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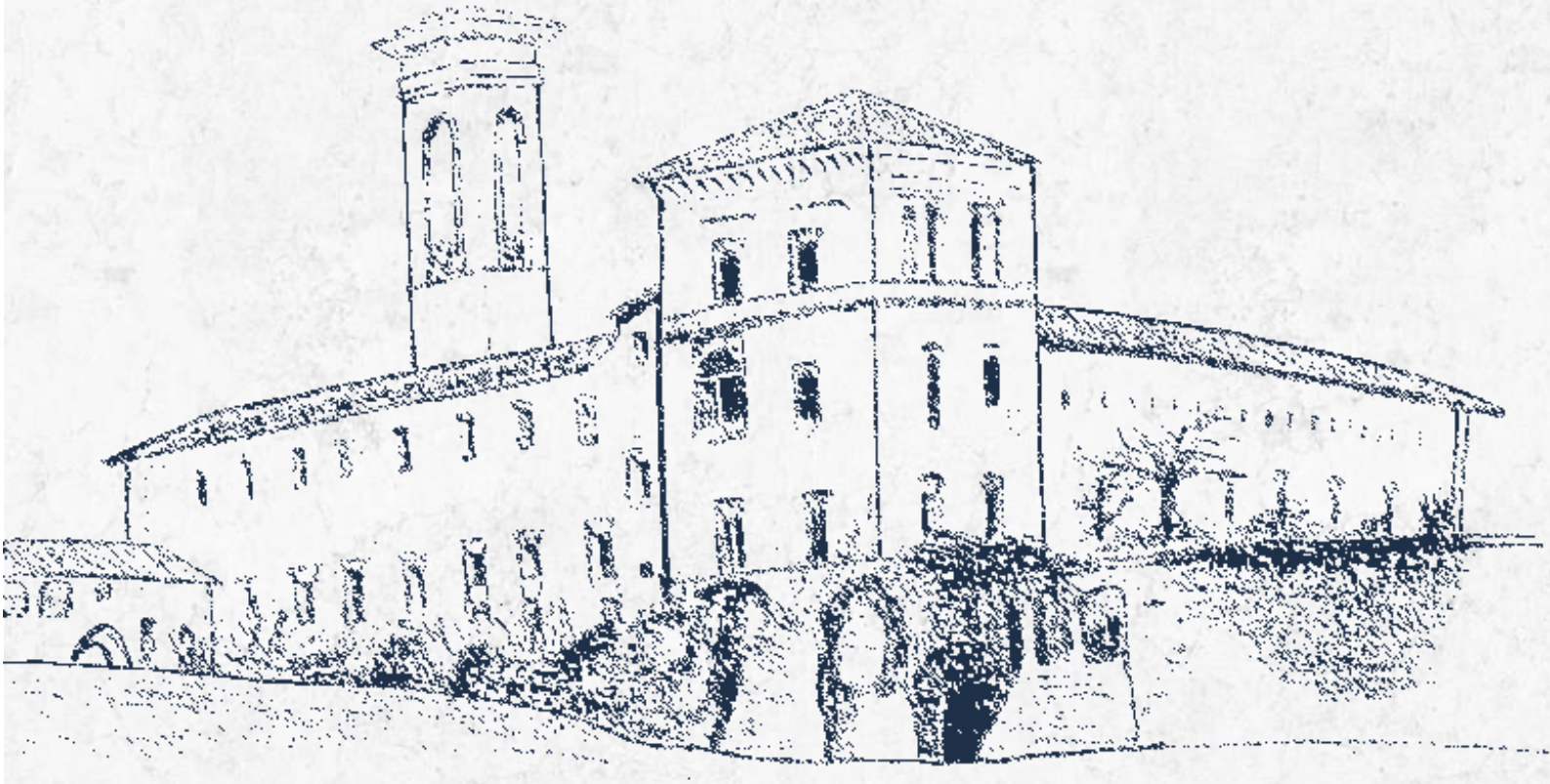

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Young People and Age Discrimination

Malcolm Sargeant [*]

1. Introduction

Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation applies to all those at work or all those seeking work. Unlike the US, the ban on unlawful age discrimination affects all those of working age. The US ADEA[1] of course applies to just those over the age of 40 years so is specifically aimed at older workers, in contrast to the European legislation which applies to all ages, including young workers and young people applying for jobs.
A Eurobarometer survey asked people about their perceptions of how widespread age discrimination was. The figures from Italy and the UK were:

	Widespread	Rare
Italy	49%	45%
UK	52%	45%

It is possible to justify direct and indirect age discrimination in EU and national law if the purpose has a legitimate aim and the means of achieving that aim are appropriate and necessary. It is unusual to be able to justify direct discrimination but there are clearly times when it is appropriate to treat people differently because of their age, so, for example, there is an EC Directive on the Protection of Young People at Work 94/33/EC (The Young Workers Directive) which provides for

[*] This paper was presented to the ADAPT international conference in Bergamo, Italy in October 2012. Malcolm Sargeant is Full Professor of Labour Law at the Middlesex University, UK.
[1] Age Discrimination in Employment Act 1967.

different rules in regard to working time for young people, e.g. longer rest periods, limited night work etc. There are many other occasions when we might apply rules based on age, e.g. when a person can drive on the roads, sell or buy alcohol etc. These are all exceptions to the principle of non-discrimination on the grounds of age, but they are, perhaps, sensible ones.

2. What is the Evidence for Age Discrimination and Young People?

There are many stereotypical assumptions about age at all levels which lead to people being treated differently as a result. Most of the research seems to have concerned with older workers and the perceptions that employers have of age linked abilities. Every stereotypical assumption about older people, however, is also likely to be a stereotypical assumption about younger people. When, for example, an employer states that older people are more reliable, the employer is also saying that younger people are less reliable. Taylor and Walker's survey in the 1990s of 500 companies[2] illustrate this. Figures such as the 36 per cent who thought that older workers were more cautious, the 40 per cent who thought that they could not adapt to new technology and the 38 per cent who thought that they would dislike taking orders from younger workers suggest that stereotypical attitudes remain strong. Yet what is important for our purposes here is that a statement such as that which suggests that older people are more cautious, also implies that younger people are less cautious[3].

A further illustration can be found in research carried out amongst employers in New Zealand[4]. Older workers were assumed to be more reliable, more loyal, more committed and less likely to leave than younger workers. On the other hand, older workers were more likely to resist change and have problems with technology. They may also be less flexible, less willing to train and be less creative than younger colleagues.

The same survey asked employers to attribute characteristics to different age groups.

[2] P. Taylor, A. Walker, *The Ageing Workforce: Employers' Attitudes Towards Older People*, *Work, Employment and Society* 8, No. 4, 1994, 569.

[3] See generally M. Sargeant, *Age Discrimination*, Gower Publishing, 2011.

[4] J. McGregor, *Stereotypes and Older Workers*, *Journal of Social Policy New Zealand* 18, 2002, 163–177.

Table No. 1 – Characteristics associated with age groups: % responses from employers.

Workers	15–29 yrs	30–44 yrs	45–59 yrs	60–75 yrs	All ages
Computer experience	66.9	19.9	1.1	-	12.1
Enthusiasm	35.2	28.5	3.3	0.4	32.6
High levels of motivation	14.9	48.0	6.4	0.3	30.3
Creativity	27.8	40.0	3.5	-	28.7
Innovation	20.0	48.4	5.1	-	26.5
Adaptability	29.8	35.3	10.8	0.3	23.8
Flexibility	24.5	33.1	16.5	1.2	24.7
Leadership	0.6	31.3	39.3	1.2	27.6
Strong work ethic	1.1	25.4	45.0	3.3	25.5
Loyalty to employer	0.3	10.7	50.3	10.6	28.1

It can be seen from this survey, if at all typical, that employers had generally a stereotypical view that younger people suffered from some significant disadvantages such a scoring low in the qualities of leadership, having a strong work ethic or loyalty to the employer. They also score lowly, compared to the next age group up, in levels of motivation, creativity and innovation. All these are "soft skills" which have been shown to be the important factors in the recruitment of young people into work.

One piece of evidence about discrimination that might be suffered by young workers is that which has been gathered about older workers.

There are some similarities in experiences. According to a survey carried out by the Employers Forum on Age and Austin Knight[5], the most common ages for women to encounter ageism at work are 21 years and 40 years; for men the ages are 18 years and 50 years. The report states that just over half of respondents who felt that they had experienced ageism said that it was because they were seen as too young. The report "reveals that one in four UK employees had been discriminated against at work because of their age – and it is clear that ageism does not discriminate. Young and old, male and female alike are affected"[6].

3. Young People and the Labour Market

The recent economic recession has hit young[7] workers very hard, but youth unemployment has been an issue for governments long before the recession started to have an impact on employment statistics. Young people have traditionally had high levels of unemployment, although these levels have generally become much higher since 2007.

Here we briefly consider the employment rates and unemployment rates for young people and then look at the types of employment contracts that young workers often work under. The conclusion is that the young may be treated as a contingent and flexible workforce and that many young workers meet the definition of "vulnerable workers" in precarious work. We then return to the subject of discrimination to assess how this makes the position of young people a difficult one.

High levels of unemployment may be seen as a manifestation of the vulnerability of young workers, but there are distinct groups that appear to be at a greater disadvantage than others. These include[8]:

• those who have experienced a lengthy period of unemployment;
• young people with low levels of qualifications and educational achievement;
• those facing health problems and disabilities;
• those from particular minority ethnic groups.

[5] www.efa.org.uk (last accessed 10 July 2011).
[6] *Ibid.*
[7] Young here refers to those under the age of 25 years.
[8] See Eurofound, *Helping Young Workers During the Crisis: Contributions by Social Partners and Public Authorities*, 2011 (last accessed 20 June 2011).

It may be therefore that, in order to understand the disadvantage suffered, we need to develop a model which shows that there are a number of layers of vulnerability each of which adds to the disadvantage suffered[9]. Apart from the four on this list, one could also imagine other layers such as gender or socio economic background.

4. Unemployment

According to the ILO[10], of the estimated 211 million unemployed people worldwide (2009) almost 40 per cent are between 15 and 24 years of age. This amounts to some 83 million young people without work[11]. Of course this is partly explained by the numbers in education and so on. The actual unemployment rate for young people was around 13 per cent in 2009, having risen from 11.9 per cent in 2007[12]. In the EU, prior to the financial crisis in 2007, the unemployment rate for young people had reached 15.4 per cent. During the next 2/3 years, unemployment has increased dramatically to a figure of some 20.7 per cent in 2010[13]. This had decreased slightly to 20.3 per cent in April 2011. This figure, however, compares badly with the unemployment rate for the 25-74 year age group where there was an unemployment rate of 8.1 per cent. Thus the unemployment rate for those under the age of 25 is two and half times higher than for those aged 25 plus. The figures vary enormously within the EU. In Germany the difference was only two percentage points (5.9 per cent for the 25+ group compared to 7.9 per cent for the under 25s). In contrast, the gap in Spain was 25.9 percentage points (18.5 compared to 44.4 per cent)[14].

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[9] For further consideration of the concept of layers of vulnerability, see M. Sargeant, E. Tucker, *Health and Safety of Vulnerable Workers: Case Studies from Canada and the UK*, *Policy and Practice in Health and Safety* 7, No. 2, 2009, 51-73, which concerned the layers of vulnerability suffered by migrant workers in Canada and the United Kingdom.

[10] International Labour Organisation.

[11] ILO, *Employment for Social Justice and a Fair Globalization: Overview of ILO Programmes*, Geneva, (last accessed 20 June 2011).

[12] ILO, *Facts on Youth Employment*, Geneva, 2010 (last accessed 20 June 2011).

[13] Eurofound, *Helping Young Workers during the Crisis: Contributions by Social Partners and Public Authorities,* European Foundation, 2011.

[14] European Commission, *Labour Market Factsheet*, Brussels, 2011.

In the UK the unemployment rate for those aged 18-24 years is 17 per cent (mid 2011)[15]. This is a small decrease from a year earlier when it stood at 17.5 per cent. This figure hides a significant disparity between males and females. The unemployment rate for males in this category is 19.9 per cent. For females it is much lower at 14.4 per cent. These figures compare to the overall unemployment rate of 7.7 per cent for all those aged 16 and over. Thus young female unemployment is almost twice the overall unemployment rate and for males it is almost three times the overall unemployment rate. Long term unemployment rates (over 12 months) for the 18-24 age group is at a lower rate than that for the labour market as a whole – 26.6 per cent compared to the overall rate of 34.1 per cent; but again there is a big difference between the sexes. The long term unemployment rate for young males is 30.2 per cent compared to 20.9 per cent for young females. This disturbing picture is made even worse when one considers the job make up for the age group.

5. Precarious working

The term precarious working is usually associated with employment that is 'non-standard' i.e. that is not governed by a contract of employment that is full time and open ended. One UK study identified twelve different forms. These were self-employment, part-time work, temporary work, fixed-term contract work, zero hours contract employment, seasonal work, (annual hours, shift work, flexitime, overtime or compressed working weeks), home working, teleworking, term time only working, Sunday working and job sharing[16]. There have been other categorisations[17], but essentially they are flexible employment relationships which can make workers vulnerable to exploitation and abuse.

The EU report *Employment in Europe 2010*[18] highlights the growing segmentation of the labour market in the EU between those that have permanent jobs "who can look forward to a life of continuous

[15] The UK statistics here come from the *Labour Market Statistics Bulletin*, June 2011 (last accessed 21 June 2011).

[16] S. Dex, A. McCulloch, *Flexible employment in Britain: A Statistical Analysis,* Equal Opportunities Commission Research Discussion Series, Manchester, 1995

[17] See, for example, M. Quinlan, C. Mayhew, and P. Bohle *The Global Expansion of Precarious Employment, Work Disorganization, and Consequences for Occupational Health: A Review of Recent Research International Journal of Health Services*, 31 No. 2, 2001 335-414.

[18] European Commission, *Employment in Europe 2010*, Brussels, 2010.

employment and careers offering promotion and rising incomes"; and those that are in temporary employment "living in a precarious situation and at risk of frequent spells of unemployment with poor prospects of career advancement". The report then states:

> Labour market segmentation affects predominately young and low-skilled workers, particularly during economic downturns. The high incidence of temporary work for these two groups can put them in a relatively precarious situation, not only in terms of employment security, but also in terms of income security, because of the limited access of temporary workers to social security benefits in general, and unemployment insurance in particular.

The report further states that the use of temporary contracts disproportionately affects young people because such contracts are often used as an entry into permanent employment. A precarious start to the world of work 'is likely to have a long lasting negative impact on future employment and earning prospects'. Useful data is difficult to come by because of the overlap between work and education in this age group. It is now worth considering some of the characteristics of the work done by young people.

5.1. Low Level Employment

At EU level, the proportion of young workers aged 15-24 employed in elementary or in low skilled manual occupations is around 1.5 times higher than in the older age categories:

Table No. 2 – Distribution of employment by age (EU) (%)[19].

	Elementary	Low skilled manual	Skilled manual	Skilled non-manual
15-24	12.5	38.7	28.8	20
25-29	8.1	27.6	25.6	38.7
30-54	9.3	22.8	27.3	40.6

[19] These figures are for 2007 and come from Eurostat, *Youth in Europe: A Statistical Portrait*, 2009.

In all countries, except the Czech Republic, they made up at least 30% of the 15-24 year old population of workers. Some 49 per cent of the 15-24 age group were in the skilled manual and skilled non manual groups, but this compared to 64 per cent of the 25-29 rear age group and 68 per cent of the 30-54 group.

5.2. Part Time Work

More than half of those aged 15-24 worked part time in order to continue their studies. This was especially true of those with low levels of educational attainment. Older age groups more often cited other reasons such as illness, personal or family reasons. Nevertheless there were still over 20 per cent of young workers who worked part time because they could not get a full time job.

Table No. 3 –Reasons for Having a Part Time Job (%) (EU)[20]

	Education or training	Could not find FT job	Other reasons
15-24	62.0	23.6	14.5
25-29	21.2	33.6	45.2

5.3. Temporary Employment

People take up temporary employment either on a voluntary basis for a number of reasons or on an involuntary basis because they cannot find work of a permanent nature. According to Eurostat[21], a majority of young Europeans were not willingly in temporary employment. The proportion of people choosing temporary work was, however, higher in the youngest age group than the 25-29 group.

[20] See note 11.
[21] See note 11.

Table No. 4 – Reasons for Having Temporary Work by Age (%) (EU).

	Contract Covering a Period of Training	Could not find a Permanent Job	Did not Want a Permanent Job	Probationary Contract
15-24	40.3	37.1	14.4	8.2
25-29	15.2	65.1	10.0	9.7

There were large differences between countries, e. g. in the youngest age group some 64.2 per cent of those working temporarily in Belgium did so because they could not find work compared to 22.5 per cent in Denmark.

5.4. Self-employment

The proportion of young people running their own business is very low in Europe, at about 4 per cent of the 15-24 group being self-employed[22].

Table No. 5 – Professional Status of Young Unemployed People by Age (%).

	Employee	Family Worker	Self-employed
15-24	93.3	2.7	4.0
25-29	89.8	1.6	8.7

6. Further Vulnerability

Apart from the difficulty in finding work and the possibility of ending up in precarious work situations, there are added vulnerabilities that young people, as well as others, can suffer from.

[22] It is worth saying that all these figures are pre-recession ones (for 2007), but for whatever reason young people are more likely to work part time and/or on a temporary basis; sometimes voluntarily and sometimes not.

6.1. Ethnicity

In the current recession in the UK, young black, Black British and mixed race people have suffered from the biggest increases in unemployment[23]. Black or Black British people between the ages of 16 and 24 have the highest rates of unemployment at over 48 per cent. This was an increase of 12.8 per cent since the start of the recession. Mixed race groups have seen the biggest increases in unemployment, from 21 per cent in March 2008 to over 35 per cent in November 2009. For white people in the same age group unemployment rose from 12.4 per cent to 20.4 per cent. The lowest increase was amongst Asian and Asian British, but the unemployment figure of 31.2 per cent is still much higher than for white people.

6.2. Education

Unemployment is highest for those with no qualifications at 43.2 per cent[24]. This was an 11.04 per cent increase between March 2008 and November 2009. Even the most educated have suffered though. In November 2009 over 17 per cent of graduates were unemployed.

6.3. Gender

Overall young men have done less well than young women. The unemployment rate for male graduates, for example, was 22.16 per cent in November 2009, compared to 13.47 per cent amongst female graduates. The worst affected group was, however, young females with no qualifications. Unemployment amongst this group was 46 per cent. This was a rise of almost 18 per cent during the period[25].

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[23] Figures come from an analysis done by the institute for Public Policy Research *Youth Unemployment and the Recession*, 2010 (last accessed 24 June 2011).
[24] Institute for Public Policy Research, *op. cit.*
[25] Institute for public Policy Research, *op. cit.* see note 14.

7. Age: The Unrecognised Vulnerability

Here we consider the extent to which employer perceptions of young people are based on stereotypical images attributing various characteristics to age.

7.1. What Employers Want

One government research report[26] stated that young people do generally experience the same generic barriers to work and training as do older people. Often, however, there is an age dimension, e.g. the report cites Hasluck[27] who "found that 18 to 24 year olds are disadvantaged by relative lack of work experience and work-related skills compared to older people; however, rising qualifications levels more generally mean that young people without qualifications now face even greater barriers to employment".

It seems apparent that employers often look for personal skills and traits in young people when considering them for recruitment. It is clear that many young applicants will not possess the skills necessary to carry out jobs that require training and experience; hence the likelihood for employers to consider other factors in the selection process. It is suggested here that the necessity for this may lead to employers being influenced by stereotypical assumptions about young people. One study based in Cumbria, in the north of England, suggested that employers were looking for included adaptability, customer service skills and communication skills; in other characteristics mentioned included enthusiasm, inter personal skills, basic work disciplines and a positive attitude[28]. One potential source of stereotypical attitudes stems from a lack of contact with the subject about whom views are formulated and this survey brings this out with regard to young people. When employers were asked about their assessment of the skills of young men living in the

[26] B. Newton, J. Hurstfield, L. Miller, R. Page, and K. Akroyd, *Training Participation by Age amongst Unemployed and Inactive People*, Report of research carried out by the Institute for Employment Studies on behalf of the Department for Work and Pensions; Department for Work and Pensions Research Report No. 291.

[27] C. Hasluck, *Employers, Young People and the Unemployed: A Review of the Research,* Employment Service Research Report No 12, Sheffield: Employment Service, 1998.

[28] A. Canny, *What Employers Want and What Employers Do: Cumbrian Employers' Recruitment, Assessment and Provision of Education/Learning Opportunities for their Young Workers*, *Journal of Education and Work*, 17 No. 4, 2004, 495-513.

district of their company, there was a marked difference between those who employed young people and those that did not, e.g. when asked about basic work discipline, some 76 per cent of those who employed young people thought it was good or reasonable as against some 35 per cent of those who did not employ young people. Some 61 per cent of those who employed young people thought that it was good or reasonable in contrast to just over 30 per cent of those who did not.

Further evidence is provided by a UK government report on the unemployed and inactive[29]. They cite a number of pieces of research including an Australian study which found, particularly in relation to young people, that employers placed high importance on maturity, adaptability, trainability, a willingness to take the initiative, cleanliness, good manners, interest in the job and a respect for authority[30]. In relation to young people, the report states[31] that:

> There is some evidence of differing employer requirements, depending on the age of candidates applying for roles, and these have often evolved from stereotypes. As Snape (1998) reports, employers perceived positive contributions that young people make to the workforce as: helping to maintain a balanced workforce age profile; receptiveness to learning and training; flexibility; and their costs (they can often be paid less than older people).
>
> Less favourable views of the young include the perception that young people have less life-experience; that they may not be able to handle certain types of jobs and that they may be more expensive in terms of training and the level of staff supervision they require (Snape, 1998).

The indications from research suggest that the soft skills are an important factor in the recruitment of young people. It may be that the judgments of these soft skills are more likely to be subject to stereotypical assumptions than more objective criteria such as qualifications or technical skills.

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[29] B. Newton, J. Hurstfield, L. Miller, R. Page, and K. Akroyd *What Employers Look for when Recruiting the Unemployed and Inactive: Skills, Characteristics and Qualifications*; Report on research carried out by the Institute for Employment Studies on behalf of the Department for Work and Pensions, 2005.

[30] A. Taylor, *What Employers Look For: The Skills Debate and the Fit With Youth Perception, Journal of Education and Work* 18, No. 2, 2005, citing M. Wooden, *Impediments to the Employment of Young People* Leabrook, SA, National Centre for Vocational Education Research, 1999.

[31] At par. 2.8.2; relying upon D. Snape, *New Deal for Young People: Unemployed People: A Good Deal for Employers?,* Employment Service, 1998.

8. Institutional Discrimination

Here is a quotation from a report prepared by Age Concern:

> Our lives are defined by ageing: the ages at which we can learn to drive, vote, have sex, buy a house, or retire, get a pension travel by bus for free. More subtle are the implicit boundaries that curtail our lives: the safe age to have children, the experience needed to fill the boss's role, the physical strength needed for some jobs. Society is continually making judgments about when you are too old for something – and when you are too old[32].

This paper does not argue that all age barriers are wrong, but argues that there needs to be adequate justification for them. This must be especially true for institutional barriers which apply to all in a particular age range.
One of the ways in which governments, especially, attempt to deal with the issue of unemployment for young people is to discriminate against them by removing employment protection or introducing rules that give them less favourable treatment than older workers.
Governments also somehow seem to think that young people become more attractive to employers if they reduce the young person's employment rights. Some examples are:

8.1. Austria

Hütter v Technische Univerisät Graz[33] was a case heard at the European Court of Justice. It concerned national legislation which excluded periods of employment completed before the age of 18 years from being taken into account when determining the remuneration of contractual public servants. The Austrian Law ('the *VBG*') did not permit any period of service before the age of 18 years to count towards any entitlements related to length of service. Mrs Hütter completed an apprenticeship at the same time as another colleague who was slightly older. When they were employed for 3 months after the apprenticeship she was therefore on a higher increment because of the amount of service that she had completed after the age of 18 years. A number of possible legitimate aims were put forward to justify this policy. One of the aims put forward to

[32] D. Abrams, *How ageist is Britain?* Age Concern; Age Concern has now merged with Help the Aged to form Age UK, 2005.
[33] Case C-229/08.

justify this policy was that the measure promoted the integration of young people into the workforce because they were less expensive[34].

8.2. France

In February 2006, the French Government tried to introduce a new employment contract for people aged under 26 years called the *Contrat Première Embauche* (CPE). This contract allowed for a two year period at its beginning when the contract could be terminated without justification by the employer and without any specific procedures to be followed by the employer. There was, of course, much protest against the proposals by the trade unions and by students, leading to the closure of many universities. Eventually the CPE was withdrawn by the Government. The purpose of the new contract was to assist the employment prospects of young people and would likely to have been a legitimate aim. Yet it was openly discriminatory against those under the age of 26 years[35].

8.3. Germany

Seda Kücükdeveci v Swedex GmbH & Co. KG[36] was another case before the European Court of Justice. In this case the complainant had been dismissed after more than 10 years employment since the age of 18 years. Paragraph 622 of the German Civil Code provided, amongst other matters, that "in calculating the length of employment, periods prior to the completion of the employee's 25th year of age are not taken into account". Her period of notice was therefore based upon the three years' service achieved after this age. The justification for this measure, according to the referring Court was the legislature's assessment that young workers generally react more easily and more rapidly to the loss of their jobs and greater flexibility can be demanded of them. A shorter notice period for younger workers also facilitates their recruitment by increasing the flexibility of personnel management.

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[34] See M. Sargeant, *The European Court of Justice and Age Discrimination, Journal of Business Law*, Issue 2, 2011, 144-159.
[35] See M. Sargeant (ed.), *The Law on Age Discrimination in the EU* Kluwer Law Publishing 2008; Chapter 4 about France is written by S. Laloume.
[36] Case C-555/07.

8.4. The United Kingdom

The full rate of the national minimum wage in the UK is not paid until a worker reaches the age of 21 years (until recently this minimum age had been set at 22 years)[37]. The hourly rate for those aged 21 plus is £5.93; for those aged 18-20 it is £4.92 and for 16-17 year olds it is £3.64. These rates are due to increase in October 2011[38]. One of the reasons put forward in justification for this is to make young people more attractive to employers. The government has said that, for example "younger workers are typically less skilled and productive than older workers"[39]. Part of the solution to this is to have a lower minimum wage, although research for the Low Pay Commission is less than conclusive about the relationship between employers' decisions to recruit and the reduced level of the national minimum wage.

Thus in all these cases there is an apparent justification that by reducing the rights of young workers, one can help them become more attractive to employers.

What is the evidence that taking away employment protection actually aids recruitment?

9. Individual Discrimination

There is further evidence (apart from that already presented) that young people have been discriminated against, or at least perceive that this discrimination has taken place, on the basis of their age. One survey commissioned by Royal and Sun Alliance[40] found that one in seven young workers (14 per cent) under the age of 25 years felt discriminated against in the workplace due to their age. This, according to the RSA summary, compared to one in ten (12 per cent) workers over 45 years of age. The research also found that more males felt discriminated against than females. Other research by the UK Employers Forum on Age[41] showed that age discrimination was the top concern for young people; much

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[37] See M. Sargeant, *The UK National Minimum Wage and Age Discrimination Policy Studies,* 31, No. 3, 2010, 351-364.

[38] There is also an apprentice rate which is not considered here.

[39] DTI, *Government Evidence to the Low Pay Commission on the economic effects of the National Minimum Wage*, November 2006.

[40] www.rsagroup.com (last accessed 12 July2011).

[41] www.eortrial.co.uk (last accessed 12 July 2011).

higher than discrimination on other grounds such as gender or race. The research found that almost one in five people aged under 20 "have been made to feel self-conscious about their age while at work or going about their daily life".

A government sponsored survey[42] found:

> One-fifth of respondents reported that age discrimination is "not at all or not very serious" whilst 36 per cent reported that age discrimination is "very serious". Younger age groups reported that age discrimination is more serious than did older age groups. For example, almost half (47 per cent) of those aged under 25 class it as "very serious" compared with 24 per cent of those aged 65-79 years.

Respondents aged under 25 are at least twice as likely to have experienced age discrimination than all other age groups.

10. Conclusion

This paper has reviewed some of the evidence and it is difficult not to conclude that young people suffer detriment based on stereotypes related to their age. The fact that employers tend to look at "soft skills" in the recruitment of young workers suggests that there is plenty of scope for stereotypical assumptions to play a role in the recruitment and selection process. There is still a need for further research, particularly with regard to employer views about younger workers, before there can be final conclusions about the extent of age discrimination against young people.

[42] D. Sweiry and M. Willitts, *Attitudes to Age in Britain 2010/11* 13, In-House Research No 7, Department for Work and Pensions, 2012.

Older Workers in Restructuring

Birgit Köper, Janine Dorschu, Greg Thomson and Götz Richter [*]

1. The Changing World of Work

Changes in society and work settings are not a new phenomenon. They are related to both taking chances and risks, and may range from slight alterations to radical changes, which affect organisational structures or even their very existence[1].

What we are currently witnessing, however, is changes taking place at an increased pace and through different dynamics, which call for adaptation and coping strategies at several levels, whether concerning employees, businesses, or the society as a whole. Major changes at the societal level are associated with globalisation, the growth of service-oriented and knowledge-based industries, demographic factors, the spread of information technology, and increasing reliance on certain economic principles, such as profitability and efficiency[2].

Within both profit and non-profit organisations, this trend leads to the establishment of more flexible work patterns, precarious contractual arrangements, new meanings assigned to concepts such as leadership and management – e.g. management by objectives – and new forms of organisational restructuring. These developments are often associated with a change or a rise in labour demand, work intensification and higher level of stress.

Demographic shifts also alter the employment structure in a considerable manner. The participation rate of women and older workers, as well as the increasing prevalence of migrant workers will produce a more diversified workforce. One major challenge resulting from this is the recognition of workers' skills and qualifications in other areas and industries. High unemployment rates, coupled with skills shortage in some sectors are

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[1] R. Trinczek, *Überlegungen zum Wandel von Arbeit*, in *WSI Mitteilungen* 11, 2011, 606-614.

