio-cultural realities.[82]

2. Recognised and Potential Grounds for Absence

The OHADA Uniform Act takes little in the way of risks when it indicates that "official holidays are determined by the contracting State, as is the applicable system of work and remuneration."[83] It remains very "classical" on the determination of paid leave and acquisition of paid leave entitlements.[84] Certain cases in which the contract is suspended are considered, fairly habitually, as "effective hours worked"; such is the case of "illness duly ascertained by a physician", occupational accidents or illnesses, the "rest period for women benefitting from the provisions relating to maternity", strikes and lock-outs "organised in compliance with the procedures", "temporary or economic lay-off periods" and "educational leave".
Any "absence of the worker authorised by the employer by virtue of the regulations, branch or individual agreements" is also considered as part of the "effective hours worked".[85] This provision makes it possible to take account of a variety of grounds for absence, depending on the country, but above all of those that are often imposed *de facto* on employers in Africa relating to social rituals and, more singularly, situations of bereavement.[86] This is confirmed in a way by the provision in the draft stating that "Within the annual limit of ten working days, any exceptional permission granted to the worker on account of family events directly affecting his or her own household may not be deducted from their paid leave entitlement."[87] The word "directly" is visibly intended to be restrictive. The fact still remains, however, that everyone is aware that "in African culture, the obligations of the worker towards the company do not take precedence over their duties to society."[88] Certain absences, sometimes long, must be respected. If it is to be effective to some extent,

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[82] *Cf. inter alia* O. Koné. Contribution à l'étude d'un droit du travail adapté à l'Afrique subsaharienne francophone à travers l'exemple des Etats d'Afrique de l'Ouest. PhD Thesis, Toulouse I University, 2010.
[83] Art. 100 of the draft.
[84] Art. 101, paragraphs 1 and 2.
[85] Art. 101, paragraph 3.
[86] *Cf. inter alia*, O. Sidibé, *op. cit.*, p. 130-141.
[87] Art. 102, al. 1.
[88] O. Sidibé, *op. cit.*, p. 136.

it appears important that labour law, particularly in Africa, must "espouse" certain socio-cultural realities. This is the case, somewhat timidly, of the OHADA draft.
Other provisions concerning "non-working" hours should also be mentioned. For instance, there is a provision for "authorisations of absences without pay (…) granted to workers to allow them: to follow an official training course, popular education or international sports training, or to attend congresses of any trades union for which they hold an office or regular mandate, or to take school, university or professional examinations."[89] The hypothesis can be put forward here that this is a sign of a certain African "political correctness", or at the very least of a trace of the sort of provisions that were characteristic of certain "socialist" labour laws in the wake of independence. The attention paid to the "sports" question is perhaps more "real and serious". Football is not explicitly mentioned, but its social and therefore political importance everywhere in Africa is well known. The draft does not hesitate to encourage Contracting States to provide "within an annual limit of thirty working days, (…), a special complementary regime for the authorisation of absences, (…) for the benefit of workers called upon by the competent administrative authority to take part in training courses for sports administrators or preparatory training sessions for national sports selections."[90]

3. Respect for Authority and Conflict Avoidance

The extent to which "social relations in traditional societies can be described as communitarian"[91] has already been stressed, with people being grouped in a variety of communities, and although it is not that they are never perceived as isolated individuals, it is only with difficulty that they are seen as such,[92] with legal personality existing only through their place and their status in the community. This community is not defined

[89] Art. 102, paragraph 2.
[90] Art. 102, paragraph 3.
[91] G. Chrétien-Vernicos*,* Introduction historique au droit, *op. cit.*, p. 67.
[92] This explains, for example, the fact the question of individual liberties at work, although not totally foreign, is addressed in Africa as a problem of given communities or categories (*Cf. inter alia,* E. Kalula, P. H. Bamu, Non-discrimination au travail et responsabilités familiales : perspectives sud-africaines, in Ph. Auvergnon (dir.), "Libertés individuelles et relations de travail : le possible, le permis et l'interdit", Presses Universitaires de Bordeaux 2011, p. 339.

by resemblances, but by the fact that people share the same life.[93] This places greater emphasis on specific features, which are seen as being complementary, than on similarities, and on the hierarchy or hierarchies than on equality. The specificity of each individual is necessary for the life of the others. In addition to this, the community "coincides with an area in which the same rules apply",[94] in the priority interest of the collective group. Once again, there is no question here of saying that the law on labour relations in Sub-Saharan Africa has as its ancestor a customary law that in fact has never existed. It is not forbidden, however, to consider that its reception and appropriation after independence have been shaped by specifically African approaches to social relations. Whatever the case, like most of the labour laws of OHADA member countries, the draft seems to be careful not to challenge the authority of the head of the company (1) and to avoid collective conflicts (2).

1. Protecting Authority within the Company

Do the obvious need to respect order within the company and the powers of figure at its head explain the brief nature of the provisions in the Act on discipline? Whatever the case, the disciplinary law that is introduced is not particularly binding (a). In addition, priority is given to an "integrated" representation of the personnel, with an obvious effort to boost "ties" rather than trouble (b).

a) Loose Disciplinary Law

A whole "chapter" of the draft is dedicated to the company rules and to disciplinary law, but it contains only three articles.[95] It is merely stated that company rules "are drawn up by the employer"[96] and that their content is exclusively limited to rules relating to the technical organisation of work, to discipline, to occupational health and safety guidelines and to wage payment terms".[97] It is indicated that "any other clause, notably relating to

[93] *Cf.* not. G. Chrétien-Vernicos, *op. cit.*, p. 67-70.
[94] *Idem.*
[95] Art. 110, 111, 112 of the draft.
[96] Art. 110, paragraph 1.
[97] Art. 110, paragraph 2.

setting remuneration, is null and void by rights"[98] and that "entry into force of the company rules is subject to those rules having been disclosed to the worker representatives, when there are any, and to approval by the Labour Inspector".[99] However, the scope of application, and therefore of the obligation of drafting company rules, remains highly uncertain, given that "the terms of disclosure, filing and display of company rules and the number of workers in the establishment above which such company rules become compulsory, are defined by the contracting State".[100]
The only "positive right" in this part of the draft resides in the assertion that "it is prohibited for the employer to impose any fines"[101] and in the provision that "the only penalty under the disciplinary powers of the employer which may result in the employee being deprived of wages is suspension, the maximum duration of which is eight days".[102] In passing, it is not uninteresting to note the use of the term disciplinary "powers" of the employer. Although everything seems to have been done to allow the employer to act as freely as possible, we should not come to too hasty a conclusion that a choice has been made here to allow what would be termed "arbitrary" employer powers in other parts of the world. This again raises the question of deference to the community spirit. The head of the company may do many things, but not just anything. It has been stressed that "in African culture", the boss is "considered quite simply like a chief, meaning a benefactor";[103] he is the guardian of the necessary and unchallenged order but cannot do anything himself that "breaches" the rules governing that order. For example, a worker "would consider any penalty for arriving late due to a major social event to be totally unjustified".[104] The fact remains, however, that rules could have been provided here to govern the right to punish people within the company, without necessarily imposing a cumbersome disciplinary procedure that would not be suited to actual practices and which is rarely provided by national legislation anyway.[105]

b) "Integrated" Worker Representation

[98] Art. 110, paragraph 3.
[99] Art. 110, paragraph 4.
[100] Art. 110, paragraph 5.
[101] Art. 111.
[102] *Idem.*
[103] O. Sidibé, *op. cit.*, p. 136.
[104] *Idem.*
[105] *Ex.* Equatorial Guinea and Guinea Bissau (J.-M. Béraud, *op. cit.*, p. 46).

Although a whole title of the draft Act is devoted to worker representation and trade union rights, and nineteen articles address the question of "worker representatives"[106] and twenty that of "trade unions",[107] priority is clearly given to promoting elected representation within the company rather than "trades union representatives". Should this be seen as a sign of wariness towards any forces that are "external" to the working community and which are more likely to challenge order than to contribute to internal regulation?

The draft clearly adopts an approach of harmonising the majority national options. With the exception of Equatorial Guinea which has no worker representation, all the countries in the OHADA area have elected "worker representatives". However, only a minority of national legislations provide for the possibility of "trades union representatives".[108] The option that was chosen is therefore that "when at least ten workers are employed, the workers elect their representatives". The elections are organised at the "initiative" and held "under the responsibility of the employer".[109] Although it is stated, somewhat surprisingly, that "Any worker representative may be dismissed during their term of office by the college of workers that elected them",[110] the choice of the duration of that term of office is left to each Contracting State.[111] The States are also authorised to create "other types of worker representation, the members of which may benefit from the same protection as that granted to worker representatives".[112]

A minimum allowance of fifteen hours for worker representatives is defined for them to fulfil their missions.[113] In addition to the monthly

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[106] Art. 163 to 181 of the draft

[107] Art. 182 to 201.

[108] This is the case of Burkina-Faso, Congo, Ivory Coast, Mali, Niger, Chad and Togo (since the 2006 code). The workforce threshold above which the "designation" or "appointment" of trades union representatives is possible varies from 11 to 100 employees.

[109] Art. 163, paragraph 1.

[110] Art. 164, paragraph 2.

[111] Art. 167.

[112] Art.169. We can think here of the introduction of protection for "trades union representatives" or members of original institutions in certain countries ("Standing Committee for Economic and Social Consultation" in Gabon, "Works Committee" in Niger, etc.). At the same time, we may have concerns as to the permission given to employers to create "rival" or "alternative" representation bodies.

[113] Art. 170, paragraph 1.

meeting with the employer,[114] these missions include presenting the employer with any "individual or collective claims", "opinions or remarks on any economic redundancy measures that are being envisaged" and referrals to the Labour Inspector of "any complaints or claims", and also informing the employer of "suggestions and observations to improve the organisation and productivity of the company" and "negotiating collective agreements in the absence of trades union representatives". On this point, we can question this de facto transfer of collective bargaining within the company – when there is any! – to worker representatives who are the only people in the company, by the terms of the draft, to benefit from a "protective status" requiring authorisation by the Labour Inspector of any redundancy plans concerning them.[115]
At this point, we should point out two national "reservations" expressed regarding the OHADA draft. The first concerns the provision requiring the reintegration into the company of any worker representative whose redundancy has been invalidated by a judge.[116] The second concerns the freedom of movement in the company of the worker representative within the framework of their use of the allowance of hours for their mission.[117] These two "reservations" and the absence of any compromise[118] show, if any such evidence were necessary, the determination to preserve the status of the head of the company and the acceptance of an "integrated" or even "controlled" form of worker representation, or at least one that does not challenge authority and order.

2. Focus on Conflict Avoidance

The OHADA Draft Act bears testimony to a wish to maintain a balance between the different interests present in the work community and to avoid any social tensions to the extent possible. It shows a particular determination to prevent collective conflicts (a). However, although preference is given to negotiation "when working relations become turbulent",[119] "cold" collective bargaining seems not to be very

[114] Art. 171.
[115] Art. 179, paragraph 1.
[116] Art. 180, paragraph 3.
[117] Art. 1 did not come to an agreement
[118] *Cf.* The summary report of the meeting of OHADA national commissions held in Lomé in 2010 mentions these two articles as "articles on which the Contracting States did not come to an agreement".
[119] P.-G. Pougoué and J.-M. Tchakoua, *op. cit.*, p. 198.

"dynamic", singularly in French-speaking Sub-Saharan Africa.[120] On this point, the project has little in the way of innovation or incentives, merely proposing to harmonise a very formal law (b). Finally, it conserves an important role for the labour administration (c).

a) A Law to Prevent Collective Conflicts

In Sub-Saharan Africa, there is a tradition of preventing – if not to say sometimes prohibiting – collective conflicts. History, and notably the colonial past,[121] coincide here with a "cultural" desire for conflict avoidance and to protect the interests of the company,[122] but also a more political wish to control social movements.[123] Without distancing itself from such a tradition, the draft proposes a "modernising" harmonisation of the national normative solutions. For example, "lock-outs" are only treated on an equal footing with strikes in a minority of the legislations of the OHADA area,[124] while the others simply prohibit them or only allow them in response to the illegal organisation of a strike or when a strike makes it impossible to ensure safety. The draft adopts the majority view: "A lock-out is legal notably in cases or force majeure or in response to an illegal strike paralysing the activities of the company".[125] This is therefore a right granted to the head of the company but on a minimal basis. In no way does it take account of the theory of "equality of arms".[126]

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120 While a country like Mali does not have this original type of "national inter-professional collective agreement", other countries do, such as Benin (agreement revised in 2005), Burkina-Faso (1974 agreement), Ivory Coast (1977 agreement), Togo (revised in 2011). The CCNI of Senegal dating from 1982 and that of Niger dating from 1972 are currently being revised in 2014.

121 Article 218 of the Overseas Labour Code of 1952 in force in the French colonies stated that strikes and lock-outs were prohibited whenever they were held before exhausting all the reconciliation and recommendation procedures. This wording is included today in certain labour codes (e.g. Art. 388 of the Burkina-Faso Code).

122 *Cf. inter alia*, J. Ndyaye. *Droit du travail Senegalais et transfert de normes*. Bulletin de droit comparé du travail et de la sécurité sociale, 2005, sp. p. 174.

123 *Cf. inter alia*, J.-M. Tchakoua. *Sources d'inspiration et logique du droit camerounais des conflits collectifs de travail*. Bulletin de droit comparé du travail et de la sécurité sociale, 2005, p. 177.

124 E.G. Cameroon, Gabon, Senegal, Chad.

125 Art. 243 of the draft.

126 Unlike, for instance, article 157 (5) of the Cameroon Code defining lock-outs as the closure of an establishment "to put pressure on workers who are striking or threatening to strike".

Strikes, meanwhile, are defined as "the collective and coordinated cessation of work with a view to backing professional demands or defending the economic and social interests of the workers".[127] This is undeniably a liberal definition. For strikes, there is a conflict prevention procedure organised around a "negotiation-conciliation" phase of a maximum duration of twenty days[128] and, failing a solution, three-day advance notice of the strike.[129] The model provides an incentive for negotiation over conflict, although it does not necessarily lead to a de facto ban on the (legal) exercise of the right to strike, as can be the case when legislations provide for periods of fifty or seventy days prior to the strike.[130] We should not conclude too hastily, however, that the approach is a permissive one. The spirit of avoidance or even countering of conflicts would appear to have prevailed when the general assertion is made that "the right to strike implies an obligation to provide a minimum service",[131] the terms of which are defined by the "competent administrative authority", at the same time as the "list of occupations" necessary to provide "essential services",[132] and that in case of "a failure to comply with the minimum service", it is possible to proceed "at any time with the requisition of those workers in private companies or public establishments and services who occupy positions that are indispensable for the safety of property and people, for maintaining public order, for the continuity of public services or for the satisfaction of the essential needs of the community".[133]

b) Formal Bargaining Rights

In addition to being perceived as a threat to the powers of the head of the company, the development of collective bargaining supposes a certain number of prerequisites, such as genuine autonomy of the parties and "in-

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[127] Art. 244 of the draft.
[128] Art. 244, paragraph 2.
[129] Art. 244, paragraph 4.
[130] 13 days for conciliation followed by a 30-day advance notice in Senegal, 50 days in Togo, 70 days at least in Equatorial Guinea, etc. On procedural restrictions on the right to strike in West Africa: P. Kiemde, *La règlementation du droit de grève au Burkina-Faso*, *op. cit.*, sp. p. 60-61.
[131] Art. 246, paragraph 1.
[132] Art. 246, paragraph 2.
[133] Art. 246, paragraph 3.

depth knowledge of the elements of the negotiation".[134] In such matters, the situation is often one of "great deprivation of trades union organisations: from a technical point of view, skills are few and far between and their mastery of economics is very relative. From the point of view of internal organisation and field presence, the trades unions are far from showing a reassuring face. Moreover, new-found pluralism poses a crucial problem that was long hidden by monolithic trade unionism: the question of the representative nature of trades unions".[135]

The call put out by some to "liberate the forces of collective bargaining"[136] does not appear to have been much heeded by those writing the OHADA draft. There is no obligation to negotiate within the company, although it is possible to make agreements, the main purpose of which is to "adapt to the specific conditions of the company or establishments in question, the provisions of the inter-professional collective agreements, branch agreements, professional or inter-professional agreements or regulations adopted by the contracting State in the absence of branch agreements."[137] In a very classical manner, this "adaptation" is made in compliance with the more favourable norm principle referred to above.[138] The scope of bargaining within the company is not specified in any more detail; only those branch agreements that are likely to be extended are subject to a list of mandatory themes.[139] In reality, what seems to have been done here is a very classical, formal harmonisation of collective bargaining law that provides little incentive. The only original contribution resides in the determination of the representative nature of the trades union[140] or employers' organisation[141] taking part in bargaining. However, the draft would appear to reserve this obligation to be "representative" only to those organisations negotiating an agreement that is likely to be the subject of an extension[142] and would not appear to apply it to those in

134 P.-G. Pougoué, J.-M. Tchakoua, *op. cit.*, p. 201.
135 *Idem.*
136 J. Issa-Sayegh, *op. cit,* p. 189.
137 Art. 216 of the draft.
138 Art. 202
139 Art. 210.
140 The representative nature of a trades union "is ascertained (…) on the basis notably of the results of the workers representative elections or any other professional election organised by the Contracting State (Art. 209 paragraph 1).
141 The representative nature of a employers' organisation "is determined (…) either on the basis of the workforce of the member companies in the geographical area or sector of activity, or on the basis of the number of workers in the geographical area and sector of activity" (Art. 209 paragraph 3).
142 Art. 207, paragraph 2 of the draft.

contact with the employer within the company.[143] Finally, within the framework of collective bargaining, there is no "protective status" allocated to worker or trades union representatives as such.

c) An Important Role Left to Labour Administration

The powers of the OHADA do not extend to the administrative organisation of the Contracting States. Therefore, "the very conception of the labour administration, its structures, services and the missions entrusted to it, specifically or in collaboration with other bodies, cannot be part of the Uniform Act. However, the powers of the Labour Inspectors who exist in all the States of the OHADA area are within the scope of the normative action of the Organisation".[144] On this point, the draft takes no risk when it indicates that each Contracting State fixes "The terms of organisation and operation of the services of the labour administration",[145] and the "specific status of Labour Inspectors and Occupational Health Inspectors".[146] It makes an implicit reference to the ILO conventions when it demands that "the Contracting State ensures that these personnel benefit from a status and conditions of service that provide them with stability in their employment and make them independent of any undue outside influence".[147] It is also up to the State to define "the remit, powers, offence ascertainment procedures and status of Labour Inspectors and Occupational Health Inspectors".[148]
More fundamentally, note can be made of the large role the project leaves to intervention by government administration in labour relations. Aside from protecting the labour law institutions, the purpose of this is generally to ensure social peace in the working community and, more broadly, the national community.[149] In addition to their activity supervising

[143] Art. 216 of the draft. (*Cf. inter alia*, I. Y. Ndiaye. La représentation collective au Sénégal. in Ph. Auvergnon (dir.), "La représentation collective en droit social", Comptrasec 2004, sp. p. 140).
[144] J.-M. Béraud, *op. cit.*, p. 93.
[145] Art. 248 of the draft.
[146] *Idem.*
[147] *Idem.*
[148] *Idem.*
[149] *Cf. inter alia*, Ph. Auvergnon, S. Laviolette, M. Oumarou. *Labour administration in sub-Saharan Africa: Functions and challenges in the light of ILO Convention n° 150*. International Labour Review 2011, vol. 150, p. 81-98.

companies,[150] the Labour Inspectors authorise (or otherwise) the dismissal of worker representatives,[151] overtime hours exceeding the allowances[152] and night work by young people.[153] Their opinion is required for lay-offs on technical or economic grounds,[154] for individual and collective economic redundancy projects[155] and on the representative nature of trades union and professional organisations.[156] Company rules may only come into force with their approval.[157] Most importantly, the Labour Inspector and, more generally, the labour administration, acts as conciliator in individual disputes and collective conflicts. Finally, in a way that is somewhat revealing of the limited autonomy of the social partners, bargaining of any collective agreement that is likely to be extended (by the Labour Ministry) only appears possible within the framework of a joint commission[158] convened and chaired by the representative of the Ministry for Labour.[159]

Conclusion

The draft Act establishing a labour law in today's seventeen OHADA Member States is marked by a number of different tendencies. On the one hand, they are visibly derived from the intrinsic ambivalence of labour law, a law that protects workers and recognises the powers of the employer. Other features betray not only the colonial sources and the way in which the law was received in Sub-Saharan Africa, but also the changes that came in the wake of independence. While providing security for investors quite logically prevails in a project in "business law", international labour law and the French legal tradition are necessarily very present. The text received a positive opinion, subject to a few reservations, from the OHADA National Commissions composed of representatives of Labour Ministries, employers' and workers'

150 Art. 145 of the draft.
151 Art. 179.
152 Art. 86.
153 Art. 94.
154 Art. 34.
155 Art. 53.
156 Art. 209.
157 Art. 110.
158 Art. 207.
159 Art. 208.

organisations. It was sent on to the OHADA Council of Ministers.[160] Since then, the project seems to have been in something of a "deep freeze". More than ten years on from its launch, this leads to new questions as to its "feasibility" and, in particular, on the method used.

Has the extent to which States will transfer their legislative and regulatory sovereignty in labour law matters to a supra-national body not been over-estimated, in political more than in legal terms? Although the majority of the States concerned share the same French Overseas Code, other legal traditions have brought their influences to bear in the region.[161] Since independence, as different political choices have been made, the laws of each country have become increasingly diversified. In fact, like in Europe although to a lesser extent, labour law has become rooted in, and linked to national political projects. Although its effectiveness is only very relative, it continues to be perceived as a conquest, a "sensitive" asset linked to the exercise of national sovereignty. This in no way ruled out the possibility, in a legal integration process conducted in an area of economic integration, of considering the creation of a regional social law,[162] provided that a clear distinction could be made between the scope of strict uniformity and those areas in which harmonisation was desirable but variable, with the latter being left to national sovereignty, including in order to take account of sub-regional diversity and allow regular adaptations to be made more easily.

Being within the framework of an organisation such as OHADA, in which the "uniform act" is the sole available legal instrument,[163] it initially seemed that the only possibility was to propose a "full labour code" to replace all the national laws and regulations overnight. Ultimately, that was what the first version of the draft sought to do. This impressive work had the merit of providing absolute security regarding the applicable law, but also the main difficulty that it concerned two zones, West and Central Africa, in which, among other things, "economic integration has perhaps

[160] The OHADA Council of Ministers, meeting in Bissau on 16-17 June 2011, was informed that most of the Contracting States in West Africa considered "that they no longer have any remarks to make" on the draft. For the contracting States of Central Africa, "for whom a consultation is still under preparation", the permanent Secretary was called upon to send them a reminder "to accelerate the organisation of said consultation" (http://web.ohada.org).

[161] *Cf. inter alia*, ILO "Les problèmes du travail en Afrique"*, op. cit.*

[162] J. Issa-Sayegh, *op. cit.*

[163] For the moment, the OHADA has not wished to diversify its "legal toolbox", unlike other organisations in Africa that have a variety of instruments, such as the WAEMU: regulations, directives, decisions, recommendations and opinions.

not reached the same outcome."[164] In addition to the issue of giving up sovereignty in a politically "sensitive" area, seeking to establish strictly identical social norms could therefore raise questions and resistance. The approach adopted from 2006 onwards was radically different. Although it was done quickly, sometimes chaotically and certainly insufficiently, the preliminary draft was reviewed, looking each time at the degree of uniformity required on the questions addressed. The "approved" draft makes a distinction first of all of those norms that are strictly uniform, prohibiting any national variations or adaptations, secondly those standards "framing" national law and therefore contributing to asserting an "economic and social model" and, third and finally, those normative areas left to the intervention of the State or social partners.

In an organisation whose clear objective is uniform law, much has been done to come up with a common labour law that allows national interventions and adaptations to persist. In the OHADA project, there is now uniform law alongside the framework directive and recommendations. If the draft should end up not being adopted, it could quite easily provide inspiration – and perhaps quickly – for two very different types of projects. The first could be to define a framework directive going beyond a mere declaration of fundamental rights, although without challenging the specifics of national frameworks. Such an objective could be relevant as part of an economic integration project involving States of different legal cultures, such as the fifteen ECOWAS States.[165] The second type of project could pursue an objective of close technical harmonisation between States that are neighbours not only geographically, but also historically and in their legal cultures, such as the eight WAEMU Member States.[166] But that is another story...

164 J. Issa-Sayegh, *op. cit.*
165 Economic Community of West African States.
166 West African Economic and Monetary Union.

Disability Discrimination and Substantive Equality: What Lessons Could Be Learned from the British Public Sector Equality Duty?

Sylvanus B. Effiom *

Introduction

The Equality Act (EqA) 2010[1] came in to force on 1 October 2010 and introduced a new public sector equality duty which not only harmonise the previous patchwork of positive duties on public authorities to promote equality in respect of race, gender and disability but also extend its coverage to include all the protected characteristics, except marriage and civil partnership.[2] As one of the key ways by which the legislation intends to strengthen the law on discrimination to support progress on equality, the PSED is intended to have a transformative effect.[3] However, the current situation with regard to disability equality is clearly unsatisfactory.

At present, Around a third of persons with disabilities in Britain experience discrimination in accessing goods or services, including health services while The employment rate of this group of persons is 48.9 % compared to 78% for the overall working-age population.[4] The Equality Review estimated that, at the present rate of progress it is likely to take decades to achieve equality of opportunity for persons with disabilities in

* Dr Effiom holds a Phd in Human Rights Law from the London Middlesex University; dr.beffiom@gmail.com.

[1] The Equality Act 2010 is the main Legislation outlawing discrimination in the UK. Section 4 of Chapter 1, Part 2 of the Act lists disability as one of the protected characteristics.

[2] The Public Sector Equality Duty is contained in Section 149 EqA 2010.

[3] Explanatory Notes, EqA 2010, (12).

[4] Office for Disability Issues at http://odi.dwp.gov.uk/disability-statistics-and-research/disability-equality-indicators.php.

fields such as education and health services while the employment gap for this group of persons will probably never be closed.[5]

This article aims at assessing the extent to which the PSED can improve the situation and thereby contribute to the attainment of substantive equality for persons with disabilities in our society. A main contention of this article is that, even though the PSED may have been intended to represent an important shift of regulatory philosophy in the area of equality legislation in Britain, its application in the field of disability could be seriously undermined by the pervading influence of the tenets of formal equality in the legislation and this may end up posing new challenges with regard to the attainment of substantive equality for persons with disabilities. Section One provides a theoretical framework for understanding the distinction between formal and substantive equality within the context of the limitations of the conventional anti-discrimination laws. Section two explores the challenges of the asymmetrical nature of disability discrimination as reflected by the role of the definition of disability as gatekeeper. The Section also highlight the difference between the medical and social models of disability and argue that, at least for the purpose of the PSED, the definition of disability should move towards a more social model. Section three examines the structure and content of the statutory duty and asks whether they can be said to reflect a substantive conception of equality. In particular, the Section highlight the synergy that must exist between the advancement of equality of opportunity and the provisions on positive measures in the EqA 2010 as an exception to the non-discrimination principle. Section four considers the connections between the equality duty and the other disability-related discrimination measures contained in the EqA 2010 such as the duty to make reasonable adjustment. Prominent in this connection is the presence in the EqA 2010 of indirect discrimination which is applicable to the protected characteristic of disability. A key element of the inquiry here will be the extent to which the PSED could operate to reinforce these measures in order to attain substantive equality for persons with disabilities.

[5] *Fairness and Freedom: The Final Report of the Equalities Review* (Communities and Local Government Publications, 1 June 2007, Product Code 06DL0440/a, www.theequalitiesreview.org.uk). p. 24.

1. Formal and Substantive Equality

British anti-discrimination Laws have traditionally been founded on two important and interrelated conceptual frameworks. The first is a formal conception of equality based on the Aristotelian notion of equal treatment that likes should be treated alike and unlike treated unlike.[6]. This is reflected in the established concept of direct discrimination which requires proof that a person has been less favourably treated than a comparator.[7] The second is a dependency on an individualised, complaints-led model of enforcement which is framed conceptually to ensure that victims of discrimination enforce their rights through individual complaints, based on proof of breach.[8]
However, after almost three decades of relevant anti-discrimination legislation, it had become increasingly apparent that the formal, individualised and complaint-based model of equality not only has significant limitations in terms of the ability to tackle the structural causes of discrimination but that these limitations have particular force in the context of disability. Formal equality which Fredman[9] has characterised as "equality as sameness" advocates consistency in all cases and is framed around achieving equal treatment for the individual. The focus of formal equality on the individual means that the specific characteristics of groups are ignored in the equality equation. The significance of this on disability equality becomes evident once it is acknowledged that structural patterns of exclusion are often responsible for making particular impairments a source of disadvantage and that positive action may be required to challenge these patterns.[10]

[6] S. Fredman, *Disability: A Challenge to the Existing Anti-Discrimination Paradigm?*. In A. Lawson and C. Gooding (eds) Disability Rights in Europe: From Theory to Practice. Oregon, Hart Publishing 2005. pp. 219-248.
[7] Although the DDA 1995 and now, the EqA 2010 appear to have a similar comparator requirement for direct disability discrimination, tribunals and courts have found it difficult to identify an appropriate non-disabled norm to function as the comparator; see Clark v Novacold [1999] IRLR 318(CA); Lewisham v Malcolm [2008] UKHL 43, [2008] 3 WLR 194; *Aylott v Stockton on Tees Borough* [2010] EWCA Civ 910.
[8] S. Fredman, *Discrimination Law*. (Oxford, OUP 2002).
[9] Ibid.
[10] C. O'Cinneide, *A New Generation of Equality Legislation? Positive Duties and Disability Rights*. In A. Lawson and C. Gooding (eds) *Disability Rights in Europe: From Theory to Practice*. Oregon, Hart Publishing, 2005. pp. 219-248.