[2] *Ibid.*

indicative of this problem[3]. In order to compensate for this imbalance, workers are supposed to be even more flexible, in terms of where, when, and how much they work, as well as in relation to their tasks and what is required of them[4].

New opportunities supplied by information technology represent a basic component for enhancing flexibility. Because of a more rapid exchange of data and information, there is no need on the part of workers to operate at a fixed workplace. Of course this aspect furthers their scope of action, yet posing some questions in terms of work-life balance.

As already pointed out, the definition of "leadership" itself is now laden with new meanings resulting from the introduction of new practices, such as that of management by objectives, so that workers have to organise themselves, and are accountable for both their work processes and the results as entrepreneurs[5].

In short, changes in the world of work constitute a challenge not only for policy-makers and employers, but also for workers in terms of increased demand associated with workload and work intensity, flexibility and responsibility, which might cause psychological distress, and have negative effects on their health.

On the basis of these considerations, the present paper addresses the issue of restructuring, and its impact on workers, particularly on older ones, for they are assumed to face more difficulties to cope with the rise in demand, in terms of adapting to permanent changes.

After some introductory remarks describing our understanding of vulnerable workers, some general findings outlining the potential negative outcomes of restructuring are presented. Further, drawing on a case study and data from a representative survey on working conditions conducted in Germany, an investigation will be provided on whether, and to what extent, older workers are more vulnerable in this respect. In considering some recent projects funded by the European Union, a set of recommendations is provided for managing restructuring in a supportive way and mitigating potential negative social outcomes.

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[3] European Commission GREEN PAPER - *Restructuring and Anticipation of Change: What Lessons from Recent Experience?* Brussels, 2012.

[4] M. Baethge, V. Baethge-Kinsky, *Jenseits von Beruf und Beruflich-keit? Neue Formen der Arbeitsorganisation und Beschäftigung und ihre Be-deutung für eine zentrale Kategorie gesellschaftlicher Integration,* in *Mittei-lungen aus der Arbeitsmarkt- und Berufsforschung* vol. 31, No. 3, 1998, 461-472.

[5] G. G. Voß, H. J. Pongratz, *Der Arbeitskraftunternehmer. Eine neue Grundform der Ware Arbeitskraft?,* in *Kölner Zeitschrift für Soziologie und Sozialpsychologie (FZfSS)* vol. 50, No. 1, 1998, 131-158.

2. Restructuring

Upward trends in globalisation, challenges and increased competitiveness in markets, new opportunities afforded by technology, and stress arising from the recent economic crises, have sped up restructuring processes among enterprises. Indeed, according to the Green Paper published by the European Commission[6], "restructuring is a crucial factor for employment and for the competitiveness of the European economy". The above further stresses the significance of effective management during organisational changes.

2.1. Definition and Scope of Application

There is no universally accepted definition of restructuring. The term is used to describe a range of organisational phenomena other than ongoing adaptation which affects the structural features of the undertaking. The European Monitoring Centre of Change makes use of 'restructuring' in a loose sense to refer to different kinds of major changes (European Monitoring Centre on Change)[7], such as:

- Relocation (activities are relocated to another location within the same country);
- Offshoring (activities are relocated to another location outside the country);
- Outsourcing (activities are subcontracted to another company within the same country);
- Bankruptcy/Closure (a premise is shut down or a company is faced with bankruptcy for economic reasons);
- Merger/Acquisition (two companies merge or the acquisition of an undertaking takes place, which then entails internal restructuring);
- Internal restructuring (the company undertakes a plan to reduce the workforce, or to initiate restructuring differently from those mentioned above);

[6] European Commission GREEN PAPER - *Restructuring and Anticipation of Change: What Lessons from Recent Experience?, cit.*

[7] European Monitoring Centre on Change (2011). European Restructuring Monitor. Available from: www.eurofound.europa.eu/emcc/index.htm

- Business expansion (a company extends its activities, consequently increasing the number of recruitments).

The European Restructuring Monitor collects data on restructuring from all European countries on a regular basis. Such statistics, however, are based on newspaper reports and only concern layoffs which are of a certain extent.
Accordingly, the picture given at international level regarding redundancy programmes cannot be deemed to be reliable, as it rests on whether or not they are reported in the media. A representative survey on working conditions (n=20,000) carried out in Germany includes questions about major changes at work such as those related to production and new techniques, organisational changes and higher levels of psychological strain. Based on this study, the manufacturing sector and the public sector in particular have been restructured, with more than 50% of the interviewees reporting changes in both sectors.
Restructuring is generally accompanied by further changes in terms of work organisation, labour demand, processes and so forth. Undertakings facing restructuring are more likely to experience adjustment in production processes, personnel, organisational issues and labour demands, where stress, work pressure, and job rotation are major components.

2.2. The Impact on Workers' Health

From a pragmatic point of view, the way in which restructuring is planned and managed transcends the organisational issues in a strict sense, and can affect workers' wellness. Work intensification and stress can leap, whereas work satisfaction and motivation can be reduced, thus impacting workers' health[8].
Following restructuring, workers are faced with numerous changes in their work environment. As previously seen, they report changes in terms of processes, products, personnel and organisational issues, tasks and demand, which are chiefly related to work pressure and stress[9].

[8] T. Kieselbach, E. Armgarth, S. Bagnara, A. L. Elo, S. Jefferys, C. Jolin, *et al.*, *Health in Restructuring. Innovative Approaches and Policy Recommendations*, European Expert Group on Health in Restructuring, Hampp Verlag, Munich, 2009, 22.
[9] T. Kieselbach *et al.*, *op. cit.;* M. Kivimäki, T. Honkonen, K. Wahlbeck, M. Elovainio, J. Pentti, and T. Klaukka, *Organisational Downsizing and Increased Use of Psychotropic Drugs among*

A group of European experts, *Health in Restructuring* – HIRES[10] – reviewed the findings on the negative outcomes in terms of health on workers' who experienced layoffs indirectly, yet not being made redundant (e.g. a colleague being dismissed). What emerged was that such workers were exposed to severe risks such as:

- Impairment in self-rated health state[11];
- Increase of certified sickness absence[12];
- Impaired sleep[13];
- Impaired "recuperativeness"[14];
- Increased self-reported stress[15];
- Cardiovascular impairment and increased rates of related mortality[16];
- Increased drug addiction[17];
- Increased number of medical prescriptions/use of psychotropic drugs[18];
- Increase of smoking and alcohol consumption[19];

Employees who Remain in Employment, in the *Journal of Community and Environmental Health*, vol. 61, 2007, 154-158; U.B. Erikkson, B. Starrin, S. Janson, *Long- term Sickness Absence due to Burnout*, in *Absentees' Experiences, Qualitative Health Research*, vol. 18, No. 5, 2009, 620-632.

[10] T. Kieselbach *et al.*, *op. cit.;* L. Henry, *et al, The Health Impact of Restructuring on Public Sector Employees and the Role of Social Dialogue (HIRES.Public)*, Final Report for DG Employment, Social Affairs and Equal Opportunities, EU Commission, WLRI, 2011.

[11] J. Vahtera, M. Kivimäki, J. Pentti, A. Linna, M. Virtanen, P. Wirtanen, and J. E. Ferrie, *Organisational Downsizing, Sickness, Absence and Mortality,* in *British Medical Journal*, 2004, 328, 555; B. Beermann, I. Rothe, *Restrukturierung, betriebliche Veränderung und Anforderungen an die Beschäftigten – einige empirische Befunde,* in L. Schröder, H. J. Urban, (eds.) *Gute Arbeit*, Bund-Verlag, Frankfurt, 2011.

[12] *Ibid.*

[13] F. Campbell-Jamison, L. Worral, and C. Cooper, *Downsizing in Britain and its Effect on Survivors and their Organisations*, in *Anxiety, Stress and Coping*, vol. 14, 2001, 35-58.

[14] P. Richter, C. Nebel, and S. Wolf (2010). *Ja macht nur einen Plan! –Gesundheitsinterventionen in turbulenten Zeiten*, in T. Rigotti, S. Korek, and K. Otto (eds.). *Gesund mit und ohne Arbeit*, Papst, Lengerich, 2010, 73-90.

[15] B. Beermann, I. Rothe, *op. cit.*; M. Kivimäki, J. Vahtera, M. Elovainio, J. Pentti, and M. Virtanen, *Human Costs of Organisational Downsizing, Comparing Health Trends between Leavers and Stayers*, in *American Journal of Community Psychology*, vol. 32, 2003, 57-67.

[16] Vahtera *et al., op. cit.*

[17] M. Kivimäki *et al.*, *Organisational Downsizing and Increased Use of Psychotropic Drugs among Employees who Remain in Employment*, in *Journal of Community and Environmental Health, cit.*

[18] *Ibid.*

[19] A. Weber, G. Hörmann, W. Heipertz, W. (2007). *Arbeitslosigkeit und Gesundheit aus sozialmedizinischer Sicht (Unemployment and health from a sociomedical perspective).* in *Deutsches Ärzteblatt*, No. 104, 2007, 2957-2962. M. R. Frone, *Are Work Stressors Related to Employee*

- Increase of musculoskeletal symptoms[20];
- Increase in the entitlement of disability pensions[21].

2.3. Restructuring and Psychological Distress

It is not clear which mechanisms lead to restructuring impacting workers' health. The objective conditions characterising this process may not determine the same reaction among workers. If anything, repercussions on health are rather different, chiefly if one considers effects such as an increase in psychological strain[22], loss of organisational trust[23], and feelings of helplessness and loss of control. If workers are faced with either excessive or insufficient labour demand, they react with insecurity[24], frustration and anxiety[25]. Organisational changes and increased demands are also related to psychological strain[26]. Vahtera et al. 2004[27] discuss three potential underlying mechanisms to support the argument that workers in working environments who undergo major changes are more likely to suffer from related medical conditions, namely:

- Alterations in the characteristics of work (job insecurity, labour demand, job control);
- Effects of social relations (support by colleagues and supervisors);

Substance Use? The Importance of Temporal Context Assessments of Alcohol an Illicit Drug Use, in *Journal of Applied Psychology*, vol. 93, No. 1, 2008, 199-206.

[20] M. Kivimäki, J. Vahtera, J. Pentti, I. Thomson, A. Griffiths, and T. Cox, *Downsizing, Changes in Work, and Self-rated Health of Employees : A 7-year 3-wave Panel Study*, in *Anxiety, Stress and Coping*, vol 14, 2001, 59-73.

[21] Vahtera *et al., op. cit.*

[22] R. Kalimo, T.W. Taris, and W. B. Schaufeli, *The Effect of Past and Antizipated Future Downsizing on Survivor Well-being: An Equity Perspective*, in *Journal of Occupational Health Psychology* vol. 8, 2003, 91-109.

[23] U.B. Erikkson, *et. al.*, *op. cit.*; F. Campbell-Jamison, *et al., op. cit.*

[24] A. Rafferty, M. Griffin, *Perceptions of Organisational Change: A Stress and Coping Perspective*, in *Journal of Applied Psychology*, vol. 91, 2006, 1154–1162.

[25] S. J. Ashford, *Individual Strategies for Coping with Stress During Organizational Transitions,* in *Journal of Applied Behavioral Science* vol. 24, 1988, 19–36.

[26] C. R. Wanberg, J. T. Banas, *Predictors and Outcomes of Openness to Changes in a Reorganizing Workplace*, in *Journal of Applied Psychology*, vol. 85, 2000, 132-1 42; R. Randall, K. Nielsen, S. T. Tvedt, *The Development of Five Scales to Measure Employees' Appraisals of Organizational-level Stress Management Interventions*, in *Work and Stress*, No. 23, 2009.

[27] J. *Vahtera, M. Kivimäki, J. Pentti, A. Linna, M. Virtanen, P. Wirtanen, and J.E. Ferrie: Organisational downsizing, sickness absence and mortality. British Medical Journal, 2004, 328, 555*

- Bad habits (smoking and excessive alcohol consumption).

Stress, work intensity and multiplicity of demands increase more significantly in restructured organisations than in organisations without restructuring[28]. Permanent restructuring does not cause adaptation effects, but rather increases the risk of stress and work intensity[29].
Subsequent to this outlook of the potential impacts of restructuring on the workforce, as well as some insight into certain related aspects, the focus will now turn to whether and to what extent older workers are more at risk of suffering from ill health in organisations which undergo restructuring.

3. Vulnerable Workers

Vulnerability can be investigated from different perspectives, each of which helps address some fundamental questions about its meaning in the context of restructuring. These questions can be summarised thus:

- Is vulnerability merely an aspect arising from the contractual relationship concluded between the parties? In other words, in which cases does vulnerability apply to a range of workers with utterly different characteristics. Is it some key determinants of vulnerability – such as old age – which make the worker more vulnerable? Or;

- Is it a combination of both, where certain characteristics make a worker more likely to be in a more vulnerable condition in occupational terms?

- Are there some broader conclusions that can be drawn about what this means for certain categories of workers, when they face restructuring?

It is these different perspectives that colour our understanding of vulnerability and its meaning in the context of restructuring.

[28] B. Beermann, I. Rothe, *op. cit.*;
[29] T. Rigotti, K. Otto, *RESTrukturierung in Deutschland: Qualitative AnalysE, Systematisierung und Typologie (REQUEST)*, Interner Bericht der BAuA, 2012. N. Wiezer, *et al.,* Exploring the Link between Restructuring and Employee Well-being, PSYRES, 2011.

From an employer's perspective, Atkinson's[30] model of flexible firms clarifies how employers might use peripheral workers to respond to a dynamic environment. Lacking the inherent safeguards provided to core workers by the contractual relationship, the number of peripheral workers can be reduced relatively quickly, enabling the business to respond to the changing environment by means of numerical flexibility. This is quite an attractive way of categorising vulnerable workers, with respect to restructuring, as peripheral workers are by definition more expendable, and thus more vulnerable.

The flexible firm outlined by Atkinson is, however, an oversimplification, an idealised type[31], the reality being that many workers who would qualify as peripheral workers, such as certain specialists, are not directly employed by choice, for they can ask for a premium as external consultants.

Nor do all core workers possess skills that are critical to the firm. Indeed, many firms with a large peripheral workforce also have a large low-skilled core workforce[32]. Some firms will naturally make peripheral workers redundant because they form the line of least resistance and costs when it comes to restructuring. However, this is only a part of the story, and workers' characteristics are also important.

The 2008 report *Hard Work Hidden Lives*[33], produced by the Trade Union Congress (TUC) and the Commission on Vulnerable Employment, took a more worker-centred approach: "Precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power in the employer-worker relationship".

In this definition, workers' vulnerability is the result of their lack of power in the workplace. The Commission estimated that there are about two million vulnerable workers in Britain. It is the nature of the workers that makes them vulnerable, not just their contractual status, yet the latter might be affected by their characteristics, too.

Safety for vulnerable workers in the construction industry has been an important issue for some time. In dealing with this question, the UK Health and Safety Executive has made use of a 'vulnerability indicator', as can be seen in Table No. 1:

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[30] J. Atkinson, *Manpower Strategies for Flexible Organizations, Personnel Management* vol. 16, 1984, 28-31.

[31] *A. Kalleberg, "Organizing Flexibility: The Flexible Firm in the New Century." British Journal of Industrial Relations. 2001, 39: 479-504.*

[32] *Ibid.*

[33] *Commission on Vulnerable Employment, Hard Work Hidden Lives, TUC, 2008.*

Table No. 1 – Categorisation for Vulnerability.

		Capacity or Means to Protect Themselves	
		High	Low
Risk of Being Denied Employment Rights	Low	Protected by Normal Employment Relations	Protected by others
	High	Protected by their own Efforts	Vulnerable

Source: HSE CONIAC[34], 2009.

The Health and Safety Executives/HSE singled out four vulnerable groups in the construction industry on the basis of this template; ageing workers, young workers, agency workers and foreign/migrant workers. This indicator provides a useful starting point for analysis with respect to restructuring. However, it may be the case that the groups identified by the HSE are specific to the construction industry, so that the reasons identifying ageing workers as more vulnerable may not necessarily apply in other sectors.

Vulnerable workers are also sometimes seen as a distinct group whose employment is atypical, thus making them precarious. Guy Standing, in his book *The Precariat; The Dangerous New Class*[35] argues that precarious employment is now so widespread and embedded that precarious workers represent a new class, i.e. the precariat. It is perhaps difficult to see vulnerable workers as a class. Yet the book makes a cogent argument for the widespread nature of vulnerable employment.

The HIRES report[36] addresses precarious employment from two angles. First and foremost, recommendation number eight of the twelve HIRES recommendations provides that contingent and temporary workers should have the same employment rights as permanent workers, thus

[34] *HSE Coniac, Report of the Vulnerable Workers Working Group, Paper M1/2009/2, 2009.*

[35] G. Standing, *The Precariat; The Dangerous New Class,* Bloomsbury Academic, 2011. Statistisches Bundesamt (2009a). *Statistisches Jahrbuch 2009: Für die Bundesrepublik Deutschland*, September, Wiesbaden, 2009a.

[36] T. Kieselbach *et al.*, *op. cit.*

acknowledging that these workers are particularly vulnerable during restructuring. The report also argues that restructuring tends to increase precarious employment, as the drive to increase competitiveness leads to the greater use of precarious workers, and that precariousness is itself a factor in increasing poor health as a result of restructuring[37]. Vulnerability is therefore a risk factor in restructuring, and can exacerbate the negative effects on health associated with it.

The notion of vulnerable employment can convey different meanings. Vulnerable workers are best understood as being a combination of different forms of vulnerability, where the contractual arrangement under which individuals are hired defines whether or not they are vulnerable, as well as the level of vulnerability at an individual level.

The characteristics pointing to individual vulnerability might mean, as likely as not, that workers find themselves in a contractual scheme that makes them vulnerable. By the same token, vulnerable workers are more likely to be made redundant, which, it is argued, leads to negative effects in terms of health.

4. The Effect of Restructuring on Older Workers

The ageing population across Europe makes it necessary to take a closer look at older workers' employability, as well as their health and well-being. In recent years, policies in Europe were intended to boost older workers' employment levels. In the framework of the Lisbon process at EU level, it was agreed that the employment rate of the population aged 55-64 years should be increased to over 50% by the year 2010. By way of example, in Germany, the employment target for older workers – that is those in the 55 to 64 age group – was achieved for the first time in 2007, with an employment rate of 51.3%. With a rise of 13.4% over the last 10 years, the employment rate of this category of workers in Germany had the most significant increase in comparison to other age groups[38]. In 2011, the employment rate for older workers was already 59.9%. On average, in all European countries the employment rate of older workers rose by approximately 10% to 47.4% (2011) in the last decade[39]. Against the background of this development, "older workers are increasingly regarded

[37] T. Kieselbach *et al.*, *op. cit.,* 39.

[38] *Statistisches Bundesamt (2009): Bevölkerung Deutschlands bis 2060. 12. koordinierte Bevölkerungsvorausberechnung. Wiesbaden.*

[39] Eurostat, *Erwerbstätigenquote älterer Erwerbstätiger*, 2012.

as a key asset, in terms of European competitiveness"[40]. However, and concurrently, older workers are often referred to as a "vulnerable group" in the labour market. Indeed, the general image of older workers in our society is usually prejudiced, as characterised by lower performances, downtime due to illness, and low skills, particularly in relation to new technologies[41]. Therefore, personnel policies are often drafted considering the foregoing aspects, especially during restructuring. On the one hand, these practices equate to corporate policy, chiefly when older workers are dismissed through restructuring. On the other hand, older workers who are made redundant as retiring in the near future, are morally and politically easier to justify than high youth unemployment – and indeed, intergenerational equity was always an argument for early retirement[42]. Thus, this approach led to the early retirement of many older workers[43]. However, the "soft" form of restructuring/downsizing is no longer possible in the so far practiced dimensions because of national government initiatives closing early retirement routes, due to the implications of demographic change. One hypothesis is that these additional barriers to re-employment make older workers now particularly vulnerable in working life.

4.1. Case Study and Secondary Data Analysis

In order to analyse whether or not older workers are more affected by restructuring in terms of stress and ill health, both a case study and a secondary data analysis have been conducted.

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[40] European Commission, *Investing in Well-being at Work. Addressing Psychosocial Risks in Times of Change*. Luxembourg, 2009.

[41] J. Grumbach, U. P. Ruf, *Demografischer Wandel in der Arbeitswelt: Handlungsrahmen und Handlungsfelder von Unternehmen, Gewerkschaften und Staat*, in T. Länge, B. Menke, (eds), *Generation 40plus. Demografischer Wandel und Anforderungen an die Arbeitswelt* Bertelsmann Verlag, Bielefeld, 2007, 33-66; H. Künemund, *Beschäftigung, demografischer Wandel und Generationsgerechtigkeit*, in T. Länge, B. Menke, (eds.) *Generation 40plus. Demografischer Wandel und Anforderungen an die Arbeitswelt*, Bertelsmanns Verlag, Bielefeld, 2007, 11-32.

[42] H. Künemund, *op. cit.*

[43] F. Höpflinger, W. Clemens, W. (2005). *Zum Generationenmix in einer demografisch alternden Arbeitswelt*, in W. Clemens, F. Höpfinger, and R. Winkler, (eds.), *Arbeit in späteren Lebensphasen. Sackgassen, Perspektiven, Visionen*, Haupt Verlag, Bern/Stuttgart/Vienna 2005, 215-238.

4.1.1. Elder Workers in Companies Experiencing Restructuring

In view of the above, the EU-project *Elder Employees in Companies Experiencing Restructuring: Stress and Well-being* (ELDERS) has therefore become a focus.
Previous international research indicates that restructuring contributes to increasing perceived job insecurity, even amongst those workers who stayed in the company after restructuring. Hence, a survey should give more of an insight into the situation of not only older, but also younger workers in firms facing restructuring, in terms of stress and well-being. In the current crisis, the banking sector is under severe restructuring, and was therefore singled out for the survey.
One of the largest savings banks in Germany took part in the survey. Savings banks have the task of offering secure and interest-bearing investments, and satisfying local credit needs. Here the financial gain is not the main purpose of the business. In general, savings banks are publicly-owned. In recent years, however, profitability has become more important, so that there has been some centralisation of units as well as outsourcing. During restructuring, various measures were carried out, and workers were made redundant. However, in comparison to other companies, savings banks offer their employees positions characterised by higher levels of protection.

4.1.2. The Study and the Sample

In September 2010, a questionnaire was sent out to different departments, which had been recently restructured. More specifically, 237 questionnaires were delivered, resulting in 117 responses from 37 men and 80 women. The respondents were divided into two groups: a first group of 72 younger employees between the age of 28 and 49, and a second group with 45 older employees from 50 to 57 years. The respondents were asked to assess their feelings regarding their current and future prospects at work, and their plans for the following years.
For a better classification of the results, the nature of the restructuring process of this savings bank will be briefly specified. Neither the ownership nor the continuance of the organisation was at stake. There was no structural change that threatened workers' qualification. Restructuring here was more a question of corporate strategy. The company would like to improve the strength of their position in the market, as well as to increase profitability. Therefore, restructuring, in this

case, involved mainly organisational changes, and only a few individuals have been affected by layoffs. However, for the majority of the respondents, the restructuring had some effect on their working situation, while for some it had a positive or a negative effect (see Table No. 2). A significant difference among younger employees could not be found.

Table No. 2 – Impact of Changes after Restructuring in %.

Consequences changes have for (in %)	Workers	Decreased	Unchanged	Increased
Application of Experience and Skills	Younger Older	33.8 32.6	46.5 44.2	19.7 23.3
Hierarchy in the Company	Younger Older	27.1 27.3	67.1 68.2	5.7 4.5
Overall Levels of Responsibility	Younger Older	26.8 27.3	46.5 47.7	26.8 25.0
Monthly Income	Younger Older	15.5 9.1	80.3 86.4	4.2 4.5

Source: ELDERS.

4.1.3. Secondary Data Analysis

In order to test the results from the exploratory case study, additional data from the representative BIBB/BAuA survey carried out during 2011-2012 were analysed for any adverse health effects experienced by older workers during restructuring. The BIBB/BAuA study is a representative survey conducted on 20,036 employees in Germany every six years. Differences between these age groups without and after restructuring should be identified. Therefore, workers from 20 until reaching the retirement age of 65 (n=19450) were divided into three groups: younger workers from 20 to 34 years (n=5113), middle-aged workers between 35 and 49 years (n=8309) and older workers from 50 to 64 years (n=6029).

4.2. Results

4.2.1. Case Study Results

The result of restructuring – even if only a few workers have been dismissed – is ongoing job insecurity[44]. The perception of job insecurity may have adverse effects on health, and thus, the remaining employees cannot always be considered to be unaffected. Physical and psychological stress can arise from this situation for the remaining employees[45]. Noer[46] describes this as "layoff survivor sickness". Job insecurity has emerged as one of the most stressful aspects of a work situation[47] and results from both situational as well as from a number of individual factors relate this. There is a close relationship between the perception of job insecurity and negative responses, such as work-related attitudes and behaviours, and work-related stress symptoms[48]. Against the background of an ageing workforce, the factor 'age' is particularly important when related to job insecurity.

However, the assumption that the perception of job insecurity increases with age could not be confirmed in our case study. Rather, it was found that younger workers were more concerned with the security of their job (see Figure No. 1). In total, almost all younger workers (93%) expressed their concerns about the continued existence of their position, in comparison to only 62% of older employees. The figures in the report *Restructuring in the Recession 2009* of the European Foundation for the Improvement of Living and Working Conditions, also show that younger workers under 25 years were particularly affected, compared to all other

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[44] J. Hartley, D. Jacobson, B. Klandermans, and T. Van Vuuren, (eds.), *Job insecurity: Coping with Jobs at Risk*. Sage, London, 1991. M. Kivimäki, *et al., Factors Underlying the Effect of Organisational Downsizing on Health of Employees: Longitudinal Cohort Study*, 2000.

[45] T. Kieselbach *et al.*, *Gesundheit und Restrukturierung: Innovative Ansätze und Politikempfehlungen*, Rainer Hampp Verlag, 2009a.

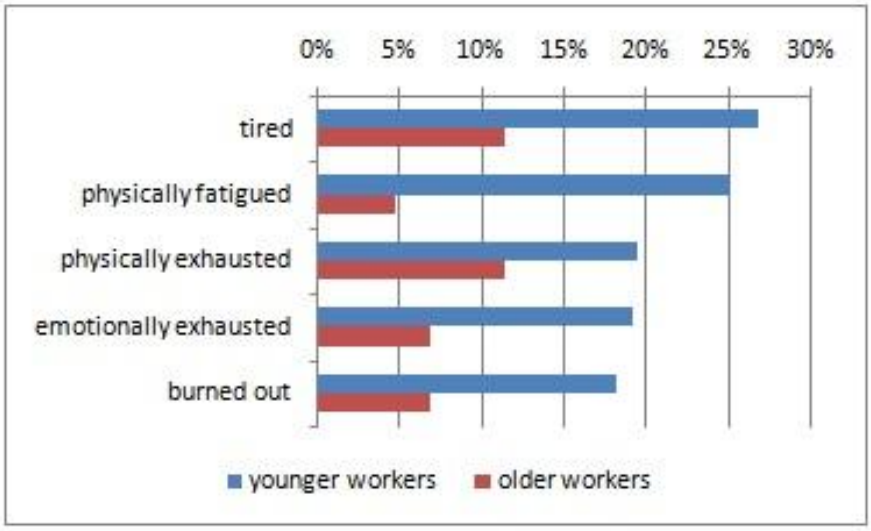
[46] D. M. Noer, *Layoff Survivor Sickness: What it is and What to Do about it,* in M. K. Gowing, J. D. Kraft, and J.C. Quick. (eds.), *The New Organisation Reality? Downsizing, Restructuring and Revitalization*, American Psychological Association, Washington D.C., 1997, 207-220.

[47] H. De Witte, *Job Insecurity and Psychological Well-being: Review of the Literature and Exploration of Some Unresolved Issues*, in *European Journal of Work and Organizational Psychology* vol. 8, 1999, 155-177.

[48] M. Sverke, H. Hellgren, and K. Näsvall, *Arbeitsplatzunsicherheit: Überblick über den Forschungsstand*, in B. Badura, H. Schellschmidt, C. Vetter, (eds.), Fehlzeiten-Report 2005. Arbeitsplatzunsicherheit und Gesundheit, 2005, 59-92.

age groups in the current economic crisis[49]. To the extent that when the respondents were asked about their perception at work in the last 30 working days, the results show higher physical and emotional distress for younger employees (see Figure No. 2). A fifth to a quarter of younger workers pointed out that they are tired at work, suffering from physical fatigue, and physically and emotionally exhausted, in comparison to only 5% to 11% of their older counterparts.

Figure No. 1 – Percentage of Employees Who Reported Physical and Emotional Strain at Work in the Last 30 Work Days After Restructuring.

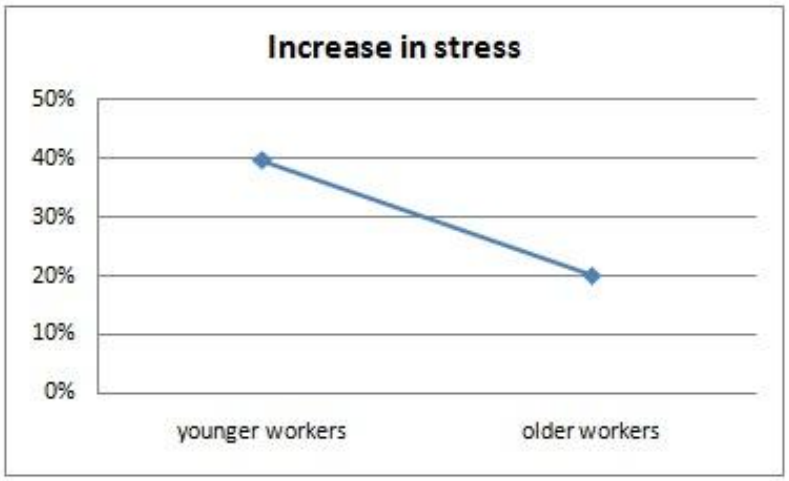


Source: ELDERS.

When respondents were asked if their levels of stress had increased, fewer older workers (20%) reported a rise of stress compared to younger workers (40%).

[49] J. Hurley, I. Mandl, D. Storrie, and T. Ward, Restructuring *in Recession*, ERM REPORT 2009, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2009.

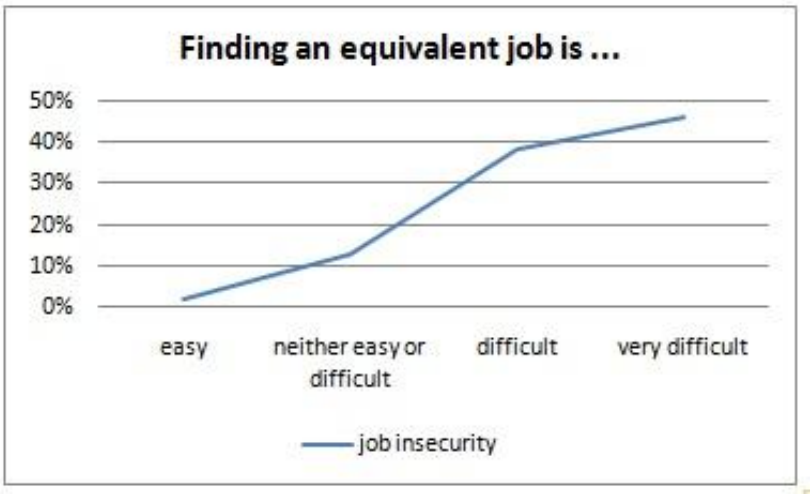
Figure No. 2 – Percentage of Employees Who Reported an Increase in Stress after Restructuring.



Source: ELDERS.

In addition, the analysis showed that, irrespective of age, the personal assessment of how easy it will be to find a new job influences the perception of job insecurity: the more difficult someone thinks it is to find an equivalent job, the greater the perceived job insecurity (see Figure No. 3).

Figure No. 3 – Correlation between the Assessment of Finding an Equivalent Job and Job Insecurity (in %).

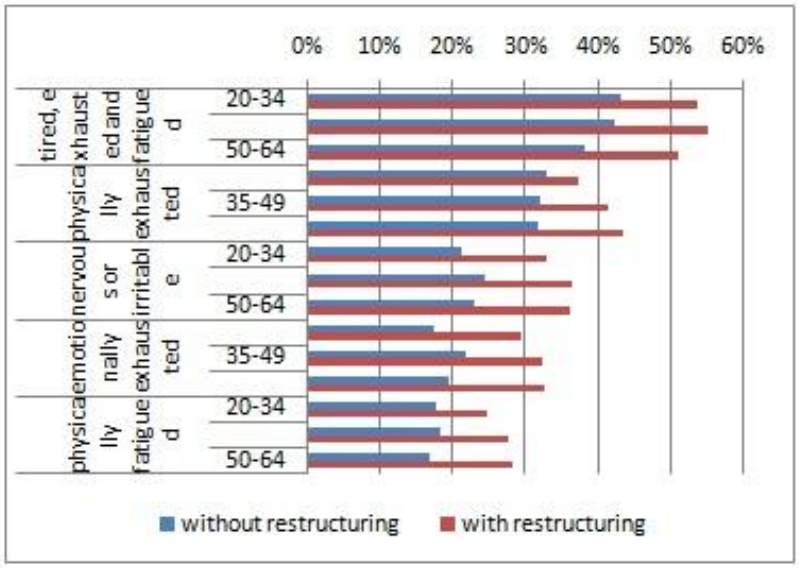


Source: ELDERS.

4.2.2. Results of Secondary Data Analysis

The analysis of the representative survey confirmed that there were barely any differences between older and middle-aged employees, in terms of exhaustion, fatigue and stress. Both groups, however, differed from young employees, i.e. those under 35 years.
The following figure highlights the differences in the perception of physical and emotional distress. The respondents, whose work environment underwent restructuring in recent times, reported higher levels of mental and physical distress. However, between the three age groups, no significant effects could be determined. Though the youngest group of workers reported less exhaustion, irritability and fatigue, their older peers did not report a higher number of cases of medical conditions compared to the middle-aged workers.

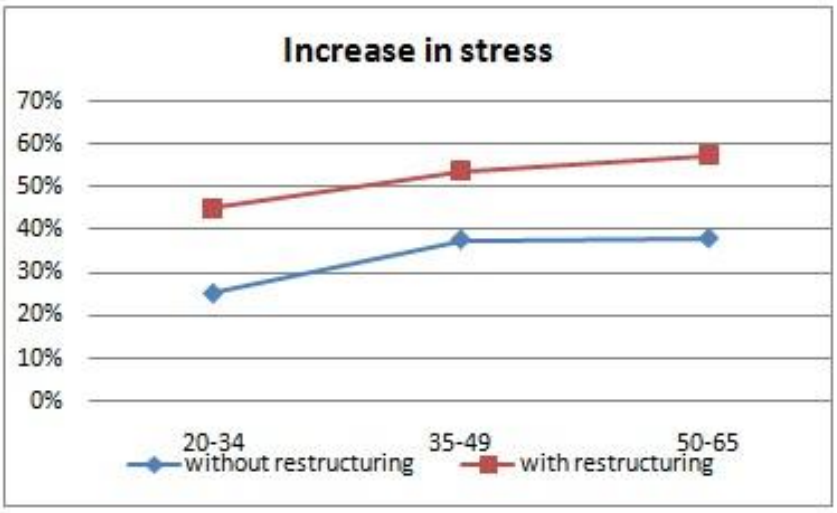
Figure No. 4 – Percentage of Employees Who Reported Physical and Emotional Strain at Work during the Last 12 Months With/Without Restructuring in the Last Two Years.



Source: BiBB/BAuA 2011/12.

Similar results were reported in terms of stress. The respondents were asked if their levels of stress had increased within the last two years. The results showed that, in all three age groups, more stress was perceived when the company had previously been restructured. Younger workers seem to sense the increase of stress less than the middle-aged and older workers. However, older workers report hardly any more stress than middle-aged workers.

Figure No. 5. Percentage of Employees who Reported an Increase in Stress With/Without Restructuring in the Last Two Years.



Source: BiBB/BAuA 2011/12.

4.3. Discussion

Restructuring can negatively impact health, and produces work intensification and stress[50]. It is assumed that ill health in this context emerges from job insecurity and anxiety[51]. This insecurity is not necessarily limited to the fear of losing one's job, since similar effects can result from changes in working conditions, such as new demands, or declines in responsibilities and authority.

In this contribution, an analysis has been provided of whether older workers are more vulnerable to negative effects arising from restructuring, such as perceived stress and ill health, particularly in terms of exhaustion and fatigue. For this purpose, an investigation has been carried out considering a case study and a secondary analysis of a representative employee survey on working conditions.

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[50] T. Kieselbach *et al.*, *op. cit.;* B. Köper, G. Richter, *Restrukturierung in Organisationen und mögliche Auswirkungen auf die Mitarbeiter*, Dortmund, 2012.

[51] J. Vahtera et al. 2004, op. vit.

As evidenced by the representative survey[52], restructuring clearly increases the exposure to stress for all and not just for older workers. This group differed from those consisting of young workers under 35 years in terms of perceived stress, yet not from middle-aged workers. Moreover, employees in firms undergoing restructuring reported more physical and emotional exhaustion, nervousness, irritability, fatigue and burnout. Also, in terms of impacting on individual health, older workers were not particularly affected compared to their middle-aged counterparts. Hence the hypothesis that older workers might suffer more severely under restructuring and might form a more vulnerable group could not be put forward.

On the contrary, in the present case study older workers over 50 years suffered even less compared to their younger counterparts. The reason for this probably lies in the specific circumstances of the restructuring that we analysed. Only few people in the organisation were given notice, so that job security was not at stake, particularly for older workers. Our case study concerned a savings bank, which belongs to the public sector. Traditionally, the principle of seniority still applies in organisations like this – meaning that older workers did not fear for their jobs at all. In this context, job tenure as regulated by German legislation (art, 1 KSchG, par. 3, 1) provides better protection against dismissals due to a longer seniority. Long-standing affiliation with the company, and thus an attachment to the company, can lead to the assumption that the workplace offers protection against dismissal, although Mohr[53] describes this as a naive conviction. The positive correlation of the two variables 'age' and 'job tenure' backs up the argument of the positive effect of legal protection for older workers with long-term employment contracts. Furthermore, younger workers are more often temporarily employed than older ones, and can therefore be dismissed more easily. In addition, the "last in, first out" principle is the reason for which younger workers are more often laid off during restructuring[54]. Furthermore, older people

[52] *BIBB/BAuA, Beschäftigtenbefragung 2011/2012 – Arbeit und Beruf im Wandel, Erwerb und Verwertung beruflicher Qualifikationen.*

[53] G. Mohr, *The Changing Significance of Different Stressors after the Announcement of Bankruptcy: A Longitudinal Investigation with Special Emphasis on Job Insecurity*, in *Journal of Organizational Behavior*, vol. 21, 2000, 337-359.

[54] M. Flynn, M. Sargeant, and Y. Li, *Beeinträchtigen Restrukturierungen die Gesundheit und das Wohlbefinden älterer Arbeitnehmer? – Drei Möglichkeiten diesen Zusammenhang zu betrachten*, in Bundesanstalt für Arbeitsschutz und Arbeitsmedizin (ed.). *Arbeitnehmern in Restrukturierungen. Gesundheit und Kompetenz erhalten*, 2013.

generally have better financial resources, which determine – in the case of unemployment – how long a person can continue their life without restrictions, until a new job is found[55]. According to the "alternative role concept"[56], members of certain groups of workers have socially accepted alternatives for the purposes of paid employment. For older workers this means entering early retirement.

Moreover, statistics of older workers can be affected by the "survivor factor"[57]. In other words, older workers with a low level of job insecurity or low job satisfaction try to leave the labour market early. The "survivors" then report on higher security and job satisfaction than those that had left early. Despite these limitations, exploratory studies provide important information and indications for further research.

The outcome of our case study, that the older employees suffered even less, suggests that the specifics of the industry and their lay-off protection laws or traditions, as well as the restructuring measures themselves have a major impact on the perception of job insecurity. Also the perception of easy access to the labour market seems to contribute to the amount of job insecurity among employees. When considering the current labour market statistics, it is obvious that particularly older workers continue to be a problematic group in the labour market[58]. This indicates a clear case of age discrimination, and the existence of reservations with respect to the performance of older workers[59]. Thereby the inter-individual variance in performance determines how workers with seniority can be healthy and productive at work. Depending on personal circumstances, lifestyle, forms of support, working conditions, health promotion and further qualification of employees, the differences in the performance of older workers are significant.

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[55] M. Flynn, *Job insecurity and Older Workers*, in Dossier Adapt 8, 28 May 2010.

[56] C. Offe, K. Hinrichs, *Sozialökonomie des Arbeitsmarktes und die Lage „benachteiligter" Gruppen von Arbeitnehmern*, in Projektgruppe Arbeitsmarktpolitik, C. Offe (eds.), *Opfer des Arbeitsmarktes – Zur Theorie der strukturierten Arbeitslosigkeit*, Luchterhand, Neuwied/Darmstadt, 1977, 3-61.

[57] A. Griffiths, A. Riffiths, A. Knight, and N. D. Mohd Mahudin, *Ageing, Work-Related Stress and Health. Reviewing the Evidence, Age Concern and Help the Age*, TAEN – The Age and Employment Network, London, 2009.

[58] Bundesagentur für Arbeit, *Der Arbeitsmarkt in Deutschland, Ar-beitsmarktberichterstattung – November 2010. Ältere am Arbeitsmarkt*, 2010.

[59] M. Sargeant, *Lifelong Learning and Age Discrimination in Employment*, in *Education and the Law*, vol. 13, No 2, 2001, 141-154; A. Ebert, E. Kistler, T. Staudinger, *Rente mit 67 – Probleme am Arbeitsmarkt. Bundeszentrale für politische Bildung*, APuZ 04-05/2007, 2007.

This may also explain the inconsistency of results, in terms of the perception of stress. Thus, the thesis that older workers are vulnerable and more affected by restructuring cannot be confirmed. Overall, the results are not clear, but do not point in the direction that older workers are more exposed during restructuring. Restructuring clearly entails an increase of strain for workers. It is therefore important to look at the stress factors closely in order to provide adequate working conditions for all categories of workers. Little is known about cumulative effects during working life. However, working conditions that take into account ageing might prevent accumulation effects whereas possible, and promote workers' employability.

5. Concluding Remarks

It cannot be argued that older workers are more vulnerable than others after restructuring. If one looks at the BiBB/BAuA survey conducted between 2011-2012, there was hardly any difference between the middle-aged workers and our focus group. Older workers – in this case regarded as those aged 50 and older – suffered even less, probably due to the specifics of the organisation, and the restructuring measures, both of which meant that their job security remained unscathed. Clearly, restructuring was related to more stress, exhaustion and fatigue for all workers and not for specific age groups in particular.

For further research, the conclusion is that the impact of special forms of restructuring have to be analysed more closely, and that more information is needed about the mediating and moderating aspects of the relationship between restructuring and ill health. From what we have seen in our analyses, age itself is not of particular importance. Demographic change is a challenge in terms of balancing the workforce structure (women, younger workers, migrants, older workers, those under precarious working conditions and so forth) rather than age only. Approaches to maintain their employability and the prosperity of the organisation in times of restructuring have to start with a risk analysis on the effect that restructuring might have on workers. Thereafter, specific measures have to be taken to mitigate potentially negative outcomes.

The Settlement of Individual and Collective Labour Disputes under Ethiopian Labour Law

Hiruy Wubie [*]

1. Introductory Remarks

The settlement of labour disputes is a precondition for a harmonious working environment. Clarity of laws governing labour relations, as well as their consistent and adequate implementation, contributes to the establishment of a dependable system of dispute settlement. Pursuant to Ethiopian labour law, labour disputes are classified as individual and collective, and a number of bodies are in charge of resolving these disputes. Yet confusion on the criteria used to draw a distinction between individual and collective labour disputes brings about major issues in terms of interpretation and implementation of relevant legal rules and judicial decisions.

In this sense, this paper is intended to clarify the criteria used to differentiate the individual from the collective nature of labour disputes in Ethiopian labour law, and to cast light on processes and powers assigned to the actors to seek a settlement. To this end, an analysis of the provisions laid down in the Labour Proclamation will be carried out, alongside an overview of legal opinion and the precedents set by the Cassation Division of the Federal Supreme Court. The aim here is to provide the readership – whether practitioners and the general public – with some useful insight into a neglected – yet crucial – topic of national labour law. The article opens with an examination of the constitutional

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and statutory basis to settle out labour disputes in Ethiopia. It then goes on to explain the main criteria adopted to distinguish between individual and collective labour disputes, particularly by explaining the rationale for such a distinction as illustrated by the Labour Proclamation. A Section devoted to the institutions and the procedures meant to settle the two types of disputes will follow, alongside some concluding remarks which summarize the main findings of the paper.

2. The Constitutional Mandate to Regulate Labour Relations in Ethiopia

Ethiopia is a federal country divided into nine regional states[1]. The Federal Constitution represents the supreme law of the land[2], as it determines the scope of action of the federal government and allocates certain powers to regional states[3]. More specifically, the federal government is entrusted with the authority to deal with national and international issues, whereas it is up to each regional state to handle the remaining questions. The Constitution provides that the legislative body of the federal government – the House of Peoples' Representatives – shall enact the Labour Code[4], and this power is among those which are exclusively designated as federal affairs. This aspect is often explained by referring to one of the main objectives of the Constitution that is establishing an economic community[5]. Pursuant to the Constitution, the House of Peoples' Representatives adopted a certain number of proclamations in order to regulate labour matters, such as the Labour Proclamation No. 377/2003[6], which was partly amended by Labour

[1] The Constitution of the Federal Democratic Republic of Ethiopia, Proc. No. 1/1995, Federal Negarit Gazeta, Year 1, No. 1 (hereinafter referred to as the FDRE Constitution), Art. 1 and 47.
[2] *Ibid.* Art. 9.
[3] See. *Ibid.* Art. 51 and 52. See also Art. 55 that sets the legislative mandate and the jurisdiction of the federal government.
[4] *Ibid.* Art. 55(3).
[5] *Ibid.* Preamble of the FDRE Constitution, Paragraph 5. See also the FDRE Constitution Art. 55(6) which empowers the federal government "to enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community". See also, F. Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*, The Red Sea Press, Inc., 1997, p. 69.
[6] Labour Proclamation, Proc. No. 377/2003, Federal Negarit Gazeta, 10th Year, No. 12, (hereinafter cited as the Labour Proclamation).

(Amendment) Proclamations No. 466/2005[7] and 494/2006[8]. Further, the rulings on labour cases of the Court of Cassation of the Federal Supreme Court (hereinafter simply referred to as the Cassation Division) also set some important precedents[9] in this respect.
Labour law provisions are applied at federal level, thus it is federal courts and its executive bodies which interpreted and implemented these provisions. As envisaged by the Constitution, the House of Peoples' Representatives can establish the federal high court or the court of first instance either at a national level or in some areas of the country only, if a two-thirds majority is achieved[10]. In its absence, the Constitution sets forth procedures to determine the jurisdiction of the federal high court, while the courts of first instance are delegated to the state courts[11].

3. The Legal Regime of Labour Disputes in Ethiopia

Labour relationships can be managed efficiently only when justice is ensured both for employers and employees. Given the imbalance in

[7] Labour (Amendment) Proclamation, Proc. No. 466/2005, Federal Negarit Gazeta, 11th Year No. 56.
[8] Labour (Amendment) Proclamation, Proc. No. 494/2006, Federal Negarit Gazeta, 12th Year No. 30.
[9] Federal Courts Re-amendment Proclamation No. 454/2005, Federal Negarit Gazeta, 11th Year No. 42., Art. 4. It provides that "Interpretation of a law by the Federal Supreme Court rendered by the Cassation Division with not less than five judges shall be binding on federal as well as regional council at all levels. The Cassation Division may however provide a different legal interpretation".
[10] The FDRE Constitution, *op. cit.* Art.78 (2).
[11] *Ibid.* Based on this delegation, it is only the State Supreme and High Courts that can legitimately settle labour cases coming from courts of law in regional territories. This makes the courts of first instance constitutionally illegitimate to settle labour cases based on federal law. The apparent constitutional illegitimacy of these courts has negative effects on the parties to the labour dispute, as State High and Supreme Courts are located in areas which are difficult to access for those living in regional states. Many Ethiopian lawyers are of the opinion that this aspect must have triggered the federal legislature to specifically mention such jurisdictional issues in the Labour Proclamation. It is stated that all individual labour cases shall be dealt with by regional courts of first instance. However, even implementing this provision, the issue of whether a clause laid down at a constitutional level can be set aside by a lower-level proclamation still remains unsolved.

bargaining powers clearly tilting towards employers[12], there should be legally regulated protection to the powerless employees which would have otherwise been relegated if all the matters had been left for market forces to decide[13]. This is the reason why relevance is given to the necessity of meaningful involvement of three actors and their respective organizations – employers, workers and the state[14] – for a just industrial relations system.

The development of legally regulated labour relations in Ethiopia is only a few decades old, as the 1960 Civil Code of Ethiopia[15] regarded individual labour relations as a service contract. Labour legislation governing collective labour relations was established in 1963 with the passing of the Labour Relations Proclamation No. 210/1963[16]. This set of provisions was superseded by the Labour Proclamation No. 64 in 1975, when the socialist regime came to power and established the public ownership of means of production, denying de facto the autonomy of the trade unions[17]. Consequently after the change of government in 1991, Proclamation No. 42/1993 was adopted as a new set of labour laws which repealed socialist law[18]. Finally, Proclamation No. 42/1993 and its Amendment Proclamation No. 88/1994 were repealed by Labour Proclamation No. 377/2003[19], which is currently in force.

Extant labour legislation in Ethiopia places emphasis on the importance of a well regulated system of industrial relations so as to create harmonious relations between workers and employers. This aspect is exhibited by one of the statements accompanying the document, which argues that "it is essential to ensure that the worker-employer relations are governed by the basic principles of rights and obligations with a view to enabling workers and employers to maintain industrial peace and work in

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[12] G. Davidov, B. Langille (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, International Institute for Labour Studies, Hart Publishing, 2006, p. 24.

[13] *Ibid.* It is contended that "If the problem is that we are not securing justice for employees through this contractual bargaining relationship, because of inequality of bargaining power on the part of employees, then we must simply adopt the procedural device of turning up the bargaining power on the side of the employee."

[14] G. J. Bamber *et al.* (eds.), *International and Comparative Employment Relations: Globalization and the Developed Market Economies, 4th ed*, ALLEN & UNWIN, 2004. p. 9.

[15] The 1960 Civil Code of Ethiopia, Art. 2512-2697.

[16] ILO, *Ethiopia: Labour Law Profile*, accessed on 30 September 2012.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

the spirit of harmony and cooperation towards the all-round development of our country"[20]. It is with this objective in mind that the government has been involved in the settling of labour disputes, chiefly with regard to the setting of some minimum criteria in terms of bargaining between the parties.

The Labour Proclamation specifies the respective rights and obligations of the parties in a labour relationship[21]; exhaustively enumerates grounds and modalities to amend, suspend and terminate the employment contract[22]; provides safeguards for special categories of workers[23] and stipulates minimum working conditions[24]. Rules can only minimize the possible occurrence of labour disputes. A working environment where no dispute takes place is almost impossible. Hence the law needs to appoint bodies and set procedures in place in order to deal with the inevitable labour disputes in Ethiopia as elsewhere.

In this respect, the Labour Proclamation defines a labour dispute as "any controversy arising between a worker and an employer or between trade union and employers in respect to the application of law, collective agreement, work rules, employment contract or customary rules, and also any disagreement arising during collective bargaining or in connection with collective agreement"[25]. This definition is a loose one which does not dare to make a distinction between individual and collective labour disputes. Yet different bodies and procedures for the settlement these two types of disputes are set up. Individual labour disputes shall be handled by regular courts alone, whereas collective disputes require special conciliation and arbitration bodies before being dealt with by regular courts for a final decision, whereas necessary. However, the distinction between individual and collective labour disputes is among the most debated issues in terms of interpretation and application of national

[20] Labour Proclamation, *op. cit.* Preamble, Par. 1.

[21] *Ibid.* Art. 12-14

[22] *Ibid.* Art. 15-45

[23] Among others: young workers, female workers, those with a disability, in the probationary period and apprentices. See, *Ibid.* Art. 11(Probationary workers), Art. 48-52 (Apprentices), Art. 87 and 88 (Female workers), Art. 89-91 (Young workers), See also, Right to employment of persons with disability Proclamation No. 568/2008, Federal Negarit Gazeta, 14th Year No. 20. (Employees with disability).

[24] These include: maximum and regular working hours (Art. 61-68), weekly rest and public holidays (Art. 69-75), and annual, special and sick leave (Art. 76-86). It has to be noted that the Labour Proclamation does not determine minimum wages for its own policy reasons.

[25] Labour Proclamation, *op. cit.* Art. 136(3).

labour law. As is evident from the foregoing definition of labour dispute, there are certain circumstances under which the interpretation of the causes of the labour dispute might be a source of disagreement among the parties involved. This takes place when such causes are examined considering the law in a wider sense, collective agreements, work rules, employment contracts, customary rules and practices – associated with the employment relations – and aspects related to collective bargaining and collective agreements[26]. Tsegaye contends that though these six grounds overlap with one another, the specific reference to each cause prevents unnecessary debate about the law in this regard. These grounds could be a source of both individual and collective labour disputes.

Of equal significance for the regulation of labour relations at a national level is the ratification of the ILO Conventions. One might note that, among others, the need to address the criticisms put forward by the ILO Committee of Experts on the Application of Standards and to comply with the obligations set forth in the ILO Conventions[27] pressured the government into passing the labour legislation currently in force. ILO Conventions No. 87[28] and No. 98[29] are worth mentioning in this respect.

4. Standards in Differentiating Individual and Collective Labour Disputes in Ethiopian Labour Law

The need to point out the differences between the individual and the collective nature of labour disputes in Ethiopia is by no means a mere theoretical one. Indeed, it might have far-reaching consequences at the time of determining the relevant authorities and procedures to settle labour disputes. A significant number of case law decisions have been reported concerning this issue[30]. Shortcomings in terms of clarity[31]

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[26] T. Workayehu, *Employment Law Training Manual for District Judges and Public Prosecutors, Part Two*, June 2008, Addis Ababa (Unpublished material. Original document in Amharic. Author's own translation), p. 40.

[27] ILO, *Ethiopia: Labour Law Profile*, *op. cit.* 16.

[28] ILO Convention No. 87, Freedom of Association and Protection of the Right to Organize Convention, 1948.

[29] ILO Convention No. 98, Right to Organize and Collective Bargaining Convention, 1949.

[30] If one considers, for instance, the rulings handed down by the Cassation Division at least six decisions included in the twelve-volume work issued by the Cassation Division concern this issue. See also the Interview with Ato Habtamu Erkyihun, Judge of the Supreme Court of the Amhara National Regional State, conducted on 28 July 2012. Ato

regarding the criteria to differentiate collective and individual labour disputes must have brought about confusion in the relevant rulings. Therefore, elucidating the nature of the disputes and providing a clear-cut explanation of the applicable labour law provisions is crucial for an efficient system of labour dispute settlement in Ethiopia.

By mandating different bodies[32] to settle the disputes based on their individual and collective nature, the Labour Proclamation does try to draw – albeit indirectly – a distinction between these disputes. The cases of individual and collective labour disputes listed in Articles 138[33] and 142[34]

Habtamu reported that there are many similar cases which are dealt with by the Supreme Court of the Amhara Region.

[31] M. Redae, *Employment and Labour Law Teaching Material*, Funded by the Justice and Legal System Research Institute of Ethiopia, 2008, p. 118. Mehari argues that it is due to a lack of clarity with this approach – i.e. illustrating instances of individual and collective labour disputes in Art. 138 and 142 of the Labour Proclamation – that the Cassation Division was compelled to provide a binding interpretation in order to attain a uniform application of the law.

[32] See infra Section 7 of this article about discussions on jurisdictional issues for the respective mandates of various organs in settling individual and collective labour disputes.

[33] Art. 138. Labour division of the regional court of first instance.

1. The labour division of the regional court of first instance shall have jurisdiction to settle and determine individual labour disputes dealing with these and other issues:
   a. disciplinary measures including dismissal;
   b. claims on termination or cancellation of the employment contract;
   c. questions related to working hours, remuneration, leave and rest day;
   d. questions related to the issuance and release of the certificate of employment;
   e. claims related to occupational injury;
   f. unless otherwise provided for in this Proclamation, any criminal and petty offences under this Proclamation.
2. The regional court of first instance shall give decisions within 60 days from the date on which the claim is lodged.
3. The party who is not satisfied with the decision of the regional court of first instance may – within 30 days from the date on which the decision was delivered – appeal to the labour division of the regional court which hears appeals from the regional court of first instance.

[34] Art. 142. Duties and Responsibilities of the conciliation officer.

1. The conciliation officer appointed by the Ministry shall endeavor to seek settlement on collective labour disputes, among others those dealing with the following issues:
   a. wage and other benefits;
   b. establishment of new conditions of work;

provoked competing interpretation of relevant legislation. In Ethiopian labour law, there are three different criteria that are often used – legitimately or not – to set the foregoing differences, most notably: the number of workers involved, whether a labour dispute is listed in Article 138 or Article 142 and whether a given dispute affects the parties' interests. Of relevance is the fact that only the third criteria is regarded as valid to differentiate the disputes, as the first and the second one can only be used as a reference over the differentiation process.

5. The Number of Workers Involved in a Dispute

A labour dispute may occur between the employer and one or more workers. For instance, an employer may wrongfully terminate the employment contract with one or more employees. Is this a collective labour dispute just because the contract of two or more employees is brought to an end by their principal? According to Ethiopian labour law, the number of persons involved in a case cannot be used as a valid criteria to consider a given dispute as individual or collective[35]. In its leading case on the issue at hand, the Cassation Division ruled that "our national legislation does not make the number of workers involved in a dispute a

c. the conclusion, amendment, duration and invalidation of collective agreements;
d. the interpretation of any provision of this Proclamation, collective agreements or work rules;
e. the procedures of employment and career advancement;
f. matters affecting the workers and the existence of the undertaking;
g. claims related to measures taken by the employer regarding promotion, transfer and training;
h. claims relating to redundancy.

2. The conciliation officer shall endeavor to reach a settlement by all reasonable means as may seem appropriate to that end.
3. Whenever the conciliation officer fails to settle a labour dispute within 30 days, he/she shall detail this attempt reporting to the ministry and serving the copy of the statement to the parties involved. Any party involved other than those indicated under Sub-Article (1) (a) of this article may submit the matter to the Labour Relation Board. If the dispute as per Sub-Article 1 (a) of this article concerns those undertaking described under Art. 136(2) of the present Proclamation, one of the disputing party may submit the case to an ad hoc board.

[35] Nowhere does the law make mention of this criteria. See also, T. Workayehu, *op. cit.*, p. 44.

standard to differentiate individual and collective labour disputes"[36]. The decisions handed down by the Cassation Division on the interpretation of certain provisions have a mandatory character for all regional and federal courts[37]. This makes the above interpretation a binding one. Therefore, unless other criteria set by the law are met, the number of workers involved in a given dispute does not make it a collective one.

6. Whether a Dispute is listed under Article 138 or 142 of the Labour Proclamation

A cursory reading of Articles 138 and 142 of the Labour Proclamation might induce one to think that the nature of the dispute is determined by its falling within those listed under Article 138 or 142 of the Labour Proclamation. Yet this does not seem to be the intention of the legislator, as the evaluation is to be carried out on a one-by-one basis. By way of examples, some individual labour disputes mentioned in Article 138 in some circumstances may qualify as collective labour disputes. By the same token, certain collective labour disputes referred to in Article 142 might be regarded as individual ones[38]. The Federal Supreme Court also suggested – albeit ambiguously – that these two articles do not enumerate all the types of disputes in an exhaustive fashion. It rules that "whether the dispute concerns wage, training, interpretation of law or other grounds that may be deemed as collective, it is only when the dispute somehow affects the rights and interests of workers operating in an undertaking that can be considered to be collective in the meaning conveyed by law"[39]. Therefore, the various instances of individual and collective disputes enumerated under Articles 138 and 142 of the Labour Proclamation might be subject to change.