An important reason why the conventional anti-discrimination laws do not adequately tackle the structural causes of inequality is its dependence on an individualised, complaints-led model of enforcement. The implication here is that, where an individual with a disability has been discriminated against in employment, the only avenue available to pursue justice is for him or her to bring a disability discrimination claim before an employment tribunal. As a result, the burdens of frequently 'lengthy and costly' litigation often fall on the most vulnerable members of society. Many individuals with a disability are unable to bring claims and justice is pursued in an ad hoc manner. Even if a claim does succeed, the remedy is still limited to compensating the individual complainant. The complaints-led model presents no obligation on employers to correct the institutional structure which gave rise to the discrimination'. Individual compensation does not necessarily guarantee change and the experience has been that patterns of structural inequalities and institutional discrimination are left unchanged.[11]

Consequently, there have been calls recently for a shift to a more effective equality strategy that not only combine the conventional anti-discrimination measures with a more 'proactive and collective' approach but is also underpinned by a substantive conception of equality. In this respect, the Discrimination Law Review (DLR), which was launched in February 2005 "to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage"[12], recommended the adoption of the four 'dimensions of equality' as identified by Fredman and Spencer[13]:

- Addressing disadvantage--taking steps to counter the effects of disadvantage experienced by groups protected by discrimination law, so as to place people on an equal footing with others;

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[11] S. Fredman. *The Public Sector Equality*. Duty Industrial Law Journal, 1 December 2011, 40 (4): p. 405. Also, see B. Hedbo. *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation*. Industrial Law Journal, 2011, 40 (4): p. 315.

[12] Department of Communities and Local Government, *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (2007) [http://www.communities.gov.uk/publications/communities/frameworkforfairnessconsultation[5.28]-[5.29].

[13] S. Fredman and S. Spencer. *Equality: Towards an Outcome-Focused Duty*. 2006, 156 Equal Opportunities Review 14. Also, S. Fredman and S. Spencer, *Beyond Discrimination: It's Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes*. 2006, EHRLR 598.

- Promoting respect for the equal worth of different groups, and fostering good relations within and between groups--taking steps to treat people with dignity and respect and to promote understanding of diversity and mutual respect between groups, which is a pre-requisite for strong, cohesive communities;
- Meeting different needs while promoting shared values--taking steps to meet the particular needs of different groups, while at the same time delivering functions in ways which emphasise shared values rather than difference and which provide opportunities for sustained interactions within and between groups;

- Promoting equal participation--taking steps to involve excluded or under-represented groups in employment and decision-making structures and processes and to promote equal citizenship.

The inception of the Equality Act 2010 supposedly embraced this shift' through the single public sector equality duty and thereby heralded the realisation of substantive equality for persons with disabilities. The notion of substantive equality was first introduced in to the case law of the United States Supreme Court in the case of *Brown v Board of Education*[14] *and its* focus is on the characteristics of group membership. The concepts of positive action and equal opportunity are central to the notion of substantive equality. Positive or affirmative action encompasses a range of policies that 'do not require evidence of discrimination on an individual basis but rest on the identification of past group-based discrimination. On its part, equal opportunity provide a vehicle for taking in to account the position of the individual in society in relation to his or her group membership and the impact that any policy or measure is likely to have on him or her.
The significance of the concept of substantive equality becomes evident when the notion of equal opportunities is distinguished from the alternative conceptions of formal equality and equality of results or outcome. As pointed out above, formal equality is based on the premise that 'likes should be treated alike' and advocates consistent treatment in all cases. Equality of results goes beyond equal treatment and aims at achieving a fairer distribution of benefits. To the extent that its aim is diagnostic, demonstrating the existence of obstacles to entry, equality of result could be said to be concerned with substantive equality rather than

[14] 347 US 483, 495 (1953).

just formally equal treatment. If equality is perceived as a spectrum, with formal equality at one end and equality of results at the other, equality of opportunity falls somewhere in the middle.
The centrality of substantive equality to the notion of equal opportunity is illustrated by Fredman using the metaphor of a race. Each competitor should have the chance to start from the same position but, once the race has begun, the outcome must depend on merit. However, while Fredman's[15] analysis of equal opportunity in terms of equality of results or output may afford opportunities to those who have been disproportionately excluded in the past, its insistence on equalizing the starting point might perpetuate disadvantage by failing to address existing discrimination and disadvantage.

The Definition of Disability

Disability discrimination under the EqA 2010 is expressly asymmetrical and the role of the definition of disability is that of gatekeeper as it grants access to the full protection of disability discrimination law only to those persons who could be regarded as being or having been disabled. Thus, Section 6 of the EqA 2010 provides:

i. A person (P) has a disability if:

(a) Has a physical or mental impairment, and
(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

ii. A reference to a disabled person is a reference to a person who has a disability.

This definition is subject to the provisions in Schedule 1 of the Act.[16] Furthermore, certain persons are deemed disabled by virtue of regulations made under the Act. Thus, persons certified as blind, partially sighted, severely visually impaired or visually impaired are deemed to be

[15] S. Fredman, supra no. 8, 15-16.
[16] Schedule 1 provides similar clarification to that in the Disability Discrimination Act 1995 but removes the categories of day-to-day activities.

disabled.[17]Furthermore, the scope of the protectorate is expanded in the context of direct discrimination to include associative discrimination and discrimination by perception[18] while a person who has had a past disability is to be treated as having a disability[19] This preserves the position with regard to those who were registered as disabled under the Disabled Persons (Employment) Act 1944 to the effect that they are treated as having had a past disability. However, the provisions on past disability are limited in their scope as they do not apply in the context of transport[20] and improvements to let dwelling and housing.[21]

The asymmetrical nature of disability discrimination under the EqA 2010 replicates the position under the DDA 1995, confirming that the legislation aims, not at neutrality, but at redressing the disadvantage experienced by a specific group.[22] While the asymmetrical nature of disability discrimination law may have the advantage of facilitating more favourable treatment of persons with disabilities, the inclusion of a definition of disability or a disabled person in the Act may present significant difficulties with regard to the restrictions it places on the scope of the protectorate. The presence of a definition of disability in the Act may imply that public authorities are not afforded any latitude in how they define disability for the purposes of implementing the equality duty and this may have the undesired effect of weakening the interpretation and enforcement of the duty.

Also, the asymmetrical nature of disability discrimination as demonstrated in the definition of the potential scope of the protectorate may give the impression that the focus is on protecting the needs of a particular group of persons with disabilities. This position is reinforced by the fact that the EqA 2010 uses the phrase 'protected characteristic' with all the connotations of protecting and providing for the welfare of a particular group of individuals with a disability. There is a possibility that policy makers and enforcement bodies may come to perceive equality for persons with disabilities as a form of welfare benefit or hand out reserved

[17] This was the position under the Disability Discrimination (Blind and Partially Sighted) Regulations 2003 SI 2003/712,
[18] Section 13 Equality Act 2010.
[19] Section 6(4) and Sched 1, para 9).
[20] Note that Part 12 of the Equality Act 2010 deals with transport.
[21] Section 6(4), Equality Act 2010. Also, see section 190of the Act.
[22] The Sex and race legislations deliberately do not target the disadvantaged group, but instead view any sex or race-based criterion as unlawful. This is the case even where the goal is to benefit the disadvantaged group. The implicit aim of the legislations is to achieve a gender neutral, colour blind society.

for a particular group or class of persons who fall within the legal definition of disability. However, it could be said that to limit the benefits of a legislation that is intended to prevent discrimination and advance equality of opportunity to certain kinds of disability or to disabilities reaching a certain degree would not appear to be consistent with the underlying goal of substantive equality. Disability discrimination law must move away from protecting a group of 'disabled' people and instead protect anyone who experiences discrimination on the grounds of impairment.

The position of the EqA 2010 with regard to the definition of disability may be contrasted with that of the EU Framework Directive on Equal Treatment in Employment and Occupation (Framework Directive).[23] The Framework Directive aims at putting into effect in the member states the principle of equal treatment in the field of employment and occupation.[24] Though the principle of equal treatment is stated in Article 2(1) of the Directive to mean that there shall be no direct or indirect discrimination on the ground, inter alia, of disability, the Directive itself does not contain any definition of disability and this may give the impression that member states are afforded considerable latitude in how, or whether, they define disability for the purposes of transposing the Directive.

However, the European Court of Justice has stated in C-13/05 *Chacon Navas v Eurest Colectividades SA*[25] *that,* for the purpose of the Directive, the concept of 'disability' must be given an autonomous and uniform interpretation and that the concept of "disability" as used in the Directive 'must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person in professional life. The *Chacon Navas Case was the* first case on the ground of disability under the Framework Employment Directive to reach the European Court of Justice and the net questions posed were whether sickness counts as a disability and, if not, could sickness (or health status) be considered covered by analogy. The Court adopted a strongly medical approach in defining disability, holding that sickness did not amount to a disability for the purpose of the directive.

The decision in the Chacon Navas case may be compared to the recent ECJ decision in C-354/13 FOA (Karsten Kaltoft) v Billundd where the court raised the possibility that a worker with long-term obesity might be

[23] Council Directive 2000/78/EC of November 2000.
[24] Ibid Article 1
[25] [2006] ECR I-6467.

regarded as disabled. In this case, the ECJ was requested to decide amongst others, whether obesity could be deemed to be a disability under EU Directive 2000/78/EC, and if so, how to determine if an obese person is protected against disability discrimination. The court held that while obesity itself cannot be regarded as a ground for protection against discrimination under EU law, nevertheless it could be a disability where it "entails a limitation which results in particular from physical, mental or psychological impairments that interactions with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one". The ECJ stated that it was a matter for national courts to determine whether the conditions required for obesity to be a disability are met. However, the ECJ decision lends credence to the view that current medical conditions that might presage future disabilities may bring the individual within the protective scope of the Directive.

The Medical versus the Social Model

Section 6 of the EqA 2010 evinces a predominantly medical definition of disability which focuses on impairment as being the cause of limited opportunities and life chances.[26] The definition requires that the interested disabled person must have a physical or mental impairment which has an adverse effect on his or her ability to carry out day-to-day activities. The Act preserves the definition of disability under the repealed DDA 1995 which was highly criticized for leaving out of its scope many types of disabilities simply because they do not meet the medical definition of impairment or because the impairment did not have any effect on normal day-to-day activities (let alone an effect which is substantial and long term). Concerns about the restrictive potentials of the definition of disability were raised by the defunct Disability Rights Commission (DRC)[27] and the DDA 1995 was amended by the DDA 2005 to ensure that those suffering from a progressive condition, specifically cancer, HIV infection or multiple sclerosis, are deemed to have a disability. This

[26] For the literature on the medical and social models of disability, see generally C. Barnes and G. Mercer (eds). *Implementing the Social Model of Disability: Theory and Research* (Disability Press 2004).

[27] The DRC was merged with the Equal Opportunity Commission (EOC) and the Commission for Racial Equality (CRE) to form the Commission for Equality and Human Rights (CEHR) in 2007.

position has been maintained under the EqA 2010 and those suffering any of these conditions will be treated as disabled under the Act.
Although the EqA 2010 has removed the eight capacities of 'normal day-to-day activities',[28] it has retained the requirement under the DDA 1995 for an impairment not only to be substantial but that it must have a long-term adverse effect on the individual's ability to carry out normal day-to-day activities. This position is regrettable as the focus of disability legislation should be on the extent and nature of discrimination, not on the extent and nature of impairment. A substantive equality approach is more likely to focus attention on the realities of disability discrimination and to take an active attitude to dismantling the obstacles which stand in the way of equality for this group of persons.[29] Perhaps, inspiration may be gained from the Irish and Australian legislations where the definition of disability does not contain any requirement that the impairment be substantial or long-term.[30]
The fact that the medical orientation of the definition of disability under the EqA 2010 could prove a hindrance rather than a help to the attainment of substantive equality for persons with disabilities may provide the necessary justification for the move toward a more social definition of disability. The social model of disability identifies "disabling barriers" rather than "impairment" as the problem to be tackled. Disabling barriers are the attitudinal, economic, and/or environmental factors preventing certain people from experiencing equality of opportunity because of an impairment or perceived impairment. The term 'disability' is used to describe a social experience. In this respect, public authorities implementing the equality duty may gain inspiration from the United Nation (UN) Convention on the Rights of Persons with Disabilities (CRPD)[31] and adopt an expansive approach by extending the outer limits

[28] See "Guidance on matters to be taken into account in determining questions relating to the definition of disability" (see www.odi.gov.uk). an impairment under the DDA 1995 was generally considered as having an effect upon a person's ability to carry out normal day to day activities only if it affects one or all of the following "capacities": mobility; manual dexterity; physical co-ordination; continence; the ability to lift or move everyday objects; speech, hearing or eyesight; memory or ability to concentrate, learn or understand and perception of the risk of physical danger; see Schedule 1 paragraph 4 DDA 1995.
[29] E Ellis, *EU Anti Discrimination Law* (Oxford University Press, 2005).
[30] Irish Employment Equality Act 1998, s 2(1); Australian Disability Discrimination Act 1992, s 4.
[31] The CRPD was adopted on 13 December 2006 and was opened for signature on 30 March 2007. The Convention and the Optional Protocol entered into force on 3 May

of the legal definition of disability to include individuals who would not generally qualify as disabled under the Equality Act 2010.
The CRPD was intended as a clear reaffirmation of the rights of persons with disabilities and contains no definition of disability[32]. However, Article 1 of the Convention evinces a predominantly social model of disability, only partially circumscribed by a medical perspective and provides that Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. The provisions of Article 1 is reinforced by the provisions of preamble e which Recognises that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.
The CRPD fundamentally challenges our conceptualisation of disability and the current understanding of disability discrimination in the UK as manifested in the EqA 2010. It can at least be said of the definition in the UN Convention that it makes an effort to understand and express the basic point that it is the interaction of disability with social processes (i.e. the absence of sensitivity in such processes to disability) that is at the root of disability discrimination. Regrettably, the formula used by the EqA 2010 and the ECJ to the effect that it is the impairment that itself hinders the participation of persons with disabilities does not demonstrate any similar depth of understanding.

2. The Structure of the Duty

The "Due Regard" Standard

At the heart of the Public sector equality duty is the core requirement that a public body must pay due regard to the need to eliminate unlawful discrimination, advance equality of opportunity and foster good relations.

2008. The UK ratified the CRPD on 8 June 2009 and ratified the Optional Protocol on 7 August 2009. The European Union (EU) ratified the convention on 26 November 2009.
[32] For the relationship between the Equality Act 2010 and the CRPD, see generally S. Fraser Butlin, *The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?*. 2011, 40 ILJ 428-438.

The 'due regard' standard was applied under the preceding race, disability and gender duties. Thus, Section 71 of the Race Relations Amendment Act 2000, passed in the wake of the McPherson report[33] which accused the Metropolitan Police Force of 'institutional racism' provided that, in carrying out their functions, defined public bodies shall have due regard to the need not only to eliminate unlawful racial discrimination but also to promote equality of opportunity and good relations between persons of different racial groups.
Both the disability and gender duties introduced in 2005 and 2006 respectively followed the blueprint of the race duty with regard to the due regard requirement. In fact, the gender duty was framed in almost identical terms to that of the race duty, except that it did not include the requirement to promote good relations but rather extended the duty to cover the elimination of harassment and victimisation.[34]
While maintaining the due regard standard, the disability equality duty contained significant elements which had the potential of delivering substantive equality to this group of persons. Of particular significance here is Section 49(A) of the Disability Discrimination Act) 2005 amendment) which required almost all public bodies to have, whilst carrying out their functions, due regard to the need to promote positive images of, and participation in public life of persons with a disability, and to recognise that achieving equality for this group of persons will at times require adjustments that will mean treating a person with a disability more favourably.[35]
However, there were several difficulties with the "due regard" standard under the proceeding race, disability and gender equality duties. Firstly, the standard was simply to 'have due regard' and this led to some uncertainty whether the 'due regard' requirement was a mere procedural requirement or a substantive, action-based stipulation requiring a public body to take positive actions to achieve results.. This point was influential on both the Equalities Review[36] and the Discrimination Law Review[37] both of whom were concerned that the implementation of the duty may

[33] Home Office, the Stephen Lawrence Inquiry. Report of an inquiry by Sir William Macpherson of Cluny. CM4262-I1998.
[34] Sex Discrimination Act (SDA) 1975, Section 76 A (1).
[35] DDA 1995, Section 49A.
[36] *Fairness and Freedom: The Final Report of the Equalities Review*. Op cit.
[37] *Discrimination Law Review: A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain*. Op cit.

become a mere bureaucratic process of compliance rather than one focused on achieving tangible outcomes.

The permissive nature of the "due regard" standard could be particularly problematic with regard to eliminating unlawful discrimination. The fact that discrimination is unlawful implies that the public authority is under a mandatory duty to eliminate it, rather than simply paying due regarded to the need to eliminate it.[38] In fact, even where the provisions of the relevant anti-discrimination statutes provide a necessary benchmark for the elimination of unlawful discrimination, there remained a real risk that such a formulation could simply perpetuate a culture of 'negative compliance' which may sit uncomfortably with the aims of the equality duty.[39]

In other words, given its permissive rather than mandatory nature, it will be difficult for the public sector equality duty to oblige organizations to discard easily the entrenched culture of negative compliance for a proactive approach without some element of coercion. If the duty is to be able to bring about enduring social change, then a more mandatory rather than permissive duty is required. It does not make sense to require public authorities to do no more than pay due regard to the need to eliminate discrimination just as it will be incorrect to assume that simply requiring organizations to pay due regard will push them to take the necessary actions to eliminate discrimination. A law which contains a much stronger formulation would signal an unequivocal endorsement of the principle of substantive equality as well as provide clear guidelines for compliance.

Second, the open-textured nature of the statutory aims to advance equality of opportunity and foster good relations could be problematic to public bodies implementing the duty. The statutory aims of 'equality of opportunity' and 'good relations' are extremely vague and If public authorities do not understand, for example, what promoting equality of opportunity actually means in practice, there is a likelihood that the implementation of the duty will become an exercise in procedure rather than one aimed at achieving real and substantive outcome. This reduces the effectiveness of the equality duty in achieving meaningful outcomes for disadvantaged groups.

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[38] S. Fredman, supra No. 11.

[39] For further details on the issue of negative compliance, see generally: S. Bisong Effiom. *The Implementation of the Public Sector Equality Duty by Local Authorities in the UK: A Case Study of the London Borough of Southwark*. Dissertation presented for the award of PhD degree, Middlesex University January 2012 (unpublished).

The new Public Sector Equality duty has maintained the foundational commitment of the previous race, disability and sex duties, requiring public authorities to 'have due regard' to the need to advance equality of opportunity, rather than to take steps to achieve results or outcomes. Furthermore, the traditional negative duty not to discriminate is now combined with the two positive duties, namely, to advance equality of opportunity and to foster good relations between persons in the community. Thus, section 149 of the Equality Act 2010 provides that:

(1) A public authority must, in the exercise of its functions, have due regard to the need to:

(a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b) Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Though the new Public sector equality duty has maintained the foundational commitment of the duty to pay 'due regard', it has however, made some significant changes towards substantive equality. First, the due regard standard has now been complimented with clearer objectives which creates a synergy with the provisions of Section 159 of the Act permitting positive action. Thus section 149(3) of the Act provides as follows:
Having due regard to the need to advance equality of opportunity ... involves having due regard, in particular, to the need to-
(a) Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b) Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c) Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.[19]

Second, the new public sector equality duty require public authorities to have due regard to the need to 'advance' equality of opportunity, rather than simply to 'promote' equality of opportunity as was the case in the preceding race, disability and gender duties. The use of the word 'advance' in the statute is significant as it indicates a more proactive approach to equality, requiring public authorities to focus on making progress in achieving outcomes. This has a particular resonance with the notion of substantive equality encapsulated in Ronald Dworkin's distinction between the equal treatment of people and the treatment of people as equals.[40]

The notion of treatment of people as equals is based on the understanding that people are entitled to equal concern and respect from the State. It marks a fundamental departure from the notion of formal equality or equal treatment by requiring treatment which is not identical in situations where treating everybody in the same way would demonstrate a lesser degree of concern and respect for certain individuals because of their particular circumstances. This point is described by Bamforth who asserts that a crucial difference between equal treatment and treatment as equals lies in the comparison which each involves. Equal treatment requires only a crude evaluation of whether two persons or actions are sufficiently 'the same' that they merit similar treatment. On the other hand, treatment as equals involves a substantive and more flexible conception of equality which focuses not on the question whether any deviation from equal treatment is permitted but on whether any such deviation is consistent with equal concern and respect.[41]

Advancing Equality of Opportunity

A central concept engaged in the public sector equality duty is that of "advancing equality of opportunity." However, while the legislation provides some details of what advancing equality of opportunity means, the question that remains is what is the end being pursued by the duty to advance equality of opportunity? In this respect, it is significant to note the Equalities Review's definition of an equal society: [42]

An equal society protects and promotes equal, real freedom and substantive opportunity to live in the ways people value and would choose, so that everyone can flourish.

An equal society recognises people's different needs, situations and goals and removes the barriers that limit what people can do and can be.

[40] R. Dworkin, *A Matter of Principle*. Oxford, OUP, 1986, pp 190-98 and 205-13.
[41] N. Bamforth. *Conceptions of Anti-Discrimination Law*. 2004, Vol. 24 *OJLS* pgs 693-4.
[42] The Equalities Review, op cit. p19.

Section 149(3) (a) emphasizes the importance of public authorities responding to the disadvantaged circumstances of certain groups in the community as a pre-condition of the effective advancement of equality of opportunity for these groups of persons. This is a particularly significant provision for persons with a disability, not only because of the profound social disadvantage currently experienced by this group of persons but also because most of them live in conditions of poverty.[43]

A key feature of substantive equality is its commitment to bettering the socio-economic position of worse-off sectors of society. In the context of disability, the relevance of the provisions of Section 149(3) (a) lies in the recognition that positive action may be needed to compensate for the accumulation of inequality resulting from the circle of disadvantage that persons with a disability have experienced across different areas of social life. The decision of the Coalition Government not to bring into effect the socioeconomic disadvantage duty in Section 1 of the Equality Act 2010 represents a setback for the attainment of substantive equality for this group of persons.

The socio-economic disadvantage duty requires certain listed public bodies such as Government departments, local authorities and NHS bodies which have strategic functions, when making strategic decisions such as deciding priorities and setting objectives, to consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage. Such inequalities could include inequalities in education, health, housing, crime rates, or other matters associated with socio-economic disadvantage. In addition, the duty applies to other public bodies which work in partnership with a local authority to draw up the sustainable community strategy for an area, when they are drawing up that strategy. These partner public bodies are specified in the Local Government and Public Involvement in Health Act 2007.

The principle of advancement of equality of opportunity for persons with a disability also involves taking positive measures to meet their needs which are different from the needs of persons who are not disabled. Christopher McCrudden has pointed out that "A vital way in which equality guarantees are underpinned is by ensuring that basic social

[43] DRC, *The Role of Independent Advocacy in Reducing Inequality and Improving the Life Chances of Disabled People: The Disability Agenda-Creating an Alternative Future*. Accessed April 2007 www.drc.gov.uk. The Disability Rights Commission was merged with the Equal Opportunity Commission and the Commission for Racial Equality to form the Equality and Human Rights Commission in 2007.

protections for the most vulnerable are secured, such as housing, food, and education. To the extent that such protections are provided to all, substantive equality will be furthered."[44] The Public Sector Equality Duty should therefore provide a framework for public authorities to reflect on how positive measures might be better directed to achieve social welfare for persons with a disability.
However, persons with a disability are not a homogenous group with the same or similar needs and there is a concern to recognise heterogeneity within disability categories in the context of the provision of welfare services. An innovative feature of the new streamlined single public sector equality duty is its wide coverage which provides public authorities with the opportunity to tackle intersectional or cumulative discrimination. The DDA 1995 assumed a single identity ascription, overlooking the fact that some of the most egregious discrimination experienced by, for example, persons with a disability from the black and ethnic minority community happens at the intersection of their two different identities[45]. Thus, understanding the different needs of persons with disabilities and designing policies and practices to meet these needs in order to achieve equality of outcome is at the heart of the new public sector equality duty.[46]

Sandra Fredman has recently speculated that social rights might provide "a better route to substantive equality."[47] In this respect, the provision of Section 149(3)(b) could be linked to the requirement of a "minimum core" approach enunciated by the UN Committee on Economic, Social and Cultural rights which appears to dictate that public authorities should initially concentrate on the needs of those who are worst-off before moving on to other, less pressing, needs.[48] This would mean that, in its

[44] C. McCrudden. *Equality and Non-Discrimination*. in D. Feldman, (ed), English Public Law, Oxford University Press, 2004, p. 588. Ch.11
[45] For an illustration of the issue of multiple discrimination and intersectionality in the disability context, see generally T. Degener. *Intersections between Disability, Race and Gender in Discrimination Law*. in D. Schiek and A. Lawson (eds). *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*. London, Ashgate, 2011. For race and gender, see K. Crenshaw. *Demarginalising the Intersection of Race and Sex*. 1989, University of Chicago Legal Forum, 139, 151.
[46] C. Gooding. *Will the New Equality Duty Deliver Progress for Disabled People?*. Keynote presentation delivered at the Lancaster Disability Studies Conference, September 2010.
[47] S. Fredman. *Providing Equality: Substantive Equality and the Positive Duty to Provide*. 2005, 21 South African Journal on Human Rights, 164, p.180.
[48] General Comment No 5 'Persons with Disabilities' adopted by the Committee on Economic, Social and Cultural Rights at its 11th session in 1994 (UN Doc E/1995/22).

budgetary and resource allocations, the public authority must give top priority to meeting the needs of persons with disabilities since, by whatever indicator, be it in housing, transportation, employment or education they are the worse off than other members of the community.
The public sector equality duty goes further down the substantive equality route by making it necessary for public authorities to engage with their employees and other interest groups. In fact, the requirement under Section 149(3) (c) EqA 2010 has a special significance to persons with a disability who have been particularly affected by exclusion from decision making processes, resulting in the neglect and or lack of understanding of their specific needs.[49] Both the DDA 1995 and the Equality Act 2010 contain provisions for specific duties which are designed to assist the public body by providing a structure for delivering on the general duty.[50]
The DDA's specific duties did not only require public authorities to draw up and publish disability equality schemes but also that the schemes should be drawn up with the involvement of persons with a disability who had an interest in the organisation's performance of its functions.[51] This requirement of consultation and involvement was widely recognised not only to be an important step in the promotion of substantive equality for persons with a disability[52] but also as one of 'the key principles which underpin the effective performance of public sector equality duties'.[53]
However, the specific duties under the Equality Act 2010 does not contain any requirement on public authorities to engage with persons with a disabilities and their representatives in framing their equality objectives and in achieving those objectives.[54]This leaves open the possibility that the potential of the new duty to deliver substantive equality would be undermined by its deference to the decision-making processes of public authorities, with their inherent tendency to reconfigure or even legitimise existing inequalities. This point assumes added significance when it is

[49] C. O' Cinneide, op cit. pp. 219-248.
[50] Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966; in relation to the EqA2010, see The Equality Act 2010 (Specific Duties) Regulations 2011SI No. 2260.
[51]Disability Discrimination (Public Authorities) (Statutory Duty) Regulations 2005 (SI 2005 No. 2966) Reg. 2.
[52] C. Pearson et al. *Don't Get Involved: An Examination of How Public Sector Organisations in England are Involving Disabled People in the Disability Equality Duty*. (2011) 26 Disability and Society 255, 266.
[53] Department for Communities and Local Government. *Discrimination Law Review*. Op. cit. p. 92, para 5.
[54] The Equality Act 2010 (Specific Duties) Regulations 2011SI No. 2260.