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[36] *KK Textile Workers' Association Vs KK Textile Industry*, Cassation Division, File Number 18180, Hamle (July) 29, 1997 E.C. Published in Decisions of the Cassation Division, Volume 1, Page 1. (Original document in Amharic. Author's own translation).

[37] Federal Courts Proclamation Re-amendment Proclamation, *op. cit.*

[38] See infra, discussions and examples in sections five and six of this article regarding instances of individual labour disputes which might be regarded as collective ones and vice versa.

[39] *KK Textile Workers' Association Vs KK Textile Industry*, *op. cit.*.

7. Whether a Given Dispute Affects the Workers' Collective Interests

There are legal systems which treat labour disputes "on rights" and labour disputes "on interests" as two different cases[40]. Disputes "on rights" refer to the implementation, interpretation, or violation of laws governing industrial relations, whereas disputes "on interests" mostly concern the employment terms to be adopted at the time of negotiating new agreements[41]. In the first case, the parties to the dispute fail to agree on the existence or scope of application of a certain right granted by law or in the employment contract. In the second case a dispute "on interests" arises when an employer and a worker or trade unions do not reach an agreement on the need and the scope of application of a certain interest which is not detailed in the employment contract nor in relevant legislation. This classification is not recognized in the national legal framework, yet it can be implied from the rationale used to differentiate individual and collective labour disputes in Ethiopian labour law. As will be further discussed, individual labour disputes mainly concern whether workers' individual rights are acknowledged by statute or specified in an employment contract. On the contrary, collective labour disputes refer to disputes on rights and interests[42] while operating in the undertaking.

In differentiating individual from collective labour disputes, we have to give prime focus to the underlying causes of such a distinction. Indeed, the law empowers different bodies to deal with these two types of disputes. Saving discussions about the rationale for jurisdictional allocation in this regard for the following sections of this paper, it is the interest at stake that determines the individual or collective nature of a dispute. If a given dispute affects the interest of the workers and the organization at large, it shall be considered as a collective dispute. On the other hand, disputes which do not impact the interest of the entire workforce shall be regarded as individual disputes.

What matters most in determining the collective or individual nature of a labour dispute is whether the issue at hand affects only an individual or a

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[40] See generally, J. V. Spielmans, *Labour Disputes on Rights and Interests*, *The American Economic Review*, Vol. 29, No. 2 (Jun., 1939), p. 299-312.

[41] *Ibid.* p. 300.

[42] Among collective labour disputes enumerated under Art. 142 of the Labour Proclamation, the following might be classified as disputes on interests: disputes related to wage and other benefits, new working conditions, and those related to the conclusion and amendment of collective agreements. It has to be recalled that Ethiopian labour law does not provide minimum wage.

number of workers[43]. This stand is also supported by the decisions of the Cassation Division, for it is argued that "the fact that a certain dispute is submitted by one or more workers shall not ascertain the individual or collective nature of the dispute. If the effects of the dispute are limited to the disputing worker (or workers) it shall be considered as an individual dispute, whereas disputes whose effects transcend individual spheres and affect the joint interest of employees shall be collective labour disputes"[44]. Therefore, it is neither the number of parties to the dispute nor the mere reading of Articles 138 and 142 of the Labour Proclamation that determines the nature of the labour dispute. Rather, it should be considered on a case-by-case basis if it affects the employees' common rights and interests. If it does, it is a collective labour dispute. Otherwise, it is an individual labour dispute. Though this condition seems less complex at a theoretical level, the solving of each case is far from easy. At this point, it might be of use to go through each instance of presumably individual and collective labour disputes enumerated in Articles 138 and 142 of the Labour Proclamation.

8. Instances of Individual Labour Disputes

The law provides that "the labour division of the Regional Court of First instance shall have the power to settle and determine the following and other similar individual labour disputes"[45]. The wording "the following and other similar […]" suggests that the range of individual labour disputes which can be dealt with by these courts is far from exhaustive[46]. The set of individual labour disputes include six cases which are outlined for illustrative purposes only, so these and other similar instances are presumed to be individual, provided that they do not affect the workers' rights and interests.

The first of the instances concerns "disciplinary measures including dismissal"[47]. Disputes regarding disciplinary measures and dismissal shall be regarded as individual. If an employer or a worker wrongfully

[43] See for example, T. Workayehu, *op. cit.*, p. 44.
[44] *KK Textile Workers' Association Vs KK Textile Industry*, *op. cit.*.
[45] The Labour Proclamation, *op. cit.*, Art. 138(1).
[46] See M. Redae, *op. cit.*, Mehari contends that "The Labour Proclamation has employed an illustrative listings of what constitutes individual labour dispute and what constitutes a collective one".
[47] The Labour Proclamation, *op. cit.,* Art. 138(1)(a).

terminates a contract – or if the employer takes disciplinary action against a worker resulting in him/her being aggrieved – the law assumes that the it is the parties' interests at stake on an exclusive basis, hence regarding the dispute as individual. However, there may be situations which may warrant disputes related to disciplinary action and give rise to labour disputes to be considered as collective. By way of example, an employer with fifty employees who unilaterally dismisses one or more of them as a result of a disciplinary action, yet not complying with dismissal procedures. Though the dismissal concerns only few workers, the unilateral nature of the disciplinary procedure affects the entire workforce[48] and thus it is seen as a collective labour dispute, as other employees or trade unions are involved.

Claims related to the termination or cancellation of the employment contracts are the second category of presumably individual labour disputes enumerated by the Labour Proclamation[49]. An employment contract is of course a juridical act with a private character. Therefore, it is very unlikely for the effects of disputes related to its termination or cancellation to involve individuals other than the parties and become a collective affair. Accordingly, such a dispute shall be an individual one.

Among the instances regarded as individual labour disputes, those related to working time, remuneration, leave and rest day follow[50]. These are all aspects which are mainly regulated by law and the employment contract. Disputes arising between the employer and the employee regarding whether the latter is paid for the work performed, or whether he/she has taken leave and rest day is always an individual concern. This is only if there is no implication on some other workers' interests. In this sense, it might be the case that a decision made by the employer amounts to creating new working conditions which might be regarded as an instance of collective labour disputes.

Questions related to the issuance of the certificate of employment[51], claims related to occupational injury[52] and disputes regarding criminal and petty offences under the Labour Proclamation[53] are the remaining instances presumed to give rise to disputes whose effects are limited to

[48] This could be equated with disputes related to "establishment of new conditions of work" which is regarded as a "collective" labour dispute. See, *Ibid.* Art. 142 (1) (b).
[49] The Labour Proclamation, Supra note 7, Art. 138(1) (b).
[50] *Ibid.* Art. 138(1)(c).
[51] *Ibid.* Art. 138(1)(d).
[52] *Ibid.* Art. 138(1)(e).
[53] *Ibid.* Art. 138(1)(f).

the parties involved. The individual character of these disputes does not lie in the fact that they are filed by one individual, but in the impact which affects that particular individual.

9. Instances of Collective Labour Disputes

The manifest imbalance of bargaining powers between the workers and the employers pushes the former to act collectively in pursuance of their objectives[54]. This is the founding principle for collective bargaining, whether involving workers or trade unions. Recognition of workers' right to take collective action is often regarded as a prerequisite for ensuring sound industrial relations. In an awareness of such issue, the Ethiopian Constitution recognizes their right "to form associations to improve their conditions of employment and economic wellbeing, including the right to form trade unions and other associations to bargain collectively with employers or other organizations that affect their interests"[55]. In matters affecting their general interests, workers operating in a certain undertaking may bring their cases before judicial and quasi judicial bodies statutorily appointed. As previously discussed, the existence or otherwise of a labour dispute affecting the collective interest of employees makes it a collective one.

In this section, the various instances of collective labour disputes laid down in Article 142 of the Labour Proclamation will be investigated. In this sense, it is specified that "the conciliation officer appointed by the Ministry shall endeavor to reach a settlement on the following, and other similar matters of collective labour disputes"[56]. The wording 'the following and other similar matters' clearly indicates that the set of collective labour disputes supplied is illustrative. Hence, other matters of collective interest may still fall within the province of the conciliation officer. Moreover, the eight instances of collective labour disputes laid down in Article 142(1) are only presumed to involve matters of collective

[54] See, G. Davidov, B. Langille, *op. cit.,* on inequality of bargaining power on the part of employees, then we must simply adopt the procedural device of turning up the bargaining power on the side of the employee".

[55] The FDRE Constitution, *op. cit.,* Art. 42 (1) (a). See also, the Labour Proclamation, *op. cit.*, Art. 113. The Labour Proclamation states that "workers and employers shall have the right to establish and form trade unions or employers' associations, respectively and actively participate therein".

[56] Labour Proclamation, *op. cit.*, Art. 142(1).

concern for the workers. The reverse might be true if any of the disputes which technically fall under Article 142 may not qualify as collective labour disputes in a strict sense – affecting the joint interests of the workers. That is why we need the rationale for each instance to be presumed as a collective dispute might be explained, alongside possible cases for a deviation.

The first instance of collective labour disputes as laid down in relevant legislation is about disputes related to wages and other benefits[57]. Ethiopian labour law opted for deregulation when it comes to determination of minimum hourly/monthly wages in an employment relationship. Though the rationale for deregulation is not stated in the law or other official documentation, it is sometimes contended that this may be because of the free market economic policy that the Ethiopian government aspires to adhere to[58]. Therefore, minimum wage and other benefits[59] are not statutorily determined. Indeed, while this aspect is left up to bargaining between the parties, remuneration has to be included – irrespective of its amount – at the time of concluding an employment contract in order for it to be valid[60]. Disputes in relation to wage and other benefits are deemed collective since, as likely as not, they will affect workers' common interests. Simply put, the issue should rather be a matter that affects individuals other than the parties, as in the case of determining wage and benefits. This is plain when one looks at the Amharic version of the document, which specifies that the concern is with "disputes related to *the determination of* wage and other benefits" (emphasis added).

Consequently, not all labour disputes about wage and other benefits are collective, as this is dependent upon whether workers' common interests

[57] Labour Proclamation, *op. cit.*, Art. 142(1)(a).

[58] See for example, M. Redae, *op. cit.* whoi argues that "It is believed that in a free market economy, price of goods and services is to be fixed by taking into account the supply and the demand side of the item in a forum of bargain. This could be the main reason why the government opted for deregulation with regard to the private sector". However, there are reasons to dissent from this position. In Ethiopia, there is a uniform application of the minimum wage for those employed in the Public Sector, and this aspect is regulated by the Civil Servant Proclamations. The main reason which led to deregulation trough labour law may be the complexity resulting from the underdeveloped and predominantly informal national economy.

[59] In the context of this paper, the expression 'other benefits' refers to those which are related to pay and other economic perquisites, e.g. welfare funds. More general benefits arising from the establishment of minimum labour conditions is beyond the focus of this work.

[60] Labour Proclamation, *op. cit.*, Art. 4(1) and (3).

are jeopardized. Apart from what is provided by relevant labour legislation, one should also consider the precedents set by the Cassation Division on the matter. The dispute was between the Ethiopian Telecommunications Corporation and an employee named Teshome Jifar[61]. The worker claimed that he deserved a wage increase and took his case before the Labour Relations Board and then the federal high court. The case was finally settled by the Cassation Division, which ruled that "the dispute on wage increase initiated by the applicant does not fall within those affecting the workers' common interests. It only concerns him and was brought to establish his rights alone. It could have been regarded as a collective dispute, had the applicant questioned the legal nature of the criteria used by his employer to increase pay. Therefore, the dispute is an individual one and falls within the jurisdiction of courts of law, not that of the Labour Relations Board"[62]. This precedent is further confirmation of the stance of lawmakers, who treat disputes arising from wage and other benefit as collective labour disputes only when workers' collective interests are affected.

Labour disputes arising out of the establishment of new working conditions[63] and the conclusion, amendment, duration and invalidation of collective agreements[64] are the second and third instances presumed to be collective pursuant to Article 142. Newly established conditions of employment[65] and collective agreements[66] are applicable for all workers in an undertaking hence it is very unlikely for these dispute to be individual. Yet this is not always the case. There could be individual labour disputes involving such issues wherein the issue at stake is limited to the applicability or otherwise of such working conditions or collective agreement in favor of one or more workers.

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[61] *Ato Teshome Jifar Vs Ethiopian Telecommunications Corporation*, Cassation Division, File Number 15410, Tikimt (October) 1, 1998 E.C., Published in Decisions of the Federal Supreme Court Cassation Division, Vol.2, p. 24 (Original document in Amharic. Author's own translation).

[62] *Ibid.*

[63] Labour Proclamation, *op. cit.*, Art. 142(1) (b).

[64] *Ibid.* Art. 142(1) (c).

[65] *Ibid.* Art. 2(6). "Conditions of work" means the entire field of relations between workers and employers and shall also include working hours, wage, leave, severance pay, workers' health and safety, compensation to victims of occupational injuries, redundancy, grievance procedures and any other similar matters.

[66] *Ibid.* Art. 124(1). "'Collective agreement' means an agreement concluded in writing between one or more representative of trade unions and one or more employers or agents or representatives of employers' organizations."

Disputes regarding 'the interpretation of any provisions of the Labour Proclamation, collective agreements or work rules'[67] are the next instance of 'collective' labour disputes indicated by the law. It is undeniable that the purpose of labour law, collective agreements and work rules is to safeguard the rights and interests of all workers. The interpretation of labour legislation, collective agreements and work rules is a shared concern, thus making relevant disputes collective. Even in this case, the reverse might be also true. Disputes on interpretation by and between an employer and an employee would remain to be individual in so far as the effects are not extended to other workers.

Disputes concerning employment issues and the promotion of workers[68] as well as claims related to measures taken by the employer on transfer, career advancement and training[69] are also presumed to be collective. Like the previous instances, not all disputes involving promotion, career advancement and training are collective, as this depends on whether the effects of the dispute are limited to the parties or not. In support of this argument, disputes are regarded as individual if the criteria adopted by the employer relative to entitlements in terms of career advancement, training and transfer result in the worker being aggrieved. This line of interpretation is in line with the precedent set by the Cassation Division[70].

Disputes regarding claims on redundancy[71] are also presumed to be collective ones. Redundancy[72] affects not less than ten percent of the workforce in an undertaking. Redundancy procedures also require comparison of individual productivity and the employer shall initiate it only in consultation with trade unions[73]. Therefore, disputes regarding this

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[67] *Ibid.* Art. 142 (1) (c).

[68] *Ibid.* Art. 142(1) (d).

[69] *Ibid.* Art. 142 (1) (e).

[70] *Ethiopian Telecommunications Corporation Vs Ato Genta Gem'a* Cassation Division, File Number 16273, Tikimt (October) 22, 1998 E.C. Published in Decisions of the Federal Supreme Court Cassation Division, Volume 2, page 30. (Original document in Amharic. Author's own translation). The case is about an employee who claims to be denied a promotion. The Cassation Division rules that though the issue involves a promotion, it is an individual labour dispute since it impacts the individual filing the case and cannot be regarded as a collective labour dispute.

[71] Labour Proclamation, *op. cit.*, Art. 142(1) (h).

[72] *Ibid.* Art. 29(1). The law defines redundancy as "reduction of the workforce of an undertaking for any of the reasons provided for in Sub-article (2) of Art. 28 affecting a number of workers representing at least ten percent of the workforce or – in the case of an undertaking with twenty to fifty employees – a reduction of workers affecting at least five employees over a continuous period of not less than ten days".

[73] *Ibid.* Art. 29(3).

issue are likely to have a bearing on the interests of a number of workers, thus they are rightly presumed to be collective. Of course there are a number of exceptions to the norm. If a worker claims that he has been made wrongfully redundant or that the amount of severance pay is less than expected, the dispute will certainly be an individual one. Conversely, if the dispute is whether the employer has legitimate grounds to make workers redundant or whether the dismissal procedures do not comply with relevant legislation, this might amount to a collective labour dispute[74]. The argument that Article 142(1) of the Labour Proclamation does not collect all the cases of collective labour disputes would be substantiated by one of the foregoing instances. It is argued that "matters affecting workers in general and the existence of the undertaking"[75] shall be deemed as collective labour disputes. Unlike other instances enumerated in Article 142(1), this one lacks specificity and does not directly refer to certain types of disputes. Rather, it is intended to help bodies to interpret law at the time of differentiating between several labour disputes.

10. Institutions and Procedures of Settling Individual and Collective Labour Disputes in Ethiopia

Dispute settlement may take different forms. In Ethiopia, there are three mechanisms of labour dispute settlement[76]. The first and most recommended one is out-of-court settlement – e.g. an agreement is reached among of the parties. The second one concerns the recourse to strikes[77] and lockouts[78]. Finally, the parties to the dispute may take their cases to certified entities and legal authorities, such as conciliation officers,

[74] See *KK Textile Workers' Association Vs KK Textile Industry*, *op. cit.*, Cassation Division has a similar stand on this point.

[75] Labour Proclamation, *op. cit.*, Art. 142(1) (f).

[76] See, T. Workayehu, *op. cit.*. Tsegaye only names two, as he merges out-of-court settlement and alternative dispute resolution mechanisms.

[77] Labour Proclamation, *op. cit.*,, Art. 136(5). "Strike" means the slow-down of work by any number of workers in reducing their normal output on their normal rate of work or the temporary cessation of work by any number of workers acting in concert in order to persuade their employer to accept certain labour conditions in connection with a labour dispute or to influence the outcome of the dispute.

[78] *Ibid.* Art. 136(4). "Lock-out" means an economic pressure applied by closing a premise in order to persuade workers to accept certain labour conditions in connection with a labour dispute or to influence the outcome of the dispute."

courts of law and Labour Relations Boards. Whereas the first two mechanisms of labour dispute settlement are not dependent upon the individual or collective nature of the dispute, such a difference has a bearing on the third mechanism, and will be the focus of the pages that follow. The law appoints different bodies and envisioned different procedures to settle out individual and collective labour disputes. Regular courts are given priority over individual disputes, while they will deal with collective ones only in the second and third instances. Collective labour disputes are usually handled in the first instance by bodies empowered in accordance with the Labour Proclamation. An example in this connection is conciliation officers Labour Relations Boards[79].

10.1. Institutions and Procedures to Settle out Individual Labour Disputes

The labour divisions of regional and federal[80] courts of first instance are statutorily empowered to settle and determine either individual labour disputes enumerated by law and other disputes[81]. Though there are major shortcomings in this regard in practical terms, the law obliges these courts to issue a decision within 60 days from the date on which the claim is lodged[82]. It also sets forth that the party who is not satisfied with the decision may appeal to the labour division of the regional or federal court

[79] See, T. Hagos Bahta, *Anomalies in the Labour Dispute Resolution Methods under the Ethiopian Labour Proclamation*, Jimma University Journal of Law, Vol. 1, No 1, October 2007, pp. 111-132. This article explains the various Alternative Dispute Resolution (ADR) methods and their legal effects as are stated in the Ethiopian Labour Proclamation.

[80] The Labour Proclamation only refers to the power of regional courts of first instance to adjudicate and settle individual labour disputes. It remains silent about similar mandates of labour divisions of the federal courts of first instance. This aspects appears to be an oversight. The fact that the Labour Proclamation provides regional courts of first instance with a constitutionally illegitimate mandate (see supra note 12 for details) may have been a cause of concern for the drafters of the Labour Proclamation, who focussed on legitimizing the otherwise illegitimate mandate of these courts. Despite their not being expressly mentioned in the Labour Proclamation, there is no reason to doubt on the constitutional and statutory scope of mandating federal courts of first instance to settle individual labour disputes. This argument is supported by the Federal Courts Proclamation No. 25/1996, Federal Negarit Gazeta, 2nd Year No. 13, Art. 14(2) which vests judicial power on courts at federal level in the event of civil cases arising in Addis Ababa and Diredawa i.e. the federal territories.

[81] Labour Proclamation, *op. cit.*, Art. 138(1).

[82] *Ibid.* Art. 138(2).

which hears appeals from the regional or federal court of first instance[83] within 30 days from the date on which the decision was delivered.
The procedures to be followed by regular courts in the process of settling individual labour disputes are the same as ordinary civil proceedings and will be made in accordance with the Civil Procedure Code of Ethiopia. The courts will adjudicate the matter based on the employment contract of the disputing parties, collective agreements and work rules (if any) the provisions of the Labour Proclamation and procedural laws provided for in the Civil Procedure Code. In Redae's words, winner-looser determination would be the final outcome of this judicial process[84]. Once the winner is identified, execution of the judgment will naturally follow.

10.2. Institutions and Procedures of Settling Collective Labour Disputes

Unlike individual labour disputes, only some collective labour disputes consider statutory rights of both the employer or employees. In other words, the subject matter of such disputes is often a forthcoming provision of collective agreements, work rules or new working conditions. If that is the case, judicial adjudication becomes inappropriate to exercise primary jurisdiction as the criteria for adjudication is yet in the process of formulation. Therefore, collective labour disputes are primarily dealt with by quasi-judicial bodies established by virtue of the Labour Proclamation, and courts are only in charge of appellate jurisdiction. In the following paragraphs, the mandates of each institution authorized to take part in the settlement of collective labour disputes will be explored, alongside the relevant procedures.

10.3 The Role and Shortcomings of Conciliation[85]

Employment relationships are juridical acts characterized by a fiduciary duty. For this reason, enabling workers and employers to maintain industrial peace and operate in a spirit of harmony and cooperation is the

[83] Ibid. Art. 138(3).
[84] M. Redae, *op. cit.*, 27 p. 119.
[85] See A. Ashagrie, *Conciliation of Labour Disputes in Ethiopia: A Critical Analysis*, Jimma University Law Journal, Vol. 1, No. 1, January, 2008, p. 114-166. This article provides an in-depth analysis of conciliation to settle collective labour disputes in Ethiopia.

prime objective of Ethiopian labour law[86]. This makes such relationships less compatible with adjudication which is resorted to when the parties are at odds with one another, often to the extent that social order is threatened[87]. Conciliation and other forms of alternative dispute resolution are recommended in situations involving fiduciary relations, as is the case of employment relationship.

Conciliation is legally defined as "an activity conducted by a private person or persons appointed by the Ministry[88] at the joint request of the parties for the purposes of bringing the parties together and seeking to arrange voluntary settlement of a labour dispute which their own efforts alone do not produce"[89]. The preferred mode of conciliation is the one wherein the parties choose the conciliation officer by agreement. The parties to a labour dispute are free to choose a conciliation officer or an arbitration body of their own and settle the case out-of-court[90]. In cases of failure to reach an agreement, either party may take the case to the Labour Relations Board or the relevant regular court[91].

In the absence of an agreement by the parties to a collective labour dispute to voluntarily appoint an arbitration body or a conciliation officer of their own, it is up to the Ministry to assign a conciliation officer to seek settlement of the case[92]. Such a conciliation officer will perform the same functions as the court of first instance for the cases enumerated in Article 142 of the Labour Proclamation concerning collective labour disputes. Conciliation officers cannot guarantee to settle the dispute. They can only make any attempt to bring about a settlement by all reasonable means as may seem appropriate to that end[93]. They have thirty days in which to amicably settle the dispute. If they fail to do so, a detailed report should be delivered to the Ministry indicating the reasons for the failure, with a

86 Labour Proclamation, *op. cit.*, Preamble, Par. 1.

87 See, L. L. Fuller, K. I. Winston, *The Forms and Limits of Adjudication*, Harvard Law Review, Vol. 92, No. 2, (December 1978), p. 357.

88 The term "ministry" refers to the Ministry of Labour and Social Affairs of the Federal Democratic Republic of Ethiopia. In regional states, offices of labour and social affairs discharge duties entrusted to the Ministry at a federal level.

89 Labour Proclamation, *op. cit.*, Art. 136(1).

90 *Ibid.* Art. 143(1).

91 *Ibid.* Art. 143(2).

92 *Ibid.* Art. 141.

93 *Ibid.* Art. 142 (2).

copy that should be served to the parties to the dispute[94]. Both parties may take the case before the Labour Relations Board as the case may be[95].

10.4. The Permanent Labour Relation Boards: Composition, Mandate and Procedures

The Labour Proclamation has established a permanent Labour Relations Boards[96]. Unlike regular courts which exercise primary jurisdiction over individual disputes, this board represents the primary jurisdiction over collective disputes for which conciliation and arbitration are more appropriate than adjudication. These boards are not staffed with full-time judges but consist of representatives from various bodies who operate for free on a part time basis[97]. Boards are part of the judicial structure and operate under the supervision of the executive branch which is empowered[98] to ensure the implementation of labour laws.

The law provides that one or more Labour Relations Boards should be established in each regional state, yet not assessing whether this is actually done[99]. Since they can hand down decisions only with regard to disputes on wage and other benefits in essential public services and undertakings[100] and most of which are federal entities, one might assume[101] that these Board would only be established at a federal level. As a point of

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[94] *Ibid.* Art. 142(3).

[95] *Ibid.*

[96] *Ibid.* Art. 144.

[97] *Ibid.* Art. 145(4).

[98] *Ibid.* Art. 144(3). The law provides that "each permanent Board shall be under the local authority responsible for the implementation of labour laws." The local authority referred by the law is the Ministry of Labour and Social Affairs and its branch offices in federal territories and Bureau of Regional Labour and Social Affairs and their respective branches in regional territories.

[99] *Ibid.* Art. 144(1) and (2).

[100] *Ibid.* Art. 136(2). "Essential public services undertakings" means those services rendered by undertakings to the general public and includes the following:

a. air transport;
b. undertakings supplying electric power;
c. undertakings supplying water and carrying out cleaning and sanitation services;
d. urban bus services;
e. hospitals, clinics, dispensaries and pharmacies;
f. fire brigade; and
g. telecommunication;

[101] This allegation is in line with the practice as no such boards are established at a regional level.

comparison with regular courts, which can be found in each *woreda*[102], there are usually only two Boards at a regional level. This is because cases entertained by Boards are collective and mainly involve policy matters, which are not routinely encountered and can be managed by one or two boards in a region. Yet difficulty to access such boards is a challenge on workers. As opposed to regular courts which necessarily require professional judges, the composition of Labour Relations Boards tries to balance the need for representation and professional expertise. In this sense "the Board shall consist of a chairman, two qualified members who have knowledge and skills on labour relations appointed by the Minister, four members of whom two represent the trade unions and two represent the employers' associations, and two alternate members one from the workers' side and the other from the employers' side"[103]. Whereas the chairman and the two members appointed by the Ministry or Regional Bureau will have professional expertise on industrial relations, the four representatives of trade unions and employers' association would be there to guard the respective interests of workers and employers.

Being independent in procedural terms, the Board shall not be bound by the rules of evidence and procedures applicable to courts of law[104] yet are still required to abide by the principles of substantive law followed by civil courts[105]. The Boards are not solely adjudicatory bodies and they shall endeavor to arrive at an amicable settlement of collective labour disputes. Towards this end, they may make use of any means of conciliation deemed appropriate, moving beyond the interests of the disputing parties for the sake of collective ones[106]. In view of speeding up collective labour dispute settlements, the law requires Boards to issue a final decision within thirty days from the date on which the claim is lodged[107].

The Board is also empowered to settle out all collective labour disputes related to the determination of wage and other benefits. It shall conciliate the parties and hand out an order or a decision[108]. The Labour Relations

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[102] *Woreda* is a lower-level administrative structure in Ethiopia. Depending on their scope, regional states have different numbers of Zonal administrations which in turn would have *woreda* administrations under them. Taking the Amhara regional state as an example, it has ten Zonal administrations and three city administrations. Taking North Gondar Zone as an example, it is composed of twenty-four *woredas*.

[103] Labour Proclamation, *op. cit.*, Art. 136(1).

[104] *Ibid.* Art. 149(5).

[105] *Ibid.* Art. 150(3).

[106] *Ibid.* Art. 150 (1) and (2).

[107] *Ibid.* Art. 151(1).

[108] *Ibid.* Art. 144(2) and 147(2).

Board shall have primary jurisdiction over the remaining collective labour disputes enumerated under Article 142 of the Labour Proclamation and other similar disputes. Once an agreement between the parties is reached, it may give its own orders and decisions[109]. Though the Boards are not judicial bodies, such orders and decisions[110] are on an equal footing with those laid down by civil courts of law[111]. The decisions are automatically enforceable[112] unless they are reversed by appeals to relevant regular courts.

11. The Role of Regular Courts in the Settlement of Collective Labour Disputes

Given the nature of collective disputes, regular courts are less appropriate to exercise primary jurisdiction. The Boards have the final say in terms of fact-finding[113] and hence no appeal can be made against it. The composition of the Board enables one to appreciate the factual conditions in relation to the dispute. However, the Board is not necessarily equipped with legal expertise and its decisions on matters of law are appealable to the federal high court[114]. In regional states, an appeal from the decision of the Board shall be made to the respective regional supreme courts by way of delegation[115]. The courts shall retain the final authority over questions of law and may uphold, reverse or modify the decision of the Board[116].

[109] Labour Proclamation, *op. cit.*, Art.147(1).
[110] *Ibid.* Art. 146(4). "Decisions of the Board shall be taken by a majority vote of the members present. In case of tie, the chairman shall have a casting vote."
[111] *Ibid.* Art. 147(4).
[112] *Ibid.* Art. 152(1) and (2). "Where a decision of the Board relates to working conditions, it shall be a term of the contract of employment between the employer and the worker, to whom it applies, and the terms and conditions of employment to be observed and the contract shall be adjusted in accordance with its provisions."
[113] *Ibid.* Art. 153.
[114] *Ibid.* Art. 140.
[115] The FDRE Constitution, *op. cit.*, Art.78 (2).
[116] The Labour Proclamation, *op. cit.*, Art. 154(2).