considered that public authorities are under no obligation to involve or even consult with persons with a disability when discharging the duty to identify equality objectives.
The decision of the Coalition government to remove the requirement to involve or consult persons with a disability does not only demonstrate a lack of sufficient understanding of the importance of process in achieving substantive equality but most importantly, carry the real risk that public bodies may begin dismantling those processes and structures which had been developed to promote the involvement of persons with disabilities in the decision-making process. The decision represents a step backwards by the government in meeting its obligations under Article 4(3) of the UNCRPD which enshrines the importance of process and involvement. The Article requires that: *in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.*

The Duty to Foster Good Relations

The facilitation of social inclusion and of participation in society may be regarded as important values which not only underlie the concept of substantive equality but also shape the content of the public sector equality duty. This is demonstrated in the duty contained in Section 149(1)(c) EqA 2010 to foster good relations. The Act provides in section 149(5) that fostering good relations involves, in particular, the need to tackle prejudice and promote understanding. In the disability context, it is important to situate the relevance of the duty to foster good relations within the context of the varied ways by which persons with disabilities could be discriminated against. Historically, persons with disabilities have been treated negatively in part because of their low status in society which has given rise to a feeling of superiority on the part of public officials and professionals. An important feature of discrimination against persons with disabilities in the community is the prevalence of proxies or stereotypes concerning the assumed characteristics of this group of persons. This

situation persists despite the assertion that "These proxies are usually highly inaccurate and diminish the individuality of the individual." [55]
This implies that the development and implementation of equality awareness strategies is a key element in the implementation of the duty on public authorities to foster good relations. There is evidence to support the assertion that the emphasis so far has been on staff training as a way of developing organizational capacity to deal with the challenges of mainstreaming.[56] However, if the duty is ultimately to change societal attitudes by eliminating prejudice and promoting understanding in the context of disability, there is a Need to extend Disability Awareness Programs to Outside the Organisation. Public bodies, especially local authorities would have to develop and implement sound and effective public awareness campaigns and strategies on disability discrimination and equality. This clearly seems essential in the light of the recent increases in the level of harassment and violence against persons with disabilities in the community and could lead to more general gains.[57]
In addition to encouraging a more proactive approach to tackling disabling barriers by other organisations outside the public body, such a public awareness campaign would support a general change in discriminatory attitudes amongst the public. The campaign would need to highlight some of the inaccurate proxies and stereotypes of persons with disabilities and the changes to the policies and practices of the public body would complement this message. There would also need to be a sustained publicity campaign particularly to highlight the difference between discrimination and hate crime in order to make sure that the broader public understood the difference and did not misinterpret it. This shift in public attitudes required by the legislation is one of its positive attractions. However, there is a need to guard against what Professor Quinn refers to as the 'temptation of elegance' or the idea that the inner beauty of a statutory provision is itself enough to bring about the desired shift in public attitude towards persons with disabilities. As the renowned American jurist Oliver Wendell Holmes has pointed out, the life of the

[55] G. Quinn. *Disability Discrimination Law in the European Union*. In H. Meenan (ed) Equality Law in an Enlarged European Union: Understanding the Article 13 Directives, Cambridge, Cambridge University Press, 2010, p 277.
[56] S. Witcher. *Mainstreaming Equality: The Implication for Disabled People*. Social Policy and Society, Vol. 4 1, 2005, pp. 55 – 64.
[57] Equality and Human Rights Commission. *Our Inquiry into the Harassment of Disabled People*. (2011) available at http://www.equalityhumanrights.com/uploaded_files/disabilityfi/dhfi_easy_read.pdf.

law is not logic but experience and experience has taught us that the formal language of the law often finds infertile ground with regard to the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. Ultimately, the shift in public attitude with regard to persons with disabilities will depend largely on the ability of public authorities to draw a connection between the law and our collective commitment to uphold those values that underpin the notion of "citizenship"-inclusion, autonomy, mutuality of obligation, civic virtue and commitment.[58]

The PSED and Positive Action

What converts the public sector equality duty from mere aspiration into a powerful lever for change is the realization that, in order to be effective, the advancement of equality of opportunity must be complemented by positive measures. This point is reinforced by the fact that the provisions dealing with positive actions were put into the Part 11 of the EqA 2010 alongside the public sector equality duty, indicating to a large extent that the legislation does not contemplate positive action measures and policy as an obstacle to the advancement of equality of opportunity.
Rather, it sees the advancement of equal opportunity as being complemented by positive action measures and policies and especially by the latter's focus on providing the material underpinning to equality. In fact, given the potential synergy between both sets of measures (measures to advance equality of opportunity on the one hand and positive action measures on the other), it is possible to conclude that any negative invocation of positive action measures such as practices that reserve certain categories of low status jobs for certain groups of persons with disabilities should be strictly scrutinised as undermining the duty to advance equality for this group of persons. Such an approach is of particular significance in the context of disability since it is obvious that profound structural change will be required to puncture the complex and deep-rooted patterns of inequality experienced by this group of persons who, historically, have not had access to equal opportunities.

[58] L. Davis. *Riding with the Man on the Escalator: Citizenship and Disability.* In M. Jones and L.A. Basser Marks (eds), Disability, Divers-ability and Legal Change. Cambridge, Kluwer Publishing, 1999, pp. 65-74.

The EqA 2010 provide for positive action with regard to all the protected characteristics at two levels; the first, contained in Section 158 deals with positive actions outside the employment field and provides that the Act does not prohibit a public authority from taking any action which is a proportionate means of achieving any one of three aims:

a) Enabling or encouraging persons who share a protected characteristic to overcome or minimise a disadvantage connected to the characteristic;
b) Meeting those needs of persons who share a protected characteristic that are different from the needs of persons who do not share it; or
c) Enabling or encouraging participation in an activity where participation by persons who share that characteristic is disproportionately low.

The second is contained in Section 159 which permits an employer to take a protected characteristic into account when deciding who to recruit or promote, where people having that characteristic suffer a disadvantage or are underrepresented in the employer's workforce.[59]However, the ambit of the permissible positive actions in recruitment and promotion under the EqA 2010 is subject to certain specified conditions which may, in practice operate to curtail the ability of employers to achieve substantive equality for persons with disabilities who wish to enter in to or remain in their employment.
First, the Act provide that The employer must not have a 'policy' of automatically treating those who share a protected characteristic more favourably than those who do not have it with regard to recruitment and promotion.[60] Positive action in recruitment and promotion is permitted only if it is a proportionate means of achieving the aim of overcoming or minimising the disadvantage or under-representation in the workforce.[61] This provision creates some ambiguity, especially in the context of disability where, according to Section 159 (3), it is possible to treat

[59] Section 159(5) EqA 2010 provides a broad definition of recruitment and includes offering a person a partnership, or a pupillage or tenancy in barristers' chambers, and public appointments.
[60] Section 159 (4) (b)Equality Act 2010.
[61] It is for the Courts and Tribunals to decide what is proportionate. The Explanatory Notes provide that factors such as the seriousness of the disadvantage, the extremity of need or under-representation and the availability of other means of countering them may be relevant in establishing proportionality.

persons with disabilities more favourably than persons who are not disabled.
The provision of Section 159 (3) could be related to the position under the DDA 1995 where the extent to which positive discrimination was permitted was related, in part to the fact that the protection afforded by the statute was asymmetrical. The legislation did not explicitly specify that a person with a disability must be qualified for a job in order to be treated more favourably than a non-disabled person. In *Archibald v Fife Council,*[62] the House of Lords held that the DDA 1995, to the extent that the provisions of the Act required it, permitted and sometimes obliged employers to treat persons with disabilities more favourably than others. In any case, it is plausible to conclude that the provisions of Section 159(3) will operate to ensure that employers continue to develop and maintain positive measures to support and encourage persons with disabilities with regard to areas such as training opportunities and work placements.
Second, the provision on positive action can be used only where the candidates are 'as qualified as' each other.[63] The Act allows for more favourable treatment only within the context of a tie-break situation; that is, where both the disabled and non-disabled candidate are regarded as equally well qualified but the fact that one of them has a disability is taken into account as a tie-breaking factor in their favour. Although the tie-break approach marks a step towards equality of results, this must take place on a case-by-case basis so that proactive policies such as quotas and targets are still prohibited. Further, as the candidates in question must be 'as qualified as' each other, the emphasis on merit that is central to the concept of formal equality remains. This would ensure that recruitments and promotions in employment will continue to be based on merit and that only the most qualified person is given the job.
The provision of Section 159(4) EqA 2010 could be compared to the provisions of Section 7 of the Local Government and Housing Act 1989, which makes it mandatory that all appointments by local authorities be made on merit. It also has a particular resonance with the provisions of Recital 17 of the Framework Directive which states that the Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the

[62] Archibald v Fife Council (2004) UKHL 32, (2004) IRLR.
[63] Section 159 (4) (a) Equality Act 2010.

relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.[64]

The limitations on positive action illustrates the pervasive influence of the tenets of formal equality on the EqA. The notion of meritocracy on which the provisions of Section 159 of the Act is based is an extremely narrow one, framed around formal qualifications and which may in fact operate to perpetuate discrimination and inequality by failing to take into account the fact that an individual's lack of the relevant formal qualification may be due to entrenched social disadvantage or physical attributes such as impairments. However, The Explanatory Notes accompanying the EqA 2010 is clear that formal qualifications are only one way in which a candidate's overall suitability may be assessed and that any such assessment will depend on a number of factors relevant to the job in question, such as experience, aptitude, physical ability, or performance during an interview or assessment. In other words, candidates must be assessed on their merits up to the point where they were found to have substantially equivalent merits. Such an interpretation would be in line with the European Court of Justice case law.[65]

The positive action provisions of the Equality Act 2010 bring UK anti-discrimination law in line with that of the EU where positive action measures have traditionally proliferated, especially in the field of employment. Of particular significance in this regard is Article 7 of the Framework Directive which permits, in certain circumstances, positive actions in favour of an employee or applicant with a disability. Article 7 (1) stress that, in order to ensure the practical realisation of the principle of equal treatment, Member States are not prevented from 'maintaining or adopting specific measures to prevent or to compensate for disadvantages' linked to the relevant grounds of discrimination, including disability.

On its part, Article 7(2) provide that the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. The reference to Health and Safety in this context is significant as there is a possibility that employers might use health and safety concerns in order to exclude persons with disabilities from the workplace. In other words,

[64] Council Directive 2000/78/EC of 27 November 2000.
[65] Case C-407/98, *Abrahamsson u Fogelquist* [2000] ECR I-5539.

health and safety concerns may become an obstacle to the achievement of a non-discriminatory and integrated workplace.[66]

Positive Action and the Duty to Make Reasonable Adjustment

There is a link between the positive action provisions of the EqA2010 and the duty to make reasonable adjustment. Section 20 of the Equality Act 2010 contains a free-standing duty to make reasonable adjustment for persons with disabilities.[67] The duty applies to both employers, providers of services and Public authorities in the discharge of their functions and contains three main elements with regards to adjustments which may be required of the duty bearer; first, it requires the duty bearers to take reasonable steps to change their provision, criterion or practice which puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Second, it requires them to take reasonable steps to overcome obstacles created by their physical features where these obstacles puts persons with disabilities at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. Third, it requires them to provide assistive auxiliary aids and services such as information on tape or brail or even the provision of a sign language interpreter where a person with a disability would, but for the provision of such an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.[68]

The provisions on positive action and the duty to make reasonable adjustment are both forms of substantive equality that not only require due regard to be given to the disadvantaged position of persons with a disability but are also concerned with the active removal of disadvantages to which persons with a disability would otherwise be subjected to. The question that may be asked is if the duty to make reasonable adjustment is co-extensive with the provisions on positive actions, what then is the "added value" of the provisions on positive action in an equality statute that already includes a duty to make reasonable adjustment?

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[66] J. Davies & W. Davies. *Reconciling Risk and the Employment of Disabled Persons in a Reformed Welfare State*. Vol. 29, No. 4, ILJ December 2000, pp. 347-377.

[67] A similar duty was imposed on employers by Section (4) DDA 1995 and on service providers by Section 21 DDA 1995.

[68] Section 20 (5) EqA 2010.

The positive action measures in the EqA are crafted in general terms and not tailored to individual circumstances, albeit with proxies for individual need in mind. On its part, the duty to make reasonable adjustment, at least in the employment context, is quintessentially individualised; it relates not to the needs of persons with disabilities in general, but to the requirements of a particular person with a disability so that his or her particular characteristics or circumstances are taken into account.

The duty to make reasonable adjustment in the employment field is reactive in nature, simply requiring duty-bearers to take reasonable steps to accommodate the needs of a particular person with a disability with whom they are confronted. The duty is only triggered when the 'interested disabled person' is put at a substantial disadvantage by some aspects of the employer's operations.[69] The duty to make reasonable adjustment therefore provides a platform for the "interested disabled person" to subjectivize some of the entitlements provided by the provisions on positive action.

A major drawback of the positive action provisions of the EqA is, therefore, its lack of direct accountability to the individual with a disability. A consequence of this lack of direct accountability is the fact that there may not be a close correlation between the positive measures provided by public authorities and individual needs. This accountability deficiency inherent in the positive action measures is compensated for by the duty to make reasonable adjustment which is enforced as part of a discrimination claim brought by an individual claimant and is intimately tied to the non-discrimination idea.[70] The duty creates clear legal standing for the interested disabled person to challenge the manner by which he or she is being accommodated and to ensure that any measures taken are adjusted to his or her realities. This underscores the point that, unlike the permissive nature of the positive action provisions, the duty to make reasonable adjustment is not a positive action left to the discretion of public or private bodies.

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[69] See Schedule 8 Part 2 EqA 2010 for definition of the "interested disabled person". A similar provision was contained in Section 4A (1), DDA 1995 which referred to "the disabled person concerned".' Lawson contend that it is because the duty is not triggered until this point that it is considered as reactive rather than anticipatory. See A. Lawson. *Disability and Equality Law in Britain: The Role of Reasonable Adjustment*. Oregon, Hart Publishing, 2008, p. 67.

[70] By section 21(2) EqA 2010, a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustment imposed on him in relation to the disabled person. Note that a failure to take a positive measure does not amount to discrimination.

It is regrettable that the Specific Duties under the EqA does not contemplate the active involvement of persons with disabilities and their representative organisations in the design and ongoing review of any positive action measures. This leaves open the possibility that public bodies will continue to design and implement positive action measures in 'the best interests' of persons with disabilities and yet in complete ignorance of their expressed wishes. The real risk here is that these measures may become very detached from what individuals actually need. This probably explain why it is so important that The duty to make reasonable adjustment continue to operate as a corrective or reality-check, enabling individuals to challenge how public authorities design and deliver relevant positive measures.

3. The PSED, Indirect Discrimination and the Duty to Make Reasonable Adjustment

Section 19 of the Equality Act 2010 introduce indirect discrimination, for the first time, in to the corpus of UK disability discrimination law. According to the Section, indirect discrimination occurs when an employer or a provider of services applies an apparently neutral provision, criterion or practice which puts, or would put persons of a protected characteristics, and which actually disadvantages a person with the said characteristics, at a particular disadvantage compared with other persons who do not share the said characteristics, unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim.
Unlike the Sex Discrimination Act (SDA) 1975 and the Race Relations Act (RRA) 1976, the Disability Discrimination Act (DDA) 1995 did not make any provision for indirect discrimination. However, the concept of indirect discrimination occupies a prominent place in the Employment Equality Directive.[71] An explanation often provided for its absence from the DDA was that much of its function was performed by the concept of reasonable adjustment. The UK government therefore relied on the proviso in Article 2(2) (b) (ii) of the Employment Equality Directive to

[71] Article 2(2) (b): Council Directive 2000/78/EC of November 2000 (The Framework Directive). The DDA 1995 was amended in 2003 to give effect to the EC Directive and introduced the concept of indirect discrimination. See DDA 1995 (Amendment) Regulations 2003; SI 2003/1673.

justify the absence in the context of disability of indirect discrimination from the DDA 1995.

The Framework Directive allows for two types of defences against a charge of indirect discrimination.[72] The first defence is of general application to all the grounds (including disability) and it allows for an objective justification with a legitimate aim and pursued by necessary and appropriate means.[73] The second defence is contained in Article 2(2) (b) (ii) and deals more specifically with the concept of indirect discrimination as applied to disability. Moreover, the defence is directly linked to the obligation to make reasonable accommodation under Article 5 of the Directive.

Professor Quinn has postulated that the provision of Article 2(2) (b) (ii) is framed on an implicit assumption that not only will 'indirect discrimination' arise unless effectively responded to with 'reasonable accommodation' but also that the only available response or cure to 'indirect discrimination' where it is proven to occur in the context of disability is the provision of 'reasonable accommodation'.[74] The understanding here appears to be that, since many if not all of the barriers that arise in the context of indirect discrimination can be removed or avoided by invoking the duty to make reasonable adjustment, then 'indirect discrimination' will arise unless 'reasonable adjustment' is able effectively to remove the substantial disadvantage to persons with disabilities caused by the relevant provision, criteria or practice. However, there is the theoretical possibility of indirect discrimination arising on the ground of disability for which the provision of 'reasonable accommodation' is no answer or solution. In such cases, the only defence that could be relied upon to defend an allegation of indirect discrimination on the ground of disability will be the general `defence contained in Article 2(2) (b) (i). In other words, the notion of 'reasonable accommodation' can be both a 'cure' to indirect discrimination and a defence against a charge of indirect discrimination when it is shown not to be possible in practice due to the defence of 'disproportionate burden' provided for by Article 5 of the Directive.

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[72] L. Waddington and A. Hendricks. *The Expanding Concept of Employment Discrimination in Europe: from Direct and Indirect Discrimination to Reasonable Accommodation Discrimination*. 18, 2002, International Journal of Comparative Labour Law and Industrial Relations, p. 403. See also, G. Quinn supra no. 38, p. 261-2.

[73] Article 2(2) (b) (i), Council Directive 2000/78/EC of November 2000 (The Framework Directive).

[74] G. Quinn. *Disability Discrimination Law in the European Union*. Op cit, p. 261-2.

The importance of the concept of indirect discrimination in achieving substantive equality for persons with disabilities may lie, partly, in its group dimension. The introduction by the EqA 2010 of the concept in to the corpus of disability employment law underscores the point that disability discrimination is not just about individual acts of discrimination but involves careful scrutiny of an organisation's policies, practices and structures. The duty to make reasonable adjustment in the employment provisions of the Equality Act 2010 does not recognise the group dimension of disability discrimination. The duty to make reasonable adjustment is not only highly individualised and reactive but also does not contain the closely related anticipatory element found in the non-employment area.
The implication here is that, without the concept of indirect discrimination, the only mechanism that could be used to oblige employers to identify and deal with institutional discrimination against persons with a disability is the public sector equality duty.[75] However, the duty is limited by the fact that it does not generally create subjective rights. The failure to comply with the Public sector equality duty does not amount to unlawful discrimination and its enforcement lies either in the hands of individuals or organisations willing to bring actions for judicial review, or in the hands of the Equality and Human Rights Commission. Also, the duty applies only to the public sector. Therefore, given its group dimension, indirect discrimination is better placed than reactive reasonable adjustment to challenge and break down systemic barriers in the field of employment. The group dimension ensures that the focus is on the structures of an organisation that are likely to perpetuate group disadvantage rather than on individual acts of discrimination.
In this respect, indirect discrimination has a particular resonance with the section 20 EqA 2010 anticipatory reasonable adjustment duty in the non-employment sphere. A salient element of the anticipatory nature of the duty to make reasonable adjustment is the fact that it requires service providers to scrutinize their physical features, provision, criteria and practices in order to identify the disproportionate disadvantage they may cause to persons with a disability in general. Scrutiny will require that consideration be given to how potential 'barriers' arising from problematic physical features, provisions, criteria or practices might be removed,

[75] A. Lawson. *Disability Discrimination In Employment And The Equality Act 2010*. 2011, 40 ILJ.

altered or avoided. It would involve carrying out a thorough impact assessment, of an organization's policy procedures and practices.[76]

This requirement that public bodies and other service providers scrutinize their policies, practices and functions contained in the prohibition against indirect discrimination and the section 20 anticipatory duty to make reasonable adjustment and conceptualize by the PSED as the duty to pay due regard is immensely significant to equality for persons with disabilities. Most of the discrimination by public bodies and service providers against persons with disabilities are "motiveless" and "indirect", arising from 'thoughtlessness or the unquestioning acceptance of long established practices' that has left a legacy of practices that effectively exclude persons with disabilities from the mainstream of society.[77]

Both the concept of indirect discrimination and anticipatory reasonable adjustment have the potentials of driving and encouraging service providers to think in advance about removing barriers experienced by persons with a disability. They operate to deny service providers of an excuse to treat persons with disabilities 'less favourably' on the basis that, because they did not know that their policies and practice were discriminatory against persons with a disability, it was not necessary to review or change such policies or practice.

There is a real possibility that a successful implementation of the PSED would not only overlap with the anticipatory element of the reasonable adjustment duties and the prohibition of indirect discrimination but the overlap is likely to encourage public bodies to discharge them together. This may ultimately result in a process whereby the three obligations not only reinforce each other but lead to an increased awareness on the part of public authorities that their obligation is not simply to have 'due regard' to the need to eliminate disability discrimination but also to take positive measures to facilitate access and inclusion for this group of persons.

[76] R (Kaur & Shah) v London Borough of Ealing & Anor [2008] EWHC 2062 (Admin). Also, R v Birmingham City Council and M, G and H v Birmingham City Council (co-joint appeals) [2011] EWHC 1147 (Admin).

[77] G. Quinn, op cit. p 231-277.

4. Conclusion

The Equality Act 2010 has fundamentally reconfigured the equality landscape in Britain and the public sector equality duty provides an important platform for public authorities to tackle institutional discrimination and inequality against persons with disabilities. If combined with other changes contained in the EqA 2010 such as the introduction of indirect discrimination and positive action, the public sector equality duty has the potential to move UK disability discrimination law more towards a profound conception of substantive equality for persons with disabilities.

However, the new duty has maintained the foundational commitment of the previous race, disability and sex duties, requiring public authorities simply to 'have due regard' to the need to promote equality, rather than to take steps to achieve results or outcomes. The 'due regard' standard may have been intentionally formulated so as to promote mainstreaming which has been recognised as a powerful tool for achieving substantive equality for persons with a disability. Nevertheless, its permissive nature may not only reflect a fundamental ambivalence as to the real importance of equality but most importantly, account for the fact that the impact of the previous Race, Disability and Sex duties has been mixed. In some instances, the duty had been reduced to some form of bureaucratic 'form-filling', especially in relation to impact assessment, rather than providing a framework to the authorities for improving the way they make decisions or allocate resources.[78] It is suggested that a stronger formulation of the duty alongside the standard of Article 2 of the International Covenant on Social, Economic and Cultural Rights, which imposes a duty on the State to '*take steps*, ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights' would ensure a conscientious implementation of the public sector equality duty by relevant public authorities.

Finally, the equality duties remain confined to the public sector, even though in recognition of the fact that a large number of public functions are now contracted to private bodies, the legislation is extended to cover

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[78] See generally: EHRC. *The Equality Duties and Schools: Lessons for the Future*. 2011; and EHRC and Focus Consultancy. *The Performance of the Health Sector in Meeting the Public Sector Equality Duties: Moving Towards Effective Equality Outcomes*. 2011. Available at http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/research-and-policy-papers-on-the-duty/, accessed 26 October 2011.

private bodies with public functions.[79] Even more regrettable is the fact that the duty does not apply to private bodies exercising purely private functions. Such a position ignores the fact that the ideal of substantive equality will only be achieved if concerted efforts are made across the public and private sectors. Perhaps there are lessons that could be learnt from Northern Ireland where the fair employment legislation applies to public and private employers and the Ontario pay equity legislation which covers all private employers who employ more than ten employees as well as all public employers.

[79] Section 150(5) and 149(2), EqA 2010. Also, YL v Birmingham City Council [2007] UKHL 27 [2007] 3 WLR 112, HL.

Mixed Economy of Welfare Emerging in Poland: Outplacement and Non-Governmental Employment Agencies Examples

Andrzej Klimczuk*

1. Introduction

In the early 21st century, one of the key challenges of social policy in Poland is to adapt its management on regional and local levels to the requirements of a service economy. Necessary conditions for the relationships between public, commercial, and non-governmental (NGOs) providers were already established after the country's entry into the European Union in 2004. However, the tasks and services of individual entities and institutions still lack coordination and integration. This situation leads to insufficient relevance, efficiency, and sustainability of results of activities. Thus, there is a need for further development of the activation (enabling) policy in combination with the concepts of governance and welfare mix. Such ideas are seen as a rather new practice in Poland, and they require in-depth analysis for reforming social services at the regional and local level.

* Andrzej Klimczuk is a Ph.D. candidate at the Warsaw School of Economics. His research focuses on the gerontology, labour economics, public management, and social policy. For a full academic profile, see independent.academia.edu/AndrzejKlimczuk. His recent publications include books *Kapitał społeczny ludzi starych na przykładzie mieszkańców miasta Białystok* (*Social Capital of Old People on the Example of Bialystok Resident*) and *Experts and Cultural Narcissism. Relations in the Early 21th Century*. This paper was presented at the international conference *Towards Inclusive Employment and Welfare Systems: Challenges for a Social Europe* held on October 9-10, 2014, at the University of Oldenburg, Berlin (Germany).

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The primary goal of this paper is to present the main characteristics of the mixed economy of welfare in the Polish system of professional activation and possibilities of its development. The paper also discusses the results of the author's own research on the implementation of welfare mix solutions related to (1) outplacement, which may be defined as services for laid-off or redundant employees before they become unemployed; and (2) employment services of NGOs employment agencies for people with disabilities. Moreover, the paper includes basic descriptions of reforms of active labour market policies (ALMPs) in Poland ongoing from 2014. The paper also discusses the challenges of the implementation of the new financial perspective of the European Union for the years 2014-2020 and the United Nations Convention on the Rights of Persons with Disabilities. The summary includes practical recommendations and the possible directions for further research.

2. Active Labour Market Policies and Mixed Economy of Welfare in Polish Context

The basic concept of combating unemployment is derived from the neoclassical economics model of labour market policy (LMP), which includes active and passive programs, and does not have the substitution rule for the economic policy, but is complementary and integrated with the economic policy[1]. In this model, it is assumed that among the causes of unemployment, there is the low activity of the unemployed and the inefficient functioning of labour offices. The primary objective of LMP is to mitigate the effects of unemployment and the temporary activation of the unemployed ones through active labour market programs. In general, labour market interventions consist of both active and passive programs that provide the protection for people who are incapable of gaining employment. While standard passive programs focus on the income support such as unemployment insurance, active programs aim to reduce unemployment by improving access to the labour market. Active instruments are used to increase the ability of unemployed ones to find jobs, increase their productivity and earnings. ALMPs may be linked with the concept of activation policies, which after A. Karwacki can be defined as the contemporary transformations in social policy associated with the shift to

[1] A. Skórska, *Przeciwdziałanie bezrobociu*, in D. Kotlorz (ed.), *Ekonomia rynku pracy*, Wyd. Akademii Ekonomicznej im. Karola Adamieckiego, Katowice 2007, p. 113.

investment in human capital, with promoting jobs and economic activity, and with the effects of these actions[2]. Activation policy can be defined as the potential practical changes, which should be reflected in the institutions (entities) covered by the new governance profile[3]. In this sense, this policy is an "activation stimuli present in various configurations between individuals, groups, and between institutions (social policy actors) understood as producers and service providers," and as "guiding ideas, goals, and demands indicated, but also (primarily) the practical side of implementing these ideas in life"[4].

The guiding ideas of activation policies are: (1) the denial of passive policy, guarantee of social security through the social provisions; (2) the appreciation of activating instruments directed at the unemployed able to work and then those who are unable to work; (3) often the mandatory nature of participation in the activation; (4) discontinuation of the decommodification or the creation of a system of social security guarantees in isolation from the labour market; (5) the attempt to build consensus in social policy beyond ideological divisions; (6) the reduction of the scale of "passive" social transfers conditioned by the introduction of support related to the participation of beneficiaries in activation programs (inclusion, reintegration); (7) the focus on the employment or rebuilding of employability; (8) the use of the potential of non-governmental organizations (NGOs) to conduct activation programs and introduce various ALMPs instruments such as social employment of disabled people in a protected labour market, subsidized employment in the open labour market, and social entrepreneurship in the social economy[5].

As for the practical side of the activation, the main challenge is to build its integrity and consistency[6]. Thus, it is reasonable to link actions and decisions taken at various levels of public life. This means combing the top-down and bottom-up initiatives and analysing the theoretical and practical understanding of the concepts of activity, coordination, and consistency of institutions and programs. Such solutions may be achieved by the dissemination of governance models focused on sharing and coordinating tasks between actors in a multi-level activation policy.

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[2] A. Karwacki, *Papierowe skrzydła. Rzecz o spójnej polityce aktywizacji*, Wyd. Naukowe Uniwersytetu Mikołaja Kopernika, Toruń 2010, p. 59.

[3] *Ibid.*, pp. 68-69.