12. Concluding Remarks

An effective and predictable scheme of settling labour disputes is an indispensable component of an efficient legal system which promotes industrial peace through harmonious employer-employee relations. Ethiopian labour law aims at creating such a system. The law classifies labour disputes into individual and collective. However, lacks clarity in supplying the criteria for such differentiation. This has practically caused unpredictability in the interpretation and application of the Labour Proclamation with regard to differentiating individual and collective labour disputes. The confusion emanating from vagueness in the Labour Proclamation is somehow rectified by the precedents set by the Federal Supreme Court. Yet perplexity still persists in court room discussions and academic circles.

What makes a labour dispute a collective one rests on whether the disputed issue affects the collective interests of workers and employers. All other cases shall always be individual disputes. The number of applicants in a given case cannot be a determinant in this respect. Nor can it be defined by a cursory look at instances of individual and collective labour disputes stated in Articles 138 and 142 of the Labour Proclamation. The disputes set as an example of individual labour disputes may qualify as collective disputes if the effects transcend beyond the applicant and be a common concern for others as well. In a similar vein, what are referred to as collective disputes may not be matters of collective concern. Accordingly, each case has to be evaluated on its own merit. The existing confusion regarding such distinction is time-consuming and a waste of resources. Therefore, judges of courts of law and members of Labour Relations Boards have to be well trained with respect to the distinction for a speedy settlement of labour disputes.

Individual labour disputes are more suitable to court room adjudication as they are based on the rights of the parties which are laid down in relevant legislation or in the employment contract. Federal and regional courts of first instance are mandated to settle out such disputes. On the other hand, collective labour disputes are combinations of claims on rights and disputes on the creation of new working conditions which are not yet legally or contractually binding on either party. This makes such disputes inappropriate for primary adjudication by regular courts. In this case, conciliation and arbitration are more effective mechanisms than adjudication. The Labour Proclamation requires such cases first to be amicably settled by a conciliation officer assigned by the parties to the dispute or the Ministry. When conciliation cannot be achieved, the case

will be referred to Labour Relations Boards as the case may be. The Boards are composed of representatives of employers and employees and experts appointed by the Ministry and shall have the final authority on matters of fact whereas questions of law are appealable to regular courts.

Human Rights in Cameroon: A New Framework for the National Commission for Human Rights and Freedom

Sylvanus Bisong Effiom [*]

1. Introduction

Human rights discourse is a relatively recent phenomenon in Cameroon. This may be partly due to the fact that this issue was seen as an international rather than a domestic issue, at least until the political upheaval of the 1990s. While the establishment of the National Commission of Human Rights and Freedom – known in French as the *Commission National des Droits de l'Homme et des Libertés* (CNDHL) – was expected to bring significant changes to this state of affairs, it ended up posing new challenges. There is a considerable risk that – at least among the general public – rights will be seen as limited to civil and political ones, thus neglecting the whole range of other regional and international human rights treaties to which Cameroon is a party[1]. The main contention of this article is that – while all rights are interdependent and indivisible – it is economic, social and cultural ones that affect the lives of the vast majority of Cameroonians and that, if taken fully on board by the CNDHL, the promotion of socio-economic rights could bring about a revolutionary attitude to human rights.

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[1] These International and Regional Human Rights Instruments include the International Covenant on Civil and Political Rights (ICCPR) of 1966; the International Covenant on Economic, Social and Cultural Rights (ICESC) of 1966, the Convention on the Rights of the Child of 1989, the Convention on the Rights of Persons with Disabilities of 2007, and the African Charter on Human and Peoples' Rights of 1986.

In making the case for the promotion of social and economic rights as agents of change, this article will draw extensively on the role and significance of the CNDHL as the main institution charged with the safeguards and the promotion of human rights in Cameroon[2]. In this respect, the main question posed by this contribution is in what way the evolving situation of human rights in Cameroon engages the legal and institutional accountability of the CNDHL and whether the Commission have the capacity to become amenable to the just claims being made in the name of social and economic rights. Section I provides a theoretical framework for considering the promotion of human rights in Cameroon, by examining the differing conceptions of human rights in the context of the obligation of the state to protect and fulfil human rights. The Section highlights the synergy that should exist and be developed between the pursuit of political rights and social and economic rights, in order to secure the full and equal enjoyment of human rights by all Cameroonians.
Section II sets out the case for economic and social rights as a catalyst for change and considers the extent to which these rights are granted and protected by the Constitution of Cameroon. In Section III, the focus is more specifically on the enforcement and promotional activities of the CNDHL. In addition, the question is whether the creation of the Commission represents an attempt towards a more participatory approach to economic development and societal change at a national level. Section IV deals with some theoretical issues around the concept of "mainstreaming" of human rights in governmental decision-making as a mechanism for the effective promotion and protection of social and economic rights. The Section builds on the relationship between equality and broader human rights standards and suggests that the CNDHL could draw inspiration from Northern Ireland and Great Britain where the institutional arrangements have driven the Constitutional and statutory agenda on equality mainstreaming.

[2] The CNDHL was established in 2004 through Law No. 2004/016 of 22 July 2004. The Commission replaced the National Committee of Human Rights and Liberty – known in French as the *Comité National des Droits de l'Homme et des Libertés* – which was created by a Presidential Decree in 1990. See Art. 2 which defines the competence of the Commission.

2. Section I

2.1. The Interdependence and Indivisibility of Human Rights

The most important instrument in the modern human rights regimes is probably the Universal Declaration of Human Rights which was issued in 1948 after the Second World War. This important document asserts that "all human beings are born free and equal in dignity and rights"[3] and describes the recognition of the "inherent dignity" and the "equal and inalienable rights of all members of the human family" as the "foundation of freedom, justice and peace in the world"[4]. These "equal and inalienable" rights inhere in us by virtue of our very humanity and are inextricably linked to the inherent dignity of the human person". In other words, rights can never be "given".

However, a distinction has traditionally been made at the international level between civil and political rights on the one hand, and social, economic and cultural rights on the other[5]. Within the United Nations framework, the former are protected by the 1996 International Covenant on Civil and Political Rights (ICCPR) while the latter are protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments require national governments to confer and safeguard the relevant rights on a universal basis that is they are obliged to grant them to all citizens without discrimination. Civil and political rights include the right to life[6], to be free from torture and inhuman or degrading treatment[7], to liberty and security of person[8], to associate freely with others[9], and to vote and take part in the political life of one's country[10]. They also include the right to be free from discrimination[11].

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[3] Universal Declaration of Human Rights 1948 Art. 1.

[4] *Ibid.*

[5] At the European level, Civil and Political Rights are protected by the 1950 European Convention on Human Rights (ECHR) while social, cultural and economic rights are protected by the Charter of Fundamental Rights of the European Union issued in 1961. The African Charter on Human and Peoples' Rights of 1986 does not make any distinction between civil and political rights and between economic, social and cultural rights.

[6] ICCPR Art. 6.

[7] ICCPR Art. 7.

[8] ICCPR Art. 9.

[9] ICCPR Art. 22. See also Art 23, concerning family rights; Art. 24, concerning the protection of children; and Art. 17, concerning privacy.

[10] ICCPR Art. 25.

[11] ICCPR Art. 26.

Economic, social and cultural rights include the right to education[12], to work[13], to health[14], and to an adequate standard of living[15]. Obviously these rights apply to everyone but they have particular relevance to marginalised and disadvantaged groups, including women and persons with a disability who have less access to adequate housing, to health care services and to employment.

The indivisibility and interdependence of rights, as encapsulated in the Universal Declaration of Human Rights were seriously undermined by the distinction between civil and political rights on the one hand and social and economic rights on the other. This distinction at the international level resonates with the political antagonism of the Cold War era during which the discourse of rights was itself used as a weapon in the political posturing between the West and the former Soviet Union. The West emphasised the importance of civil and political rights laid down in the ICCPR, while the communist Soviet Union actively supported the ICESCR and referred to rampant unemployment, lack of universal healthcare among others not only as forms of abuse of human rights in the capitalist world but also as symptomatic of the failings of the capitalist economic system. This legacy of Cold War rhetoric did not only contribute to the general perception that human rights are primarily about civil and political rights but also played a major role in stalling the debate of social and economic rights.

However, the demarcation between civil and political rights and between socio-economic rights has come under increasing strain in international human rights law[16]. First, there is an increasing recognition that political and civil rights might have social or economic implications[17]. This is most exemplified in the context of the provisions of the United Nation Convention on the Rights of Persons with a Disability (CRPD)[18], where

[12] ICESCR Art. 13.
[13] ICESCR Art. 6.
[14] ICESCR Art. 6.
[15] ICESCR Art. 11.
[16] For example, the African Charter on Human And Peoples' Rights of 1986 does not make any distinction between civil and political rights and between economic, social and cultural rights.
[17] See generally, R. Avison, *On the Relationship between Civil and Political Rights and Economic and Social Rights*, in M. Coicaud, M.W. Doyle, and AM Gardner (eds.), *The Globalization of Human Rights,* UN University Press, Tokyo, 2003).
[18] 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 2008.

the right to liberty has been reconceptualised and interpreted in such a way to confer a right to a person with a disability to maximize his personal mobility and to impose a positive obligation on the State to fulfill this right through the provision of assistive aids and training in mobility skills[19]. Similarly, the right to freedom of expression and opinion is interpreted in such a way as to impose an obligation on national governments to accept and facilitate the use of sign languages, Braille and other alternative modes and formats of communication by persons with a disability[20].

Second, a core right implicated in the domain of both political and civil rights, as well as social and economic rights represents a form of equality and non-discrimination. However, the ideal of equality and non-discrimination is important not only because it constitutes an important bridge between political rights and social and economic rights in conceptual terms. Its relevance also lies in the fact that also it has a particular relevance in the domain of social and economic rights. In fact, it is the equality perspective that gives added meaning to the infringement of other social rights such as the right to health care, the right to education, and the right to work. In other words, it is not so much these rights that are at stake in isolation but the securing of their equal effective enjoyment to all. Identifying equality as the controlling benchmark in the protection and promotion of human rights has the practical effect of placing on the state a legal and moral duty to find optimal policy solutions to achieve it[21].

2.2. Human Rights and the Obligations of the State

In order to situate the role of the CNDHL as an institutional mechanism by the State to ensure the protection and promotion of human rights, it may be useful to examine briefly some of the conceptual understandings of human rights in the context of what is generally referred to as the

[19] UNCRPD Art. 20.

[20] UNCRPD Art. 21. For a comprehensive analysis of the provisions of the CRPD, see generally A. Lawson, *Disability and Equality Law in Britain: the Role of Reasonable Adjustment*, Hart Publishing, Oregon, 2008.

[21] For a comprehensive discussion of equality in the European Union in the context of disability, see G. Quinn, *The European Social Charter and EU Anti-discrimination Law in the field of Disability: Two Gravitational Fields with One Common Purpose*' in G. de Burca, B. de Witte (eds.) *Social Rights in Europe,* OUP 2005, Oxford, pp. 279-304.

negative and positive obligations of the State. This may be important in establishing any systematic correlation between categories of human rights and ways of fulfilling them. The distinction between negative and positive duties mirrors the traditional distinction between civil and political rights, which are negative duties of restraint, which prevent governments from interfering with individual freedom; and socio-economic rights, which are positive rights, casting positive duties on the state to act against want or need[22].

Generally, there are three main objections to the "positive rights" interpretations of human rights. The first is that human rights are primarily about liberty, particularly freedom from arbitrary or unjustified *state* action. This traditional paradigm of human rights is premised on a particular view of the relationship between the State and the individual. On this view, the function of human rights is to protect the individual against interference by the State in his or her individual liberty. Protection by the state against want or need is assigned to the realm of policy, and socio-economic rights to the realms of aspiration. The second objection to the reading of positive rights is more pragmatic and it is premised on the fact that, unlike civil and political rights, social and economic rights potentially have considerable resource implications and are therefore not appropriate for judicial resolution. The third major objection to the positive rights interpretation is an institutional one. The thrust of this objection is that, beyond the issue of resources, courts are simply not the right places to be making positive rights decisions which have structural implications. In other words, there are important institutional difficulties in the courts' involvement in the adjudication of social and economic rights, particularly with regard to such issues as remedy, fact-finding and representation[23].

The traditional concept of human rights which limits the role of the State to one of avoiding harm caused by its own actions is a narrow and restrictive one which fails to capture the recent developments in comparative Constitutional and human rights law. Human rights are not just about liberty and freedom from arbitrary or unjustified state action. They are also primarily about liberty and freedom from poverty,

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[22] S. Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, in *Public Law,* 2006, pp. 498-520.

[23] For a critical analysis of these points, see generally C. McCrudden, *Mainstreaming Human Rights*, in C. Harvey (ed.) *Human Rights in the Community: Rights as Agents of Change,* Hart Publishing, Oxford & Portland, Oregon, 2005, pp. 9-28.

substantive equality, distributive justice and human dignity[24].

Furthermore, the traditional paradigm of human rights ignores both the value of social interaction and the ways in which breaches of rights operate in a collective and institutional way. This is particularly true of gender and disability inequality, which affects individuals as a result of their group membership and where inequality is frequently a consequence of institutional arrangements for which the State may not be directly responsible[25]. Moreover, the focus by the traditional paradigm on restraint assumes that the State is a potential threat to freedom, rather than a potential force for enhancing freedom through the provision of social goods.

It is now established that the state has a positive duty to promote and to fulfill human rights and that human rights have a fundamental role to play in the fight against underdevelopment and poverty[26]. Of particular significance in this context is the typology developed by Sue according to whom there are three somewhat different but interrelated obligations on the state that may arise in the human rights context: the duty to respect human rights; the duty to *protect* human rights; and the duty to fulfill human rights[27].

The typology has a strong institutional element to it that encompasses both the negative as well as the positive duties of the state. The obligation to *respect* human rights requires that states refrain from infringing a human right directly through its own actions, while the obligation to *protect human* rights places the state under a duty to prevent a right from being infringed by non-state actors. On its part, the obligation on the state to fulfill human rights requires states to facilitate access to these rights, or to provide these rights directly through the use of state power. However, what is crucial here is the recognition that both the freedom from state interference and the freedom from poverty and deprivation are inextricably intertwined. This point was aptly put by President Roosevelt in 1941, when he stated that "True individual freedom cannot exist

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[24] A. McColgan, *Principles of Equality and Protection from Discrimination in International Human Rights Law,* 2003, in *European Human Rights Law Review* pp. 1-13.

[25] S. Fredman, *Changing the Norm: Positive Duties in Equal Treatment Legislation,* in *Maastricht Journal of European and Comparative Law,* 12, 2005, pp. 1-27.

[26] T. Pogge, *World Poverty and Human Rights, Cosmopolitan Responsibilities and Reforms*, Cambridge, Polity Press, 2002.

[27] H. Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy,* Princeton, Princeton University Press, 1996.

without economic security and independence"[28]. In the same vein, Sen has underscored the point that civil and political rights are essential for the achievement of true freedom from poverty and underdevelopment by demonstrating that countries with accountable leadership do not suffer famine because their leaders know that if they are to remain in power, they must take action to protect the population[29].

3. Section II

3.1. The Distinctiveness of Social and Economic Rights as Agents of Change

While it is now settled that all rights offer the potential to act as agents for change, it is the contention of this article that it is the promotion and protection of socio-economic rights – alongside, not in contradistinction to civil and political rights – that has the potential to act as a particularly effective force for change in Cameroon. First, economic, social and cultural rights are likely to be particularly important in effecting social change in Cameroon simply because they involve the vast majority of Cameroonians, in comparison to civil and political rights. Over 80% of Cameroonians are living in poverty today and the poverty gap is increasing as many people are without adequate housing, health care or food. While no one can dispute that civil and political rights could be prerequisites to securing effective economic and social rights, it is arguable that they touch the lives of fewer Cameroonians directly. Most Cameroonians live their lives without the risk of being arrested, detained or even tortured by the authorities because of their political engagement. Indeed, even in highly despotic societies, often relatively few people are made to suffer so as to ensure the compliance of the vast majority. Thus, while the protection and promotion of civil and political rights are vital to Cameroon's thriving democracy, improvements in this area alone are unlikely to affect large numbers of Cameroonians as directly as would dramatic improvements in measures aimed at addressing poverty, malnutrition, unemployment and access to proper health care facilities.

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[28] 11th Annual Message To Congress, (11 January 1944),in J. Israel, ed., *The State of the Union Messages of the Presidents,* Chelsea House Publishers, New York. 1966, Vo1.3, p. 2881, cited in H. Steiner, P. Alston, *International Human Rights in Context*, OUP, 2000, p. 243.

[29] A. Sen, *Freedoms and Needs*, The New Republic, 10 and 17 January 1994, pp. 31, 32, cited in *International Human Rights in Context*, *Ibid.*

Second, the very fact that economic, social and cultural rights are the "poor relation" in the human rights discourse in Cameroon can be turned to advantage by both the CNDHL and all those working for change in this domain. Civil and political liberties have ancient roots in political struggle and are therefore deeply entrenched in the consciousness of those fighting for political change in Cameroon. The particular challenge posed in Cameroon in the context of social and economic rights is the fact that very little is still known about these rights. One reason for this state of affairs may be that, even though the U.N. Committee on Economic, Social and Cultural Rights has been granted jurisdiction to scrutinize the government's implementation of economic, social and cultural rights, the sessions of the Committee, although public, are rarely reported in the Cameroon media, which means that there is little accountability of the government on economic, social and cultural rights and very little national dialogue on the promotion and protection of these rights. A consequence of this is that social and economic rights do not enjoy the same level of societal protection and support as civil and political rights. However, it is plausible to argue that, as with earlier civil and political struggles, the very assertion of social and economic rights will effect a change in the thinking of Cameroonians about the power arrangements in society. As demonstrated below, the promotional activities of the CNDHL through education, campaigning and mainstreaming directed at changing this reality can empower most Cameroonians who will most benefit from a wider respect of social and economic rights.

Third, it is fair to consider the promotion and securing of economic, social and cultural rights as a civilizing factor that could immeasurably enhance the quality of democratic life in Cameroon. The debate around human rights in Cameroon has often been characterised as being too legalistic, and of particular interest to lawyers and the "elites" of society. A focus on socio-economic rights would not merely involve more people in the debate of rights; it is likely also to engage a qualitatively different support base. Human rights campaigns for improved education, health care or even for employment opportunities for the millions of unemployed young people in Cameroon are likely to attract not only more people, but a much wider and more diverse constituency of interest.

Furthermore, a focus on socio-economic rights could play a pivotal role in keeping space in the democratic process open for vulnerable groups such as women and persons with disabilities by regulating and limiting the kind of choices that the government makes with regard to the

electoral process[30]. Such a focus could ensure, for example, that women are provided the support they need to participate in the electoral process while polling stations are made accessible to persons with a disability. A major failure of our democratic process is the discrimination against vulnerable and marginalized groups in society resulting in the denial of their civil and political rights. If left unchecked, such an impulse toward exclusion and discrimination will lead to a total closure of the political and civil space for these groups of citizens and ultimately to the implosion of the political order[31].

3.2. The Constitutional Protection of Social and Economic Rights in Cameroon

It is now acknowledged that economic, social and cultural rights are fundamental human rights which must be secured and promoted by the state, albeit progressively, and within its available resources[32]. In other words, the promotion and protection of social rights is both a legal and Constitutional responsibility of the State[33]. However, very little has been done to entrench social rights into the Constitutional and legal fabric of Cameroon. This may be due not only to the fact that the protection of social rights sometime involve the deployment of major resources but also that they are rarely self-contained. In fact, there appears to be some uncertainty on how such a right should be interpreted and applied by the judiciary and other bodies. Human rights standards in the civil and political realm are reasonably well established internationally. The securing of economic and social right is far from being defined at the international level, still less interpreted or applied universally.

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30 G Quinn ,*The Human Rights of People with Disabilities Under the EU Law* in P. Alston, M. Bustelo, *et. al.* (eds), *The EU and Human Rights,* OUP, Oxford, 1999, p. 281.

31 See generally, G. Quinn, *The European Social Charter and EU Anti-discrimination Law in the Field of Disability: Two Gravitational Fields with One Common Purpose* in G. de Burca, B. de Witte (eds.), *Social Rights in Europe,* OUP, Oxford 2005, pp. 279-304.

32 See Art. 2(1) of the ICESCR and General Comment No. 3 "The nature of tates parties" obligations, adopted by the Committee on Economic, Social and Cultural Rights at its fifth session in 1990 (UN Doc E/1991/23). Also, note that the CRPD makes provision for economic, social and cultural rights but not civil and political rights to be implemented on a progressive basis; see generally, CRPD Art. 4(2). This reflects the conventional view that the effective implementation of economic and social rights is likely to require the investment of resources to a much greater extent than is the implementation of political and civil rights.

33 G. Van Bueren, *Including the Excluded: the Case for an Economic, Social and Cultural Human Rights Act,* in *Public Law,* 2002, pp. 456-472.

The existence of a general principle of equal treatment in Cameroon is recognised by Art. 1(2) of the Constitution which provides that "the State shall ensure the equality of all citizens before the law"[34]. This Constitutional approach to equality and non-discrimination is based on a self-standing principle of general application which does not provide any specific limitation on the circumstances in which it is applicable or the grounds on which the difference of treatment is challengeable[35]. However, non-discrimination is often tied to some more specific context and this fact is recognised by the Constitution – albeit in the context of sex discrimination – which further provides that "the State shall guarantee all citizens of either sex the rights and freedom set forth in the Preamble".
The use in the Constitution of the wording "without discrimination" in relation to the responsibility of the State to ensure the wellbeing of the citizens implies that the core right engaged in the domain of social and economic rights is that of equality and non-discrimination. It is significant that the Preamble of the Constitution acknowledges the right of all Cameroonians to work36. For the moment, however, the right to work seems to be the only social right expressly referred to in the Preamble of the Constitution. This is not surprising because economic contribution through employment appears to be the only genuinely valued contribution in our societies. Though the Preamble of the Constitution does not expressly refer to such other social rights as the right to adequate housing, education and health, it is plausible to conclude that these rights are similarly protected by the constitutional commitment "to ensure the well-being of every citizen without Discrimination"[37].

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[34] The Constitution of Cameroon, passed by Law No. 96-06 of 18 January 1996 to amend the Constitution of 2 June 1972. Many written Constitutions contain express statements guaranteeing the right to equality in some form or other. Examples include the Equal Protection Clause contained in the 14th Amendment of the US Constitution, Article 40.1 of the Irish Constitution and Section 15 of the Canadian Charter of Rights and Freedoms, 1982.

[35] McCrudden refers to such Constitutional provisions of equality and non-discrimination as "equality as rationality"; see C. McCrudden, H. Kountouros, Human Rights and European Community Law, in H. Meenan (ed.) Equality Law in an Enlarged European Union: Understanding the Article 13 Directives, Cambridge University Press, Cambridge, 2010, p. 73.

[36] The Preamble provides that "every person shall have the right and the obligation to work".

[37] Preamble of the Constitution of the Republic of Cameroon, *op. cit.* This is reinforced by the provision in the Preamble that "The State shall provide all its citizens with the conditions necessary for their development".

The enjoyment of the highest attainable standard of health has been affirmed in the World Health Organisation (WHO) Constitution in 1946 as one of the fundamental rights of every human being[38]. Health was defined as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[39]. The definition of health in terms of social wellbeing by WHO is significant as it implies that factors enhancing and jeopardising the health of Cameroonians reach far beyond the availability or non-availability of medical care. At the individual level, access to employment and/or income-generation, housing, nutrition, and water and sanitation enhance individual health much more than medical interventions. At the community level, an important dimension to social wellbeing is the psychological integrity of the individual in terms of the relationship he or she has with other members of the community[40]. The Preamble of the Constitution provides that Cameroon is a society founded on the ideals of "Fraternity, Justice and Progress." Social inequality and discrimination are contrary to human dignity and corrosive of social solidarity[41]. Fundamentally, human rights are not merely about the intrinsic worth of each human being and their dignity; it is also about their equal inherent self-worth[42].

There is a growing trend by states towards the Constitutional protection of socio-economic rights which may serve as a blueprint for action by Cameroon. A leading example in this respect is South Africa, which enshrines in its 1996 Constitution the most comprehensive range of economic, social and cultural rights in the world. For example, Sections 26(1) and 27(1) of the South African Constitution *state* that everyone has the right of access to housing, health care services, sufficient food and water, and social security. These rights are, however, qualified by Sections 26(2) and 27(2), which provide: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights". However, in

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38 For further information on the WHO Constitution, see generally www.who.int.

39 *Ibid.*

40 I. Doron, *Demographic, Social Change and Equality,* in H. Meenan (ed) *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives*, Cambridge University Press, Cambridge, 2010.

41 M. Bell, *Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination,* in G. de Burca, B.de Witte (eds.), *Social Rights in Europe*, OUP, Oxford, 2005.

42 G. Quinnand, T. Degener, *Human Rights and Disability: The Current use of United Nations Human Rights Instruments in the Context of Disability*, HR/PUB/02/1, United Nations, New York and Geneva, 2002.

the Certification of the Constitution Case, the South African Bill of Rights was challenged, inter alia, on the ground that it enshrined social and economic rights which were non-justiceable. The Constitutional Court adopted a cautious approach, holding that "at the very minimum socio-economic rights can be negatively protected from improper invasion"[43] and that the inclusion of economic, social and cultural rights in the Bill of Rights was therefore constitutional[44].

4. Section III

4.1. The Role of the CNDHL in Promoting Social and Economic Rights

Asserting that social and economic rights are fundamental rights is one thing. Making the extra assertion that these rights are one that can be and should be addressed at the level of the CNDHL is quite another. The main question posed in this respect is in what way does the promotion and protection of social rights in Cameroon engage the legal responsibility of the CNDHL? The role of the CNDHL to promote and protect Human Rights is acknowledged in Art. 1(2) of its enabling statute which stipulates that the Commission is an independent body charged with the promotion, evaluation and protection of human rights in Cameroon. The remit of the Commission has two dimensions; its general and specific functions. The general functions of the Commission include ensuring full and equal access to justice for all Cameroonians and the respect of "due process" in relation to the dispensation of justice. The Commission is also expected not only to ensure the respect of the human rights of persons in prison with regard to the conditions of their detention but also that there is freedom of press and communication and that the right of Cameroonians to associate freely is respected. The remit of the Commission also covers such areas as education, housing, health, work, environmental issues, private and family life. Finally, the Commission is expected not only to address issues of development generally but also to direct particular focus on ensuring the protection and promotion of the rights of children, women, persons with disabilities and the indigenous population who are the most disadvantaged in the society.

[43] Ex p. Chairperson of the Constitutional Assembly, in *Certification of the Constitution of the Republic of South Africa*, 1996, 4 S.A. C.C., par. 78.
[44] S. Fredman, *Providing Equality: Substantive Equality and the Positive Duty to Provide*, in *South African Journal on Human Rights* 21, 2005, pp. 163 – 190.

With regard to its specific functions, the Commission is empowered to:
- address and investigate all complaints of human rights violations, including those notified to it by NGOs throughout the national territory and using the resources of its regional offices;
- undertake visits to prisons and other detention centres in order to ensure that the conditions of detention comply with international standards;
- educate and promote public awareness on issues of human rights and freedom through the use of the media and promotional leaflets. The Commission is also expected to work closely with the relevant ministers in developing educational programs for the teaching of human rights;
- When requested, provide an opinion on all issues pertaining to human rights and freedom to the government and other stakeholders;
- develop and implement a national and realistic plan of action (PAN) for the promotion and protection of human rights in Cameroon.

Certain preliminary lessons could be drawn from this legal framework of the CNDHL with regard to its ability to promote and protect human rights in Cameroon. The first lesson is that the independence of the Commission is essential, so as to ensure relative isolation from political pressures. The independence of the CNDHL, like that of the judiciary, will help to ensure Cameroon's pluralistic democracy by checking and limiting the excesses of the executive. The UN Paris principles set out the desirable status and functions of human rights agencies[45]. These include accountability to the directly elected legislature rather than to the executive. The CNDHL is a body created by Parliament and is supposed to be independent of the executive. The Commission's governing Board constitutes of a President, a vice president and 30 Commissioners selected from various state organs and professional bodies[46]. However, the President and Vice President of the Commission are appointed directly by Presidential decree[47]. This absence of direct accountability to Parliament with regard to the appointment of the key administrative officers of the Commission, coupled with the reality of executive control over resources[48] has the potential of leaving the Commission vulnerable to outside pressures and thus casts doubts on its claim as an independent

[45] United Nations, *Principles Relating to the Status of National Institutions*. United Nation General Assembly Resolution 48/134, December 1993.
[46] Art. 3 of law no 2004/016 of 22 July 2004.
[47] Art. 6 of law no 2004/016 of 22 July 2004.
[48] The Commission is currently funded as a part of the state budget and from donations from both local and international partners; see Art. 20 of law No. 2004/016 of 22 July 2004.

body. This situation may be altered if the appointment of the President of the Commission, including the commissioners is not only subject to parliamentary ratification but if the budget of the Commission should be set by Parliament. This would also be the case if the Commission should formally report to and be held to account by parliament.

However, the deficiencies in the independence of the CNDHL are compensated by the fact that the Commission has the powers to determine its own internal structure and operational arrangements, including powers to establish regional offices in all the ten regions of Cameroon. The decision to allow the CNDHL to determine its own structure and modus operandi makes sense as it is better than to have the law impose a potentially unworkable and artificially rigid structure which would leave the Commission incapable of responding to new challenges. A human rights commission cannot perform its role effectively if it does not reflect, or even relate to the lived experience of disadvantaged groups. The composition of the CNDHL and the skills and knowledge of its staff will have to reflect to some degree the diversity and experience of the various disadvantaged groups its work is intended to assist. However, the success or failure of the CNDHL will ultimately depend on how it uses the powers conferred by Parliament to achieve its aims, not on the shape of its internal design and structure.