[4] *Ibid.*, p. 70.

[5] *Ibid.*, pp. 82-83.

[6] *Ibid.*, pp. 114, 120, 149-178.

According to M. Powell, the mixed economy of welfare is a provision of welfare by the state or public entities, commercial entities, the NGO sector, and the informal sector[7]. At the same time, he combines this concept with the concept of the social division of welfare, which refers to the public benefits, employment benefits, and tax benefits. Powell points to the possibility of applying these concepts to the analysis of (1) elements of the mixed economy of welfare and the ways in which different sectors are present in modern welfare states, the processes of their formation and alteration (for example, changes in time and space of the public sector, the commercial sector, the NGO sector, and the informal sector); and (2) three dimensions of the mixed economy of welfare (benefit sources and production processes, their funding, and forms of regulation)[8].

Powell also emphasizes that these concepts not only have a descriptive approach (which refers to the presence of various sectors in the social policy), but also a normative approach that relates to change in the roles and meanings of various sectors (for example, downsizing the role of the state)[9]. The normative approach allows the analysis of ideological assumptions, which include different configurations of the mixed economy of welfare. In general, it is noted that the left wing supports the dominant role of the state in building the welfare by limiting or preventing the market share and support the public benefits more than the employment benefits and tax benefits. These solutions help citizens by the guarantee of justice of access to benefits and services. Meanwhile, the right wing seeks to build a welfare society by supporting the solutions of the commercial entities, NGO entities, and informal entities and at the same time, it promotes the reduction of the state instruments. Thus, according to the right wing, the increased economic efficiency aims to improve the quality of services and reduced welfare dependency of people. The right wing does not attach much importance to the employee benefits and taxation, although some of their supporters are opposed to solutions such as the tax relief and consider it as negative to the market mechanism[10].

A different approach to a mixed economy of welfare is suggested by M. Grewiński, who uses the terms "multisectoral social policy" or "mixed social

[7] M. Powell, *Wielosektorowa gospodarka i społeczny podział dobrobytu*, in M. Powell (ed.), *Zrozumieć wielosektorową gospodarkę dobrobytu*, Elipsa, Wyższa Szkoła Pedagogiczna Towarzystwa Wiedzy Powszechnej, Warszawa 2010, p. 21.
[8] *Ibid.*, p. 21.
[9] *Ibid.*, p. 22.
[10] *Ibid.*, p. 23.

policy". These refer to "activities of various actors within the social activity of the public, commercial, NGO, and informal sectors, serving to satisfy the social needs of citizens, and alleviating and/or eliminating social issues by use of the potential of pluralist welfare state, civil society, and social capital in a spirit of the co-responsibility for social cohesion, inclusion, and social security"[11]. The researcher points out two aspects of the mixed economy of welfare: the welfare mix and the welfare pluralism. The former refers to the use of mixed forms in shaping the welfare and to the technique of decomposing tasks and social services in different sectors. The latter is understood as a discussion about the diversity of entities in various fields and sectors of the social policy[12].

According to Grewiński, in Poland the pluralistic employment policy and the LMP have been developed because of the economic transformation after 1989, which revealed the issue of unemployment. This issue was absent on a large scale in the communist Poland. The laws on employment and unemployment in the 1990s tried to build the foundations of institutional policies against unemployment. At that time solutions such as passive labour market policy programs were introduced (PLMPs), the categorization of unemployed and public employment services, a system of labour offices with consulting and consultative entities (employment councils), the fund for counteracting the adverse effects of unemployment of people with disabilities, and the fund for workers laid-off due to persistent problems with the employer's solvency[13]. Administrative reform, which was carried out in 1999, led to the decentralization of public employment services by the creation of the district (local) employment offices. Thus, the activity of labour offices was subordinated to the local authorities, which sometimes led to poor functioning of these offices, reducing the scope of their activities, and the weak link between their activity and the problems of local labour markets.

Actually, until the introduction of the "Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions" only the public sector was responsible for tackling unemployment in Poland (first central, then the local government). Although as early as in the 1990s the commercial and governmental services for the unemployed and job seekers[14] were already present, the multisectorality gained importance in

[11] M. Grewiński, *Wielosektorowa polityka społeczna. O przeobrażeniach państwa opiekuńczego*, Wyd. Wyższej Szkoły Pedagogicznej TWP, Warszawa 2009, p. 37.
[12] *Ibid.*, p. 38.
[13] *Ibid.*, pp. 311-312.
[14] *Ibid.*, pp. 313-314.

this area only with a change in the law in 2004, which coincided with the entry of Poland into the European Union. The new Act introduced a definition of labour market institutions and specified the public employment services, the public Voluntary Labour Corps (professional activation services for youth), commercial entities, NGO entities such as employment agencies, training institutions, social dialogue institutions, and local partnerships[15]. Cooperation of the public providers, the commercial providers, and the NGO providers of labour market services was also stimulated by the introduction of the Act on Social Employment[16], the Act on Public Benefit and Volunteer Work[17], the Act on Public-Private Partnership[18], and the Act on Social Cooperatives[19]. However, despite the significant role of commercial entities and NGOs in the development of human resources, specialized services, job placement, and counseling for entrepreneurs there are still problems with the coordination and integration of cooperation and partnership in activation projects[20].

3. Case Studies of Multisectoral Solutions for Active Labour Market Policies in Poland

The case study is usually defined as a technique of in-depth analysis of the phenomenon, which may be a starting point for creating the theory, to modify existing ones, and to inspire further research[21]. This technique allows the identification of policy stakeholders, situational factors, the management, operations' areas, and primary values and principles of policy. This section includes observations and conclusions from author's own studies on innovative solutions in the field of ALMPs that were aimed at the integration of services provided by the public entities, the

[15] *Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions*, Ministry of Labour and Social Policy, Warsaw 2012.
[16] *Ustawa z dnia 13 czerwca 2003 r. o zatrudnieniu socjalnym*, Dz.U. 2003, nr 122 poz. 1143.
[17] *Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i o wolontariacie*, Dz.U. 2003, nr 96 poz. 873.
[18] *Ustawa z dnia 28 lipca 2005 r. o partnerstwie publiczno-prywatnym*, Dz.U. 2005, nr 169 poz. 1420.
[19] *Ustawa z dnia 27 kwietnia 2006 r. o spółdzielniach socjalnych*, Dz.U. 2006, nr 94 poz. 651.
[20] M. Grewiński, *Wielosektorowa polityka społeczna. O przeobrażeniach państwa opiekuńczego*, *op. cit.*, p. 353.
[21] R.E. Stake, *Jakościowe studium przypadku*, in N.K. Denzin, Y.S. Lincoln (eds.), *Metody badań jakościowych*. Tom 1, PWN, Warszawa 2009, pp. 623-654.

commercial entities, and the NGO entities. Two case studies focus on (1) the implementation of outplacement as a service for prevention of unemployment of laid-off employees from the small and medium-sized enterprises (SMEs); and (2) the cooperation between public employment services and NGOs employment agencies during labour activation of people with disabilities.

4. Case Study: Implementation of Outplacement by Small and Medium-Sized Enterprises

The economic crisis, which began in 2008, forced the companies to adapt to new conditions. Workers' employment was one of the fields affected by the cost cuts. Many companies assume that it will help them to survive during declining of financial resources and a reduction of interest in their offer, goods, and services. According to the KPMG's study, layoffs of employees were the most popular action undertaken by companies at the beginning of the crisis. Among 303 surveyed companies in Poland, nearly 88% entities declared that the crisis implicated changes in their human resources management[22]. At the end of 2010, almost 45% enterprises declared layoffs, and 1/10 of them planned to continue the reduction of employment. At the same time, 93% of companies believe that this technique is effective and brought the expected results. Meanwhile, techniques such as internal recruitment, flexible forms of employment, and outsourcing were used almost half as often as the reduction in employment. Therefore, enterprises take actions to benefit in a shorter rather than in a longer term, a move which exposes them to a number of risks associated with the negative effects of layoffs such as loss of the valuable human capital, the reduction of motivation to work among remaining employees, and worsening of the company's image.
The use of outplacement may lead to avoiding such adverse effects of layoffs. This concept was coined in the 1980s, but its history dates back to the beginning of the 20th century, and the development of employment services for soldiers dismissed from the military service. Outplacement may be defined as redundancies initiated by the employer, which include the introduction of a new job for employees that is located outside a current company. Thus, outplacement aims to reconcile economic values

[22] J. Karasek, A. Emerling, P. Kwiatkowski, *Optymalizacja kosztów a utrzymanie pracowników. O reakcjach firm na trudne warunki rynkowe*, KPMG, Warszawa 2011, p. 9.

(the desire to increase the value of the company) and social values (work, social security)[23]. In Poland, the first outplacement programs started in the 1990s. However, the "monitored layoffs" are relatively little popular among Polish companies. Outplacement allows both employees and companies to increase their chances of maintaining competencies and of better adapting to the requirements of the market competition.

So far, three models of the implementation of outplacement were developed in Poland: classic, adapted, and environmental[24]. The "classic outplacement" focuses on the diagnosis of potential and needs of laid-off workers, psychological support, counseling, training, and job placement. The employer is contracting such tasks in consulting firms or employment agencies. The model of "adapted outplacement" additionally includes involvement of stakeholders such as local government, administration, business support, and NGOs in the process. These entities create the local partnerships and pacts on employment. Last model—the "environmental outplacement"—aims to prevent the effects of long-term unemployment in the situation of the collapse of local labour market. It additionally includes the development of activation centers, community-building services and self-help groups.

It should be underlined that the Polish legal regulations do not obligate employers to use any of these models. According to the "Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions," the outplacement services are mandatory only when the employer reduces the employment by 50 employees in 3 months[25]. However, small enterprises (10-49 employees) and medium-sized enterprises (50-249 employees) usually reduce the employment by avoiding this requirement. The services, which are consistent with the adapted outplacement and the environmental outplacement, may be used on a voluntary basis.

According to the Act, the outplacement occurs when there is a termination of employment or service relationship for reasons related to the employer. Therefore, workers who are in the period of dismissal, employment, and at risk of dismissal may receive assistance in the form of labour market services. In situations of massive job cuts, employers can count on the help from the labour office in the preparation and

[23] A. Ludwiczyński, *Alokacja zasobów ludzkich organizacji*, in H. Król, A. Ludwiczyński (eds.), *Zarządzanie zasobami ludzkimi. Tworzenie kapitału ludzkiego organizacji*, PWN, Warszawa 2006, pp. 222-224.

[24] J. Koral, *Outplacement - sposób na bezrobocie*, FISE, Warszawa 2009, pp. 6-15.

[25] *Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions*, Ministry of Labour and Social Policy, Warsaw 2012.

implementation of the outplacement program. The Act requires the employer to provide the employment services for workers who will be laid off or have been already dismissed in the last 6 months. The law does not regulate the content and stages of the outplacement program. Thus, the employer may construct a program according to his or her capabilities, needs of laid-off workers, and situation in the local labour market. The Act does not provide specific guidance on the exact content of support programs for laid-off workers and how they should be carried out. Thus, employers are free to choose actions and services. This means that every time the outplacement program should be "tailored" to the financial and organizational capabilities of the employer, the individual needs of laid-off workers, and the condition in the local labour market. Typically, outplacement programs include forms of support, such as job search and job placement for program participants; the provision of psychological support; teaching of mobility in the labour market; the assistance in preparing the application documents and for job interviews; the analysis of professional aptitude; the assistance in organizing the further career path; and the participation in vocational training.

The Act allows an implementation of the outplacement program by the public employment office, by the private employment agency, by an NGO employment agency, or by the training institution. Outplacement program may be financed entirely by the employer. It can also be financed entirely or partially from public funds. The program can be carried out by the employment office, employment agencies, or training institutions. Workers who are in the period of dismissal may also ask for the support in the public employment office to start the outplacement program. Support is provided, among other things, by guidance counselors in the district labour office, or at the information and career-planning center of the regional labour office. Laid-off employee can also ask the employment office for a referral to training or request training in educational institutions if they are already carrying out an outplacement program.

In 2012, the author conducted research in the Podlaskie Voivodship (region) as a part of the project called the "Innovation on the Cusp—Testing and Implementation of the New Methods of Outplacement" (pol. "Innowacje na zakręcie—testowanie i wdrażanie nowych metod outplacementu")[26]. The project focuses on the implications of current global financial and economic crisis on the implementation of

[26] M. Klimczuk-Kochańska (ed.), *Bariery i potencjały rozwoju outplacementu dla firm i pracowników*, Narodowe Forum Doradztwa Kariery, Białystok 2013.

outplacement by SMEs. It includes the Quantitative Computer Assisted Telephone Interviewing (CATI survey) conducted in 2012 on a sample of exactly 200 employees and 200 companies divided into the following industries: the crafts industry; industries crucial to the regional development; the public sector; and the start-ups, the future growth industries. At this point, only some results associated with a welfare mix in the field of ALMPs will be described.

According to the study, representatives of the selected enterprises quite often have a general understanding of the outplacement concept. Nearly 31% of respondents associate it with the human resources management and labour market. A similar proportion of respondents claimed that they had a theoretical understanding of outplacement (27.5%). However, in the light of further results it should be considered that the knowledge of these programs is very general and superficial. For 38.5% respondents' outplacement is an unknown concept.

Table 1: Individuals and Bodies Potentially in charge of Outplacement.

	In total			Women			Men		
	Yes	No	No answer	Yes	No	No answer	Yes	No	No answer
Employer	183	13	4	117	9	4	66	4	0
in %	*91.5%*	*6.5%*	*2.0%*	*90.0%*	*6.9%*	*3.1%*	*94.3%*	*5.7%*	*0%*
Human resource department of the employer	135	62	3	95	33	2	40	29	1
in %	*67.5%*	*31.0%*	*1.5%*	*73.1%*	*25.4%*	*1.5%*	*57.1%*	*41.4%*	*1.4%*
Psychologist	100	90	10	72	51	7	28	39	3
in %	*50.0%*	*45.0%*	*5.0%*	*55.4%*	*39.2%*	*5.4%*	*40.0%*	*55.7%*	*4.3%*
The broker of the District Labour Office	138	50	12	92	31	7	46	19	5
in %	*69.0%*	*25.0%*	*6.0%*	*70.8%*	*23.9%*	*5.4%*	*65.7%*	*27.1%*	*7.1%*
Counselor/external consultant hired consulting firm	134	60	6	94	33	3	40	27	3
in %	*67.0%*	*30.0%*	*3.0%*	*72.3%*	*25.4%*	*2.3%*	*57.1%*	*38.6%*	*4.3%*
Counselor/external consultant employed by an NGO	115	71	14	80	39	11	35	32	3
in %	*57.5%*	*35.5%*	*7.0%*	*61.5%*	*30.0%*	*8.5%*	*50.0%*	*45.7%*	*4.3%*
Other (please specify)	5	7	188	5	2	123	0	5	65
in %	*2.5%*	*3.5%*	*94.0%*	*3.9%*	*1.5%*	*94.6%*	*0%*	*7.1%*	*92.9%*

Source: Own elaboration, CATI on employees, N=200.

Respondents were also asked to answer questions about the potential course of outplacement programs. From the perspective of employees, the implementation of outplacement should be mainly the task for the employer (91%) and the district labour offices (69%). Nearly 57.5% of the respondents expect NGO services, which should be considered as a good result if we take into account the current relatively small promotion of their activation services. Relatively high responsibility for providing support to redundant workers is expected from the human resources department of the employer (67.5%) and job counselors or external consultants from consulting firms (67%). Such opinions may affect the perception of outplacement services as costly and at the same time to serve as an "excuse," a simple explanation to avoid responsibility for helping laid-off employees, and lead to avoidance of support expectations among employees.

Table 2: Potential Distribution of Costs for Outplacement Programs

	In total			Women			Men		
	Yes	No	No answer	Yes	No	No answer	Yes	No	No answer
Employer	187	11	2	122	6	2	65	5	0
in %	*93.5 %*	*5.5%*	*1.0%*	*93.9 %*	*4.6%*	*1.5%*	*92.9 %*	*7.1%*	*0%*
Laid-off employee / unemployed person	17	177	6	13	111	6	4	66	0
in %	*8.5%*	*88.5 %*	*3.0%*	*10.0 %*	*85.4 %*	*4.6%*	*5.7%*	*94.3 %*	*0%*
Public employment office	183	16	1	123	6	1	60	10	0
in %	*91.5 %*	*8.0%*	*0.5%*	*94.6 %*	*4.6%*	*0.8%*	*85.7 %*	*14.3 %*	*0%*
Sharing of costs between the employer and the labour office	65	102	33	48	59	23	17	43	10
in %	*32.5 %*	*51.0 %*	*16.5%*	*36.9 %*	*45.4 %*	*17.7%*	*24.3 %*	*61.4 %*	*14.3%*
Another entity (what kind?)......	10	54	136	9	30	91	1	24	45
in %	*5.0%*	*27.0 %*	*68.0%*	*6.9%*	*23.1 %*	*70.0%*	*1.4%*	*34.3 %*	*64.3%*

Source: Own elaboration, CATI on employees, N=200.

Table 3: Companies' Previous Efforts in times of Crisis

	Yes		No	
	N	%	N	%
Closing down unprofitable subsidiaries, branches	42	21.0%	158	79.0%
We limit the production	30	15.0%	170	85.0%
We save what they can	88	44.0%	112	56.0%
We are looking for cheaper suppliers, subcontractors	87	43.5%	113	56.5%
We cut administrative costs	105	52.5%	95	47.5%
We reduce employment	78	39.0%	122	61.0%
We shorten the working time of employees	33	16.5%	167	83.5%
We send employees on unpaid leaves	33	16.5%	167	83.5%
We thoroughly investigate and analyze the economic situation of the company	120	60.0%	80	40.0%
We share information and plans with the crew	63	31.5%	137	68.5%
We develop a strategy to prevent crises	85	42.5%	115	57.5%
We shift employees between positions	52	26.0%	148	74.0%
We hire an external expert / advisory firm	52	26.0%	148	74.0%
We report the problems to the Marshal's / Provincial / Municipal Office	28	14.0%	172	86.0%
We report the problems to the Provincial Labour Office / District Labour Office	23	11.5%	177	88.5%
We are looking for funding to support the modernization of the company by the European Union	63	31.5%	137	68.5%
Other, what .....?	10	5.0%	190	95.0%
The company has not yet found itself in a situation of crisis	3	1.5%	197	98.5%

Source: Own elaboration, CATI on employees, N=200.

Concerning the distribution of costs for providing support to redundant workers, even more employees mainly pay attention to the responsibility of employers (93.5%) and local labour offices (91.5%). The possibility of combining the funding by these entities is allowed by 32.5% of employees. Only 8.5% of workers consider that such costs should be borne by the laid-off or unemployed person. Thus, it is expected that the employers will accept the responsibility for the negative effects of layoffs in financial terms. Such approach is not conducive to the governance of adapted outplacement and environmental outplacement programs. This perspective is inconsistent with the declared permission to split the organizational dimension of the support and expectation of combining the benefits and services of specialists from public and private employment services, training institutions, and social dialogue institutions.

At the same time, these findings are limited. It is difficult to argue on this basis that the respondents share the principles of "buy and deliver," according to which the employer should pay and implement the outplacement services for laid-off persons. Therefore, future studies may also include a shift from a two-dimensional approach (the production of benefits and services as well as financing of benefits and services) towards a three-dimensional approach (addition of the dimension of regulation of activities of the public entities, commercial entities, NGO entities, and informal entities)[27]. Such approach needs more emphasis on the current legal restrictions on usage of outplacement by SMEs.

Representatives of companies were asked a series of questions about their preparation for the implementation of outplacement programs. About 82.5% of companies do not develop professional competence profiles and other tools for assessment and skills' diagnosis. Approximately 88% of businesses do not have a development strategy, which would include a description of potential organizational changes and actions that should be undertaken in response to the crisis. Moreover, 92% of companies do not have a methodology and tools to build the company's growth strategy. About 66% of companies do not survey training needs of their employees and even more—87% of them do not have the methodology of transferring employees' knowledge and skills within the organization. In this situation, both the distribution of costs and organizational dimension, which focus on contracting the outplacement to public and NGO entities, seem to be necessary. The main challenge is, therefore, to promote among the companies applying stakeholder analysis and boosting their governing ability during the process of employment restructuring. Such solutions would also meet the expectations towards outplacement declared by employees.

According to company declarations they responded in the past to the crisis primarily through undertaking research and analysis of the economic situation of the company (60.0%), the reduction of administrative costs (52.5%), "saving on what they can" (44.0%), and by the search for cheaper suppliers and subcontractors (43.5%). Only a few companies reported problems to local government (14%) and public employment services (11.5%). These declarations of firms are significantly different from actions expected of the employees in the field of dealing with the crisis.

[27] M. Powell, *Wielosektorowa gospodarka i społeczny podział dobrobytu*, *op. cit.*, p. 32-36.

Thus, both sides of the employment relationship are rather complementary. Employers do not feel the responsibility for the negative effects of redundancies while employees' expectations are limited to acquiring financial support and additional help from public labour offices. This situation creates unfavorable conditions for the implementation of the adapted outplacement and the environment outplacement, in which employers should demonstrate greater commitment to improve the situation of laid-off employees and co-workers that are in similar circumstances. NGOs can clearly organize the outplacement, promote the corporate social responsibility, and encourage the governance during restructuring processes. The collected data justifies further research on the financial and organizational dimension of outplacement, and on the regulatory roles of the different sectors that are acting in diversified conditions at a local and regional level.

The new impetus for the promotion of outplacement services is the reform of ALMPs in Poland, which started in 2014. New version of the Act on the Promotion of Employment and Labour Market Institutions implies, in particular, an increase of pressure on the efficiency by the profiling of services provided to unemployed persons and by commissioning the activation services by the public employment offices to the selected external entities[28]. Among others the reform includes goals such as contracting activation services for selected groups of unemployed in the private and NGOs employment agencies; the improvement of governance and social dialogue in local LMPs through the transformation of the Labour Market Councils consisting of representatives of trade unions, employers' organizations, representatives of local governments, and community organizations to manage the Labour Fund's resources and to programme and monitor LMPs; reducing the bureaucracy of labour office services; the integration of counseling, career information, and assistance in job search; grants for telework; awards for employment agencies if they manage to find a job for the unemployed; the tripartite training agreements between unemployed, labour offices, and training institutions; the subsidy for hiring of unemployed aged 50+; vouchers for the young unemployed to spend on the training, relocation, and

[28] P*rojekt założeń projektu ustawy o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy oraz niektórych innych ustaw,* Ministry of Labour and Social Policy, 13.02.2013, www.mpips.gov.pl/bip/projekty-aktow prawnych/projekty-ustaw/rynek-pracy/ustawa-o-zmianie-ustawy-o-promocji-zatrudnienia-i-instytucjach-rynku-pracy-oraz-niektorych-innych-ustaw-/, accessed 15.03.2013; J. Męcina, *Niewykorzystane zasoby. Nowa polityka rynku pracy*, ASPRA-JR, Warszawa 2013.

internship; establishment of a National Training Fund, which will cover entrepreneurs' costs of employees' training.
The second source of a future welfare mix in the Polish ALMPs, which is related to the outplacement, may be the programming of the European Union's new financial perspective for the years 2014-2020, which includes the services co-financed by the European Social Fund. The 2007-2013 Human Capital Operational Programme coordinated by the Ministry of Infrastructure and Development allowed the implementation of the comprehensive outplacement projects. In 2014-2020, the outplacement will be financed under the Knowledge—Education—Development Operational Programme as a part of the action to support the development of competence and qualifications of employees and enterprises to adapt to the economic changes[29]. Projects in these programs are selected in the regional competitions from the proposals submitted by commercial entities and NGOs, which mainly run the training institutions and employment agencies.

5. Case Study: Employment Agencies for People with Disabilities

In this case, the need to construct rules of the welfare mix and governance is even more complicated and demanding. In Poland, various departments, entities, and bodies currently provide services for people with disabilities. In reference to the analysis of M. Rymsza we may note that in Poland, there is a need for a "reintegration of integration," which is, the cooperation of different departments, organizations, and institutions that mainly fulfill their statutory tasks without particular attention to the effects of their activities[30]. This leads to the phenomenon of four parallel and uncoordinated sectoral policies for people with disabilities: (1) the rehabilitation of persons with disabilities (including the occupational therapy workshops and social enterprises); (2) the social assistance; (3) the employment and labour market services (public employment offices, commercial employment agencies, and NGOs employment agencies); (4) the social employment (including centers and clubs for social integration). Each of these subsystems provides activation services, which are different, but with not well coordinated, synonymous,

[29] *Program Operacyjny Wiedza Edukacja Rozwój 2014-2020*, Ministry of Infrastructure and Development, Warszawa 2014.
[30] *Cf.* M. Rymsza, *Aktywizacja w polityce społecznej. W stronę rekonstrukcji europejskich welfare states?*, IFiS PAN, Warszawa 2013, pp. 352-354.

and overlapping objectives. Successively these are: (1) the vocational activation, social activation, and health rehabilitation; (2) the empowerment; (3) the employment; and (4) the social integration.
In 2013, the author conducted research on employment agencies for people with disabilities, which was as part of a national project "Non-Governmental Employment Agencies for Disabled People. Opportunities and Dilemmas of Development in the Non-Governmental Sector" (pol. "Niepubliczne agencje zatrudnienia osób niepełnosprawnych. Możliwości i dylematy rozwoju w sektorze pozarządowym")[31]. The primary objective of the study was to formulate answers to the question of what the most important factors are determining the role of employment agencies for people with disabilities run by NGOs in Poland and what their main needs and the barriers to the development are. The basic premises of the study were current and expected changes in the NGOs employment agencies So far, such detailed analysis on a national scale has not been carried out. Meanwhile, in recent years these entities used the European funds for the development of the innovative activation projects and sought professionalization, specialization, and standardization of their services. The analysis included a qualitative critical review of secondary sources (theoretical publications, the recommendations of the international and national social policies, and reports of employment agencies) and the quantitative research—individual telephone interviews with NGOs leading employment agencies for people with disabilities. Research includes 31 interviews from the sample of all 95 such entities run in Poland. Exactly 11 agencies were located in and around Warsaw. While other important cities were Lublin (3 agencies) and Łódź (2 agencies). Thus, nearly 35.5% of agencies of the total sample are located in the Mazowieckie Voivodship. Regarding the territorial scope of activities, approximately 29.8% agencies focus only on the local level, 38.8% on a regional level, while 29.3% on a domestic level, and 0.9% on an international level. At the same time, agencies employ an average of about 30 employees such as guidance counselors, coaches, and lawyers. An employment agency for people with disabilities operates in the field of vocational guidance (32.1%), employment in the country (29.8%), and personal counseling (27.4%). These agencies occasionally engaged in temporary employment services and abroad job offers.

[31] A. Klimczuk, M. Siedlecki, P. Sadowska, M. Sydow, *Niepubliczne agencje zatrudnienia osób niepełnosprawnych. Możliwości i dylematy rozwoju w sektorze pozarządowym*, FPMiINR, Fundacja SocLab, Warszawa-Białystok 2013.

The main challenge of the NGO employment agency sector for persons with disabilities is its high internal diversity in terms of the capacity, a scale of operation, and the number of customers, which is not conducive to integration and joint actions with public employment services. The average agency registers during the year 374 persons with disabilities that are seeking work (ranging from several thousands of people to several people), acquires 6 jobs offers per month (74 in the year), and through their services 5 customers per month (61 per year) find employees. Currently, slightly more clients of job agencies are women. At the same time, clients of agencies are predominantly people aged 50+ (58.0%) and persons aged 25+ (48.4%). Thus, there is a need to adjust the agency services to their characteristics and create alliances with partners specializing in an aging society, such as training institutions, which are conducting programs in the field of lifelong learning. It should also be noted that, in the opinion of the respondents, agencies have to deal with difficult customers who are usually demanding the fundamental information on occupations, employment, training opportunities, and education (70.0%). So far, most of the job offers (36%) came from the other social entities, NGOs, and social enterprises. Similar shares of 11.6% are applications from the construction companies, trade industry, and hospitality industry. Deficits of offers are observed mainly in the case of the public administration, agriculture, real estate activities, culture, entertainment, and recreation. There are no job offers for people with disabilities in management positions, administrative positions, technical positions, and the positions that require high availability and mobility.
The primary opportunity for the development of employment agencies for people with disabilities is their inner potential. In general, respondents highly appreciate their NGOs, an average of 4 points in a 6-point scale (where 1 is unsatisfactory, and 6 is perfect). At 4.6 points, they evaluate various aspects of the organization's infrastructure (office, accessibility for clients, and lack of architectural barriers), skills, and resources. The agency marketing, business consulting, quality management and general aspects of the management, are also positively evaluated. The biggest challenge is the financial management. While acquiring the external resources is evaluated as good (4.1), the quality of competencies of fundraising staff is insufficient (3.9), the financial stability of the entity is rather low (3.5), and the ability to use NGO's financial resources is low (3.2). The agencies point out that the activation of their customers is often possible only with external funding, which leads to the strong competition for grants without concern for the quality of submitted projects. At the same time when their fundraising departments are weak, the agencies are dependent on the

European and domestic public funds. The main problems in raising the external funds are the complicated procedures and low subsidies (both 32.3%) and the lack of support from the local authorities (29.0%). In the standardization of their services, agencies perceive the continuous improvement of services (4.4), an increase of requirements for their employees and their contacts with the environment (4.3), and the promotion of agency through the creation of the best practices (4.3). Respondents were also asked to assess the barriers to the development of agencies. The highest scores were obtained on the side of the public employment service deficits: lack of interest in cooperation, lack of studies of the best practices in employment of people with disabilities, lack of contacts developed between agencies, and lack of measures to support employment agencies such as training and joint projects with local authorities.

Regarding employment agencies' cooperation with other institutions, the study evaluated their relationships with 30 types of broadly defined labour market institutions, social institutions, and business environment. The analysis shows that agencies have virtually no contact with entities such as technology transfer centers and investment funds. Their relations are neutral with entities such as technology parks, institutions of social dialogue, scientific, research and development entities, and higher education. While the cooperation focuses on the district family assistance centers, public employment services, support centers run by NGOs, and therapy workshops. The actual competitors of agencies are social integration clubs, volunteer work camps, training institutions, local partnerships, and support centers run by NGOs. The analyzed employment agencies mostly have had experience of cooperation with public employment services such as the project partner (67.7%). They have also taken part in a project funded by the European funds (64.5%) and partaken in the joint information and publicity (61.3%).

Forms of cooperation that have not been used in the relations of NGOs employment agencies and public employment services include: the use of integrated databases of beneficiaries of labour market institutions and social assistance (93.5%); the financial support from the Labour Fund (80.6%); and the transfer of data recorded by the office about the unemployed ones and job seekers (77.4%). Most organizations reminded that actions such as the exchange of knowledge about unemployed persons are currently not possible due to the Act on Personal Data Protection. Some public employment services have opined that the public labour offices only hide their inactivity behind the protection of personal data, as they can shape the cooperation with other entities to exchange necessary information with agencies including, for example, job offers. However, they do not do it either from the lack of desire or due to the treatment of employment agencies as competition. There are also voices that problems will be solved by the full privatization of employment services so that all agencies will work under the same conditions. Respondents recognize that the cooperation could bring benefits in the form of social activation of the unemployed and excluded persons and their comprehensive support. The barriers are the lack of will (11%), the formalism, the lack of tradition of cooperation (8.5%), and the lack of finance (8.5%).

Table 4: Assessment of the Employment Agency Relationship with Labour Market Actors and Social Institutions (Part 1).

	No contacts	Indifference - neither competition nor cooperation	Competition	Cooperation	Do not know/no opinion
Local and regional development agencies	7	11	0	11	2
%	*22.6%*	*35.5%*	*0%*	*35.5%*	*6.5%*
Social integration centers	6	10	0	12	3
%	*19.4%*	*32.3%*	*0%*	*38.7%*	*9.7%*
Lifelong learning training centers	5	12	1	10	3
%	*16.1%*	*38.7%*	*3.2%*	*32.3%*	*9.7%*
Technology transfer centers	10	12	0	5	4
%	*32.3%*	*38.7%*	*0%*	*16.1%*	*12.9%*
Investment funds	8	15	1	4	3
%	*25.8%*	*48.4%*	*3.2%*	*12.9%*	*9.7%*
Business incubators	4	14	1	10	2
%	*12.9%*	*45.2%*	*3.2%*	*32.3%*	*6.5%*

Other employment agencies	4	9	1	17	0
%	*12.9%*	*29.0%*	*3.2%*	*54.8%*	*0%*
The institutions of social dialogue (trade unions, employers' unions, unemployed unions)	1	15	0	15	0
%	*3.2%*	*48.4%*	*0%*	*48.4%*	*0%*
Financial institutions	3	13	0	13	2
%	*9.7%*	*41.9%*	*0%*	*41.9%*	*6.5%*
Academic institutions, research and development institutions, higher education	1	15	0	15	0
%	*3.2%*	*48.4%*	*0%*	*48.4%*	*0%*
Institutions of local partnership	1	12	2	16	0
%	*3.2%*	*38.7%*	*6.5%*	*51.6%*	*0%*
Training institutions	3	13	2	12	1
%	*9.7%*	*41.9%*	*6.5%*	*38.7%*	*3.2%*
Chambers of commerce and industry	6	12	0	11	2
%	*19.4%*	*38.7%*	*0%*	*35.5%*	*6.5%*

Source: Own research, ITI on NGO employment agencies, N=31.

Table 4: Assessment of the Employment Agency Relationship with Labour Market Actors and Social Institutions (Part 2).

	No contacts	Indifference - neither competition nor cooperation	Competition	Cooperation	Do not know/no opinion
Chambers of crafts	4	13	0	13	1
%	*12.9%*	*41.9%*	*0%*	*41.9%*	*3.2%*
Clubs of social inclusion	1	15	7	7	1
%	*3.2%*	*48.4%*	*22.6%*	*22.6%*	*3.2%*
Commercial consultancies	4	13	1	13	0
%	*12.9%*	*41.9%*	*3.2%*	*41.9%*	*0%*
Voluntary labour corps	2	8	3	18	0
%	*6.5%*	*25.8%*	*9.7%*	*58.1%*	*0%*
Non-governmental organizations working in the field of vocational activation	0	11	1	19	0
%	*0%*	*35.5%*	*3.2%*	*61.3%*	*0%*
Social welfare centers	4	11	0	15	1
%	*12.9%*	*35.5%*	*0%*	*48.4%*	*3.2%*
Technology parks	3	15	0	13	0
%	*9.7%*	*48.4%*	*0%*	*41.9%*	*0%*
District family assistance centers	1	5	0	25	0
%	*3.2%*	*16.1%*	*0%*	*80.6%*	*0%*
NGOs support centers	1	9	2	19	0
%	*3.2%*	*29.0%*	*6.5%*	*61.3%*	*0%*
Public employment services (regional, district)	6	5	1	19	0
%	*19.4%*	*16.1%*	*3.2%*	*61.3%*	*0%*
Regional center of social policy	5	9	0	16	1
%	*16.1%*	*29.0%*	*0%*	*51.6%*	*3.2%*
Independent positions, departments in local government units	7	5	0	18	1

%	*22.6%*	*16.1%*	*0%*	*58.1%*	*3.2%*
Social cooperatives	6	9	0	14	2
%	*19.4%*	*29.0%*	*0%*	*45.2%*	*6.5%*
Business associations	7	11	0	11	2
%	*22.6%*	*35.5%*	*0%*	*35.5%*	*6.5%*
Professional associations (for example, Polish Engineering Association)	5	8	0	16	2
%	*16.1%*	*25.8%*	*0%*	*51.6%*	*6.5%*
Therapy workshops	4	8	0	19	0
%	*12.9%*	*25.8%*	*0%*	*61.3%*	*0%*
Professional activity workshops	6	8	0	17	0
%	*19.4%*	*25.8%*	*0%*	*54.8%*	*0%*

Source: Own research, ITI on NGO employment agencies, N=31.

The study shows that in Poland an important issue is the cooperation of NGOs employment agencies for people with disabilities with not only the public employment services, but also with the social assistance institutions, educational institutions, scientific institutions, and business environment. Most of them do not maintain regular contact with each other or are indifferent to each other. Moreover, the public employment services are present in the dual role—as both collaborators and competitors in the exchange of job offers and in the implementation of projects involving the European funds.

In this context, the source of a future mixed economy of welfare in Polish ALMPs may be the implementation of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) that was ratified by Poland in 2012[32]. This Convention imposes on the country the obligation to remove barriers to access by persons with disabilities in using their rights also in terms of labour and employment, in monitoring the implementation of these rights, and the dissemination of knowledge about the Convention among citizens. It should be noted that the ratification will influence in the coming years the integration of social policy in the

[32] *The United Nations Convention on the Rights of Persons with Disabilities*, adopted by the United Nations General Assembly on December 13, 2006.

fields of: equality before the law, universal design, equal access to education, digital inclusion, participation of people with disabilities in elections, and their access to justice[33]. According to the early international examinations of the CRPD in the context of social inclusion, there have been noted problems with its application to domestic law, domestic policy, and domestic courts and at the same time there are still the gaps in their consistency with the CRPD. Among the observed obstacles are: the need for more detailed domestic legislation, the lack of awareness of the rights of people with disabilities, the lack of accessibility, the old and current public policies, and the current national budget systems[34].

6. Conclusions

This section focuses on the practical recommendations and directions for further research. Outplacement programs should take into account the best practices in communicating redundancy decisions to affected employees. It is reasonable to maintain employees' employability and to support their ability to remain on standby for the possibility of redundancies. Outplacement programs should include activities not only for workers affected by redundancies, but also for those remaining in the company. The benefits for laid-off workers may be generated by the outplacement programs in forms of temporary employment, employment in NGOs and social enterprises, and in the coordination of these programs with employment agencies. It should be underlined that NGOs may also be animators and actors of outplacement by the management of such programs and by the coordination of their own activities and activities of other entities. It is reasonable to promote and strengthen local partnerships as entities that can serve the adapted outplacement and the environmental outplacement and thus improve the strategic management of LMPs at the local and regional level. It is reasonable to break the stereotype of the high cost of outplacement through the promotion of best practices of NGOs employment agencies. Also, important is the promotion of outplacement as part of the corporate social responsibility. Attention should be paid to promoting the outplacement as part of stakeholder governance by companies, which may contribute to the

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[33] A. Błaszczak (ed.), *Najważniejsze wyzwania po ratyfikacji przez Polskę Konwencji ONZ o Prawach Osób Niepełnosprawnych*, Biuro Rzecznika Praw Obywatelskich, Warszawa 2012.
[34] A. Rimmerman, *Social Inclusion of People with Disabilities: National and International Perspectives*, Cambridge University Press, New York 2013, pp. 135-137.

creation of economic and social values. It is necessary to collect and disseminate the best practices of outplacement programs for SMEs. However, the literature on the subject consists mainly of studies carried out in large companies. An undertaken analysis allows identifying the following directions for further research: the deepening of research on the possibilities of outplacement management of NGOs; research on the opportunities and barriers of outplacement from the perspective of NGOs and social economy entities operating in the labour market; and three-dimensional welfare mix approach to the use of outplacement by SMEs in the cooperation with private employment services (service provision, finance, and regulation).

There are also many recommendations in the case of cooperation between public employment services and NGOs employment agencies in activation of people with disabilities in the labour market. There is a need for the dissemination of governance models in the relations between these entities based on a dialogue, which can lead to a better allocation of tasks, resources, access to information, to the emergence of new solutions, and can solve problems in a horizontal manner—taking into account all their aspects. Agencies should adapt their services to the needs of people aged 50+ by cooperation with lifelong learning institutions. There is a need to conduct the research on the effectiveness of agency services, agency financing, and coordination models, including links between employment agencies and the social economy. An analysis of the environment of people with disabilities and disability culture in Poland is still needed, including the attitudes, opinions, and service relationships with entities of social policy. Another field of studies may focus on practices in which people with disabilities are perceived not only as recipients or as consumers of services, but also as citizens and co-producers. Moreover, the internal diversity of the environment of people with disabilities needs more emphasis on the processes of self-organization to defend and exercise their rights. There is also a need to focus on the disability in the life cycle perspective—study of biographies, taking into account the different stages of life and areas of the relationship of people with disabilities with the entities of social policy and ALMPs. Another topic is the analysis of the multiple discrimination and ways to prevent its occurrence, particularly in the public entities. It is also possible to develop a collection of the best practices in employment of people with disabilities in the labour market, including employers' attitudes and solutions for disabled employees and the occupancy of higher management positions by persons with disabilities.

The New Frontiers of Welfare Systems: The Employability, Employment and Protection of People with Chronic Diseases

Michele Tiraboschi *

1. Framing the Issue

A growing share of the economically active population[1] reports to suffer from a temporary inability or a reduced ability to work because of the onset and the course of a chronic disease.

Leaving aside overly technical definitions used in medicine and other research domains[2], this paper employs the expression "chronic diseases" to refer to irreversible pathological alterations that require special

* Full Professor of Labour Law at the University of Modena and Reggio Emilia (Italy). Director of the Centre for International and Comparative Studies on Law, Economics, Environment and Work (DEAL) at the Marco Biagi Department of Economics of the University of Modena and Reggio Emilia (Italy). He also serves as an expert in labour law and labour market studies for the European project *Cancer Control Joint Action* (CanCon, www.cancercontrol.eu) funded by the European Union within the 2014-2017 EU Health Programme. The present work is dedicated to the memory of Roberta Scolastici and Simona Guerrini and serves as a theoretical background for an innovative project on the employability and the re-employment of people with chronic diseases promoted by the Association for International and Comparative Studies in the field of Labour Law and Industrial Relations (ADAPT) in collaboration with the Coronel Institute of Occupational Health of the Academic Medical Center (the Netherlands), the European Public Health Alliance (Belgium), the Work Foundation of Lancaster University (UK) and the Uniwersytet Warszawski Medyczny (Poland). To facilitate consultation and comparison, many documents and papers referred to in this paper are collected and published in the ADAPT Observatory on Work & Chronic Disease and can freely accessed at the cooperative platform http://moodle.adaptland.it (heading: *Osservatori*).

[1] Also known as the "labour force", that includes both employed and unemployed people.

[2] For a technical definition of "chronic disease", see S. Varva (a cura di). *Malattie croniche e lavoro: una rassegna ragionata della letteratura di riferimento.* ADAPT University Press, 2014.

treatment, long-term monitoring, observation, and care. These include cardiovascular and respiratory diseases, musculoskeletal disorders, HIV / AIDS, multiple sclerosis, several types of cancer, diabetes, obesity, epilepsy, depression and other mental disorders.
As far as the cases examined in this paper are concerned[3], the impact that chronic diseases have on sick people in terms of income, job opportunities, career prospects and social inclusion varies considerably, as do the effects on their family members who are tasked with providing care and assistance (i.e. caregivers).
Some measures that might help cope with these specific issues are provided by the national systems of social security (e.g. early retirement programmes ensuring access to pension schemes or sickness allowances) and by laws and collective bargaining (e.g. the total or partial suspension of employment and the provision of wage compensation on a temporary basis) (see par. 2).
However, little attention has been paid to the economic impact that chronic diseases have on healthcare and welfare systems[4]. Particularly, in the medium and the long run. The major deficiencies of these systems as regards their financial sustainability are exacerbated by the rise in life

[3] For an overall evaluation of the impact that chronic diseases have on post-industrial societies that considers economic indicators and socio-economic aspects, see P. BRAVEMAN, L. GOTTLIEB, *The Social Determinants of Health: It's Time to Consider the Causes of the Causes,* Public Health Reports, 2014, Supplement 2, pp. 20-31 and the bibliography therein. See also, UNITED NATIONS DEVELOPMENT PROGRAMME, *Addressing the Social Determinants of Non communicable Diseases,* Discussion Paper, October 2013.
[4] This point is made cogently by R. BUSSE, M. BLÜMEL, D. SCHELLER-KREINSEN, A. ZENTNER. *Tackling Chronic Disease in Europe: Strategies, Interventions and challenges.* European Observatory on Health Systems and Policies, World Health Organization 2010, who argue that "there is considerable evidence on the epidemiology of a chronic disease, but little on its economic implications" (p. 19). See also UNITED NATIONS, *World Population Ageing 2013,* Department of Economic and Social Affairs, ST/ESA/SER.A/348, 2013, p. 75.

expectancy[5], the resulting upward adjustment of the retirement age and stricter criteria to access pension benefits[6].

1.1. Chronic Diseases: The Sustainability of Healthcare and Welfare Systems

As is widely known, people's longevity increases the demand for healthcare services and long-term social benefits, bringing about higher public expenditure[7]. Nevertheless, budget constraints and the ensuing tightening of the subjective and objective criteria to access pension and welfare benefits, compel people to postpone retirement and often to cope with physical, psychological, psychosomatic and psychosocial diseases while still at work (e.g. stress, anxiety, panic, depression, cognitive impairment, fatigue, and muscle weakness). In turn, this hampers the performance of day-to-day working tasks and translates into higher rates of absenteeism[8].

At present, no data or reliable projections are available relating to the overall incidence of chronic diseases on the economically active

[5] Cf. D.E. BLOOM, E.T. CAFIERO, E. JANÉ-LLOPIS, S. ABRAHAMS-GESSEL, L.R. BLOOM, S. FATHIMA, A.B. FEIGL, T. GAZIANO, M. MOWAFI, A. PANDYA, K. PRETTNER, L. ROSENBERG, B. SELIGMAN, A.Z. STEIN, C. WEINSTEIN. *The Global Economic Burden of Noncommunicable Diseases.* Geneva, World Economic Forum, 2011. A 10-year increase has been reported in Europe in the last 50 years in relation to life expectancy. EUROPEAN COMMISSION, *Demography Report: Older, more numerous and diverse Europeans*, Commission Staff Working Document, Luxembourg, Publications Office of the European Union, 2011, p. 33.

[6] Cf. OECD, Pensions at a Glance 2013: Retirement-Income Systems in OECD and G20 Countries, Paris, 2013 and EUROPEAN COMMISSION, *Pension adequacy in the European Union,* Brussels, 2012. In literature: M. SZCZEPAŃSKI, J.A. TURNER (eds.). *Social Security and Pension Reform: International Perspectives*. Upjohn Institute, Kalamazoo, 2014; A. GRECH, *Assessing the Sustainability of Pension Reforms in Europe,* in *Journal of International and Comparative Social Policy,* 2013, pp. 143-162.

[7] Cf. F. BREYER, F. COSTA-FONT, S. FELDER. *Ageing, Health, and Health Care.* in *Oxford Review of Economic Policy,* 2010, pp. 674-690 and M. Suhrcke, D.K. Fahey, M. McKee, *Economic Aspects of Chronic Disease and Chronic Disease Management,* in E. Nolte, M. McKee (eds.), *Caring for People with Chronic Conditions: A Health System Perspective,* Maidenhead, Open University Press, 2008, pp. 43–63.

[8] Cf. the comparative analysis from EUROFOUND on *Employment Opportunities for People with Chronic Diseases*, European Observatory of Working Life – EurWORK (http://www.eurofound.europa.eu). With reference to Italy, cf. ISTAT *Limitazioni nello svolgimento dell'attività lavorativa delle persone con problemi di salute,*op. cit.

population[9] and employment trends[10]. One explanation for this is that workers tend to hide their real medical conditions from their employers because of the consequences that disclosing such information might have on their remuneration and career prospects.

However, the European Network for Workplace Healthcare Promotion estimated that almost 25% of the working age population in Europe experience disorders caused by at least one chronic disease[11] and that the share of the chronically ill in employment is equal to 19% of the labour force[12]. On the contrary, the rate of labour market participation in Europe of people over 55 years old–i.e. the share of the economically active population most at risk of losing the ability to work[13] – is projected to rise by 8.3% and by 14.8% in 2020 and 2060,respectively[14].

In the Eurozone, the estimated impact of chronic diseases on workers over 55 years old is even more significant; a 10% and a 16.7% increase have been said to occur by 2020 and by 2060[15].

Undoubtedly, the labour market participation of people with chronic diseases will become necessary in the long run to cope with the reduction in labour supply, a shortage of skilled workforce, and the pressure on the

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9 Cf. For each chronic disease, OECD, *Health at a Glance: Europe 2012, OECD* Publishing, 2012, pp. 34-48. Cf. also WORLD HEALTH ORGANIZATION, *Non communicable Diseases Country Profiles 2011,* WHO Library Cataloguing-in-Publication Data, 2011 (p. 98 provides data on Italy).

10 In reference to Italy, see ISTAT, *Limitazioni nello svolgimento dell'attività lavorativa delle persone con problemi di salute,* Report maggio 2013. A staggering 6.5 million people in the 15-to-64 year-old age group (that is 16.5% of the working population) reported to suffer from one or more chronic diseases that have different impacts on their working life.

11 Cf. *European Network for Workplace Health Promotion, PH Work Promoting Healthy Work for People with Chronic Illness: 9th Initiative (2011 - 2013)*, 2013. Data are more detailed when it comes to the United States, where 40.3% of those in the 20-to-44 year-old age group suffer from at least one chronic disease, while 16.8% of those in the same age cohort have been diagnosed with two or more long-term conditions. In the 45-to-64 year-old age group, the share of population affected by at least one chronic disease rises to 68%, and those with two or more irreversible conditions are 42.8% of the total population. Cf. G. Anderson, *Responding to the Growing Cost and Prevalence of People With Multiple Chronic Conditions*, 2010, p. 8.

12 As estimated by the *Recommendations from ENWHP's ninth initiative Promoting Healthy Work for Employees with Chronic Illness – Public Health and Work,* p. 7.

13 Cf. K. KNOCHE, R. SOCHERT. K. HOUSTON. *Promoting Healthy Work for Workers with Chronic Illness: A Guide to Good Practice.* European Network for Workplace Health Promotion, 2012, p. 7.

14 Cf. EUROPEAN COMMISSION. *The 2012 Ageing Report: Economic and Budgetary Projections for the 27 EU Member States (2010- 2060).* European Economy 2|2012, p. 63.

15 *Ibidem.*

pension system caused by the considerable ageing of the labour force[16]. This is especially true in countries such as Italy, Japan and Spain, where the share of those aged over 65 is expected to peak in 2050, constituting one third of the entire population[17].
Moreover, investing in healthcare and welfare for the economically active population will increasingly become an "economic imperative"[18] to ensure the sustainability of social security systems.
It should be also noted that, a decline of industrial work, employment opportunities and professional qualifications are on the rise in some crucial sectors, such as caregiving, which nevertheless faces some major issues. This is due to cyclical mismatches between labour supply and demand concerning medical staff[19], and a shortage of professionals with the necessary skills to understand[20] and manage the problems experienced by people with chronic diseases (e.g. the desire to return to work, re-employment).
Significantly, the estimated cost to treat chronic diseases in Europe is 700 billion euro that is between 70% and 80% of total healthcare expenditure[21]. A steady increase has also been reported in the share of people requesting sick leave, taking early retirement and living on long-term disability allowances, who account for 10% of the labour force in some countries[22].

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[16] OECD. *Sickness, Disability and Work: Breaking the Barriers – A Synthesis of Findings Across Oecd Countries.* Paris, 2010, p. 22.
[17] OECD. *Sickness, Disability and Work: Breaking the Barriers etc.*. cit., p. 24.
[18] Cf. HEALTHY WORKING LIVES. *Managing a Healthy Ageing Workforce: A National Business Imperative.* NHS Health Scotland, 2012.
[19] Cf., T. ONO, G. LAFORTUNE, M. SCHOENSTEIN. *Health Workforce Planning in OECD Countries: A Review of 26 Projection Models from 18 Countries.* OECD Health Working Paper, n. 62/2013 and M. SCHOENSTEIN. *Health Labour Market Trends in OECD Countries.* OECD Health Division, Global Health Workforce Alliance Forum Recife, 11 November 2013. For a summary in Italian, cf. A. SANTOPAOLO, F. SILVAGGI, G. VIALE. *La programmazione dei fabbisogni di medici e infermieri nei Paesi OCSE: verso un modello multi-professionale per rispondere alle sfide dell'invecchiamento e delle malattie croniche.* In *Bollettino ADAPT,* n. 31/2014.
[20] In this perspective, Regulation No. 2013/1291/EU of 11 December 1991 provides some useful insights into the *Horizon 2020*framework programme of research and innovation. Cf. annex 1, part III ("Challenges for society"), where explicit reference is made to the emergency caused by chronic diseases and their economic and social costs.
[21] EUROPEAN COMMISSION, *The 2014 EU Summit on Chronic Diseases – Conference Conclusions,* Brussels, 3 - 4 April 2014, p. 1.
[22] Cf. OECD. *Sickness, Disability And Work Keeping On Track In The Economic Downturn.* OECD Background Paper, Paris, 2009, p. 10.

An international study conducted by the Harvard School of Public Health (HSPH) for the World Economic Forum[23] estimates that, between 2011 and 2030, there will be a $47-trillion cumulative loss of output due to chronic diseases and mental illnesses connected to healthcare and social security, reduced productivity and absenteeism, prolonged disability and the consequent reduction of income for the families involved. More precisely, 1.2% of GDP of the OECD area involves disability and related initiatives (2% if sick pay entitlements are factored in), that is some 2.5 times the cost of unemployment benefits[24]. Measured as a percentage of total public social expenditure; the average cost of disability in the OECD area amounts to 10%, with peaks of 25% in some countries.
Not surprisingly, major concerns arise from the projections of healthcare and social security expenditure for the next decades[25]. These concerns are of an economic nature and refer to the steady increase in chronic diseases, which develop at a higher pace than does the ageing of the population[26]. Some of them, such as obesity, respiratory distress, depression and other mental disorders occur at a young age[27], making it even more difficult to identify and define them, and to devise adequate policy responses.
In the European countries – notably those that adopt the "Bismarck model": Belgium, Estonia, France, Germany, Lithuania, Luxembourg, The Netherlands, Poland, The Czech Republic, Romania, Slovakia, Slovenia, Hungary[28] – where the costs of healthcare expenditure (not pensions) are

[23] Cf. The study by D.E. BLOOM, E.T. CAFIERO, E. JANÉ-LLOPIS, S. ABRAHAMS-GESSEL, L.R. BLOOM, S. FATHIMA, A.B. FEIGL, T. GAZIANO, M. MOWAFI, A. PANDYA, K. PRETTNER, L. ROSENBERG, B. SELIGMAN, A.Z. STEIN, C. WEINSTEIN. *The Global Economic Burden of Non communicable* Diseases. Cit., p. 29.
[24] Cf. OECD. *Sickness, Disability And Work Keeping etc.*. Cit., p. 13. where it is highlighted that in such countries as The Netherlands and Norway, expenditure for disability and sickness benefits accounts for 5% of GDP.
[25] Again, EUROPEAN COMMISSION. *The 2012 Ageing Report: Economic and Budgetary Projections for the 27 EU Member States (2010- 2060),* cit.
[26] Cf. audizione del rappresentante di Farmindustria presso la Camera dei Deputati nella seduta n. 5 di lunedì 29 luglio 2013, p. 19 (availableat www.camera.it).
[27] Cf., among others, J.C. SURIS, P.A. MICHAUD, R. VINER. *The adolescent with a chronic condition. Part I: developmental issues.* In *Archives Disease in Childhood,* 2004, p. 938–942.
[28] Cf. the report for the Committee of the Regions drafted by Progress Consulting and Living Prospects. *The management of health systems in the EU Member States - The role of local and regional authorities*. European Union, 2012, p. 98-102. In Italy, the law requiring the national health service to be funded trough social contributions paid by employers and employees was repealed by Article 36 of Legislative Decree No. 446 of 15 December 1997. Now the national health service is financed by the government and the regions through the payment of certain levies on productive activities and personal incomes

covered by workers and businesses[29],an increase has been reported in the *old-age dependency ratio*. In other words, the share of those who pay social contributions and actively participate in the labour market is gradually decreasing compared to those who qualify for and access social benefits. The European Commission has estimated that the o*ld-age dependency ratio* will double in the next few decades, rising from 26% in 2010 to 52% in 2060[30], with a considerable increase in long-term healthcare and welfare expenditure linked to the ageing of the population[31].
The same holds true for those countries where alternative mechanisms are in place to fund the welfare system, especially those such as in Italy with low rates of regular employment. Here, demographic changes and an ageing population place a strain on public expenditure (social security and healthcare) mainly because the limited implementation of the *pay-as-you-go* system, which is based on shared financing[32].

1.2. The Impact of Chronic Diseases on Labour Market Dynamics, Productivity and Work Organisation

Besides the concerns related to the initiatives to fund welfare systems, preoccupation arises also as regards another neglected issue[33], namely the

(IRAP and IRPEF). Cf. *Opzioni di Welfare e integrazione delle politiche.* Rapporto CEIS Sanità VIII Edizione, giugno 2012, p. 96.

[29] A comparative analysis of public expenditure on social protection in Europe (concerning the costs for retirement, disability, unemployment, family, housing, diseases and medical care) is provided by COORDINAMENTO NAZIONALE DELLE ASSOCIAZIONI DEI MALATI CRONICI. *XI° Rapporto nazionale sulle politiche della cronicità*. Roma, 176-180.

[30] EUROPEAN COMMISSION, *The 2012 Ageing Report: Economic and Budgetary Projections etc.,* cit., pp. 60-61 and pp. 159-161.