Second, it is clear that the remit of the CNDHL is wide and covers both what would generally be considered as political and civil rights and economic, social and cultural rights. However, while the promotion and protection of political and civil rights should understandably be emblazoned on the agenda of the CNDHL, given the fact that the idea of creating a Human Rights Commission in Cameroon was borne out of response to the political upheavals of the 1990s, it is significant to note that, of recent the CNDHL has made some progress in the domain of economic and social rights. The active participation of the Commission in the drafting of laws on issues such as the payment of a minimum wage in Cameroon is certainly an expression of the Commission's determination to push forward its agenda on issues of socio-economic rights[49]. In particular, the Commission was instrumental in ensuring not only that a participatory approach was adopted in the development of the strategic plan for the health sector 2001-2010 but also that the plan contained measures aimed at poverty alleviation. The Commission was also instrumental in pushing through the decision to increase salaries in the

[49] *Ibid.*

public sector[50] and the implementation of the minimum wage in the private sector[51].

Third, it is significant that the CNDHL has as a part of its remit the promotion of the socio-economic development of Cameroonians. A focus on economic, social and cultural rights could be seen as a productive factor in the drive for economic and human development. Although the securing and promotion of economic, social and cultural rights have resource implications, an increased focus on these rights by the CNDHL may accelerate the pace of economic and human development and thus the wealth creating capacity of the country: the right to education is an investment in human capital; the right to work helps reduce the level of unemployment and the right to health ensures a more efficient workforce. While there may be reservations towards the adoption of a purely economic rationality for the promotion of human rights, it is difficult not to agree that it happens to be particularly powerful in the socio-economic contexts since these rights, if appropriately promoted and protected, would undoubtedly go a considerable way towards the elimination of the disease of underdevelopment; poverty, hunger, malnutrition, inaccessibility to adequate health care and thus improve the socio-economic circumstances of most Cameroonians, especially those who are the victim of exclusion, marginalization and neglect[52].

4.2. Promoting Human Rights through Information, Education and Consultation

According to Art. 1(2) of Law No. 2004/016, the CNDHL is to achieve the promotion and protection of human rights in Cameroon through consultation, deliberations and evaluation. This clearly indicates the

[50] *Décret* No. 2008/099 of 7 mars 2008 which increased the salaries of Civil Servants and state agents by 15%.

[51] *Décret* No. 2008/2115/PM of 24 June 2008. The decree is generally referred to by its French appellation *salaire minimum interprofessionnelle garanti* (SMIG) and increased the minimum wage from 23 514 Fcfa to 28 216FCFA.

[52] For details on the Government's policies on poverty and other social issues, see generally Ministry of Planning, Programming and Regional Development, *Progress Report on the Implementation of the Poverty Reduction Strategy Paper as of 31 December 2005*, 2006. See also, IDA and IMF, *Annual Progress Report on the Poverty Reduction Strategy*, IDA and IMF Joint Staff Report, 2006.

adoption of a participatory approach to human rights. In this respect, the CNDHL could operate as a regulatory body for the array of Human Rights Organisations and Non-Governmental Organisations operating in Cameroon, developing their capabilities and providing them with space for deliberation to bring about change. The Commission has extended powers to consult, inform and to engage with ministers and various non-governmental organisations in setting objectives and measuring progress on human rights through its Plan of Action.

However, the potential of the CNDHL to engage with organisations and other stakeholders outside the public service has been disturbingly underdeveloped. A human rights culture is unlikely to evolve only from the public sector alone. Developing such a culture is a project that needs encouragement and commitment from both the public and private sectors. The CNDHL will need inspired and determined leadership, if it is to use its powers and resources effectively to engage with both the public and private sectors. It should be particularly effective in stimulating law reform in areas such as land rights, employment rights in the public and private sectors, the elimination of discrimination against marginalised groups such as children, women, persons with disabilities and indigenous peoples.

Within its remit, The CNDHL should also educate and promote public awareness on issues of human rights and freedom through the use of the media and promotional leaflets. The Commission is also expected to work closely with the relevant ministers in developing educational programs for the teaching of human rights. This confirms the primary role of the Commission as a promoter of societal change. A key objective of Human Rights Organisations is to change societal attitudes so as to eliminate discrimination. The Preamble of the Constitution provides that Cameroon is a society founded on the ideals of "Fraternity, Justice and Progress". Fraternity is likely to prevail only where there is mutual respect between groups based on understanding and valuing of diversity and shared respect of equality and human rights. The CNDHL should also be able to serve as a single port of call for victims of discrimination, and for organisations seeking advice on how to avoid discriminatory acts or how to implement equality of opportunity policies.

The CNDHL has a general duty to encourage and support a society based on freedom from prejudice and discrimination. The ongoing debate on discrimination against homosexuals in Cameroon means that the Commission has new terrain on which to press for change. In the same vein, the commission would inevitably have to maintain a sufficiently strong focus on combating tribalism. In this respect, both the

promotional and enforcement aspects of the work of the commissions are important and need to be combined in a common strategy: the "carrot" of promotion becomes more attractive when the "stick" of enforcement is a real threat. However, striking the right balance between promotion and enforcement may prove difficult for the CNDHL but is not impossible.

4.3. Inquiry and Investigation

Art. 1(2) gives the CNDHL extensive powers to investigate and address all complaints of human rights violations in Cameroon. This enforcement power covers violations of both political and civil rights and social and economic rights. There are two types of investigation which may be carried out by the Commission. First, the Commission may act on complaints of human rights violations received from NGOs throughout the national territory, including individual-based complaints. It is important that the CNDHL should be able to provide support for those who suffer discrimination and other forms of human rights violations, especially given the absence of legal aid or alternative sources of support for individuals seeking legal redress. Supporting individual cases is now often seen as the primary role and the "bread and butter" work of the Human Rights Commissions[53]. However, while procedures for individual complaints can lead the government and other private organisations to review their practices, what we should not lose sight of is the fact that the CNDHL is a state-funded body charged with the specific task of promoting and protecting human rights. It is not a representative body, and while independent in how it performs its functions, the Commission is ultimately appointed by and accountable to the government for how it spends public funds, not to the NGOs or individuals. This makes the CNDHL a less than perfect representative voice on behalf of disadvantaged groups such as women, persons with disabilities or children[54].

Second, the Commission may investigate complaints of human rights violations received from its regional offices. At present, the CNDHL has offices in all the ten regions of Cameroon and the existence of the

[53] B. Hepple, *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation*, in *Industrial Law Journal* 40, No. 4, p. 315.

[54] With regard to the position of the Commission For Equality and Human Rights of Great Britain, see C. O'Cinnede, *The Commission for Equality and Human Rights: A New Institution for New and Uncertain Times*, in *ILJ* 36, No. 2, 2007, pp. 141-162.

regional offices is justifiable on pragmatic grounds, as the activities of the commission in these regions will inevitably require special and distinct approaches. However, there are particular challenges posed in Cameroon in the context of the enforcement role of the CNDHL with regard to economic and social rights. Apart from the fact that relatively little is still known by Cameroonians of the whole world of economic, social and cultural rights, the Commission ability to investigate violations of these rights is seriously compromised by severe budgetary constraints which has almost paralysed the activities of the Commission[55].

As mentioned above, the CNDHL is a body largely funded by the government and one objection to the positive rights enterprise is that positive rights potentially have considerable resource implications. This is where the commitment of the government to promote economic and social rights becomes crucial. Investigating violations of human rights is essentially what a good Human Rights Commission should be concerned about. One of the problems of the CNDHL is that, even when it discovers that there has been a human rights violation, it does not have the resources to investigate it. There should be much more attention paid to how the CNDHL is funded if human rights violations are to be properly investigated in Cameroon.

The violation of economic and social rights is both a Constitutional and legal issue and, where the CNDHL finds that there has been a violation of the economic and social rights of Cameroonians, it must take action to obtain redress. the fact that the Constitution of Cameroon does not contain any substantive guarantee of economic and social rights and the courts have been denied any expressed jurisdiction in this domain does not mean that the constituent elements of social rights are non-justiceable and incapable of being adjudicated by the courts[56]. What is challenging about a judicial review of social rights is not only that they involve allocation of resources but also that they are rarely self-contained. A budget is inherently interdependent whilst the right to "equality" appears to be an open-ended and

[55] According to the President of the Commission Dr. Banda, the Commission was unable to fund the operations of its field workers during the last Presidential elections.

[56] G. Van Bueren, *No Turning Back—The Right to Housing is Justifiable* and *The Cluster of Rights*, in D. Davis and H. Cheadle, (eds.), Fundamental Rights in the Constitution (Butterworths, 2002).

indeterminate concept, capable of giving rise to multiple and often conflicting accounts of its "proper" meaning[57].

There is a need to recognise the part that the Cameroon courts could play in protecting the socio-economic rights of Cameroonians. Extant Administrative Law of Cameroon may reflect the values of legality, fairness and rationality intended to protect citizens from exercises of power that may infringe against their interests. However, Administrative Law was not designed to achieve structural change and structural change is unlikely to occur through Administrative Law alone[58]. Thus, a new emphasis on social rights by the courts is needed to ensure that these rights are not only guaranteed but are fully protected by the law. The Cameroon courts may gain inspiration from the judgments of the South African courts with regard to the protection of economic and social rights[59]. A leading case in this domain is *Grootboom*[60]. The claim in *Grootboom* was brought by Mrs. Irene Grootboom and 899 other respondents who were destitute and homeless, because they had been evicted from their largely metal shacks. They had built their homes on private land earmarked for formal low-cost housing. They alleged that their circumstances violated s. 26 of the Constitution. In his judgment, Yacoob J. found the state housing programme to be invalid to the extent that it failed to make provision for people in immediate and desperate need. Although laudable, the programme concentrated unduly on the goal of constructing permanent houses for as many people as possible over time, instead of providing shelter for the desperate in the interim. The Court therefore held that the programme would have to be modified so as to include a component catering for those in immediate need, even if this decreased the rate at which permanent houses could be constructed. The Court left the form of that component as well as the exact proportion of the housing budget that should be allocated for that purpose to be decided by the state authorities. The Court did, however,

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[57] C. O'Cinneide, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?,* in *UCL Human Rights Review*, No. 2008.

[58] O. Dawn, *Common Values in Public and Private Law and the Public/Private Divide*, Public Law, 1, 1997.

[59] M. Wesson, *Equality and Social Rights: An Exploration in Light of the South African Constitution*, in *Public Law*, 2007, pp. 748-769.

[60] Government of the Republic of South Africa, The Premier of the Province of the Western Cape, Cape Metropolitan Council, Oostenberg Municipality v. Irene Grootboom and Others (2001 (1) SA 46) (CC) See also the judgment of the Constitutional court of South Africa in Soobrarnoney v Minister of Health (Kura-Zulu-Natal) CCT 32/97 (26 November 1997).

stipulate that "a significant number of desperate people in need [must be] afforded relief, though not all of them need receive it immediately"[61].

5. Section IV

5.1. Mainstreaming Human Rights

Given the fact that Constitutional or even judicial protection of social and economic rights are limited in Cameroon, the CNDHL should focus more on encouraging a preventive rather than a litigation approach to human rights compliance. One way of achieving this is by encouraging the "mainstreaming" of human rights in governmental decision-making. "Mainstreaming" in this context refers to the process whereby a human rights perspective is incorporated into all stages of policy development, review, evaluation and implementation by all those involved in policymaking[62].
The need to avoid the marginalisation of human rights thinking is pressing in Cameroon, particularly in the context of ensuring the compliance of the government with those positive obligations of the state to protect and promote human rights. There is a growing perception that, unless special attention is paid to the promotion and protection of human rights in policy making, it will become sidelined by government ministers who do not view issues of human rights as central to their concerns. In fact, the need to mainstream human rights in government decision-making has not only been identified as a priority by the United Nations High Commissioner for Human Rights[63], but it was also seen as a necessary component in the operational link between human rights and the attainment of the Millennium Development Goals (MDG)[64].
The MDG is a set of eight time-bound, quantifiable goals destined to translate into action the commitment by world leaders to reduce extreme

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[61] Government *of the Republic of South Africa v Grootboom, judgment* of the Constitutional Court, October 4, 2000, par..23,
[62] C. McCrudden , *Mainstreaming Human Rights* in C. Harvey (ed.), *Human Rights in the Community: Rights as Agents of Change,* Hart Publishing, Oxford & Portland, Oregon, 2005, pp. 9-28.
[63] UN Office of the High Commissioner for Human Rights, *Mainstreaming Human Rights,* available at (last accessed 3 March 2004).
[64] UNDPO, *Human Rights: Making the Link*, UNDPO Oslo Governance Centre.

poverty and achieve human development and human rights[65]. These goals are stated as;

- Eradicate extreme poverty and hunger;
- Achieve universal primary education;
- Promote gender equality and empower women;
- Reduce child mortality;
- Improve maternal health;
- Combat HIV/AIDS, malaria and other diseases;
- Ensure environmental sustainability;
- Develop a global partnership for development.

The United Nations has pointed out that the human rights framework does not only ensure that the MDGs are pursued in an equitable, just and sustainable manner but also that development policies are statutorily underpinned by a universal set of values[66]. Linking MDGs and human rights through mainstreaming will ensure that the government proactively take human rights into account by building it into the activities of all those primarily involved in the development and implementation of MDGs policies. This will help the government stay true to the spirit and vision of the Millennium Declaration, which places human rights at the heart of efforts to achieve human development.[67] The CNDHL could play an important role in challenging the effectiveness of the mechanisms established by the Government for the implementation of the MDG by ensuring that a human rights perspective is built into all the policies.
As pointed out above, a core human right with particular significance in the domain of social and economic rights is that of equality and non-discrimination. There have long been somewhat similar discussions on the benefits and problems of mainstreaming in the context of equality and non-discrimination requirements and a part of the scholarly work has argued that human rights considerations be "mainstreamed" in similar ways to those adopted for equality mainstreaming[68]. In this respect, the CNDHL may gain considerable inspiration from the operations of two Human Rights organisations where equality mainstreaming has featured prominently in their agenda. The first is the Equality Commission for

[65] *Ibid.*
[66] United Nations, *Human Rights and the Millennium Development Goals in Practice: A Review of Country Strategies and Reporting*, United Nations, New York and Geneva, 2010.
[67] UNDPO, o*p. cit.*
[68] C. McCrudden, *Mainstreaming Human Rights, op. cit.*

Northern Ireland which has responsibility for the implementation of the provisions of Section 75 of the Northern Ireland Act 1998[69]. Section 75 provides that each "public authority" is required, in carrying out its functions relating to Northern Ireland, to have "due regard" to the need to promote equality of opportunity between certain different individuals and groups. The relevant categories between which equality of opportunity is to be promoted are between persons of different religious belief, political opinion, racial group, age, marital status, or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.
The second is the Commission for Equality and Human Rights of Great Britain which has responsibility for ensuring the implementation of the Public Sector Equality Duty (PSED)[70]. The PSED is contained in Section 149 of the Equality Act of 2010. At the heart of the 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. Thus, Section 149 of the Equality Act of 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.

However, it is the provisions for the enforcement of the equality duties in Northern Ireland and Great Britain that mark out the mainstreaming approach as particularly interesting from a human rights viewpoint. With regard to the Northern Ireland equality duty, all public authorities in

[69] C. McCrudden, *Review of Issues Concerning the Operation of the Equality Duty,* in E. McLaughlin and N. Faris (eds.), *Section 75 Equality Review—An Operational Review,* Belfast, 2004.
[70] S. Spencer, *Equality and Human Rights Commission: A Decade in the Making*, 2008, in *The Political Quarterly,* No. 79, pp. 6-16. Also, C. O'Cinnede, Commission for Equality and Human Rights, *A New Institution for New and Uncertain Times*, *op. cit.*

Northern Ireland are required to submit to the Equality Commission an equality scheme which shows how the public authority proposes to fulfil the duties imposed by Section 75 in relation to the relevant functions, and which specifies a timetable for measures proposed in the scheme. Where it thinks appropriate, the Commission may request any public authority to make a revised scheme. Before submitting a scheme to the Equality Commission, a public authority must consult, in accordance with any directions given by the Commission, with representatives of persons likely to be affected by the scheme, and with such other persons as may be specified in the directions. An equality scheme is required to state the authority's arrangements for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity. On receipt of a scheme from a Northern Ireland department or public body, the Commission either approves it or refers it to the Secretary of State. Where the Commission refers a scheme to the Secretary of State, the Commission is required to notify the Northern Ireland Assembly in writing that it has done so and send the Assembly a copy of the scheme. When a scheme is referred to the Secretary of State, he has three options: to approve the scheme, to request the public authority to make a revised scheme, or to make a scheme for the public authority.

A somewhat different approach is taken in Great Britain under the Public Sector Equality Duty. The duty is a general one, set out in the Act itself as the Public Sector Equality Duty, and specific duties imposed through regulations[71]. The specific duties are designed to provide a structure for delivering on the general duty and require the relevant public authorities to publish a range of equality data relating both to their workforces and to the services they provide. There are three main identifiable parts of the duty; the duty to publish equality data, the duty to set equality objectives and the duty to publish transparently and proactively.

Two particularly important techniques have been developed to make the idea of equality mainstreaming effective in both Northern Ireland and Britain and which seem particularly well suited for addressing the two obligations of promoting and protecting human rights. The first is the requirement to conduct equality impact assessments as part of the process

[71] Section 153 Equality Act 2010 gives the Secretary of State the power to impose specific duties through regulations. Schedule 19 of the Act list out the bodies subject to the Specific duties which are now contained in the Equality Act 2010 (Specific Duties) Regulations 2011 SI No.2260.

of considering proposals for legislation or major policy initiatives. In the context of equality mainstreaming, impact assessment involves assessing what the effect of a proposed legislation or policy is, or would be, on particular protected groups, such as women or persons with disabilities. To the extent that the technique can develop criteria for alerting policy makers to potential problems before they happen, impact assessment could be considered as essentially anticipatory and a proactive approach which not only emphasise the effect of policies on the human right in question but also how the government should exercise its discretion in such a way as to protect and promote human rights. This involves examining not only alternative ways of delivering policies but also of moderating any adverse effects that the policies may have on the human rights of those affected.

A second important feature of the mainstreaming approaches of Northern Ireland and Britain is the extent to which groups inside and outside the public body have attempted to use the process as part of a strategy not only to influence governmental policy making but also to construct a more participatory approach to the development and implementation of policies. In the context of the protection and promotion of human rights, mainstreaming should not only be a technical mechanism of assessment within the bureaucracy but an approach that engages those with an interest in the particular policy or policies. Engagement here goes beyond "consultation" which often gives only a passive role to those consulted to respond to proposals made by the government and involves a process not only of information exchange but also of learning and persuasion based on reasoned argument, with a view to reaching agreement on how best to promote and protect human rights[72]. In fact, "engagement" in the context of the promotion and protection of human rights must ensure that certain basic moral and political values are upheld. These include respect for the dignity of vulnerable individuals, the elimination of discrimination and the promotion of equality and the need to foster good relations between different groups in the community. This approach to engagement is consistent with a modern understanding of deliberative democracy which Fredman defines as "a situation in which citizens share a commitment to a resolution of problems of collective choice through public reasoning"[73].

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[72] B. Hedbo, *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation,* in *Industrial Law Journal* 40, No. 4, 2011, p. 315.

[73] S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties,* Oxford University Press, Oxford, 2008, pp. 35-36.

It is important to point out here that the approach that may be adopted to the issue of mainstreaming in Cameroon will inevitably differ from that in Northern Ireland and Great Britain. This is due partly to two fundamental reasons. First, the development of the Northern Ireland equality-mainstreaming model is intricately linked to the Constitutional context, which places equality issues high on the political agenda. Second, equality mainstreaming in both Northern Ireland and Great Britain takes place against the background of extensive statutory provisions dealing with anti-discrimination and equality. This distinguishes the equality agenda in these countries from that of Cameroon where no equivalent extensive Constitutional or statutory protections exist.

An institutional implication of mainstreaming for the CNDHL would, therefore, be the recruitment, development and support of what might be referred to as an epistemic community which would consist of a network of professionals with recognised expertise in human rights issues and an authoritative claim to knowledge within that domain. These professionals would have to work collaboratively with government officials and the civil society, including NGOs to develop a participatory approach to mainstreaming human rights into governmental decision-making. An important "by-products" of such an approach will not only be the development of a crucial link between government and "civil society" but also the encouragement of greater participation in decision-making by marginalised groups, thus lessening the democratic deficit.

6. Conclusion

The creation of a commission to protect and promote human rights represents a significant milestone in the development of a human rights culture in Cameroon. However, focusing attention primarily on civil and political rights does not move Cameroon forward. The promotion and protection of economic, social and cultural rights should represent the next Constitutional dynamic in Cameroon. It is a dynamic which not only calls for a change to the legal and Constitutional framework but also one that should be at the heart of the operations of the CNDHL. Whether the Commission fails or succeeds may to a large extent depend upon the quality of its leadership and the effectiveness of the strategies it uses to achieve its statutory objectives. In particular, the activities of the Commission should move beyond issues of enforcement and address those which are important to the achievement of equality of opportunity, such as improved representation of women and disabled persons in public

life. The Commission would also have to encourage good practice amongst both public and private sector employers while promoting awareness and understanding of human rights by the general public. These promotional activities of the Commission should be set out in its plan of action.

The Shift towards Single-employer Bargaining in the Italian Car Sector: Determinants and Prospects at FIAT

Paolo Tomassetti [*]

1. Introductory Remarks and Theoretical Background

Since the 1960s, Italian scholars have regarded FIAT[1] as a textbook case upon which industrial relations (IR) theories are based. FIAT workers called strikes to increase pay even under the Mussolini regime, contributing to the collapse of the Italian home front during World War II[2]. When comparing post-war reconstruction in various European countries, Wolfson History Prize winner Adam Tooze concluded that FIAT cars were the real European post-war miracle[3].

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[1] In the context of this paper, the terms "FIAT", "FIAT Group" or simply "Group" are used to identify FIAT S.p.A. and FIAT Industrial S.p.A., together with their direct and indirect subsidiaries which include, since 1 June 2011, Chrysler Group LLC and its direct and indirect subsidiaries. Unless otherwise specified, data on the Group are drawn from the company annual reports for the years 2009, 2010, 2011.

[2] C. Baldoli, *Spring 1943: the FIAT Strikes and the Collapse of the Italian Home Front,* in *Oxford History Workshop Journal*, 72, No. 1, 2011, 181-189.

[3] A. Tooze, *Comparing Europe's Post-war Reconstructions: First Balkan Workshop*, Birkbeck College, London, 28 October 2005.

A significant number of FIAT workers are still unionized, and its plants continue to be associated with post-Taylorist work organisation and massive industrial action. As the largest Italian manufacturer, FIAT's interests have traditionally held sway within the national industrial relations system, influencing both the government and Confindustria, the main employers' association in the manufacturing sector. Despite the strength of FIAT's voice in negotiating conditions within the national sectoral collective agreement for metalworkers, and in drawing up national labour legislation, in October 2011 the Group's management announced that FIAT planned to leave Confindustria and the multi-employer bargaining system. They publicly stated that the reason for this move was that the Group "cannot afford to operate in Italy in a framework of uncertainty that is so incongruous with the conditions that exist elsewhere in the industrialised world"[4]. Immediately afterwards, FIAT completed the construction of a monistic industrial relations system by concluding a single-employer agreement at the group level, designed to cover the whole car industry.

Portrayed as an example of a multinational's disruptive impact on national industrial relations[5], the Fiat shift to single-employer bargaining marked a revolution in the Italian industrial relations system, insofar as – despite the trend toward decentralization – the national sectoral collective agreement continues to be the cornerstone of the system. There are no official statistics on the coverage of single-employer bargaining in Italy. However, and save for a few cases – e.g. postal services – it is generally assumed not to be the country's prevalent form of collective bargaining. In the context of this paper, the term "single-employer bargaining" is used to refer to collective agreements concluded by management and trade unions at group, firm or plant level, outside the general framework set under multi-employer bargaining[6]. It is important to distinguish this category of collective agreements from other types of decentralized bargaining, the scope of which is organized and controlled centrally by peak-level associations.

Various hypotheses on the root causes of the developments at Fiat have

[4] Sergio Marchionne, FIAT CEO. *Letter to Emma Marcegaglia, President of Confindustria.* 3 October 2011.

[5] G. Meardi, *European Industrial Relations under International Pressure. A Six-country Comparison,* IRRU, University of Warwick, 2012.

[6] K. Sisson, *The Management of Collective Bargaining*, Blackwell, Oxford, 1987.

been put forward[7]. Whether or not this shift to single-employer bargaining in the Italian car sector can be seen as the tip of the iceberg of an overall trend towards disorganized decentralization[8] and market individualism[9] in Italy is still debated.

The aim of this paper is to contribute to this debate. By casting light on the institutional and economic determinants behind the FIAT farewell to Confindustria and the shift to single-employer bargaining, an attempt is made to answer the following questions: Will other industries move towards single-employer bargaining? Will the FIAT Group revert to multi-employer bargaining? In responding to these questions, it is argued that, under the current institutional and economic scenario, the FIAT phenomenon is likely to remain an isolated one, and in all likelihood the company will revert to multi-employer bargaining.

2. The Steps towards Single-employer Bargaining

In the last decade, the FIAT Group reported net losses ranging from €529 million in 2002 and €840 million in 2004, to €345 million in 2009. The low productivity levels of the Italian subsidiaries are generally accepted to have been one of the major causes of the economic crisis affecting the Group at the turn of the century. In order to frame the extent of the problem, FIAT presented the results of a cross-plant benchmarking exercise according to which, in 2009, at their premises based in Pomigliano D'Arco, 5,000 blue-collar workers manufactured 36,000 cars, against a potential plant production of 240,000 cars. Significantly, over the same period, at the Tichy plant in Poland, 6,000 blue-collar workers produced 600,000 cars. It has also been argued that the Italian FIAT plants are 15-20% less efficient than those in the rest of Europe. FIAT branches in Poland, Serbia and Turkey operate at more than 70% of their capacity, Italian plants at 33%[10]. Although this gap is put down to the

[7] T. Treu, *Gli accordi in deroga in Europa e la sfida ai sistemi contrattuali*, in *Quaderni di Rassegna Sindacale*, 1/2011; L. Bordogna, *Un decennio perduto o un declino inevitabile?* In *Europa, Lavoro, Economia*, 6/2011.

[8] F. Traxler, *Farewell to Labour Market Associations? Organized versus Disorganized Decentralization as a Map for Industrial Relations*, in C. Crouch and F. Traxler (eds.), *Organized Industrial Relations in Europe: What Future?* Aldershot, Avebury, 1995.

[9] J. Purcell, *Ideology and the End of Institutional Industrial Relations: Evidence from the UK,* in C. Crouch and F. Traxler (eds.), *Organized Industrial Relations in Europe: What Future?* Aldershot, Avebury, 1995.

[10] The Economist, *Arrivederci, Italia?*, 5 November 2011.

management choice to produce cars elsewhere, and also partly to varying levels of demand, the extent of the difference is mostly the result of lower productivity[11].

The year 2011 marked a turning point for the Group. The alliance established with Chrysler in 2009 was further strengthened over the same year, with FIAT taking up to 58.5% stake in January 2012. Between 2010 and 2011 profits bounced back again and indicators for 2012 suggest the year will end positively.

In addition to its financial and market response to the crisis, in April 2010 the Group's management revealed a 20-billion-euro *Fabbrica Italia* plan to double domestic production by 2014. The project was intended to reorganize production in Italy in line with the World Class Manufacturing standards, by overhauling labour relations and introducing greater flexibility and collective bargaining governability[12].

Accordingly, FIAT negotiated three plant-level agreements for the production sites[13] in Pomigliano (15 June 2010), Mirafiori (23 December 2010) and Grugliasco (4 May 2011). Manufacturing at these plants is currently managed by three Fiat subsidiaries, which the Group's management disassociated from Confindustria. The foregoing agreements were therefore concluded outside the framework of the national sectoral collective agreement for metalworkers. A 'take it or leave it' strategy and whipsawing practices were adopted by the management at the negotiating table. Under the threat of lower investments and plant closure, union concessions[14] on organizational flexibility were made in exchange for

[11] FIAT has experienced issues in term of productivity in its plants since the outbreak of the crisis that affected the auto industry in Western Europe and the United States in the late 1970s. Because of insufficient capital investment and extremely confrontational and inflexible industrial relations throughout the 1970s, FIAT's productivity, profitability and plant utilization rates were all lower than those of its major competitors at the time (R. M. Locke, *The Demise of the National Union in Italy: Lessons for Comparative Industrial Relations Theory,* in *Industrial and Labor Relations Review* 45, No. 2, 1992, 229-249).

[12] "Bargaining governability" is defined by scholars as the legal enforceability of collective agreements, which makes collective agreements legally binding for the signatories, and the existence of a peace obligation prohibiting industrial action during the term of a collective agreement (F. Traxler, B. Kittel *The Bargaining System and Performance: A Comparison of 18 OECD Countries*, in *Comparative Political Studies* 33, No. 9, 2000, 1154–1190). Likewise, FIAT management refers to the concept of "bargaining governability" as the condition under which a collective agreement, once concluded, must be complied with by its signatories and the workers.

[13] The three plants employ: 4,000, 10,000 and 1,1000 workers, respectively.

[14] Concession bargaining is commonly defined as "an explicit exchange of moderation in labour costs for improvements in job security" (P. Cappelli, *Concession Bargaining and the*

wavering commitment on the part of management to produce some vehicles in Italy, instead of moving their production elsewhere.

The agreements provide a system of employee representation which only includes the signatory unions; Fiom-Cgil –the most representative metalworkers' trade union – is therefore not represented at the plants in Pomigliano, Mirafiori and Grugliasco, as it rejected the deals and the relevant concessions. Such concessions include, among others, a more flexible system of shifts and working hours: the number of breaks in an 8-hour shift – three 10-minute breaks instead of two of 15 and one of 10 minutes, respectively – has been reduced, while the number of shifts has increased from 15 to 18 over 6 working days. The agreements also target widespread absenteeism by curbing pay for workers who take sick leave repeatedly around holidays, allowing FIAT to call on each worker for 120 hours of overtime per year without union approval, plus 80 hours agreed upon with the unions. Moreover, trade unions have explicitly undertaken to fulfil the commitments agreed upon, so that wildcat strikes over conflict of rights can be avoided.