[31] EUROPEAN COMMISSION. *The 2012 Ageing Report: Economic and Budgetary Projections etc.* An overview is provided at pp. 34-36 and pp. 40-41. Cf. also D.E. BLOOM, E.T. CAFIERO, E. JANÉ-LLOPIS, S. ABRAHAMS-GESSEL, L.R. BLOOM, S. FATHIMA, A.B. FEIGL, T. GAZIANO, M. MOWAFI, A. PANDYA, K. PRETTNER, L. ROSENBERG, B. SELIGMAN, A.Z. STEIN, C. WEINSTEIN, *The Global Economic Burden of Noncommunicable Diseases,* cit.

[32] On this point, see N. SALERNO. *Le risorse per il welfare del futuro. Insufficienza del pay-as-you-go e disegno multipilastro*. In *Diritto delle Relazioni Industriali,* n. 1/2015.

[33] Of significance is the recommendation of the European Council to assess the impact of this phenomenon and of the national reforms of the health systems on the labour market, productivity and competitiveness, more generally. Cf. COUNCIL OF EUROPEAN UNION, *Council conclusions on the "Reflection process on modern, responsive and sustainable health systems*, Employment, Social Policy, Health and Consumer Affairs, Council meeting Brussels, 10 December 2013, p. 4.

impact of chronic diseases on labour market dynamics and, at the micro level, on the organization of work to manage the presence or the return to work of sick workers. This is because the latter are inevitably less productive and more prone to injuries[34] or serious accidents at work[35], as many studies have pointed out.
Comparing today's expenditure and population with the projections for 2060, it is labour input that acts as the main lever for growth in Europe. This is so in a context characterized by the overall aging and contraction of the economically active population, also in consideration of the share of people regarded fit for work[36]. Coping with chronic diseases is not only a matter of social inclusion and protection. It also has an impact on the dynamics of labour productivity, with repercussions on the competitiveness of businesses and national economic systems and workers' career paths.
Significantly, chronic diseases are frequently linked to occupational risk factors resulting from working tasks[37], and from illnesses developed at work[38] or because of work[39]. These present the case of an "hidden

[34] According to a recent US study, an overall increase has been reported in the number of occupational injuries among employees with chronic diseases, which were distributed as follows: asthma (+14%), diabetes (+17%), heart diseases (+25%) and depressions (+25%). Cf. K. M. POLLAK, *Chronic Diseases and Individual Risk for Workplace Injury,* in *Occupational and Environmental Medicine,* 2014, pp. 155-166.
[35] In this sense, cf. J. KUBO, B.A. GOLDSTEIN, L.F. CANTLEY, B. TESSIER-SHERMAN, D. GALUSHA, M.D. SLADE, I.M. CHU, M.R., CULLEN. *Contribution of health status and prevalent chronic diseases to individual risk for workplace injury in the manufacturing environment*. In Occupational and Environmental Medicine, 2014, pp. 159-166. Cf. also the comparative report written for EUROFOUND. *Employment Opportunities for People with Chronic Diseases*. Cit., especially the section *Higher exposure to risks and hazards.*
[36] EUROPEAN COMMISSION. *The 2012 Ageing Report: Economic and Budgetary Projections etc.*. Cit. An overview of the report is available on p 34.
[37] In 2007 the World Health Organization has estimated that there were more than 300,000 fatalities because of various work-related diseases (not including the deaths from injury) the majority of which were chronic diseases. Cf. WORLD HEALTH ORGANIZATION. *Action Plan for Implementation of the European Strategy for the Prevention and Control of Noncommunicable Diseases 2012–2016*. Copenhagen, 2012, p. 21.
[38] An example is the effects that passive smoking has on the development of tumours and cardiovascular diseases. Cf. among others, I. KAWACHI, G.A. COLDITZ. *Workplace Exposure to Passive Smoking and Risk of Cardiovascular Disease: Summary of Epidemiologic Studies,* in *Environmental Health Perspectives.* 1999, pp. 847-851.
[39] An example of this is the impact of certain psychological and social factors, like work-related stress, job instability, shift work and working long hours. Cf. among others N.H. ELLER, B. NETTERSTRØM, F. GYNTELBERG, T.S. KRISTENSEN, F. NIELSEN, A. STEPTOE, T. THEORELL. *Work-Related Psychosocial Factors and the Development of Ischemic Heart Disease A*

epidemic", as the International Labour Organization[40] has put it, the impact of which is far greater than that of many acknowledged work accidents, and gives rise to legal disputes, direct and indirect liability and additional costs for employers[41].

As to labour supply and productivity, chronic diseases affect welfare systems, business dynamics and overall employment levels, and result in fewer active people and more barriers to labour market entry[42]. As early as in 2007, the International Labour Organization reported that, in Europe, only 66% of the unemployed / jobless people between 16 and 64 years old had an opportunity to find a job; this percentage decreases to 47% for the chronically ill, and to 25% for those affected by a serious disability[43].

The "great crisis" that began in 2007 with the collapse of the financial markets inevitably worsened the odds to find employment for people with a chronic disease, particularly for those suffering from mental disorders[44]. This despite the fact that they are more willing than before to search for a job, because of the reduction in public spending and the tightening of the criteria regarding retirement age or to qualify for permanent disability allowances.

The estimations from the Organization for Economic Cooperation and Development –which are in line with the data contained in the Report of the European Commission on Disability[45] and the very detailed information provided by the comparative analysis on chronic diseases by

Systematic Review. In *Cardiology in Review,* 2009, pp. 83-97 and M. KIVIMAKI, J.E. FERRIE, E. BRUNNER, J. HEAD, M.J. SHIPLEY, J. VAHTERA, M.G. MARMOT. *Justice at Work and Reduced Risk of Coronary Heart Disease Among Employees*. In *Archives of Internal Medicine*, 2005, pp. 2245-2251.

40 ILO. *The Prevention of Occupational Diseases*. Geneva, 2013, p. 4.

41 An attempt to estimate the cost of occupational diseases is provided by ILO *cit.*, pp. 8-9.

42 Cf. R. BUSSE, M. BLÜMEL, D. SCHELLER-KREINSEN, A. ZENTNER. *Tackling chronic disease in Europe: Strategies, Interventions and* challenges. Cit., pp. 20-24, more specifically the overview, the classification of chronic diseases, and the conclusions referred to in the relevant literature.

43 Cf. ILO. *Equality at Work: Tackling the Challenges. Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*. Geneva, 2007, pp. 44-45. Cf. also S. GRAMMENOS. *Illness, Disability and Social Inclusion*. European Foundation for the Improvement of Living and Working Conditions, Dublin, 2003, pp. 43-47.

44 Cf. S. EVANS-LACKO, M. KNAPP, P. MCCRONE, G. THORNICROFT, R. MOJTABAI. *The Mental Health Consequences of the Recession: Economic Hardship and Employment of People with Mental Health Problems in 27 European* Countries. In *PLoS ONE,* 2013, pp. 1-7

45 EUROPEAN COMMISSION. *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*. COM (2010) 636 def., p. 7.

EUROFOUND[46] – report that the employment rate of those with chronic diseases is just over half of the economically active population, while the unemployment rate is twice as much[47].

This group of people faces objective difficulties at the time of entering and re-entering the labour market which are often associated with psychological strain and uncertainty, that lead them to abandoning plans of returning to work. They are also the victim of prejudices and stereotypes related to certain chronic diseases, and have to cope with forms of work organisation that penalise them as based on extremely rigid criteria, among others workplace presence, fitness for work and productivity. As far as the most vulnerable groups of the population[48] are concerned, some discriminatory practices arise that at times turn into systematic harassment (e.g. bullying) and unavoidably raise questions of social justice, inclusion and equity[49].

Furthermore, the relevant literature has pointed out that a vicious circle is often created, in that unemployment and unstable working conditions are the direct or indirect cause of chronic diseases and worsened health conditions, especially in relation to mental disorders[50]. A US study shows how the involuntary loss of employment among those aged over 50 doubles the risk of a heart attack; Japanese research analyses the impact of unemployment on people's lifestyles, emphasising the increase in the use

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[46] Cf. the comparative study of EUROFOUND on *Employment opportunities for people with chronic disease,* cit. (esp. the section *Employment situation of people with chronic diseases,* the national reports available at www.eurofound.europa.eu, and the documentation that can be accessed at the ADAPT Observatory on Work and Chronic Diseases available free of charge at the online platform http://moodle.adaptland.it (heading *Osservatori*).

[47] OECD. *Sickness, Disability and Work etc.*. Cit., p. 23 and p. 31, 32, 37.

[48] Cf. EUROPEAN COMMISSION. *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe.* Cit., where special reference is made to the vulnerability of women, young people, migrants and those with a mental disease.

[49] Cf. EUROPEAN COMMISSION. *The 2014 EU Summit on Chronic Diseases – Conference Conclusions*. Brussels, 3 - 4 April 2014, cit., p. 4. On this point, see also the comparative study from EUROFOUND on *Employment opportunities for people with chronic disease,* cit. (especially the section *Discrimination and prejudice at work)* and the national reports on the issue.

[50] In addition to the pioneering study of M. JAHODA, P.F. LAZARSFELD, H. ZEISEL, D. PACELLI. *I disoccupati di Marienthal,* in *Studi di Sociologia*. 1987, pp. 229-231, see also the references in A. NICHOLS, J. MITCHELL, S. LINDNER. *Consequences of Long-Term Unemployment.* The Urban Institute, Washington, 2013, pp. 9-10. CFR. ATRES' D. Stuckler, S. Basu, M. Suhrcke, M. Coutts, M. McKee. *Effects of the 2008 recession on health: A first look at European data*. in The Lancet. 2011, pp. 124–125, and, comparatively, EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS, *Access to Healthcare in Times of Crisis,* Dublin, 2014.

of substances such as tobacco and alcohol, which are among the main causes of chronic diseases; other studies point out the impact of unemployment on mental disorders (anxiety, stress, depression, etc.)[51]. On the contrary, many studies report that the direct incidence of unemployment on health and mental conditions is irrelevant in those countries, e.g. Germany[52], where a sound system of social security is in place, with unemployment benefits and adequate re-employment services.
Over the last decades, labour law and welfare systems have experienced significant changes due to new modes of production and work organization induced by technological innovations and globalization[53]. As seen in the foregoing pages, equally important have been demographic changes, the ageing workforce[54] and the consequent impact of chronic diseases on work organization and on labour productivity. Labour law should give careful consideration to these issues, through an approach that favours personal wellbeing based on a more efficient and inclusive labour market, and promotes the modernization of the regulatory framework and the underlying industrial relations system.

1.3. Research Objectives

This study sets out to highlight the relevance that the impact of chronic diseases on the employment relationship and on the social security system might have on labour law and welfare systems, as well as on their future development. This research strand has been investigated only to a limited extent[55]. Yet it might contribute to favouring the shift from a merely

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51 Cf. the literature provided in S. VARVA (a cura di). *Lavoro e malattie croniche: una rassegna ragionata della letteratura di riferimento*. Cit.
52 H. SCHMITZ. *Why are the unemployed in worse health? The causal effect of unemployment on health*, in *Labour Economics*. 2011, pp. 71-78. An opposite view on the same data is provided in L. ROMEU GORDO. *Effects of short- and long-term unemployment on health satisfaction: evidence from German data*. In Applied Economics, 2006, pp. 2335–2350.
53 Cf., among others, the MCKINSEY REPORT. *The Future of Work in Advanced Economies*. McKinsey & Company, 2012.
54 Cf. A. CHIVA, J. MANTHORPE. *Older Workers in Europe*. Open University Press, 2009 and the comparative study carried out by EUROFOUND (*Sustainable Work and the Ageing Workforce,* Luxembourg, 2012) and OECD (*Ageing and Employment Policies – Country Studies & Policy Review* available at www.oecd.org). In relation to the effectiveness of Italian social security, cf. N. C. SALERNO. *Finanziare il Welfare,* in *Quaderni Europei sul Nuovo Welfare*. 2014, n. 21, especially § 2, 3 e 4 on demography, employment and productivity.
55 Among the early studies on this subject, cf. S. GRAMMENOS. *Illness, Disability and Social* Inclusion. Cit., especially p. 1, where it was argued that "chronic illness, and especially

passive and emergency income support measures – which at times results in labour market exclusion through so-called "medicalization" (see par. 2) –to more innovative approaches based on preventive measures at the workplace (see par. 4) and initiatives promoting the employability and the return to work of workers with chronic diseases (see par 3).
Carrying out innovative research on the relationship between work and chronic diseases is necessary for the future sustainability of welfare systems, and to effectively prompt the renewal of national industrial relations systems. Owing to technological and demographic changes, IR systems are now called to handle the transformations, either in formal and notional terms, of concepts such as "workplace presence", "work performance", "fulfilment of contractual obligations" (see below, par. 5) and to strike a new balance between productivity and equity, inclusion and social justice.

2. Chronic Diseases: The Shortcomings of the Current Responses Provided by Labour Law and Social Security Systems

As pointed out above, the employment prospects of people with chronic diseases are limited and have worsened over the past decades following economic stagnation and the crisis of international financial markets. Undoubtedly, reduced or limited workability affects the competitiveness of people with chronic diseases when searching for employment. In a similar vein, those who do have a job are less likely to keep it at the end of their sick leave.
Comparative analysis shows that protection schemes vary considerably across countries, since they depend to a great extent on the specific regulations on dismissal and other aspects, for instance one's inability to work, poor performances, and absence from work[56].

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mental illness, remains very much a hidden issue. Discussion about disability tends to get stuck on the issue of rights, where there is a lackluster consensus, but fails to move into the area of active policy implementation. As a result, the disadvantages for people with disabilities or illness do not really change: they tend to be marginalised, even stigmatised, and feel isolated from many parts of social and public policy as well as the labour market".

[56] Cf. the comparative analysis by S. FERNÁNDEZ MARTÍNEZ. *Enfermedad crónica y despido del trabajador: una perspectiva comparada*. In *Relaciones Laborales y Derecho del Empleo,* n. 1/2015.

It is true, however, that the rigid classifications of chronic diseases according to categories laid down in national welfare and social security regulations, accentuate so-called medicalization[57] and contribute to creating structural barriers to employment[58].

In Europe as elsewhere[59], the traditional approach of social security systems draws on medically-driven criteria to determine the allocation of disability allowances that often produce early exit from the labour market of those concerned, even when unnecessary.

This brings about adverse effects on patients' morale and physical recovery. It is frequently the case that the chronically ill look for a job not so much for economic reasons, but because entering the labour market is associated with a return to a normal life[60].

The boundaries between work ability and disability are blurred, considering that peoples' reaction to the same disease is different either in

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[57] The notion of "medicalisation" was employed for the first time in the 2002 issue of the *British Medical Journal* to refer to a widespread attitude in western societies that emphasizes the need for diagnosis, treatment rather than the promotion of people's well-being and health. Cf. R. MOYNIHAN, R. SMITH. *Too Much Medicine?.* In British Medical Journal, 2002, pp. 859-860 and S. BROWNLEE. *Why too much Medicine is Making us Sicker and Poorer.* Bloomsbury Publishing, 2010.

[58] This point is made cogently by A. VICK, E. LIGHTMAN. *Barriers to Employment Among Women with Complex Episodic Disabilities.* In *Journal of Disability Policy Studies*, 2010, pp. 76-77. Cf. also L.C. KOCH, P.D. RUMRILL, L. CONYERS, S. WOHLFORD. *A Narrative Literature Review Regarding Job Retention Strategies for People with Chronic Illnesses.* In *Work,* 2013, p. 126.

[59] Cf. The Canadian case described in A. VICK, E. LIGHTMAN. *Barriers to Employment Among Women with Complex Episodic Disabilities*. Cit., p. 77-78.

[60] A vast amount of literature points out the therapeutic impact that employment has on sick people. Cf. among others EUROPEAN NETWORK FOR WORKPLACE HEALTH PROMOTION, *Promoting Healthy Work for Workers with Chronic Illness etc.,* cit. and J.F. STEINER, T.A. CAVENDER, D.S. MAIN , C.J. BRADLEY, *Assessing the Impact of Cancer on Work Outcomes What Are the Research Needs?.* In *Cancer,* 2004, esp. p. 1710, where it is argued that "work is important to the individual, to his or her family and social network, to the employer, and to society at large". In reference to the role of employment as a lever for social inclusion, see also S. ZAMAGNI. *People Care: dalle malattie critiche alle prassi relazionali aziendali.* In Atti del convegno della Fondazione Giancarlo Quarta, Milano, 26 ottobre 2011.

physical or emotional terms. Further, the course of a chronic disease is unpredictable because many subjective and objective factors come into play, among others the support provided by family, society, and healthcare facilities, personal income, treatment and recovery programmes.
By contrast, current social protection systems still adopt static and standardised models (*one-size-fits-all* solutions) that do not make it possible to conduct evaluations targeted on each person that consider one's ability to work, occupation and tasks, type of contract and working time, work environment and relationship with colleagues and supervisors. Nor do they take into account elements such as the characteristics of the firm and the welfare schemes implemented, any physical adjustments related to the disease, the invasive nature of the treatment and its effectiveness, the evolution of the disease, and so on[61].
As authoritatively highlighted by the Organization for Economic Cooperation and Development[62], many people with limited ability to work are considered by current welfare systems unfit for work, even when this is not completely the case. The entitlement to a disability allowance does not require beneficiaries to actively search for a job. In addition, in many countries, it is the law itself that prohibits the recipient of a disability allowance to work. Otherwise, they might lose their disability benefits, which are only slightly above subsistence levels[63].
Ensuring adequate protection to those with a permanent or temporary inability to work does not come down to merely providing protection in

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[61] Cf. T. TASKILA, J. GULLIFORD, S. BEVAN. *Returning to Work Cancer survivors and the Health and Work Assessment and Advisory Service*. Work Foundation, London, 2013, esp. 3, where it is highlighted that "successful work retention for people with a diagnosis of cancer depends not only on the severity of one's condition but also on the individual's capacity to cope with crises or with fluctuations in health or functional capacity. The coping process nevertheless depends on several social aspects of work, such as the work environment and the amount of support one gets in the workplace. This process is also affected by the extent to which healthcare services prioritise work as a clinical outcome and a welfare system that supports job retention". In the same perspective, cf. J.F. STEINER, T.A. CAVENDER, D.S. MAIN, C.J. BRADLEY. *Assessing the Impact of Cancer on Work Outcomes What Are the Research Needs?*. In *Cancer*, 2004, pp. 1703-1711.
[62] Cf. OECD. *Sickness, Disability And Work Keeping On Track In The Economic Downturn*. Cit., qui p. 17-18.
[63] Again OECD. *Sickness, Disability And Work etc.*. Cit., p. 18.

the labour market and the employment relationship. This is an issue to be dealt with from a medical and social perspective, as the question being posed is whether or not patients have to integrate their disability benefits resulting from their inability to work[64].

Compounding the picture are national policies relieving employers from certain formal obligations. While still required to bear the labour costs of their employees, they are released from providing practical solutions to the issues faced by workers with chronic diseases (e.g. absence from work). On their part, workers find it more advantageous to draw disability benefits on a permanent basis – and concurrently take up undeclared work – rather than benefitting from temporary unemployment benefits and having their remuneration reduced because of lower productivity or higher rates of absenteeism.

Conceived in an economic, social and demographic scenario that was similar to the current one, the social security systems in place in Western European countries[65] now appear inadequate to attend to the issues resulting from chronic diseases discussed thus far[66] that can be regarded as new if we consider their scope, seriousness and economic impact. This and other factors indirectly contribute to shrinking the employment and re-employment opportunities for people suffering from a chronic disease.

Barriers and disincentives to work are also provided by current labour laws and collective agreements. Particularly in Europe and North America, the traditional principles of non-discrimination and equal treatment[67] undoubtedly ensure a broad and modern set of formal rights

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[64] *Ibidem*. For a useful overview of Italian legislation on disability, cf. M. CINELLI. *Diritto della previdenza sociale*. Giappichelli 2013, cap. XI.

[65] As to traditional welfare systems, cf. F. GIROTTI. *Welfare State. Storia, modelli e critica*. Carocci, Roma, 1998.

[66] Cf. also S. ZAMAGNI. *People Care: dale malattie critiche alle prassi relazionali aziendali*. Cit., "the welfare state in place in Europe as elsewhere following World War II is based on the idea that if someone is not fit for adequately carrying out certain tasks cannot think of staying on at work.

[67] Cf. S. FERNÁNDEZ MARTÍNEZ already referred to *Enfermedad crónica y despido del trabajador: una perspectiva comparada*, cit., spec. § 2. In relation to European anti-discrimination legislation, cf. FREDMAN. *Discrimination Law*. Clarendon Law Series, 2011; E. ELLIS, P. WATSON. *EU Anti-Discrimination Law*. Oxford University Press, 2012; B. DOYLE, C. CASSERLEY, S. CHEETHAM, V. GAY, O. HYAMS, *Equality and Discrimination*, Jordan Publishing Limited, 2010; D. SCHIEK, V. CHEGE (eds). *European Union Non-Discrimination law. Comparative Perspectives on Multidimensional Equality Law*. Routledge-Cavendish, 2009. An overview of North American anti-discrimination EU legislation, cf. P. BURSTEIN. *Discrimination, Jobs and Politics. The Struggle for Equal Employment Opportunity in*

and protection[68]. Yet the practical implications of these safeguards are frequently overlooked, as are the preventive measures at work (see par. 4), the subjective and objective conditions of the chronically ill and the features of the companies they work for (see par. 5).
Consequently, the limited effectiveness of formal labour laws[69] comes as no surprise. In many countries, and along the lines of what happens with welfare systems, chronic diseases are considered through a passive and standardised approach, without ensuring economic incentives to employers, *ad-hoc* protection and promotion, and above all active policies favouring job retention and the return to work, along with medical and psychological support[70]. If anything, the numerous formal requirements in

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the United States since New Deal. The University of Chicago Press, 1998; R. C. POST, R.B. SIEGEL. *Equal protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*. In *The Yale Law Journal*, 2000, pp. 441-526. As for the Italian case, cf. A. LASSANDARI. *Le discriminazioni nel lavoro. Nozioni, interessi, tutele*. Wolters Kluwer Italia, 2010.

[68] Cf. the comparative study carried out for EUROFOUND. *Employment opportunities for people with chronic disease*. Cit. (esp. The section *Main policy measures and initiatives at national level)* and the national reports available at EUROFOUND's website (www.eurofound.europa.eu). The international literatures has given empirical evidence of some major developments at a company level when dealing with chronic diseases. This translates into forms of support given to workers, who only in a few cases have been discriminated. Cf. the study on a group of female workers affected by breast tumour conducted by R.R. BOUKNIGHT, C.J. BRADLEY, L. ZHEHUI. *Correlates of Return to Work for Breast Cancer Survivors*. In Journal of Clinical Oncology*,* 2008, pp. 345-353 esp. p. 148 and p. 150, where it is stated that "more than 80% of patients returned to work during the study period, and 87% reported that their employer was accommodating to their cancer illness and treatment" and that "few women (7%) reported problems with discrimination because of cancer, suggesting that this was not a widespread problem for breast cancer patients in our sample."

[69] The low effectiveness of the formal safeguards provided by labour law is highlighted, among others by F. DE LORENZO. *Presentazione Progetto ProJob: lavorare durante e dopo il cancro*. (proceedings) ADAPT – FAVO dell'11 settembre 2014, Roma, available at the *ADAPT* Observatory on *Work & Chronic Disease*.

[70] Cf. the work by A. DE BOER, T. TASKILA, S.J. TAMMINGA, M. FRINGS-DRESEN, M. FEUERSTEIN, J.H. VERBEEK. *Interventions to enhance return-to-work for cancer patients*. In *Cochrane Database of Systematic Reviews,* 2011, esp. pp. 3-4. A classification is provided of those interventions to help workers with cancer to return to work, which can be also applied to anyone with a chronic diseases. Such measures are: (1) *Psychological* ("any type of psychological intervention such as counselling, education, training in coping skills, cognitive-behavioural interventions, and problem solving therapy, undertaken by any qualified professional (e.g. psychologist, social worker or oncology nurse"); (2) *Vocational* ("any type of intervention focused on employment. Vocational interventions might be person-directed or work-directed. Person- directed vocational interventions are aimed at the patient and incorporate programmes which aim to encourage return-to- work, vocational rehabilitation, or occupational rehabilitation. Work-directed vocational

place to protect workers with a chronic health condition sometimes act as a disincentive to employers. To the point that they employ subtle practices that border on discrimination in order not to hire sick workers. They fear that, by concluding an employment relationship with them, they will have to deal with complex procedures concerning their termination for economic reasons, should sick workers fail to integrate with their colleagues at work or because of their inability to work[71].

In considering the return to work of those who lost their job because of an illness, the poor results recorded by certain measures should be seen as equally predictable. These include the low effectiveness[72] of reserved employment (e.g. designating some occupations to sick workers), certain tax exemptions and the possibility to temporarily suspend[73] the employment relationship laid down by many legal systems, that usually applies only to firms with a given number of employees[74].

The few studies on this topic have highlighted that the implementation of the quota system for workers with chronic diseases has produced some results in terms of job retention for those who are already employed,

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interventions are aimed at the workplace and include workplace adjustments such as modified work hours, modified work tasks, or modified workplace and improved communication with or between managers, colleagues and health professionals"); (3) *Physical* ("any type of physical training such as walking, physical exercises such as arm lifting or training of bodily functions such as vocal training"); (4) *Medical or pharmacological* ("any type of medical intervention e.g. surgical or medication such as hormone treatment"); (5) *Multidisciplinary* ("a combination of psychological, vocational, physical and / or medical interventions").

71 This aspect is highlighted by the OECD report. *Sickness, Disability And Work Keeping On Track In The Economic Downturn*. Cit., p. 25. An overview of national legislations that prohibit dismissing workers for economic reasons arising from their inability to perform their task cf. *International Dismissal Survey*. Laga, Belgium. October 2012. With special reference to Germany, cf. R. SANTAGATA. *I licenziamenti in Germania: i presupposti di legittimità,* in *Diritto delle Relazioni Industriali*. 2013, qui spec. pp. 889-892. On the case of the UK, cf. *Dismissals for Long Term Sickness Absence*. In Library of House of Commons, January 2010.

72 As far as Italy is concerned, cf. il MINISTRO DEL LAVORO. *VI Relazione al Parlamento sullo stato di attuazione della legge 12 marzo 19998, n. 68 "Norme per il diritto al lavoro dei disabili" (anni 2010 – 2011).* Roma, pp. 56-75.

73 Pursuant to Italian legislation (Article 14 of Act No. 68/99), employers in the private sectors and certain public entities that cannot hire the number of disabled workers required by the law can be partly relieved of such obligation upon payment of a contribution to the Regional Fund for the Employment of Disabled People.

74 For a comparative analysis cf. the study carried out for EUROFOUND on *Employment opportunities for people with chronic disease,* and the national reports widely referred to in this paper.

while penalising job-seekers, thus negatively impacting their employment trends[75].

Even without considering those elusive practices put in place by some employers, hiring and keeping workers with a chronic disease should not be done to fulfil a legal obligation and avoid sanctions. It requires a positive attitude and the active participation of both employers and workers that should be based on mutual adaptation in order to reconcile their respective needs (so-called sustainable work, see par. 5).

To ensure treatment and care and avoid the dismissal of the chronically ill, suspension from work also plays a part, although applying for limited periods of time. Further, despite some innovations introduced by collective bargaining (see par. 5), work suspension is not adequate to manage long-term and serious diseases as chronic ones, which also require flexible working hours and working tasks for both workers and their families[76]. This is the only way to reconcile the worker's willingness to actively participate in the working life and the employer's need to be efficient and productive.

Another aspect to consider is that the foregoing suspension and the reduction of the working activity for workers with a chronic health condition come along with lower remuneration – just when they might incur higher expenses (medicines, nursing, assistance and so forth)[77] – and place them at a disadvantage in terms of career prospects and professional growth.

Equally significant is that employers –mainly in Southern Europe, e.g. Italy[78] –express increasing disapproval with granting paid leave and suspension from work to both sick workers and their families. They lament that workers are overprotected and that they repeatedly take time

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[75] Still OECD. *Sickness, Disability And Work Keeping On Track In The Economic Downturn*. Cit., p. 25.

[76] Still EUROFOUND. *Employment opportunities for people with chronic disease*. Cit., along with the national reports.

[77] Osservatorio sulla condizione assistenziale dei malati oncologici. *6° Rapporto sulla condizione assistenziale dei malati oncologici*. Sanità, Il Sole 24 Ore, 2014, p. 28, and *Meeting the needs of people with Chronic Conditions*, National Advisory Committee on Health and Disability, Wellington, New Zealand, 2007, pp. 8-9. Cf also the data in F. DE LORENZO. *Presentazione Progetto ProJob: lavorare durante e dopo il cancro*. Atti del convegno ADAPT – FAVO dell'11 settembre 2014, Roma, available at the ADAPT Observatory on Work & Chronic Disease.

[78] This risk was pointed out in Italy some ten years ago. *L'assenteismo costa l'1% del PIL*. In Il Sole 24 Ore del 5 dicembre 2007. Some similar concerns are regularly raised in the reports from Centro Studi of Confindustria on the labour market and the Italian economy (available at www.confindustria.it).

off from work even when not needed. This practice, coupled with inadequate monitoring from those in charge (social security and health authorities) ends up penalizing those who really require long time off from work due to their illness[79].
Consequently, the forms of protection ensured by law and collective agreements based on quota systems, the suspension of the employment relationship and job retention strategies for the time needed for treatment, are designed for salaried and open-ended employment (that in Southern Europe mainly concerns male workers hired by large companies)[80]. Nevertheless, the recent evolution and fragmentation of the labour market reported an intensive use of intermittent, temporary and atypical work, that does not allow those with a chronic disease to fully benefit from the foregoing safeguards[81] for long periods.
Artisans, small business owners, the self-employed and those who are economically dependent on a single principal/client are faced with even more insecurity. This is because they fall outside the notion of "legal subordination" and the ensuing safeguards provided by labour law, which are still relevant although salaried employment is no longer the most widespread form of work[82].

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[79] This explains the clamour following the renewal of some collective agreements (e.g. the commerce sector) where the social partners agreed to reduce workers' safeguards in the event of repeated short-term absence from work, in order to focus on the protection of long-term and more serious diseases. Cfr. E. CARMINATI. *Lotta agli assenteisti e maggiori tutele per i malati gravi*. In Bollettino Speciale ADAPT, 7 aprile 2011, n. 17.

[80] This argument is supported by an examination of female unemployment rates, which are still low in Southern Europe, and the gender of the workforce in atypical and precarious employment. Not to mention that workers are still tasked with caring for family members and sick people. Cf. S. GABRIELE, P. TANDA, F. TEDIOSI. *The Impact of Long-Term Care on Caregivers' Participation in the Labour Market*. ENEPRI Research Report No. 98, November 2011, esp. p. 6; and EUROPEAN COMMISSION, *Long-term Care for the Elderly*, Luxembourg, Publications Office of the European Union, 2012.

[81] Cf., among others, M. GIOVANNONE, M. TIRABOSCHI (a cura di). *Organizzazione del lavoro e nuove forme di impiego. Partecipazione dei lavoratori e buone pratiche in relazione alla salute e sicurezza sul lavoro – Una Literature Review*. 2007 in Osservatorio ADAPT Nuovi lavori, nuovi rischi, pp. 9-13. In relation to our analysis, see A. C. BENSADON, P. BARBEZIEUX, F.O. CHAMPS. *Interactions entre santé et travail, Inspection Gènèrale des Affaires Sociales*. Paris, 2013, p. 5.

[82] Cf. among the many contributions in G. DAVIDOV, B. LANGILLE (eds.). *Boundaries and Frontiers of Labour Law*. Hart Publishing, 2006 and, more recently, H. ARTHURS. *Labour Law as the Law of Economic Subordination and Resistance: A Counterfactual?*. Comparative Research in Law & Political Economy. Research Paper, n. 10/2012.

Consequently, the invitation of the European Commission to "take due account of the problems of fairness"[83] requires a review of existing national social security systems. The foregoing considerations make it clear that workers with chronic diseases who want to stay on at work or re-enter the labour market need more than quota systems and the formal protection ensured to healthy workers by traditional labour law.
Likewise important is envisaging innovative and individually-targeted welfare policies, and measures promoting new definitions for "productivity" and "workplace presence" helping reconcile patients' and employers' needs. There is an increasing awareness of the need for wide-ranging and innovative changes when considering the relationship between work and chronic diseases[84].
This is because public institutions adopt a narrow-minded approach to regulate the issue, for instance by considering rights, obligations, sanctions, and the provision of care and assistance as separate elements. Yet a comprehensive strategy is needed that considers sick workers' human dimension while laying down inclusion policy[85].

3. From Subsidies, Quota Systems and Passive Protection Measures, to Activation, Work-life Balance and Retention Policies

In view of the considerations made above, the 2006 UN Convention on the Rights of the disabled[86] is a starting point to modernize social protection systems and labour law in relation to the emerging issues of chronic diseases and the ageing of population. The Convention is the

[83] Cf. EUROPEAN COMMISSION. *The 2014 EU Summit on Chronic Diseases – Conference Conclusions*. Cit., p. 4. With reference to chronic diseases, see Resolution of the European Parliament of 10 April 2008, *Combating cancer in the enlarged European Union*.
[84] A call to change the paradigm from the medical point of view that has implications on work was made as early as ten years ago by the World Health Organisation in *Innovative Care for Chronic Conditions*, 2002, p. 4.
[85] In the same sense, Cf. S. GRAMMENOS. *Illness, Disability and Social Inclusion*. Cit., esp. p. 1: "the public sector tends to tackle the issue from one perspective (public health) or another (social affairs) and usually not in a comprehensive way (physical illness but not mental illness; social assistance but not inclusion; benefits but not activation). There is a lack of critical assessment about how the policies work and what could be the best allocation of resources".
[86] UN Convention for the Rights of Persons with Disabilities of 13 December 2006, which was subsequently approved and enforced by the European Union through Decision No. 2010/48. The convention was ratified in Italy by means of Act No. 18 of 3 March 2009.

result of a complex and cultural process to approach the issue of diversity in society[87]. This document points out that the condition of disability, as defined in the broadest possible sense[88], is not based on the idea of "limitations" as an intrinsic quality or condition of individuals. It is more akin to an "interaction" between impaired or disadvantaged people and physical, "behavioural" and "environmental" barriers, which prevent their actual participation in society and their inclusion in the labour market in a condition of equality with others[89].

This point has been also made by European institutions in relation to people with disabilities[90]. The main argument is that the issues faced by workers with chronic diseases and their employment cannot be dealt with only from a medical point of view. This approach often causes their exit from the labour market and the safeguards ensured by labour law and collective bargaining still consider them as "different".

Further, the implementation of initiatives promoting their social inclusion cannot be dependent upon the good will or the indulgence of employers and human resources managers[91], although many of them are moving in

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87 T. J. MELISH. *Perspectives on the un convention on the rights of persons with disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why The U.S. Should Ratify*. In *Human Rights Brief*, 2007.

88 Here reference is made to disability strictly speaking, being this an evolving concept, as pointed out in let. e) of the Preamble of the Convention.

89 Cf., in various passages, the Preamble of the Convention, especially let. e). See also the *International Classification of Impairment Disabilities and Handicaps* (ICIDH) by the World Health Organisation that has been appended to the *International Classification of Diseases* (ICD) and the March 2002 *International Classification of Functioning, Disability and Health* (ICF). Here, disability is defined as an interactive and evolving process resulting from the complex interaction of health conditions and environmental and personal factors. See also S. GRAMMENOS. *Illness, Disability and Social Inclusion*. Cit., pp. 29-34 and J. PITCHER, G. SIORA, A. GREEN. *Local Labour Market Information on Disability*. In *Local Economy,* 1996, pp. 120-130.

90 Cf. the European Directive No. 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation for disabled persons that moves away from the mere provision of support that has long marked European and national legislation. Consideration of the evolution of the notion of disability, the employment and the return to work of people with disabilities is given in the Communication of the European Commission concerning the *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*. Brussels, COM (2010) 636 final and in the clarification made by the ECJ through *HK Danmark* 11 April 2013, C-335/11 e C-337/11, and *the European Commission vs The Italian Republic* of 4 July 2013, C-312/11 and Z., 18 March 2014, C-363/12.

91 And workers. In Italy, there has been a case that received extensive media coverage. A bus driver returned to work after his paid leave. He was still sick so his 250 colleagues

the right direction by devising effective codes of conducts[92] and policies as part of corporate social responsibility (see par. 4).
Removing those barriers (either physical or not) that prevent or limit sick workers' access to the labour market[93], is the first step to facilitate their inclusion. Further initiatives should take due account of human diversity and contribute to better matching labour demand and supply. This matching cannot be predetermined by law (for instance through designing a number of jobs for sick workers), nor can it be promoted through economic incentives or sanctions.
Rather, it is essential to define a conceptual and operational framework modelled on individuals[94] that considers each work environment. This will allow for a shift away from abstract models and standardised work performance assessment methodologies in use in Fordism, when a different legal framework, and different organisational and production needs were in place (see par. 5).
Traditional recovery strategies – concerning the medical, professional, and psychological sphere[95] – should be supplemented by policies favouring the return to work and re-employment of workers with chronic diseases. To do so, a different approach is needed that involves our attitude rather than the legal or the institutional framework: emphasis should be given to people's abilities and not to their disabilities[96].

made available their leave to help him keep his job. Cf. *L'autista di bus tornata alla vita con le ferie regalate dai colleghi*. In *Il Tirreno,* 7 maggio 2014.
[92] See the comparative studies carried out by EUROFOUND, and par 3.2 "Examples of enterprises and/or collective agreements implementing initiatives or establishing clauses to support people with chronic diseases" of the national reports contained in A. CORRAL, J. DURÁN e I. ISUSI. *Employment opportunities for people with chronic diseases*. European Observatory of Working Life, November 2014.
[93] In relation to the issue of disability strictly speaking, cf. the Communication from the European Commission *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*. Cit., p. 4. See also S. GRAMMENOS, *Illness, Disability and Social Inclusion,* cit., pp. 36-42.
[94] In the same vein, see cf. S.J. TAMMINGA, J.H. VERBEEK, A.G. DE BOER, R.M. VAN DER BIJ, M.H. FRINGS-DRESEN. *A work-directed intervention to enhance the return to work of employees with cancer: a case study*. In *PubMed*, 2013, pp. 477-485.
[95] Cf. the classification of re-employment strategies and the considerations applicable to all chronic diseases put forward in A. DE BOER, T. TASKILA, S.J. TAMMINGA, M. FRINGS-DRESEN, M. FEUERSTEIN, J.H. VERBEEK. *Interventions to enhance return-to-work for cancer patients*. Cit. *supra* footnote 70.
[96] In this perspective, see the study from OECD. *Sickness, Disability And Work Keeping On Track In The Economic Downturn*. Cit., p. 19 that describes the shift from "disability to ability". Cf. also OECD. *Transforming Disability into Ability Policies to Promote Work and Income Security for Disabled People*. Paris, 2003.

This means to prioritise "what people with health problems can still do at work and, consequently, develop appropriate support and programs that strengthen them in this regard"[97].
This has been done in Australia, Denmark, Finland, The Netherlands, Sweden, United Kingdom, New Zealand[98] where policies favouring sick workers' job retention and return to work have been successfully implemented.
A different approach can pave the way to an action plan to bring to fruition the reform of welfare and industrial relations systems that were initially intended in Europe as emergency solutions. They were passive measures put in place to provide a response to the economic crisis, yet they resulted in a mere reorganisation of social and healthcare expenditure, which was put into question by less available resources.
By contrast, welfare reform and healthcare spending reviews should be carried forward taking into account demographic changes and future labour dynamics. This will provide decision-makers and supranational institutions with financial responses and anthropological answers in a time marked by economic and social turmoil that results in worry and uncertainty[99]. The issues faced by people with chronic diseases and their return to work may be dealt with through a comprehensive strategy. This approach seems essential in the current demographic scenario to devise welfare schemes that focus on individuals.

3.1. Rethinking Welfare-to-work Policies, Incentives and Public Subsidies

In Europe, some major interventions are needed in relation to *welfare-to-work* policies[100] and economic incentives, which so far have failed to

[97] Again, see OECD. *Sickness, Disability And Work Keeping On Track etc.*. Cit.
[98] See the national reports carried out between 2006 and 2008 by OECD on *Sickness, Disability and Work: Breaking the Barriers* and available on the OECD website. See also some more recent reports on innovative re-employment policies for disabled workers and the chronically ill conducted by EUROFOUND *(Employment Guidance Services for People with Disabilities)* available at http://www.eurofound.europa.eu/ as well as the study *Employment opportunities for people with chronic disease,* cit. especially the National reports from Denmark, Finland, The Netherlands, Sweden and the United Kingdom.
[99] Cfr. COMITATO PER IL PROGETTO CULTURALE DELLA CONFERENZA EPISCOPALE ITALIANA. *Per il lavoro. Rapporto-Proposta sulla situazione italiana*. Editori Laterza, Bari, 2013.
[100] As already done in some countries. Cf. OECD. *New Ways of Addressing Partial Work Capacity*. Progress Report, April 2007,pp. 4-7.

consider the vocational rehabilitation of people with chronic diseases notwithstanding the recommendations from EU institutions[101]. Thus they are entitled to a number of benefits, but empirical evidence has shown that these forms of aid contribute to their exclusion from the labour market[102].

This aspect is exemplified by a number of countries (Denmark, Luxembourg and The Netherlands)[103] where priority has been given to the review of public subsidies over procedures to assess workers' working capabilities[104], so that people with reduced work abilities are to some extent regarded as fit for work and do not access disability allowance. In empirical terms, the direct correlation is yet to be demonstrated between the way welfare and social security systems are conceived and the strategies favouring or preventing labour market inclusion for these workers. But it is a fact that in countries where no permanent or temporary disability benefits are provided to people with a reduced work ability, lower inactivity rates for people with chronic diseases are reported[105].

This move is likely to produce an increase in the unemployment rates for this category of workers (Luxembourg's case)[106], yet it fulfils the purpose of addressing the employability and re-employment of workers with chronic diseases considering a labour-based approach rather than taking a medical perspective (see par. 2). A reallocation of public subsidies should follow. They should not be used to fund passive policies that lead to inactivity but to promote economic incentives favouring workers' retraining and return to work.

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[101] Cf., among others, EUROPEAN COMMISSION. *The 2014 EU Summit on Chronic Diseases*. Cit., esp. p. 3 "the use of structural, research and other EU funds for this purpose should be improved".

[102] According the OECD, the majority of persons with a partial work capacity who take up disability benefits never return to the labour market. Data from various countries suggests that after being on disability benefits for a year, statistically more recipients are dying than returning to employment. Cf. OECD. *Sickness, Disability And Work Keeping On Track etc.*. Cit., p. 19.

[103] Cf. OECD. *New Ways of Addressing Partial Work Capacity*. Cit., p. 4.

[104] This point has been made by the OECD. *New Ways of Addressing Partial Work Capacity*. Cit., p. 4. With reference to the Estonian case, cf. also M. MASSO. *Estonia: Employment opportunities for people with chronic diseases*. European Observatory of Working Life, November 2014.

[105] Again, OECD, *New Ways of Addressing Partial Work Capacity,* cit., qui p. 7.

[106] Ibidem.

A case in point is Danish *flex-jobs*[107],that is subsidised employment schemes for those with a reduced workability of at least 50%[108]. Disability benefits in Denmark are only granted to those with a permanent reduced work ability that does not allow them to perform work, irrespective of whether or not they attend activation or vocational rehabilitation programmes. Instead, special forms of unemployment benefits are provided to those who can engage in part-time work through adequate medical, therapeutic, and psychological support and training. Employers who resort to flex-jobs are paid economic incentives, while workers receive a standard wage.

The Danish case is of relevance if compared to other countries, e.g. Italy, where working time adjustments or even the right of sick workers to work part-time provided by law[109] or collective bargaining[110] in the event of certain chronic diseases did not produce tangible results[111]. This is due to the weak correlation of working time measures with social security and assistance benefits, and with incentive schemes promoting re-employment. They inevitably involve adaptation of the work environment on the part of the employer[112] that is not offset by the reduction of the sick worker's salary because of fewer hours worked.

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[107] In comparative terms, the system in place in the Netherlands is particularly significant (see OECD. *New Ways of Addressing Partial Work Capacity*. Cit., p. 5-8). This system consists of two main components. The long-life provision of a disability benefit for those who are no longer able to work and another form of benefit for those with a partial and temporary disability. Those falling within this second group are employed in low-paying occupations and entitled to a bonus. They are also engaged in job-searching and labour market participation initiatives.

[108] Again OECD. *New Ways of Addressing Partial Work Capacity*. Cit., qui p. 5.

[109] Cf. the national reports contained in EUROFOUND. *Employment opportunities for people with chronic disease*. Cit.

[110] Cf. the comparative study carried out for EUROFOUND on *Employment opportunities for people with chronic disease,* cit., especially the section *Examples of enterprises and collective agreements implementing support initiatives.*

[111] In Italy, only 8.6% of workers with an oncological condition asked to transform their employment relationship from full-time to part-time or other flexible working arrangements. By contrary, 20% of workers with cancer reported having left their job. Cf. Osservatorio sulla condizione assistenziale dei malati oncologici, *6° Rapporto sulla condizione assistenziale dei malati oncologici*. Sanità, Il Sole 24 Ore, 2014, p. 25.

[112] Cf. again the case of the Netherlands (footnote 107) where the employer is under the obligation to adapt the workplace to the sick worker's health conditions for which some economic incentives are made available. See the national report on The Netherlands by W. HOOFTMAN NDI. HOUTMAN, contained in EUROFOUND, *Employment opportunities for people with chronic disease*. Cit. par. 3.1.

Likewise important are those retraining strategies envisaged by public and private employment services to help sick workers re-enter the labour market[113]. The case of Norway[114] stands out as noteworthy[115]. Here, the public employment service works together with the national institute of social security to simplify and coordinate the services provided, and to ensure close interaction between active and passive employment policies, for example when granting work incentives and disabilities benefits. Further, the principle of conditionality[116] has been strengthened in many countries. In other words, receiving or maintaining social security benefits is made dependent upon participation in training and retraining schemes[117], while promoting a more adequate link between public and private placement services through cooperation and subsidiarity[118].

3.2. Reviewing the Strategies for Work-life balance and Equal Opportunities: Promoting *Work-health-life Balance*

At a European level, additional efforts should be channelled into reviewing the strategies concerning workers' work-life balance and equal opportunities, not only in terms of gender but to promote *work-health-life-balance*. This will help boost business productivity and efficiency[119] in the

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[113] An overview of some good practices is provided in the summary documents edited by S. AUTIERI, F. SILVAGGI. *Buone prassi in materia di reinserimento delle persone con disabilità: schede di sintesi.* In Bollettino ADAPT, n. 34/ 2014. Cf. also EUROFOUND. *Employment opportunities for people with chronic disease*. Cit.

[114] The same happens in the UK. Cf. the national reports of Norway and the United Kingdom included in the comparative analysis conducted for EUROFOUND on *Employment opportunities for people with chronic disease,* cit.

[115] Cf. F. SILVAGGI. *Il ritorno al lavoro dopo il cancro: una prospettiva europea.* In Bollettino ADAPT, n. 27/2014.

[116] Cf. the national reports included in EUROFOUND. *Employment opportunities for people with chronic disease.* Cit.

[117] Cf. B. GAZIER. *Vers un nouveau modèle social.* Champs Essay, Parigi, 2009; F.J., GLASTRA B.J. HAKE, P.E. SCHEDLER. *Lifelong Learning as Transitional Learning*. In *Adult Education Quarterly*, 2004, n. 54; A.M. Saks, R.R. Haccoun. *Managing performance through training and development*. Toronto, Nelson Education, 2010.

[118] On the definition of the conditionality principle in relation to the Italian case, cf. L. CORAZZA. *Il principio di condizionalità (al tempo della crisi).* In *Giornale di Diritto del Lavoro e di Relazioni Industriali*, 2013, pp. 489-505.

[119] On the importance of the strategies to concurrently ensure social protection and production efficiency, cf. E. RAMSTAD. *Promoting Performance and the Quality of Working Life*

short and the long run, while dealing with certain employment-related issues like quality, sustainability[120], diversity, and the impact of technology on one's working and personal life. A major overhaul of stagnating OHS legislation is therefore needed, since it was conceived for an industry-based economic and a social paradigm that are now outdated.
Following the transposition of Directive No. 89/391/EEC of 12 June 1989[121] into national legislation, the employer is under the obligation to ensure the safety and the" health of workers in every aspect related to the work"[122], "adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods"[123].
Also, Council Directive No. 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[124] calls for the need to promote a labour market favourable to

Simultaneously. In *Internal Journal of Productivity and Performance Management*, 2009, pp. 423-436.

120 On the concept of sustainable work, see EUROFOUND. *Sustainable Work and the Ageing Workforce*. Luxembourg, 2012, especially p. 7-8.

121 Cf. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

122 Article 5 of the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

123 Art 6 let d) of the Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. As regards the transposition of this principle into national legislation, see EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the practical implementation of the provisions of the Health and Safety at Work Directives 89/391 (Framework), 89/654 (Workplaces), 89/655 (Work Equipment), 89/656 (Personal Protective Equipment), 90/269 (Manual Handling of Loads) and 90/270 (Display Screen Equipment), COM(2004)62.As far as Italy is concerned, Article 42 Legislative Decree No. 81 of 9 April 2008 health and safety at work titled "measures in the event of unfitness to perform a specific mention" sets forth that "the employer […] puts in place the measures indicated by the relevant health authorities. If workers' fitness is required to perform certain tasks and they are unable to perform them, workers should be assigned to an equivalent or a lower-level task while being entitled to the same remuneration as before". Pursuant to this provision, the employer is required to make an attempt at replacing the worker who is unfit for the task assigned, irrespective of the seriousness of his/her inability. On the right of the worker to be assigned to a different task, also through a reasonable change of work organization, see S. GIUBBONI. *Sopravvenuta inidoneità alla mansione e licenziamento. Note per una interpretazione "adeguatrice"*. In *Rivista Italiana di Diritto del Lavoro*, 2012, pp. 304-308.

124 Cf. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

social inclusion, asking Member States to formulate a coherent set of policies aimed at combating discrimination against groups such as persons with disability[125].

Prompting the adoption, whereas possible[126], of policies to promote equality, the Directive also provides that employers envisage "appropriate measures, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resource"[127].

As is well known, a part of the literature[128] has seriously called into question the employers' interest to devise measure to adapt the workplace to the need of workers with a chronic diseases. This also includes employers unwillingness to assign other tasks or to employ individuals with a chronic disease. Instead, they welcome public training schemes for chronically ill employees while they are still in employment.

One might also note that the obligations referred to above, which are contained in both legislation and employment contracts, are not as effective as they should be because they are not supplemented by adequate measures of work-life balance based on employability and the

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[125] Par. 8) of Council Directive 89/391/EEC of 12 June 1989 provides that "the Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force".

[126] Article 5 of Directive No. 2000/78/EC sets forth that "In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned".

[127] Par. 20) of Directive No. 2000/78/CE.

[128] Cf. S.H. ALLAIRE, J. NIU, M. P. LA VALLEY. *Employment and Satisfaction Outcomes from a Job Retention Intervention Delivered to Persons with Chronic Diseases*, in *Rehabilitation Counseling Bulletin*. 2005, p. 108, where it is argued that: "it's not clear that employers would be interested in intervention that helps employees identify and request accommodation". In relation to the employer's unwillingness to take on workers with disabilities and to the costs to adapt the workplace, cf. also DEPARTMENT FOR WORK AND PENSIONS. *Economic and Social Costs and Benefits to Employers of Retaining, Recruiting and Employing Disabled People and/or People with Health Conditions or an Injury: A Review of the Evidence*. 2006, p. 88.

mutual adaptability of the parties concerned. If these initiatives were put in place, the employer would have a more pro-active attitude, not just to comply with formal obligations, but because these actions might benefit the company in terms of productivity, efficiency, cost-saving (either direct and indirect costs) and employee loyalty (par. 5).
Ensuring sustainable work to both the employer and the sick employee[129] will make it possible to give practical form to certain "recommendations"[130] which are taken for granted but poorly implement. According to these recommendations, the programmes involving mutual adaptation should be in force while workers with chronic diseases are still in employment, to prevent one's inability to work rather than dealing with it afterwards, when they have lost their skills and are forced out of the labour market (so called job mastery)[131].

4. Promoting the Prevention of Chronic Diseases at the Workplace

Prevention has now become a stated objective of the European Commission in the medium and long term. Decision-makers at the EU level[132] have stressed the need to act on risk factors (smoke, alcohol, eating habits, lifestyles) paying particular attention to the most vulnerable groups.
In this perspective, workplaces, schools and universities play a major role to devise preventive measures that should be more effective than those in place thus far[133].
This is even more so as the major issues concerning the relationship between employment and chronic diseases are due to social and economic determinants (income levels and education), so the ability to react to a serious disease and return to employment also depends on the resilience and vulnerability of those involved[134]. In turn, the manner in which legal

[129] Cfr. EUROFOUND. *Sustainable Work and the Ageing Workforce*. Cit.
[130] Cf. the first of the nine *Recommendations from ENWHP's ninth initiative Promoting Healthy Work for Employees with Chronic Illness – Public Health and Work,* p. 10, which is frequently overlooked.
[131] In this perspective, see S.H. ALLAIRE, J. NIU, M. P. LA VALLEY. *Employment and Satisfaction Outcomes etc.*. Cit.
[132] Cf. EUROPEAN COMMISSION. *The 2014 EU Summit on Chronic Diseases*. Cit., p. 2 e p. 4.
[133] *Ibidem.* Cf. A.C. BENSADON, P. BARBEZIEUX, F.O. CHAMPS. *Interactions entre santé et travail, Inspection Générale des Affaires Sociales.* Paris, 2013, p. 6.
[134] Resilience and vulnerability are key concepts in the academic debate concerning prevention and mitigation strategies. They are also being given priority at the micro-level

obligations are fulfilled changes in each workplace and rests on the response – either negative or positive – provided by each company.
On a close reading, "wellness at work" is not a new concept among employers. They have voluntarily decided[135] to take further action, moving from merely complying with protection measures against chronic diseases imposed by legislation and collective agreements to setting forth initiatives of Corporate Social Responsibility[136], i.e. to raise awareness[137] about lifestyles and habits that are detrimental to their employees' health[138].

(i.e. at the individual, community and company level), following demographic, economic, environmental and work-related changes and the increasingly special character of workers and workplaces. Consequently, the one-size-fits-all rule is no longer applicable. The word "resilience" was first used in physics and ecology, thanks to the work of C.S. HOLLING. *Resilience and Stability of Ecological Systems*. In *Annual Review of Ecology and Systematics*, 1973, 1-23. Later on, the term was also employed to refer to people, families, communities and organizations. In considering disruption or hardship, resilience is defined as a positive adaptability trajectory (cf. F.H. NORRIS, S.P. STEVENS, B. PFEFFERBAUM, K.F. WYCHE, R.L. PFEFFERBAUM. *Community resilience as a metaphor, theory, set of capacities, and strategy for disaster readiness*. In American Journal of Community Psychology, 2008, pp. 127-135) and constitutes «the capacity for successful adaptation, positive functioning or competence […] despite high-risk status, chronic distress, or following prolonged or severe trauma», cf. B. EGELAND, E. CARLSON, L.A. SROUFE. *Resilience as process*. In Development and Psychopathology, 1993, pp. 517-534. As for vulnerability, the 2010 glossary of the United Nations International Strategy for Disaster Reduction (UNI-SDR) states that it is "the characteristics and circumstances of a community, system or asset that make it susceptible to the damaging effects of a hazard". This concept is closely connected to that of resilience, as pointed out by C. FOLKE. *Social-Ecological Resilience and Behavioural Response*. Beijer International Institute of Ecological Economics, Royal Swedish Academy of Sciences, 2002, p. 3 and T. CANNON. *Vulnerability analysis and the explanation of "natural" disasters*. In A. VARLEY (editor), Disasters, Development, Environment, Wiley, 1994, p. 19. The authors argue that vulnerability is a complex element resulting from the combination of primary (status, gender, ethnics,) and secondary factors (e.g. age).

135 An overview of the measures taken at a company level is provided in *The Willis Health and Productivity Survey*. New York, 2014. Cf. also S. MATTKE, H. LIU, J.P. CALOYERAS, C.Y. HUANG, K.R. VAN BUSUM, D. KHODYAKOV, V. SHIER. *Workplace Wellness Programs Study, Final Report*. RAND Health, 2013 who report that more than 50% of US companies with more than 50 employees (that is ¾ of the US workforce) provides wellness programmes.

136 Cf. the Green Paper of the European Commission. *Promoting a European Framework for Corporate Social Responsibility*. Brussels, 18.7.2001 COM (2001) 366 final, esp. § 2.1.2.

137 Cf. E. MASSAGLI (a cura di). *Il welfare aziendale territoriale per la micro, piccola e media impresa italiana*. ADAPT Labour Studies e-Book series, 2014, n. 31.

138 Among the first authors who highlighted the new approach of company policies (from initiatives to prevent occupational injuries and diseases to those preserving one's

These important measures are often funded by public and private entities or by the employer himself by means of economic and financial incentives[139]. Such initiatives consider two main aspects: preventing chronic diseases by acting on risk factors (primary prevention); diagnosing and treating them at their early stage, that is before complications arise that prejudice workers' health and their opportunity to stay on at work (secondary prevention)[140].
In reality, the company-based initiatives intended to prevent chronic diseases (e.g. weight management, the provision of healthy food at workplace canteens, smoking bans, health education, regular check-ups, in-company physical exercise, discounts on the enrolment fees for the gym), and social security schemes supplementing or providing medical coverage are seen as initiatives of Corporate Social Responsibilities or widespread examples of good practices[141].
As widely pointed out by an increasing number of scholars at the international level[142], and particularly if a long term perspective is taken[143],

health), see R.E. GLASGOW, J.R. TERBORG. *Occupational Health Promotion Programs to Reduce Cardiovascular Risk*. In Journal of Consulting and Clinical Psychology*,* 1988, pp. 365-373.