Prompted by FIAT urging for innovation and bargaining governability, Confindustria amended the rules on collective bargaining by concluding an Interconfederal agreement on 28 June 2011 with Cgil, Cisl and Uil, the largest trade union confederations at a national level. The most innovative provision is that firm-level agreements signed under the majority rule (assessed through a specific procedure) are generally binding on the whole workforce. However, as the Interconfederal agreement was not then retroactive, it did not apply to agreements concluded at the plants of Pomigliano, Mirafiori and Grugliasco, although the majority of workers had ratified them. Fiat therefore started lobbying for a provision to make the agreement of June 28 retroactive.

The attempt eventually succeeded, following a letter from the Presidency of the European Central Bank which called for a review of the collective bargaining mechanisms in order to improve the productivity and competitiveness of Italian companies. In September 2011, the government passed Article 8 of Law No. 148/2011 (the Budget Law).

National Economy, in Industrial Relations Research Association, Proceedings of the 35th annual meeting (New York, Dec. 28-30 1982), Madison Wis., IRRA, 1982, 362-371). In the context of this paper, however, the concept of "concession" is referred to as a general deterioration in employment conditions or, from another perspective, as an increase in organizational flexibility. Thus, in the short term, concessions can imply an increase in labour costs since organizational flexibility tends to be compensated with increased pay.

Besides making the Interconfederal agreement concluded on 28 June retroactive, the new provision allows bargaining at lower level to derogate from sectoral agreements and national legislation, even those concerning employment protection.

Trade unions were taken aback, and committed themselves to reject any agreement concluded at company level that departed from existing legal provisions. On 21 September, they reached a new bipartite agreement with Confindustria, which reasserts the autonomy of social partners in issuing rules on collective bargaining. In this sense, the agreement of 28 June was regarded as the only legal framework for bargaining at lower levels, thus considerably watering down the scope of Article 8.

This state of play led the FIAT Group to announce that, starting from 1 January 2012, it would no longer be a member of Confindustria. This move allowed the group to apply the new bargaining conditions set down by Article 8 to all its branches.

Soon afterwards, FIAT unilaterally withdrew from all existing collective agreements to "reorganise and harmonise collective contractual provisions at company and territorial levels which have been introduced at different times, and in order to make them consistent and compatible with conditions of competitiveness and efficiency"[15].

By resorting to concession bargaining, FIAT then drew up a comprehensive agreement through which the Group planned to invest some 20 billion Euros in Italy, provided that trade unions were open to the new accord. However, Fiom-Cgil left the negotiating table when it realized that FIAT intended to consider the Pomigliano deal and *Fabbrica Italia* as the baseline for talks. The negotiations resulted in a group-level agreement concluded on 13 December 2011, which Fiom-Cgil did not sign.

On 1 January 2012, FIAT replaced the national sectoral collective agreement for metalworkers with the comprehensive group-level agreement of 13 December 2011. This new single-employer agreement broadly sets forth the same conditions as the agreements concluded at Pomigliano, Mirafiori and Grugliasco, although certain provisions have been amended, and some elements that need to be applied across the entire FIAT Group have been incorporated. The agreement was ratified by the majority of employee representatives and provides a set of conditions which apply to all the companies in the Group, viz. a more

[15] Giorgio Giva, H. R. Industrial Relations, FIAT Group. *Letter to Trade Unions Federations' Secretariats*. 21 November 2011.

flexible system of shifts and working hours, responsive to changes in production; a system of employee representation that only involves the signatory unions; and a mechanism intended to discourage industrial action against existing collective agreements.
The pay increases foreseen by the national sectoral collective agreement for metalworkers are also applied, as well as the adjustments to basic pay established under the national sectoral collective agreement for managers of industrial companies. Most importantly, the closing article of the new agreement provides that: "The signatories agree on the nature of this agreement as a specific collective labour agreement, as it is designed to provide a comprehensive first-level economic and normative discipline, and replaces the relevant national sectoral collective agreements for those companies that intend to implement it […]"[16]. This provision extends the scope of the agreement beyond the Group companies to the entire Italian automotive industry.

3. Analysis

Employers base their strategies on their own evaluation of situations and perception of their own interests. Multinational companies can probably be best described as operating "self-referentially" in production markets, and –to some extent – also in the labour markets. It is therefore difficult to understand the root causes of their industrial relations strategies. Bearing these assumptions in mind, this section analyses what lies behind the official reason given by FIAT management for exiting Confindustria: the Group "can't afford to operate in Italy in a framework of uncertainty that is so incongruous with the conditions that exist elsewhere in the industrialised world". Possible motives are investigated for FIAT's departure from Confindustria and the national sectoral collective agreement for metalworkers, as well as the institutional and economic conditions that permitted the company to shift to single-employer bargaining.

[16] FIAT S.p.A., Fim-Cisl, Uilm-Uil, Fismic, Ugl-Metalmeccanici, Associazione Quadri e Capi FIAT, *Contratto collettivo specifico di lavoro di primo livello,* 29 December 2010.

3.1. Institutional determinants

A key factor allowing FIAT to leave the multi-employer bargaining system was that collective agreement does not have an erga omnes effect in Italy. In an industrial relations system where national collective agreements have erga omnes application, this would have not been possible, neither in countries where collective agreements are legally binding – e.g. Spain – nor where affiliation to employers' associations is compulsory – e.g. Austria. Indeed, in cases in which collective bargaining at the sectoral or central level is legally binding, companies under its scope are required to implement it, irrespective of their affiliation to an employers' association. In contrast, it is possible to exit multi-employer bargaining in industrial relations systems with a low degree of bargaining governability – like Italy – where the collective bargaining system is currently self-regulated[17], and affiliation to employers' associations is voluntary[18].

Although the non-binding nature of collective agreements made FIAT's move possible, the low bargaining governability resulting from the scant effectiveness of peace obligation clauses probably influenced the company's decision to exit the multi-employer bargaining system. As in Italy's case, peace obligation clauses are only binding on the parties to a collective agreement, and unaffiliated employees or non-signatory trade

[17] The Italian industrial relations system is currently based on the tripartite framework agreement signed at the inter-professional level on 22 January 2009 and on the Inter-confederation agreement of 28 June 2011. These agreements have created a voluntary, comprehensive multi-employer bargaining model, with the national sectoral collective agreement regarded as the basis of the system. The multi-employer bargaining model is articulated thus: peak-level associations of employers and workers define rules governing the relationships between the bargaining levels, including the following principles: a) *ne bis in idem*, i.e. decentralized bargaining cannot deal with matters already covered by national sectoral collective agreements; b) the scope of decentralized bargaining is defined by national sectoral collective agreements; c) opening clauses entitle decentralized bargaining to deviate from the standards set by national sectoral collective agreements under certain circumstances. These rules, however, are contractual in nature: they are self-regulated and only apply for as long as enterprises voluntarily choose to stay within the multi-employer bargaining structure. Case law on the structures of collective bargaining allows employers to choose between multi-employer and single-employer bargaining.
Inter-professional and sectoral collective agreements do not have erga omnes effect, i.e. they are binding on the parties and on the rank and file. However, although not legally binding, voluntary extension mechanisms and case law have increased coverage, now concerning up to 80% of the workforce.

[18] Provided that employers' association membership is voluntary, affiliated companies are obliged to implement the collective agreements signed by their employer's association.

unions can organize industrial action, including lawful strikes over conflicts of rights. This mechanism produces uncertainty at the company level. Yet a shift to single-employer bargaining does not resolve the dilemma, since the latter stems from case law on constitutional provisions, and not just from contractual rules provided by multi-employer bargaining (the Inter-confederation agreement of June 28 acknowledges this principle). However, the uncertainty of the collective bargaining framework probably jeopardized the stability and labour peace achievable under multi-employer bargaining[19], making it less attractive to the FIAT Group.

On the other hand, existing model of multi-employer bargaining in Italy are unlikely to have prompted FIAT's pursuit of more competitiveness in single-employer bargaining. In multi-employer bargaining systems how possible it is to trade organizational flexibility off against investment and employment guarantees largely depends on the collective bargaining architecture, on precisely those provisions which articulate bargaining levels.

In times of economic crisis and faced with international price competition, inelastic articulation between bargaining levels has proven disruptive to multi-employer bargaining institutions. In processes of disorganized decentralization[20] companies leave employers' associations and shift to single-employer bargaining in order to negotiate measures beyond the scope of sectoral collective agreements.

Otherwise, flexibility between bargaining levels would counteract – or restrict – the effects previously discussed. Opening clauses – or derogation clauses – on wage and labour settings can be expected to play a key role in the implementation of strategies to increase company competitiveness in times of crisis[21]. Usually drawn up at sectoral level or based on statutory provisions, opening clauses provide the space for company-level bargaining to derogate from standards set under sectoral agreements, in order to adapt them to the circumstances of individual companies, while preserving multi-employer bargaining. In Italy, opening clauses are highly regulated, both by law and by collective agreements

[19] K. Sisson,*op. cit.*

[20] F. Traxler, *Farewell to Labour Market Associations? Organized versus Disorganized Decentralization as a Map for Industrial Relations*,*op. cit.*

[21] M. J. Keune, *Decentralising Wage Setting in Times of Crisis? The Regulation and Use of Wage-related Derogation Clauses in Seven European Countries*, in *European Labour Law Journal*, No. 1, 2011, 86-96.

reached at inter-confederation and sectoral level[22]. This provides the bargaining system with the necessary flexibility to accommodate management demands for derogations. Accordingly, the concessions yielded through the single-employer agreement at FIAT could have been arranged alternatively under multi-employer bargaining, by implementing those opening-clauses[23].

3.1.1. Conflict-related Determinants

In this analysis of the FIAT case, conflict-related determinants require special attention. Anti-union sentiments and confrontational relationships between management and labour have historically characterized industrial relations at FIAT, where some 40% of the work force is unionized – with even higher estimates for blue-collar workers[24].

After World War II, trade unions in FIAT plants were so powerful that they were able to achieve their goals by merely threatening strike action. On the other hand, management increasingly resorted to union-avoidance strategies. FIAT policy was to avoid dealing with internal commissions – the traditional form of workplace representation in Italy – only negotiating with cooperative members, usually not from Cgil, the General Confederation of Italian Workers[25].

Soon after the rupture in relations with the unions following massive restructuring in 1980, FIAT began to take a harder line on industrial relations. This translated into discriminatory practices, including layoffs to rid the plants of union activists[26].

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[22] Both statutory legislation – Article 8 of Law No. 148/2011 – and collective bargaining provide for opt-out clauses allowing social partners at firm or local level to deviate from the standards set by sectoral collective agreements and statutory labour legislation.

[23] It is also true, however, that the national sectoral collective agreement for metalworkers covers an extremely wide area, although there are substantial technical and economic differences between the various companies concerned. Perhaps this partly explains the FIAT demands for differentiation of working conditions on a company-by-company basis. Attempts to outline a specific sectoral collective agreement for the automotive sector were put forward by Confindustria through its branch organization Federmeccanica, but the proposal was never acted upon.

[24] Data presented on 13 November 2007 at the Marco Biagi Foundation by Paolo Rebaudengo, former Senior Vice President of Industrial Relations at FIAT S.p.A. www.fmb.unimore.it. (last accessed 31 December 2012)

[25] G. Giugni, *Bargaining Units and Labor Organization in Italy,* in *Industrial and Labor Relations Review* 10, No. 3, 1957, 424-439.

[26] M. Locke*, op. cit.*

Although the attitude of most trade union organizations in FIAT plants – Fim-Cisl, Uilm-Uil, Fismic, UglMetlameccanici – has become more cooperative over the years, FIAT management still considers the Fiom-Cgil presence in the workplace antithetical to competitiveness and collective bargaining governability[27].

The problem of bargaining governability has become more pronounced since 2009, when, on 22 January, Cgil refused to sign the tripartite cross-industry agreement – the main document of the multi-employer bargaining system in Italy – and Fiom-Cgil did not take part in the renewal of the national sectoral collective agreement for metalworkers. As well as encouraging industrial action against FIAT, Fiom-Cgil attempted – by taking the matter to court – to have the separate national sectoral collective agreement for metalworkers declared not to be binding on its members.

Industrial relations on the factory floor further deteriorated in 2010, subsequent to a change in the management practices in order to align them with the World Class Manufacturing and Ergo-Uas standards. These changes include methods such as management by stress, a system which stretches production arrangements to eliminate any slack. In order for the plants in Pomigliano and Mirafiori to operate at their full potential, blue-collar workers are required to work as hard as they can, and pervasive monitoring of their performance exposes them to ongoing pressure from their principal. This has led labour relations in FIAT plants to worsen and workers to mobilise even in the form of work stoppages.

Thus, management at FIAT has had to cope with an unprecedented state of uncertainty, both in and out of the workplace. It is reasonable to suppose that this uncertain scenario has undermined the stability and the "managerial control" that multi-employer bargaining is expected to guarantee[28], making the system unattractive for a company explicitly

[27] Yet in some cases the position of the different trade union federations represented in FIAT plants has been misinterpreted. For example, the concessionary agreement to restructure the Pomigliano plant in 1987 was reached between Alfa Romeo – at that time not yet part of the FIAT Group – and Fiom-Cgil and Uilm-Uil. Fim-Cisl rejected the deal and tried to mobilize the local workforce against it.

[28] Alongside "market control" – i.e. taking wages out of competition – "managerial control" is considered a fundamental benefit to employers during collective bargaining (A. D. Flanders, *The Tradition of Voluntarism,* in *British Journal of Industrial Relations* 12, 1974, 352-370; K. Sisson, *op. cit.*). It usually refers to the employers' need to secure union assistance "in making and upholding rules to regulate work and wages for the sake of gaining employee consent and co-operation and avoiding costly strikes" (A. D. Flanders, *op. cit.*).

asking for measures to neutralize conflict in the workplace.
Moreover, by shifting to single-employer bargaining, FIAT succeeded in excluding Fiom-Cgil from representation in its plants. Confindustria was one of the signatories to the tripartite cross-industry agreement of 23 July 1993, pursuant to which union channel representation structures would be turned into works councils, elected by the whole workforce[29]. Having left Confindustria, FIAT is no longer required to apply the foregoing agreement and can replace works councils with trade unions' workplace representative bodies under Article 19 of the Workers' Statute. However, as Fiom-Cgil did not sign the new FIAT Group agreement, it is no longer entitled to set up its own representative bodies in FIAT plants. This is because Article 19 of the Workers' Statute only allows members of trade unions which have signed a sectoral and/or company level collective agreement currently in force to stand for election as employee representatives.

3.2. Economic Determinants

The transnational activities of the Group may be one reason behind the decision to move out of Confindustria. If we accept that companies opt for multi-employer bargaining to take wages out of competition[30], economic internationalization and global competition give national employers' associations a minor role in the pursuit of this goal. It is therefore argued that, once the costs of membership exceed the benefits, affiliated employers are likely to leave and newly-established companies will probably not join[31]. It is thus not surprising that even as it bid farewell

[29] In Italy there are two channels for workplace representation. The first is the union channel, regulated by Article 19 of Law No. 300/1970 (Workers' Statute). According to Article 19, only organisations signatory to a sectoral and/or company collective agreement in force in the workplace are entitled to set up plant-level union structures (so called *Rappresentanze Sindacali Aziendali*). As for works councils, they were introduced by the cross-industry tripartite agreement signed on 23 July 1993, in which the parties agreed to convert the union channel representation structures into works councils (so called *Rappresentanze Sindacali Unitarie*). Works councils are formally independent from unions and are appointed by employees, regardless of their trade union affiliation. In enterprises joining employers' associations which signed the 1993 agreement, the works council model applies. If a company is not affiliated to an employers' association, trade union representative bodies are elected according to Article 19.

[30] A. D. Flanders, *op. cit.,* K. Sisson, *op. cit.*

[31] F. Traxler, *Economic Internationalization and the Organizational Dilemma of Employer Associations: A Comparison of 20 OECD Countries*, in W. Streeck, J. R. Grote, V. Schneider

to Confindustria, FIAT's voice within the European Automobile Manufacturers' Association (ACEA) gained strength, with the Group soon being appointed head of the association.

The standardization of assembly procedures between Italian plants and manufacturers abroad, as well as overcapacity, may have played an important role in the successful whipsawing strategy adopted by FIAT. Indeed, the threat to disinvest and close plants proved not to be empty when the production of new car models was moved from Mirafiori to Kragujevac in Serbia, and the closure of its historic production site in Termini Imerese took place. Apart from making the coercive comparison between locations more effective[32], the ability to shift production easily between plants and the numbers of factories with surplus capacity and facing falling demand may also have contributed to increase the company bargaining power sufficiently to leave multi-employer bargaining.

However, the FIAT case seems to suggest that it was not the mere availability of exit options that allowed the company to implement an effective whipsawing strategy and to impose structural constraints on trade unions. Elsewhere economic hardship and weak job growth have proven to be important – if not necessary –conditions for the threat of plant shutdowns to become credible[33]. It is also likely that the FIAT Group's dominance in the Italian vehicle labour market has been a major factor in making sectoral trade unions take the threats seriously. The position of the company in the labour market could be described in terms of monopsony[34], as labour demand in the Italian automotive industry is

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and J. Visser (eds.), *Governing Interests: Business Associations Facing Internationalization,* Routledge, London,2006, 93-114.

[32] I. Greer, M. Hauptmeier, *Political Entrepreneurs and Co-managers: Labour Transnationalism at Four Multinational Auto Companies*, in *British Journal of Industrial Relations* 46, No. 1, 2008, 76-97.

[33] L. A. Bell, *Union Concessions in the 1980s*, in *Federal Reserve Bank of New York Quarterly Review / Summer*, 1989, 44-58.

[34] The term "monopsony" literally means a market with a single buyer. A monopsony occurs in the labour market when there is a single dominant buyer of labour (W. M. Boal, M. R. Ransom, *Monopsony in the Labor Market*, in *Journal of Economic Literature*35, No. 1, 1997, 86–112). This is the case with the FIAT Group, which includes brands such as Ferrari, Maserati, Alfa Romeo, Lancia, Abarth, Case New Holland, Iveco, MagnetiMarelli, Jeep and Chrysler. The others carmakers in Italy –Lamborghini, Fornasari and Pagani – produce custom-built cars and have a minor impact on the occupational figures. The FIAT Group, together with its subsidiaries and its supply-chain, therefore covers almost the entire labour market demand in the automotive sector, employing 62,583 workers in the Italian plants. Component manufacturers and coachworks employ an estimated 112,000 workers (A. L. Gigio *et al.*, *Indotto FIAT o Motor*

dependent on a single group. Furthermore, the prospect of the threatened plants being taken over by other (foreign) investors was – given the prevailing conditions – unrealistic[35]. There were talks of an unconfirmed Volkswagen interest in purchasing Alfa Romeo and reconverting an Italian plant, which was eventually discovered to be the one in Cassino. Due to the fear of unemployment and the lack of occupational alternatives[36], negotiations in the form of concession bargaining could hardly be evaded, and signatory trade unions to the new FIAT agreements were not in the bargaining position to resist the shift to single-employer bargaining.

4. Recent Developments and Prospects at FIAT

The general public is concerned that Fiat will stop investing in Italy. Worries that Italy's biggest manufacturer may leave do not stem only from national affection for the brand. In recent decades, the Italian government has allocated massive investments – both directly and indirectly – to help it to recover. The implicit deal was that FIAT would maintain production in Italy, where almost half of its employees and 40% of its plants are still based. Although doing business in Italy is far from easy[37], FIAT is a privileged player in a country that continues to supply the company with one-third of its revenue. If history, duty and public money talk louder than industrial relations, then FIAT has a reason to stay.
Analysts are more preoccupied with the question of whether the Group will revert to multi-employer bargaining, and whether the FIAT

City? La filiera dell'auto torinese di fronte alle nuove catene globali del valore, Banca d'Italia, 2011).

[35] The FIAT plant in Termini Imerese employs 1,500 workers and still awaits reconversion. In June 2010, the company announced that it would close in December 2011. An invitation to tender for the revival of the site was issued by the Italian Ministry for Economic Development on 17 June 2010. It describes the geographical and logistical characteristics of the plant and argues that it is available "under certain conditions with particular attention to safeguarding the current employment levels". There have so far been no expressions of interest. A version of the tender can be found at the following link to the Wall Street Journal edition of 17 June 2010: www.jstic.com. (Last accessed 31 December 2012).

[36] According to McKersie and Cappelli, if a company announces that it is shutting down a facility, the response of the workers to this prospect will depend upon what they see as their alternatives for finding other work. R. B. McKersie, P. Cappelli P., *Concession Bargaining*, WP 1322-82, 1982.

[37] The World Bank, The International Finance Corporation, *Doing Business Report, 2012*, www.doingbusiness.org, 2012.

phenomenon will involve other sectors. Predictions in the field of industrial relations are difficult to make, but, by looking at the intersection between the causes and the recent developments at FIAT, a possible scenario can be conceived.

4.1. Will FIAT Revert to Multi-employer Bargaining?

If the plan is to keep investing in Italy, it is likely that the FIAT Group will revert to multi-employer bargaining. Some of the institutional factors encouraging FIAT to shift to single-employer bargaining are becoming irrelevant, making the cost-benefit of the exit strategy less favourable for the company[38]. Firstly, a number of tribunals ruled against the attitude of the Group companies, seen as anti-unionist, for Fiom-Cgil was denied representation in the workplace. These decisions are based on a new and more extensive interpretation of Article 19 of Law No. 300/1970 (Workers' Statute), according to which trade union workplace representative bodies can be set up by trade unions that participated in the negotiation of agreements in force, even if they did not actually sign any of them[39]. If the Italian Supreme Court (*Corte di Cassazione*) upholds this case law, Fiom-Cgil will be able once again to stand in elections for workers' representatives in the Group companies, undermining one of FIAT's main aims when it left Confindustria.
In addition, in *Fiom-Cgil v FIAT Group* of 23 April 2012, the court ruled that the new FIAT single-employer agreement does not fall within the scope of Article 8 of Law No. 148/2011 (see par. 2), arguing that Article 8 refers to decentralized collective agreements under multi-employer bargaining[40]. Therefore, although the majority of sectoral trade unions joined the new FIAT agreement, this cannot be regarded as generally binding under Article 8, thus not applying to the members of Fiom-Cgil.

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[38] A. O. Hirschman, *Exit, Voice, and Loyalty*, Harvard University Press, Cambridge, 1970.
[39] Case *Fiom-Cgil v Iveco*, Bolzano Court, 22 June 2012; Case *Fiom-Cgil v FIAT Group*, Larino Court, 23 April 2012; Case *Fiom-Cgil v MagnetiMarelli (FIAT Group)*, Napoli Court, 12 April 2012; Case *Fiom-Cgil v MagnetiMarelli (FIAT Group)*, Bologna Court, 27 March 2012. In contrast to this case law, in Case *Fiom-Cgil v FIAT Group*, Torino Court 13 April 2012 and Case *Fiom-Cgil v Case New Holland (FIAT Group)*, Lecce Court, 12 April 2012, the tribunal rejected the claim filed by Fiom-Cgil, providing a literal interpretation of Article 19, Law No. 300/1970 in order to reaffirm that only signatory trade unions to a sectoral and/or a company-level collective agreement currently in force were entitled to set up a workplace representative body.
[40] Case *Fiom-Cgil v FIAT Group*, Larino Court, 23 April 2012.

It is also worth recalling that every year since 2008, governments have passed exemptions on the income tax and social security contributions for additional wage linked to productivity, such as incentive pay and flexible working time arrangements. Aimed at incentivizing decentralized bargaining, these fiscal measures only apply to variable pay resulting from decentralized collective agreements concluded at district, company or plant level. Since the new FIAT agreement is a group-level one and designed to cover the entire automotive sector, it is reasonable to suppose that tax relief will not be applied in this case. In order to be eligible for fiscal incentives, companies making up the FIAT Group would need to renegotiate additional firm-level agreements, which would increase the level of distributional conflict that results from supplementary bargaining.

The relationship between the legal framework and the collective bargaining system is also of relevance from another perspective. A body of statutory rules other than Article 8 empowers collective bargaining to enable the flexible implementation of labour legislation. Yet these forms of devolution of power to collective bargaining – including those introduced by the latest labour market reform (Law No. 92/2012)– mainly refer to national sectoral collective agreements[41] or – in compliance with their rules – to lower levels of bargaining[42].

This means that, in practical terms, such agreements can be concluded only within the framework of multi-employer bargaining, hence narrowing the scope for single-employer bargaining over organizational flexibility.

If the assumption is that collective bargaining governability and organizational flexibility affect competitiveness, the developments discussed here are likely to draw FIAT back into the multi-employer bargaining.

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41 M. Tiraboschi, *Italian Labour Law after the so-called Monti-Fornero Reform (Law No. 92/2012)* 1, No. 3-4, ADAPT University Press, 2012.

42 Some examples from the recent labour market reform (Law No. 92/2012) passed on 28 June 2012: Article 1 paragraph 9, b) and c) allows for collective agreements reached by employers' associations and trade unions at the sectoral or company level to conclude first fixed-term employment contracts that can be agreed upon without providing a justified reason, either technical or organizational. This can also be said of collective agreements in the context of multi-employer bargaining for temporary agency contracts, part-time work, job-on-call and some other employment schemes. The statutory regulations on occupational health and safety also assign multi-employer bargaining a key role in the implementation and integration of the legal framework.

4.2. Will Other Sectors Move towards Single-employer Bargaining?

Turning to the second question, it appears unlikely that other industries will move towards single-employer bargaining. Away from the manufacturing sector, the link between the national legal framework and multi-employer bargaining institutions is even stronger. This is particularly the case in those industries where bilateralism has been established[43]. Bilateral bodies originated in the building sector, as instruments for the joint administration of funds collected for use in critical circumstances (illness, occupational injuries, mutual assistance in the event of reduction of working hours, and so forth). Outside the building sector, in the early 1980s employers' associations and trade unions started setting up bilateral bodies in other industries where industrial relations were weak, and where there was a prevalence of micro enterprises, unstable employment, high employee turnover, widespread use of contingent and undeclared work, and a limited trade union presence. These factors characterise the artisanal, commercial and services sectors, tourism and the liberal professions. The increasing importance attached to the tertiary sector in economic terms has contributed to the development of bilateral bodies over the last decade. From 2003 onwards, that is subsequent to the enforcement of the Biagi Law (Law No. 276/2003), the Italian legislator has entrusted bilateral bodies with more and more power, regarding them as the privileged channel for labour market control[44]. Exiting multi-employer bargaining would thus imply doing away with the system of

[43] Bilateral bodies are joint committees consisting of workers' and employers' representatives set up by national sectoral collective agreements. Funded by contributions paid by employers and workers, they provide employment services and safeguards to both management and labour. A comprehensive description of bilateralism is provided in M. Tiraboschi, P. Tomassetti, *Bilateralism and Bilateral bodies: The New Frontier of Industrial Relations in Italy,* in Proceedings of the 16th World Congress of ILERA, Philadelphia, USA, 2–5 July 2012.

[44] The special – yet not exhaustive – nature of the functions carried out by these sectoral joint committees pursuant to Article 2, sec. h of Law No. 276/2003, includes the promotion of more stable employment and good-quality jobs; the provision of placement services; the setting-up of vocational education and training; the dissemination of anti-discrimination practice, the promotion of the integration of disadvantaged groups into the labour market; the setting-up and administration of mutual assistance funds to provide income support for workers operating in industries where ordinary wage guarantees are not afforded; the certification of employment contracts and their compliance with norms and contribution schemes; the development of initiatives on occupational health and safety; other activities assigned to them by collective agreements.

bilateralism that has been contributing to the efficient governance of highly complex, dynamic and fragmented labour markets since the 1980s.
It can also be argued that what happens at FIAT will remain an isolated case because of the exclusive dominance of the Group in the relevant labour market. In this sense, most Italian companies do not seem to have the necessary bargaining power[45] to impose structural constraints on trade unions, including the shift to single-employer bargaining.
This is also the case for companies operating in industries with high labour demand fragmentation (e.g. tourism, commerce and services in general), where opening clauses, in fact, are not implemented or decentralized bargaining is actually non-existent[46].

5. Conclusion and Implications on IR Theory

While the absence of statutory intervention in the post-war Italian industrial relations system results in uncertainty, the analysis of the FIAT case suggests that legal mechanisms do exist to prevent the erosion of the multi-employer bargaining architecture experienced elsewhere[47]. This is because in Italy the legal framework seems to induce – if indirectly – the industrial relations system (and the process of decentralization) to be organized through multi-employer bargaining. Indirect legal inducements for companies to stay in multi-employer bargaining may further explain why collective bargaining coverage has remained steady in recent decades, although the absence of an erga omnes effect of collective agreement in Italy.

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[45] Within this paper, the concept of "bargaining power" refers to the power of companies to obtain concessions, lower labour standards and to impose structural constraints on trade unions.

[46] This may be because in competitive labour markets the bargaining power of each company is likely to decrease, to the extent that possible employment within the sector is not linked to the fate of a single employer. The general model of the perfectly competitive labour market would suggest this, as it is based on the assumption that employees have a free, no-cost choice of a large number of employers for whom they might work. Competition among these employers then leads to a single market wage – and similar employment conditions – for all workers. Any attempt by an employer at cutting wages – or reducing labour standards – will cause all existing workers to stand down immediately.

[47] A. Hassel, *The Erosion of the German System of Industrial Relations,* in *British Journal of Industrial Relations* 37, 1998, 483–505.

One might argue that functional equivalents to extend the efficacy of multi-employer collective agreements have played a major role in this respect. The Italian judiciary refers to national sectoral collective agreements when deciding whether or not employment contracts are consistent with the economic indicators set out in the Constitution. However, this extension mechanism neither obliges employers to enforce the relevant collective agreement, nor to stay in multi-employer bargaining: while required to abide by the minimum standards set by sectoral collective agreements at a national level, employers can still pursue this avenue through single employer-bargaining or even unilaterally. It is therefore reasonable to suppose that other incentivizing forces are also at work to attract companies to multi-employer bargaining.
Excluding the interplay of other variables, the FIAT case seems to confirm the positive relationship between the bargaining power of a company and the degree of labour demand concentration in the industry concerned: the more labour demand is concentrated, the more the dominant company holds sway over trade unions, shifting the distribution of power to its own advantage. A second theoretical implication of the FIAT case may therefore be that when an employer's ascendancy in the labour market is associated with low (foreign direct) investment attractiveness, monopsony is far from being just a textbook model.