139 This topic has been recently investigated by Z. BAJOREK, V. SHREEVE, S. BEVAN, T. TASKILA. *The Way Forward: Policy Options for Improving Workforce Health in the UK.* The Work Foundation, London, 2014, esp. pp. 27-32. In relation to the incentive schemes devised by the employer, cf. K.M. MADISON, K.G. VOLPP, S.D. HALPERN. *The law, policy, and ethics of employers' use of financial incentives to improve health*. In *Journal of Law Medicine, Ethics,* 2011, pp. 450–468. The authors consider the expediency and the legitimacy of these incentive schemes in terms of coercion and discrimination against certain groups of workers on grounds on their habits.

140 A wide number of case studies is provided in S. MATTKE, H. LIU, J.P. CALOYERAS, C.Y. HUANG, K.R. VAN BUSUM, D. KHODYAKOV, V. SHIER. *Workplace Wellness Programs Study, Final Report.* Cit. The issue of workplace wellbeing is considered by OECD. *How's Life? 2013 - Measuring Well-Being.* OECD Publishing, 2013, esp. pp. 147-171.

141 On the desire to emulation as a lever to adopt workplace wellness strategies, cf. S. ZAMAGNI. *People Care: dale malattie critiche alle prassi relazionali aziendali.* Cit.

142 See the review by L.S. CHAPMAN. *Meta-Evaluation of Worksite Health Promotion Economic Return Studies: 2012 Update.* Marzo - aprile 2012, ADAPT Observatory on Work & Chronic Diseases, that collects the results of over 100 studies published on peer-reviewed journals. See also, L.L. BERRY, A.M. MIRABIT, W.B. BAUN*, What's the Hard Return on Employee Wellness Programs?.* In *Harvard Business Review,* 2010, pp. 105-112; K. BAICKER, D. CUTLER, Z. SONG, *Workplace Wellness Programs Can Generate Savings.* In *Health Affairs,* 2010, pp. 304–311; C. HOCHART, M. LANG. *Impact of a Comprehensive Worksite Wellness Program on Health Risk, Utilization, and Health Care Costs.* In Population Health Management, 2011, pp. 111–116; H. VAUGHAN-JONES, L. BARHAM. *Healthy work: Evidence into action.* The Oxford Health Alliance, The Work Foundation - RAND Europe,

these wellness-at-work initiatives benefit the employer, either directly or indirectly. Some major advantages from the company include: the reduction of the costs arising from their employees' disability, increased productivity and loyalty, talent retention, reduced absenteeism, fewer workers on leave, and a lower impact of presenteeism[144], that is working when one's health conditions do not allow to perform duties.

Including the promotion of employee health and well-being in the company policies gives employers the opportunity to review their organizational and productive models considering the transformation of work in the economy and society spurred by wide-ranging changes in demography and technology [145].

The positive effects that wellness policies produce at the company level have been widely acknowledged. For this reason, a question is being asked as to why many employers fail to devise initiatives that in practical terms help to prevent and raise awareness about occupational health [146]. This aspect can be partly explained by the impact of the economic and financial crisis on company budgets[147], and by the fact that small-sized businesses are the norm in Italy, thus these initiatives are poorly implemented[148].

London, 2010, PRICE WATER HOUSE COOPERS. *Building the case for wellness 4th February 2008*. Report for the UK Department for Work and Pensions, 2008.

143 Cf. S. MATTKE, H. LIU, J.P. CALOYERAS, C.Y. HUANG, K.R. VAN BUSUM, D. KHODYAKOV, V. SHIER. *Workplace Wellness Programs Study, Final Report.* Cit., espe. p. 3 where they make reference to "selected employers with strong commitments to wellness".

144 As for presenteeism, cf. K. KNOCHE, R. SOCHERT. K. HOUSTON. *Promoting Healthy Work for Workers with Chronic Illness: A Guide to Good Practice*. Cit. p. 9.

145 In this sense, a study has been carried out on the impact that wellness programmes have on the effectiveness of organisations. Cf. the WORLD ECONOMIC FORUM. *The Wellness Imperative Creating More Effective Organizations*. Geneva, 2010, p. 16.

146 This is the question posed by Z. BAJOREK, V. SHREEVE, S. BEVAN, T. TASKILA. *The Way Forward: Policy Options ecc.*. Cit., p. 9.

147 In this perspective, see Z. BAJOREK, V. SHREEVE, S. BEVAN, T. TASKILA. *The Way Forward: Policy Options ecc.*. Cit., p. 10.

148 In relation to the Italian industrial relations system, one might note that an innovative set of benefits has been put in place for employees that also includes the provision of healthcare services (so-called bilateralism). These benefits are now widespread in many industries characterized by micro and small-sized businesses. See
M. TIRABOSCHI. *Bilateralism and Bilateral Bodies: The New Frontier of Industrial Relations in Italy*. In E-*Journal of International and Comparative Labour Studies*, 2013, pp. 113-128, and the study conducted by Italia Lavoro in 2012/2013 concerning the duties and the functions of bilateral bodies, among other the provision of complementary healthcare (cf. ITALIA LAVORO. *Gli enti bilaterali in Italia – Primo rapport nazionale.* 2013, pp. 127-146).

Adding to this are the many legal, fiscal, organization and cultural obstacles that hamper the dissemination of wellness-at-work practices[149].

5. A New Industrial Relations Perspective: Productivity and Sustainable Work and the Importance to Rethink the Notions of "Presence at Work", "Job Performance" and "Full Compliance with Contractual Terms"

Thus far, the present investigation has enabled us to cast light on three main lines of action, the implementation of which has however been limited and fragmented: 1) to modernize the national systems of social protection that should be more individual-oriented 2) to step up activation policies, as well as those concerning work-life balance and retention 3) to provide preventive measures at the workplace.
Nevertheless, a detailed analysis of the national and international literature shows that the management of the delicate relationship between employment and chronic diseases fails to consider the role that the industrial relations system might play[150].
It must be pointed out that there have been some pioneering studies that have pointed out how collective bargaining in different industries has supplied further protection to workers affected by "serious diseases"[151], by acting along with traditional legal provisions.
This usually takes place through: 1) longer statutory leave of absence and sick leave 2) forms of income support while the employment relationship

[149] Cf. S. MATTKE, H. LIU, J.P. CALOYERAS, C.Y. HUANG, K.R. VAN BUSUM, D. KHODYAKOV, V. SHIER. Workplace Wellness Programs Study, RAND, Santa Monica, 2013 and R.Z. GOETZEL et al.. *Do Workplace Health Promotion (Wellness) Programs Work?*. In Journal of Occupational and Environmental Medicine, 2014, pp. 927-934.
[150] Cf. la *literature review* curata da S. VARVA. *Malattie croniche e lavoro: una rassegna ragionata della letteratura di riferimento*. Cit.
[151] For the Italian case cf., S. BRUZZONE. *Disabilità e lavoro - Una disamina delle disposizioni contrattuali per la conciliazione dei tempi di lavoro e cura: il caso della Sclerosi Multipla*. Associazione Italiana Sclerosi Multipla, 2012 e già ID.*, Il lavoro come precondizione di inclusione sociale nell'ambito dei diritti umani*. In AA.VV.. *Lavoro e disabilità: la sclerosi multipla e le patologie croniche progressive nel mercato del lavoro*. In *Osservatorio Olympus,* 2002 (http://olympus.uniurb.it). For a detailed analysis of the terms laid down by collective bargaining at national and company level, cf. ADAPT. *Rapporto sulla contrattazione collettiva in Italia (2012-2014)*. ADAPT University Press, 2015, especially the section *Malattie croniche e lavoro nella contrattazione collettiva*.

is suspended[152] 3) regular breaks to allow treatment and help recover from mental and physical strain 4) policies of work-life balance based on the rescheduling of working time, telework and temporary and voluntary part-time arrangements[153] 5) working arrangements allowing caregivers the opportunity to strike a balance between work and family commitments[154] 6) initiatives enabling workers to be assigned to new tasks[155] or to be transferred[156].

These measures, although laudable, are still sketchy and present some shortcomings. They are not based on a full understanding of the aspects they intend to regulate, and no links exist with public and private welfare

[152] Cf. the company-level collective agreement concluded by Luxottica on 17 October 2011, which is among the first initiatives in this field. Pursuant to this agreement, employers with serious diseases are entitled to an allowance equivalent to up to 100% of their remuneration if they are absent from work for more than 180 days.

[153] A comparative analysis, that is limited to oncological diseases, is provided in the study by M. TIRABOSCHI (a cura di). *Promoting new measures for the protection of women workers with oncological conditions by means of social dialogue and company-level collective bargaining* carried out in 2008 for the European Commission, funding line *Industrial Relations and Social Dialogue*, available at the ADAPT Observatory on *Work and Chronic Diseases*.

[154] In Italy, a first intervention to afford protection to caregivers for workers with oncological conditions is Legislative Decree No. 276 of 10 September 2003 (also known as the Biagi Law). This provision allows caregivers to work part-time and request leave to better reconcile work and family commitments. See M. Tiraboschi. *Lavoro e tumori: Quali tutele?*. In Bollettino Speciale ADAPT, n. 16/2014. On the US case, cf. K. MATOS, E. GALINSKY. *2014 National Study of Employers*. Families and Work Institute, 2014.

[155] The collective agreement concluded in the energy sector sets forth that in order to facilitate the re-employment of sick workers, new tasks will be assigned to them – also through part-time and flexible working arrangements – taking into consideration the indications provided by the public health authorities or the certified centers that assist these workers during treatment and rehabilitation, in line with the employers' organizational and productive needs. Although implicitly, the provision suggests that the recommendations provided by the foregoing public entities might refer to either part-time or flexible working schemes or the tasks to be performed. Cf. *Rapporto sulla contrattazione collettiva in Italia (2012-2014)*, ADAPT University Press, cit.

[156] Still in relation to the Italian case, the collective agreement concluded in the construction sector is worth a mention. This collective agreement contains a provision pursuant to which workers who cannot be reassigned due to certified health or family reasons cannot be dismissed if the company can still employ him in the same productive unit. Therefore, workers' health conditions are taken into consideration to avoid their dismissal, since their health status is used as evidence of their inability to be reassigned. This provision bears relevance in that the only clause regulating workers' transfer is Article 33 of Act No. 104 of 5 February 1992, which however is concerned with disabled workers or their family members. Cf. *Rapporto sulla contrattazione collettiva in Italia (2012-2014)*, ADAPT University Press, cit.

systems[157]. The case of Italy is an egregious example. Here, a high number of collective agreements[158] allowed workers with oncological conditions[159] to enter part-time work, in full compliance with the law. Although widespread, this practice was not implemented consistently and resulted in forms of discrimination against those workers who were affected by chronic diseases other than oncological ones. This is because the latter are not given the same opportunities to change their working schemes as the former, nor is this prejudicial treatment sufficiently and reasonably motivated by lawmakers or IR actors[160].
One thing is acknowledging that labour lawyers, HR managers and trade union representatives superficially consider chronic diseases as an undistinguished group when it comes to affording safeguards. They all produce vulnerability and long-term absence from work requiring adaptation in relation to working hours and full compliance with contractual obligations. Another thing is extending and implementing protection and rights through collective bargaining and its actors, who obviously lack the necessary medical knowledge to draw a distinction between different chronic diseases and their impact on the employment relationship. This state of affairs is not the result of chance events[161] but by the seriousness of the disease and its effect on workers and their residual capacity to fulfil contractual obligations.

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[157] The author of this paper has dealt with this issue in *Oltre il conflitto: le nuove prospettive del welfare aziendale in Italia*, in *Contratti e contrattazione*, dicembre 2014, n. 12, pp. 4-5. In reference to the Italian case, see E. MASSAGLI. *Il welfare aziendale territoriale per la micro, piccola e media impresa italiana*. Cit.
[158] Cf. *Rapporto sulla contrattazione collettiva in Italia (2012-2014)*, ADAPT University Press, cit.
[159] Article 46 of Legislative Decree No. 276 of 10 September 2003. Cf. Ministerial Circular No. 40/2005. An analysis of this provision and the relevant collective agreements is provided in P. TIRABOSCHI, M. TIRABOSCHI. *Per un diritto del lavoro al servizio della persona: le tutele per i lavoratori affetti da patologie oncologiche e tumore al seno*. in Diritto delle Relazioni Industriali, 2006, n. 2, 524-530.
[160] S. BRUZZONE. *Disabilità e lavoro ecc.,* cit., esp. pp. 11-16, pp. 19-20, p. 23, pp. 28-29. To many people, cancer differs from other chronic diseases and workers with an oncological condition might experience social stigmatization, especially at work, as though it were not possible to recover and return to work.
[161] This is what happened in Italy where the idea to give workers with an oncological condition the right to part-time work was suggested informally to the then Deputy Minister of Work Maurizio Sacconi by Prof De Lorenzo who was the President of the National Association of People with Cancer, their Relatives and Friends at the time of drafting the Biagi Law.

Significantly, the few studies that have monitored the impact that diseases have on one's employment and return to work following treatment and recovery have been mostly carried out by teams of doctors on just one disease[162]. In addition, the literature has only rarely dealt with the effects that the many types of different diseases have on employment. Besides the needs that are common to all sick workers (coping strategies, support of colleagues, adequate working conditions, health and social assistance, incentives, flexible working times and adequate workloads, absence management, presenteeism, etc.), some special aspects concern chronic diseases in relation to their duties according to the type of disease[163] and the response to treatment.
Similarly to the systems of social protection described in par. 2, collective bargaining has provided support to workers affected by chronic diseases through a one-size-fits-all approach that is inappropriate to define and deal with each case. One explanation for this is that the safeguards currently in place do not lend themselves to evaluations targeted on individuals and on the consequences that the disease has on one's performances. Neither do they take account of the occupation, contractual terms and tasks etc. Consequently, entrusting the employer with the task to reasonably adapt these safeguards to the need of each sick worker[164] proves unsuccessful. The measures involving the industrial relations system concern salaried and standard employment (see par. 2) and usually take a defensive approach. In other words, with a view of helping sick workers to safeguard their jobs and source of income, the initiatives in place are aimed at moving away from merely assessing the fulfilment of duties and the arising inability to carry out tasks as elements to terminate the contract[165]. This explains why the set of formal rights accorded to workers with chronic diseases in legislation and the

[162] Cf. the literature review by S. VARVA. *Malattie croniche e lavoro: una rassegna ragionata della letteratura di riferimento*. Cit.
[163] Cf., in relation to workers with rheumatoid arthritis, diabetes mellitus or suffering from hearing loss, S.I. DETAILLE, J.A. HAAFKENS, F.J. VAN DIJK. *What employees with rheumatoid arthritis, diabetes mellitus and hearing loss need to cope at work*. in Work Environment & Health, 2003, pp. 134-142.
[164] In this perspective, cf. the recommendations of the EUROPEAN NETWORK FOR WORKPLACE HEALTH PROMOTION. *Recommendations from ENWHP's ninth initiative Promoting Healthy Work for Employees with Chronic Illness – Public Health and Work*. Cit., p. 5.
[165] The issue is dealt with in a comparative perspective by S. FERNÁNDEZ MARTÍNEZ. *Enfermedad crónica y despido del trabajador: una perspectiva comparada*. Cit. In reference to the Italian case,cf. S. GIUBBON. *Sopravenuta inidoneità alla mansione e licenziamento*. Cit.

employment contract are ineffective[166], particularly when they are not properly linked to additional initiatives (i.e. training, psychological support, recovery[167]) and included in wellness-at-work policies at the company level (see par. 4).

Yet industrial relations might play a decisive role as regards activation policies and the return to work of workers with chronic diseases. This will only happen through collective bargaining and the bilateral bodies in place to manage workers' benefits at the company and the local level, which help raise awareness of the transformation of work stemming from organizational, demographic and technological changes that considerably affect such concepts as "presence at work", ""job performance" and "full compliance with contractual obligations".

When devising innovative forms of protection, consideration should be given to the recent evolution of both contractual and working arrangements, and to explain the major changes in work and production[168]. These major developments, which are accelerated by the ageing of the population, profoundly affect the concept of "worker", "capabilities", and "fitness for work". While employed in a loose sense in the past, these notions are now increasingly considered in relation to one's task[169] and the different stages of one's career.

The examination of chronic diseases provides an opportunity to experiment on new organizational and regulatory models that consider ongoing demographic and economic changes and favour a better evaluation of labour productivity[170]. This should take place taking into

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166 Cf. F. DE LORENZO. *Lavorare durante e dopo il cancro: una risorsa per l'impresa e per il lavoratore.* cit. *supra,* nota 77 in relation to the Italian case.

167 See note 70.

168 On the way to do business and organise production, the evolution of atypical and autonomous work, the evolution of trades, skills and professions, the challenge of the modernization of the labour market, see *Le Grande Trasformazione del Lavoro*, blog ADAPT su Nòva, Il Sole 24 Ore (http://adapt.nova100.ilsole24ore.com).

169 R. LINARES, V. MORTARA. *Abilità, idoneità, capacità, validità: problematiche dell'inserimento, riammissione e reinserimento al lavoro.* In F. PELONE (a cura di), Atti VII Convegno Nazionale di Medicina Legale Previdenziale, INAIL, 2009, p. 303.

170 As already pointed out in par. 1, productivity is being questioned by a demographic situation in which the index of economic dependency (EUROPEAN COMMISSION, DIRECTORATE-GENERAL OF ECONOMIC AND FINANCIAL AFFAIRS, *The 2012 Ageing Report: Economic and budgetary projections for the EU27 Members States (2010-2060)*, 2012, esp. pp. 71-75), coupled with a rise in the direct and indirect costs to treat chronic diseases (for the European case, see F. DE LORENZO. *Presentazione Progetto ProJob: lavorare durante e dopo il cancro.* Cit.; for the US case, see U.S. Workplace Alliance. *The Burden of Chronic Disease on Business and U.S. Competitiveness*. 2009) and the unemployment of people with

account each worker's professional and career paths and the emerging idea of "sustainable work" so that one's performances should be assessed considering health and mental conditions while at work[171]. This brings to the fore the major role that can be played by current industrial relations systems. Although facing a decline[172], industrial relations might be given fresh momentum as a tool to thoroughly review[173] the criteria to redistribute and to assess the value of work, balancing between employers' needs and workers' protection.
Through adequate collective bargaining, one option could be that of including "some guarantees" in the employment contract facilitating proper management in the event of a chronic disease, while ensuring certain levels of labour productivity[174]. This would come along with fine-

chronic disease (the higher costs are those resulting from the "years out of work") bring about a number of critical issues in relation to the sustainability of social and economic systems that call for a rethinking of sick workers' retention and return to work. This point is made clear by R. BUSSE, M. BLÜMEL, D. SCHELLER-KREINSEN, A. ZENTNER. *Tackling chronic disease in Europe: Strategies, Interventions and challenges, European Observatory on Health Systems and Policies*. World Health Organization 2010, p. 20: "With regard to labour supply and labour productivity, chronic conditions and diseases mean fewer people in the workforce, with early retirement, barriers to employment, and stigma. There is reasonable evidence on the negative impact of chronic disease and risk factors on the labour market, showing that chronic disease affects labour supply in terms of workforce participation, hours worked, job turnover and early retirement as well as wages, earnings and position reached".

171 In this sense, cf. the relevant work carried out by EUROFOUND. *Sustainable Work and the Ageing Workforce*. Luxembourg, 2012, which provides a detailed description of the main indicators concerning "sustainable work". In literature, cf. P.P. DOCHERTY, J. FORSLIN, A.B. SHANI. *Creating Sustainable Work Systems – Emerging Perspectives and Practice*. Routledge, London, 2002.

172 On the decline of industrial relations and its subfields, cf. the vast amount of literature in B. KAUFMAN, *Il principio essenziale e il teorema fondamentale delle relazioni industriali,* in M. MASSAGLI, R. CARAGNANO (a cura di). *Regole, conflitto, partecipazione*. Giuffrè, 2013, pp. 3-40, and the academic debate originated by A. HASSEL. *The Erosion of the German System of Industrial Relations*. In British Journal of Industrial Relations, 1999, pp.. 483–505.

173 On the prospects for reviewing industrial relations, see again B. KAUFMAN. *Il principio essenziale e il teorema fondamentale delle relazioni industriali*. Cit. On the German case and wide-ranging theoretical implications, see W. STREECK. *Re-forming Capitalism. Institutional Change in the German Political Economy*. Oxford University Press, 2010.

174 An egregious example of this is the collective agreement concluded on 26 February 2011 in the manufacturing sector referred to above. The employer's needs to increase productivity in relation to absenteeism lead to favour long-term absence from work over short-term one to benefit workers with serious chronic diseases. Cf. E. CARMINATI. *Lotta agli assenteisti e maggiori tutele per i malati gravi*. Cit.

tuning job performance in line with the radical changes in society, production and work organization. The throughout and analytical assessment of each performance should be founded on objective and subjective parameters according to the sustainability of work in a given production context.
One conclusion that can be drawn from the present investigation that will certainly serve as a starting point from future research is that the complex relation between work and chronic diseases is far from marginal in labour law. Research into this relation will enable to go beyond those engrained practices that characterize the current job grading schemes laid down in collective bargaining in many countries[175], which were conceived to assess job performance in 1900s. What is needed now is a system modelled on individual needs and the contribution that each worker can provide to production that moves away from a purely commercial evaluation that only considers the mere provision of work in exchange of remuneration[176].

[175] On the prospects to move away from the hard-and-fast rules used in employment grading cf. L. RUSTICO, N. TIRABOSCHI. *Standard professionali e standard formative.* In M. Tiraboschi (a cura di), Il testo unico dell'apprendistato, Giuffrè, Milano, 2911, pp. 423-450 that consider the Italian case. An overview of the issue is also provided in M. MAGNANI. *Organizzazione del lavoro e professionalità tra rapporti e mercato del lavoro.* In *Giornale di Diritto del Lavoro e di Relazioni Industriali,* 2004, p. 165 and ff.
[176] This certainly provides the opportunity to employers to cooperate with institutions and goes behind the provision of remuneration for the services performed. The traditional view is described in U. CARABELLI. *Organizzazione del lavoro e professionalità: una riflessione su contratto di lavoro e post-taylorismo.* In Giornale di Diritto del Lavoro e di Relazioni Industriali, 2004, p. 1 and ff.

The Future of Work: Attract New Talent, Build Better Leaders, and Create a Competitive Organization by Jacob Morgan. A Review

Peter Norlander[1]

The Future of Work by Jacob Morgan uses a collection of recent trends, some related to changes in society but many related to technology, to offer guidance on how to navigate the rapidly changing 21st Century employment environment. The essential prediction appears to be that things will be very different in the future, and that organizations need to adapt as a consequence. While that advice may seem conventional, Morgan offers many suggestions on how to do this.

Morgan presents 10 ways the new employee is different from the old, a six-step process for adapting to the new way of work, 12 habits of highly-collaborative organizations, 4 roadblocks of the future organization, 14 principles of the future organization, 10 principles of the future manager, 7 principles of the new employee, and three ways that the world of work today is different.

But the problems begin to creep in on closer analysis. The first reason things are different today is "the speed of change." Morgan describes how doubling the number of grains of rice on each square of a chessboard leads to more rice at the end of 64 squares than all the rice in the world. Borrowing the futurist Ray Kurzweil's concept of the second half of the chessboard, Morgan informs the reader that "this idea basically deals with the fact that once the grains of rice reach the second half of the chessboard the growth becomes exponential. Today, we are at the second

[1] Peter Norlander is a doctoral candidate at the UCLA Anderson School of Management.

half of the chessboard where changes are happening at a more rapid pace …" (17).

Of course, in this example, growth is also exponential on the first half of the board and the rate never changes – the grains of rice double with each additional square. Kurzweil's observations has to do with the change in the amount of rice on the second half of the board having a significant impact and eventually becoming astronomical – an illustration of the power of exponential functions. Morgan confuses rates with impact and doesn't provide an example of changes in the rate of change at work, and this would seem to have little to do with the future of work or even work at all. Exactly what about work is changing at an exponential rate? Not to worry: Morgan ties it back in by suggesting that technological disruption is creating inequality and that individuals and organizations need to adapt.

The second and third reasons why things are different is that we are all connected and everything is being disrupted. Morgan seems to think that the ability to be connected 24/7 and the disruptive forces are both inevitable and unambiguously good, as are freelancing and globalization. At the least, these are good or bad some of the time and various actors in various times and places have pushed back against these forces. Perhaps a more apt characterization of changes in the workplace is that they are glacial when compared to more radical innovations in technology, perhaps due to the active resistance of governments, organizations, and workers to changes that would harm their interests.

Workers don't really appear to be a causal factor in Morgan's analysis of the future of work, except as members of generations that are supposedly acculturated to different behaviors. Millenials receive a lot of attention, as they are supposedly more motivated by "meaningful work" than profit or prestige, but there is to be no equilibrium in the future of work: "When Generation Z becomes the majority workforce and starts relying on teleportation, self-driving cars, and artificially intelligent robots at work, then I and the rest of the millennials will have to adapt to that as well."

Morgan is addressing an important issue, but in place of analysis, offers techno-causation, clichés and buzzwords. In contrast to when he started work: "None of the platforms we use today were in existence; there was no Facebook, Jive, Yammer, Twitter, or LinkedIn. There was no iPhone, iPad, Siri, Watson, or a bunch of other things that have so dramatically impacted our lives. We didn't have the same behaviors either. " But have these really impacted work?

There is surprisingly little discussion of work for a book on the future of work. Morgan's seems to think every worker and workplace is going to be radically affected by the latest technological fad. But the bigger problem is that his understanding of work is a distortion of reality: he doesn't adequately characterize what work is for most people who perform it, or how and why most people work. His analysis is concentrated on a fine slice of the highly educated and high wage end of the work spectrum, and in the industries most impacted by technology. He writes that the following time honored and much despised structures of white-collar working life are dead: the corporate office, 9 a.m. - 5 p.m. jobs, and commuting to work are all things of the past. And yet the modal reality is that most working people still get up in the morning and drive to work.

In addition to dying practices, workers are also seen as the walking dead. Morgan cites research showing 63% of American workers are disengaged at work and 87% are emotionally disconnected. He says that these "employees are sleepwalking through their jobs … a.k.a. they are zombies!" These are big problems, but Morgan doesn't offer a solution or an analysis beyond a "theory of zombification" that starts with debt-laden university graduates accepting jobs for pay rather than purpose.

What academics of work can probably agree with in Morgan's book are some of the following conclusions he draws: in order to prosper, organizations in the future will need to put people first, lead through values, establish democratic learning environments, and increase diversity of under-represented minorities and inclusion of multiple perspectives.

Many academics of the work relationship might further propose that structural reforms are needed to address 21st Century employment issues – including research-informed work redesign, reforms in labor and employment law, macroeconomic policy adjustments, revitalization of the labor movement, and steps that would improve wages, working conditions and benefits.

Morgan's extrapolation of generational and technological tendencies makes the future sound inevitable and adaptation sound like a necessity. He is decidedly optimistic about the five trends he identifies and presents no alternative scenario other than getting behind the juggernaut of forces including new behaviors, technology, millennials, mobility and globalization. Rather than being causal drivers of change, these trends could of course themselves be broken apart and seen as elements of a social system that could also be forced to adapt.

Morgan's model for getting ahead of the work environment starts with rethinking the game of chess. The lessons from the new masters of the game argue for the following ways of getting ahead: challenge tradition, identify opportunities, and adapt continuously. These are fine insights, but is high-stakes adversarial n-dimensional chess really the right model? My sense is that the overqualified and disengaged workers of today would be more responsive to a change in the game than a rethinking of the old one. Unfortunately, changing a game reintroduces the less predictable elements of bargaining between the players and the contested and varied interests that actually do establish how work is organized within democratic societies.

Predictions about the future are hard, especially when they are based on the past. Today's dispiriting facts related to worker satisfaction and rising inequality, along with the promise of new technologies and behaviors, offer only a glimpse of what tomorrow holds. While prophetic thinking like Morgan's isn't quite legitimate among workplace scholars, there is a market for people who offer heuristics and make confident-sounding predictions. Workplace scholars who could offer better alternatives but do not may cede the speculative territory. This can lead to further propagation of past errors and new illusions.

Work is a fundamentally socially determined activity, and while there is the possibility of an analogy between the rate of change in technology and change at the workplace, this book doesn't make a convincing case. Non-linear, density-dependent, and causal effects in social systems are complex and hard to understand, and offering predictions may be little more than astrology. Ultimately, what perhaps can be said is that the future of work is that it is wide open, and that people will have to care enough about it if they are to construct a better path.

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