Bilateralism and Bilateral Bodies: The New Frontier of Industrial Relations in Italy

Michele Tiraboschi *

1. Bilateralism as a Way to Enhance Workers' Participation in Italy

Bilateralism has been increasingly regarded as the new frontier for the rebirth – or at least the profound renewal – of industrial relations in Italy. Originally established only in the building sector, bilateral bodies were considered as instruments for the joint administration of financial resources collected by employers' associations and trade unions for the allocation of benefits in some critical circumstances (illness, occupational injuries, mutual assistance in the event of stoppage or reduction of working hours, and so on). In addition to the building sector, a system of bilateral bodies was set up starting from the early 1980s in other sectors as well where industrial relations were weak, and where there was a prevalence of micro enterprises, unstable employment, high turnover of employees, a widespread use of atypical and undeclared work, and limited trade union presence. This is the case of the artisan sector, commerce and tourism and – more recently – liberal professions. Accordingly, bilateralism has developed in these sectors as a cooperative method of stabilizing both products and markets and as a form of protection of workers by means of the joint administration and governance of the entire labour market, becoming the paradigm of a new system of cooperative and collaborative industrial relations. This should come as no surprise. Indeed, these committees are well-established bodies in the industrial relations arena, characterized by a "dynamic" nature, yet far less regulated – particularly in the Anglo-Saxon countries. In addition to collective

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bargaining, bilateral bodies are usually administered by committees consisting of representatives of both employers and trade unions. As joint bodies, they perform their duties on a cooperative and participative basis, for they *per definitionem* constitute the manifestation of the contractual intent of the parties setting up the bilateral bodies, as laid down in collective agreements. They can be seen as a traditional cooperative device within the Italian industrial relations system, particularly if considered in terms of regulations set forth in collective agreements. Yet, their innovation lies in the bilateral and participatory approach, which makes a clean break with the past. In this connection, the Italian case is noteworthy. Unlike the other countries in continental Europe, the dialogue among social partners is less institutionalized – also because of a lack of trade union legislation – and this aspect is traditionally associated with high levels of industrial conflict at both individual and collective levels.

Accordingly, bilateralism is seen as an instrument to create more participatory labour-management relations in Italy, also taking account recent developments concerning legislative issues and contractual arrangements. Nevertheless, bilateralism presents some distinguishing features that seem to be specific of the Italian legal and trade union systems – which, for instance, differ considerably from German co-management, particularly with regard to the employees' involvement in management decision-making. Although sharing similar views on decision-making, the distinctive trait of the Italian case lies in that joint bodies comply with regulations laid down in collective agreements, making provision for both the internal and external labour market to supplement statutory rules and protect and resolve all workers' claims. For this reason, bilateralism can be viewed as a form of employees' participation to economic and social processes which goes beyond the management of decision-making and the effective oversight of the company, as it helps to devise a shared strategy to stabilise the labour market and provide protection to workers by means of the joint administration of the entire labour market. In this sense, bilateralism has been reported to be increasing in Italy – also thanks to the devising of ad-hoc legislation – as it has been considered the most influential and reliable device to bring about a change of the antagonist attitude within the production processes. Through a renewed sense of trust and cooperation, it would also be possible to further enhance the fruitful relationship between capital and labour with regard to economic growth, productivity and social justice. From 2003 onwards, that is after the enforcement of the Biagi Law, the Italian legislator entrusted the bilateral bodies with

more powers – following on from some successful outcomes in terms of governance and regulation – as contributing to the creation of a system of industrial relations which is more appropriate in keeping up with economic and societal changes. Due to major developments in the market economy (the growth of the service economy, globalization, delocalisation), profound economic changes in demography and their impact on welfare states in terms of sustainability, it has been necessary to resort to alternative measures of social protection. Significantly, the central government has downplayed its role as an administrator of financial resources – providing its contribution only in an indirect way – by setting forth a set of framework provisions serving as reference legislation for those operating in the private sector. In this sense, the role of bilateral bodies is relevant, all the more so following the resounding impact of the crisis on the world economies, which called for private investments to sustain a welfare state that proved to be inadequate.

2. Bilateral Bodies: Juridical Nature and Functioning

In the context of the Italian system of industrial relations, the expressions "bilateral bodies" or "joint bodies" are used to refer to entities that are set up and regulated by means of collective bargaining and that have three main features:
1) they consist of representatives from social partners who conclude collective agreements through which such bodies are governed;
2) provide (employment) services and protection to both workers and employers, in accordance to what is laid down by collective agreements and by statutory laws. Funds to such activities are collected by means of contributions paid by employers and – to a minor extent – by workers;
3) Upon the free choice of the parties that comprise them, bilateral bodies are autonomous legal entities.
From a legal and technical viewpoint, bilateral bodies are therefore entities consisting of the signatories to a collective agreement that take the form of unincorporated/voluntary associations or associations with legal personality. By signing the accord, its associates, that is employers' associations and trade unions, express their willingness to constitute the joint body. In technical terms, it is the collective agreement that lays down the obligation to establish the joint body. It follows that all bilateral bodies are committees having a contractual nature – upon approval of its article of association – need to comply with a contractual obligation, the expression of private collective autonomy. The juridical nature of these

entities becomes apparent if one considers that they are entrusted with special functions by law. In this case, the willingness to constitute the body is still regarded as resulting from private autonomy which is manifested through the collective agreement. The law only allows for some tasks and functions to be fulfilled by bilateral bodies, with the establishment of the body itself that is left to private and collective autonomy.

Unlike other voluntary associations, the main characteristic of bilateral bodies is their joint nature (*pariteticità* in Italian) at managerial level, a typical feature of collective bargaining, from which they originate. Besides appointing a president serving as a legal representative, these committees set up bodies consisting of both representatives from employers' associations and trade unions with decision-making, executive and executive powers, who remain in office for three years and can be re-elected. Decisions are made on an unanimous basis so as to avoid cleavage among unions representatives or issues arising from employers becoming the minority. Bilateral bodies are also independent in financial terms, for they can rely on their own resources collected through membership fees which are paid on a regular basis. They are also entitled to tax incentives and contribution relief. The services provided by these entities to workers (e.g. supplementary health services, supplementary retirement schemes, income supports, and the co-funding of public income support, pursuant to Art. 19 of Legislative Decree No. 185/2008 as subsequently converted into Law No. 2/2009) are forms of protection that in some cases are deemed to be contractual rights, provided that some conditions are met.

2.1. Funding Bilateral Bodies

The question as to whether one should be under the obligation to join bilateral bodies needs to be investigated considering the negative freedom of association. In this sense, Art. 39 of Italian Constitution provides that individuals – be it employers or workers – have the right to refuse to associate with others in collective organizations, as in the case of bilateral bodies. It is important to point out that one of the main problems to deal with in this connection, is the difficulty arising from including clauses for the setting up of the committees among the binding clauses of the collective agreements (known as economic and regulatory clauses). Further, Italian legislation does not provide for the *erga omnes* effect of collective agreements, that are treated as private agreements – pursuant to

the section of the Civil Code that deals with contracts and obligations – and therefore cannot apply to a third party (non-signatory trade unions and companies). Thus, since the provisions laying down the establishment of this committee are included among the obligations set in the collective agreement, there is no requirement on the part of employers in terms of funding and membership. Such an obligation would induce them into joining the union – yet in an indirect manner – therefore violating the foregoing principle of negative freedom of association, according to which no obligation to join the bilateral body can be imposed on employers who are not enrolled in unions that have set them up. The same holds true for associates, as only signatories need to comply with provisions for the setting up of the bilateral bodies, as included in obligations set in the collective agreements.

However, what has recently emerged from the debate among legal scholars is that such an interpretation of relevant legislation is somehow objectionable, as the section containing obligations in collective agreements only refers to the set of provisions regulating the relationship between unions that are signatories to the accord, without any consequences for the workers. Arguing for the obligatory nature of the provisions concerning the bilateral bodies is like stating – so to say – that they fall outside the legal sphere of the workers. Reality is usually different, at least in cases whereas signatories to collective agreements that set up the bilateral body provide otherwise.

In cases where contributions are not paid by the employers to the bilateral body, workers will not be entitled to benefits as specified in the contract. In this sense, the failure to become an associate – particularly the failure to comply with the payment of contributions to the body – will translate into fewer benefits and lower levels of protection for the workers, placing them at an economic disadvantage. It is therefore apparent that workers are affected – yet in an indirect manner – from such non-payment. On the basis of these considerations, it might be argued that the provision of services offered by bilateral bodies, both at national and local level, should be regarded as contractual rights whereas expressly laid down by the collective agreement, a type of "deferred earnings" that workers should also be granted if operating under employers who have not joined the body.

The issuing of Circular No. 43/2010 by the Italian Ministry of Labour makes provision for the obligation in terms of membership and contributions to join the bilateral bodies. The document specifies that membership is not mandatory. However, workers working for employers who did not sign the collective agreement setting up the body, should be

entitled to the same rights of those working for the signatories. In the former case, employers should fulfil their obligation by adhering to these committees, or by paying an amount of money in accordance to what is laid down in the collective agreement or providing them with equivalent benefits. This only happens if the applicable collective agreement states that a certain benefit provided by the bilateral body represents contractual rights, on the assumption that such benefit is regarded as a "fringe benefit" or "additional remuneration". As a result, Circular No. 43/2010 points out that workers performing for employers who did not join the body are entitled to contractual rights that take the form of additional remuneration. Therefore – and in accordance to what is set by collective bargaining – these rights can be fulfilled by paying a sum of money or granting a service that amounts to that provided by the bilateral bodies. In complying with the rights that are guaranteed by the Italian Constitution, this mechanism provides an alternative system of funding as contributions are paid directly to the bilateral bodies, preventing cases of a "race to the bottom" that might reduce the levels of protection granted to workers. There is no doubt about the constitutional legitimacy of this financing system, as it is up to the employers to choose whether to join the bilateral body or not, by paying the amount due. However, even though they may opt out of the committee, they are still under the obligation to pay the corresponding sum to workers, because of the *erga omnes* effect of collective agreements, in the sense that they extend to all employers in the industries covered. Arguably, the freedom of choice on the part of employers should be distinguished from their free will, particularly when this undermines or clashes with the rights of workers to receive services provided by bilateral bodies or equivalent benefits. This is the case insofar as such benefits are considered as a form of remuneration entitled to workers – either directly or indirectly – in proportion to the quantity and quality of their work and in all cases sufficient to ensure them and their families a free existence as laid down by Art. 36 of the Italian Constitution. It is worth pointing out that Art. 36 also allowed the Italian judiciary to determine the remuneration criteria for non-unionized workers or those operating for employers who were not a member of the bodies that signed the collective agreement. Accordingly, such a mechanism seems to reconcile opposite interests. On the one hand, employers would have the right to refuse to join the body. On the other hand, employees would be granted an extra sum of money, the amount of which corresponds to contributions not paid to the body. This functioning seems consistent with collective bargaining practices in this

sector, that are intended to promote new arrangements to enhance the productive system and safeguard workers' rights.

3. Bilateral Bodies and Their Main Functions

Bilateral bodies played an active role in renewing the labour market. In this sense, the Biagi law purposely included them among the sources of labour law, classified as a "privileged channel" for the regulation of the labour market (Art. 2, par. 1, sec. H of Legislative Decree No. 276/2003). Bilateral bodies have been set up in different industries not just as a mere service provider, but rather as a means for assisting labour market stability and protecting workers by way of the joint administration and governance of the entire labour market. Accordingly, bilateralism is regarded as an established instrument to enhance cooperative dialogue among social partners and the full implementation of mechanisms of protection for workers, such as the provision of benefits as laid down in the collective agreement.
On the basis of such successful experience in terms of governance and joint administration, the legislator entrusted bilateral bodies with a new and wider set of powers. The special – yet not exhaustive – nature of the functions these committees are empowered to perform pursuant to Art. 2, sec. h of Legislative Decree No. 276/2003, allows for the experience of bilateralism to handle issues other than those universally regarded as relevant and long-lasting. Indeed, bilateral bodies carry out a number of important functions. In general, they are set up to
- promote more stable and quality jobs;
- provide placement services;
- devising programmes for training, particularly by means of on-the-job learning;
- disseminate good practices against various discriminatory practices, favouring the integration of disadvantaged groups into the labour market;
- set up and administer mutual assistance funds for income support;
- certificate employment contracts and their compliance with norms and contributions schemes;
- develop actions and initiatives relating to occupational health and safety;
- undertake other activities assigned to them by collective agreements.

With regard to the last point, the attempt has been to free and provide bilateral bodies with more leeway to manoeuvre with regard to the joint regulation of the labour market.

In Italy, it is collective bargaining that makes provision for the setting up of joint bodies, although in some cases this is done by making reference to a special legislative framework. The reason for this distinction lies in the difference between the services provided by these bodies and the functions they carry out. Some of them are established via collective bargaining on an exclusive basis, while others are recognised by law, although being the result of private bargaining autonomy. If bilateral bodies were not expressly assigned, the foregoing functions by relevant authorities, services that are "authorised" and "recognised" by law could not be provided in any case – or they would not produce specific effects within the Italian legal system. Conversely, the services specified in the collective agreements originate directly and autonomously from collective bargaining and, as such, are of a different type and are provided in a number of ways, depending on the functioning of the bilateral bodies and some contractual arrangements.

3.1. Occupational Health and Safety

The role played by bilateral bodies in terms of occupational health and safety is relevant, as they are legally assigned special functions and need provide some special services.
Legislative Decree No. 276/2003 and, more recently, the consolidating legislation on health and safety at work (Implementing Decree No. 81 of 9 April 2008, subsequently amended by Legislative Decree No. 106 of 3 August 2009), view the joint bodies as a channel to promote, steer, and support both employers and employees which should lean on a participatory model to develop strategies concerning health and safety.
In practical terms, such legislative support is evident if one considers two funding schemes. Art. 52, sec. C provides for a special fund set up by the National Institution for Insurance against Accidents at Work (*INAIL*) that supports activities carried out by joint bodies. Further, Art. 51, par. 3-bis allows for the usage of ad-hoc funds (*fondi interprofessionali*), or funds for temporary agency workers in order to finance health and safety training programmes. Of relevance is also the fact that – pursuant to Legislative Decree No. 106/2009 – employers can be awarded with a certificate showing that effective OHS management practices and organizational models have been adopted. The fulfilment of these tasks on the part of bilateral bodies also ensures their involvement in terms of health and safety governance, on the assumption that such a participatory

model contributes to building a safety culture in the company, increasing the minimum levels of protection in the working environment.

3.2. Training

On the subject of training, the Italian legislator has provided a significant number of provisions to allow bilateral bodies to carry out activities with regard to vocational training. Art 118 of Law 388/2000 sets forth the establishment of some special funds for life-long learning (called interprofessional joint funds for life-long training – *fondi paritetici interprofessionali per la formazione continua*), that are to be laid down in interconfederal agreements among the largest employers' associations and trade unions at a national level. The money allocated amounts to 30% of contributions paid by each worker to employers who join the fund – and corresponds to the mandatory insurance against unemployment. In cases when the employers join the fund on a voluntary basis, it is the National Institution for Insurance against Accidents at Work that is under the obligation to pay such amounts of money. The strengthening of the role of the bilateral bodies as training provider also within the company results from the view shared by the parties that training is a common good and can help to promote employability and competitiveness.

3.3. Matching Supply and Demand in the Labour Market

The provision of placement services is among the most relevant functions assigned to bilateral bodies by law. Such an activity can be carried out upon authorization released by the Ministry of Labour pursuant to Art. 6, par. 3 of Legislative Decree 66/2003.
The idea to authorize trade unions to serve as placement providers – also indirectly via bilateral bodies – arises from the assumption that they can protect workers not only by negotiating the best working conditions, but also by administering some services that help the unemployed and first-time job-seekers to access or re-enter the labour market.

3.4. The Certification of Labour Contracts

Undoubtedly, one of the major developments that has recently taken place in labour legislation – particularly with regard to the employment

relationship – is the appointment of bilateral bodies as a subject for certification of a labour contract. Not only can bilateral bodies certify contractual schemes regarded as atypical and flexible, but also all the others contractual arrangements, in order to determine the rights and obligations deriving from them, as well as the ensuing forms of protection. This aspect will also help to clarify issues in terms of transactions as laid down by Art. 2113 of the Civil Code, and promote soundness with regard to contributions as a means for transparency in the labour market and employment services.
In legal terms, the involvement of bilateral bodies in the certification of labour contracts is relevant in promoting bilateralism as an instrument to ensure that employers fulfill some duties (e.g. payment of social security contributions, the identification of the employment relationship – whether autonomous work or salaried employment – particularly for tax, social security, and even administrative purposes). The peculiarity of this function lies in that certification also involves an inspection and validation process of employers that join the bilateral bodies that adds to that carried out by public institutions – e.g. the National Social Welfare Institution (*INPS*) and the National Institution for Insurance against Accidents at Work (*INAIL*).

3.5. Income Support

Bilateral bodies also provide a decisive contribution in terms of income support measures, by administering the mutual assistance of funds that support workers operating in those industries that do not envisage wage guarantee funds. With a view to safeguard workers' rights, the function of bilateralism in this area is twofold: experimenting with practices of co-management, yet still referring to forms of welfare (public aid) provided by the government. It is therefore pivotal to devise some innovative welfare schemes that match public measures and non-state sources. To this end, social safety net measures could be supplemented with well-established funds run by bilateral bodies.
In an awareness of this state of affairs, the legislator has laid down a number of provisions – Art. 2 of Legislative Decree 276/2003, subsequently amended and repealed by Art. 5 of Law No. 196 of 24 June 1997 and more recently, which, in turn, has been amended by the set of provisions labeled as *Collegato Lavoro* – in order to govern and regulate the setting up of funds for income support and the provision of training on the part of relevant authorities. The enactment of the *Collegato Lavoro*, has

attributed a decisive role to the bilateral bodies – particularly by envisaging unemployment allowances to maintain continuity of income in cases of prolonged unemployment. In this sense Art. 19 of Law Decree No. 185 of 29 November 2008 – which was subsequently converted into Law No. 2 of 28 January 2009 and which refers to a scheme laid down by Art. 13, par. 8 of Law Decree No. 35 of 14 March 2005, subsequently converted into Law No. 80 of 14 May 2005 – makes provision for income supports to be paid by bilateral bodies in the event of stoppage in those sectors that are not covered by wage guarantee funds, *de facto* increasing the levels of protection. In a similar vein, the direct involvement of bilateral and joint bodies in the provision of lifelong learning constitutes an attempt to experiment with and further develop supplementary welfare schemes, the result of the relationship between active and passive labour market policies, in order to guarantee that workers are offered adequate protection.

In the context of this paper, it seems worth pointing out that the increasing attention given to income support measures on the part of actors involved in collective bargaining led to the establishment of bilateral bodies operating at a national level on matters concerning the healthcare system and the system of supplementary pension. The latter is of relevance, as regulated by some special provisions (Legislative Decree No. 124 of 21 April 1993; Legislative Decree No. 243 of 23 August 2004; Implementing Decree No. 252 of 5 December 2005).

4. Concluding Remarks

The fact that in the future bilateral bodies might perform all activities and functions assigned to them statutorily or by applicable collective agreements upholds the intention of the legislator to rely on joint bodies and bilateralism to modernize trade unions – who are more and more involved in practices at company and local level – and to the establishment of a new and alternative social model.

In this perspective, there are reasons to question the view that regards the set of provisions promoting bilateralism as a "Trojan horse" to be used only to transform the role of trade unions, without considering the function of bilateral bodies as a tool to reflect the interests of those concerned, seeing them simply as service providers. For this viewpoint, one of the major concerns is that bilateralism might take the place of trade unions in dealing with some issues, especially by giving priority to dialogue over the traditional conflictual methods and downplaying the

role of collective bargaining. As a result, trade unions would no longer be the interpreters of social conflict and the representatives of common interests, but they would just provide employment services and deprived of their autonomy.

In reality, bilateralism should be considered as another activity carried out in the context of unions, as it functions on the basis of what is laid down by rules of the collective agreements, as referred to by the legislator. Clearly, there are different functions. In some cases, they administer mutual assistance funds, dealing with resources financed by social partners on an exclusive basis. In other cases, they carried out general functions assigned by law, without managing financial resources. In some other cases bilateral bodies are legally responsible for the management of public resources. In the case of the latter, it is reasonable on the part of the government to carry out a monitoring function on the basis of agreed upon criteria. In Italy, the involvement of trade unions in financial and management issues – both in an direct and indirect manner – is established (the authorized centres of fiscal assistance – *CaF* – and organizations affiliated with leading trade unions that offer a wide range of services dealing with special issues – *patronati* – are some suitable examples in this connection).

The development of bilateralism – which should take place gradually but steadily – also through a range of provisions that promotes the setting up of bilateral bodies, is consistent with a new and practical system of industrial relations based on cooperation, and with ongoing societal and economic changes which result in the need to set new priorities in terms of labour market policies. The decline of the manufacturing sector that favoured the growth of the service sector and small enterprises, the dissemination of productive processes at a local level, ongoing changes in technology, the widespread use of atypical work and, more recently, the *debacle* of the economic system highlighted the weaknesses of the domestic production system, which might lead to a global crisis and increase unemployment levels. For this reason, there is a need to devise a new welfare system that takes account of the shortcomings of financial resources available and promotes the participation of individuals and groups concerned (the notion of horizontal subsidiarity).

The aim of bilateralism is to put forward a range of solutions and measures that provides protection in terms of remuneration and social security, the costs of which could not be borne by a system characterized by shortcomings and wastes.

Evidently, the fact that bilateral bodies reduce the level of conflict and enhance social cohesion represents a surplus value. Indeed, these

committees are bodies operating in the context of industrial relations on a participatory and cooperative basis. Although performing their duties autonomously, they comply with rules and procedures laid down by the founding parties in the collective agreement. For this reason, Ten years ago the accompanying report of the Biagi Law referred to bilateral bodies as privileged channels for enhancing social justice and competitiveness that might contribute to providing a more cooperative approach to industrial relations, thus promoting more stable and quality jobs.

5. Essential Literature Review

As a typical and, to some extent, unique institution of the Italian industrial relations system, bilateral bodies have been mainly the subject of investigation carried out by Italian scholars. English literature on bilateralism is therefore limited to few contributions written by Italian academics, including an introduction to bilateral bodies in the artisan sector by S. CIUFFINI, G. DE LUCIA *The System of Bilateral Bodies in the Artisan Sector: The Italian Experience in the Context of European Social Dialogue*, IJCLLIR, 2004 and a focus on bilateralism as a form of employee involvement in Italy by M. TIRABOSCHI M., F. PASQUINI, W. BROMWICH, *Employee Involvement in Italy*, in M. WEISS, M. SEWERYNSKI (eds.), *Handbook on Employee Involvement in Europe*, Kluwer Law International, 2004 and M. TIRABOSCHI, *Employee involvement in Italy*, in VARIOUS AUTHORS., *Employee Involvement in a Globalising World. Liber Amicorum Manfred Weiss*, Berlin, Berliner Wissenschafts-Verlag, 2005.

Regarded as the new frontier for the rebirth (or at least the profound renewal) of labour relations in Italy, bilateral bodies are organisations set up jointly by employers' associations and trade unions on the basis of a collective agreement. In order to distinguish them from other forms of joint institutions, L. BELLARDI in L. BELLARDI, G. DE SANTIS (eds.), *La bilateralità tra tradizione e rinnovamento*, Franco Angeli, 2011, recently proposed a more detailed definition according to which the expression "bilateral or joint bodies" is used to refer to entities that are set up and regulated by means of collective bargaining and that have three main features: 1) they consist of representatives from social partners concluding collective agreements through which such bodies are governed; 2) provide (employment) services and protection to both workers and employers, in accordance to what is laid down by collective agreements and by statutory law. Funds to such activities are collected by means of contributions paid by employers and – to a minor extent – by workers 3) Upon the free

choice of the parties that comprise them, bilateral bodies are autonomous legal entities.

Bilateral bodies were originally widespread only in the building sector as a strategy for the joint administration of financial resources collected by employers associations and trade unions for the allocation of benefits to employees in certain critical circumstances (illness, accidents at work, mutual assistance in case of stoppage or reduction in working hours, etc.). Starting from the earlier contribution, a first historical analysis of the origins of bilateralism in the Italian building sector is carried out by L. BELLARDI, *Istituzioni bilaterali e contrattazione collettiva: il settore edile (1945/1988)*, 1990.

From the early 1980s, in addition to the building sector, a system of bilateral bodies was set up also in other industries characterised by weak industrial relations and a limited presence of trade unions such as the craft sector, commerce and tourism, not only for the joint administration of financial resources but also as a new paradigm of a cooperative system of industrial relations. A cross-sectoral description of bilateralism in Italy is provided by M. CIMAGLIA, A. AURILIO *I sistemi bilaterali di settore,* in L. BELLARDI, G. DE SANTIS, (eds.), *La bilateralità tra tradizione e rinnovamento,* Franco Angeli, 2011.

Taking into account the classical demarcation between static and dynamic collective bargaining systems proposed by O. KAHN-FREUND, *Intergroup Conflicts and their Settlement*, Brit. J. Sociol., 1954, there is large consensus among academics to frame bilateral bodies under the dynamic model. Bilateralism therefore represents a refusal of the traditional conflictual method of labour dispute resolution based on static collective bargaining, which is not well suited to the peculiarities and characteristics of certain sectors (prevalence of small and micro enterprises, fragmentation of the workforce, high turnover of employees, rapid and continuous changes in the labour market, etc). In other words, according to M. TIRABOSCHI, *The reform of the Italian labor market over the past ten years: a process of liberalization?*, CLLPJ, 2008 bilateralism does not eliminate conflict, nor does it alter the function of the trade union with a shift toward a liberal approach to labour market regulation, but may be useful for implementing the terms and conditions negotiated during collective bargaining. In this connection, M. BIAGI, *Cultura e istituti partecipativi delle relazioni industriali in Europa,* in L. MONTUSCHI, M. TIRABOSCHI, T. TREU (eds.), *Marco Biagi un giurista progettuale*, Milano, 2003 regarded bilateralism in Italy and Europe as a cooperative and participative model of industrial relations aimed at protecting workers in small and micro enterprises through the joint administration and governance of the entire labour market. The bilateral

approach is therefore associated with an industrial relations model of a collaborative and cooperative type, promoting territorial development and regular employment of good quality.

As far as the legal nature of bilateral bodies is concerned, a comprehensive analysis is provided by L. BELLARDI, *Contrattazione collettiva ed enti bilaterali: alcune osservazioni,* Lav. Inf, n. 1/1997, D'ALOIA G., *Sindacato e enti bilaterali. Spunti da una ricerca,* Quad. Rass. Sind., n. 4/2005, D. GAROFALO, *Il bilateralismo tra autonomia individuale e collettiva,* in VARIOUS AUTHORS, *Autonomia individuale e autonomia collettiva alla luce delle più recenti riforme,* Milano, 2005 and M. NAPOLI, *Diritto del lavoro e riformismo sociale,* Lav. Dir., 2008. Unanimously academics recognize that bilateral bodies have a contractual origin, even in cases where their establishment is foreseen by the law.

Linked to their legal nature, the founding system of bilateral bodies has been widely debated among scholars during the last decade in relation to the nature of collective agreements in Italy, which are not provided with *erga omnes* power. The thesis under which the financial contribution to bilateral bodies is not compulsory for those companies unaffiliated to the employer association that signed the collective agreement was mainly supported by F. STOLFA, *Enti bilaterali artigiani e benefici contributivi*, Dir. Prat. Lav., 1997. On the other hand, P. ICHINO, *Estensione dell'obbligo di adesione ai fondi di sostegno al reddito*, in DPL, 1994, p. 3424; A. BELLAVISTA, *Benefici contributivi ed enti bilaterali artigiani*, in RIDL, 1998, p. 476; M. MISCIONE, *Le prestazioni degli enti bilaterali quale onere per sgravi e fiscalizzazioni*, in DPL, 1997, pag. 3347, M. LAI, *Appunti sulla bilateralità*, in *DRI*, 2006 and more recently M. TIRABOSCHI *La contribuzione alla bilateralità: il modello del settore artigiano*, in GL, n. 37/2010 defended the opposite thesis, which is now reinforced by the administrative act No. 43/2010 issued by the Italian Ministry of labour according to which the contribution to bilateral bodies is binding for all the companies irrespective of their affiliation to the signatory employers' associations. This interpretation is basically grounded in the fact that if the companies could opt-out to pay contribution to its relevant sectoral bilateral body, their employees would therefore be discriminated against those workers that benefit of the services provided by it.

The reform of the labour market regulation enacted in 2003 (known as the Biagi Reform) strengthened the role played so far by the bilateral bodies, assigning them new and extended functions. In this perspective bilateralism is proposed by the legislator as a privileged channel for the regulation of the labour market not only in the building, craft, commerce and tourism sectors, but also as the paradigm of a new system of labour

and employment relations in order to create more participatory relations in all sectors. In positive terms, extensive analysis on the effects of the Biagi reform on bilateralism is provided by a number of Authors in M. TIRABOSCHI (ed.), *La riforma Biagi del mercato del lavoro, Prime interpretazioni e proposte di lettura del d.lgs. 10 settembre 2003, n. 276. Il diritto transitorio e i tempi della riforma*, Milano, 2004. On the other hand, criticism on the strengthening of bilateral bodies was expressed by G. MARTINENGO, *Enti bilaterali: appunti per una discussione*, in LD, 2003, MARIUCCI L., *Interrogativi sugli Enti Bilaterali*, in *LD,* 2003; Id, *Commento sub art. 2 lett. h)*, in E. GRAGNOLI, A. PERULLI (eds.), *La riforma del mercato del lavoro e i nuovi modelli contrattuali*, Padova, 2004, S. LEONARDI, *Bilateralità e servizi: quale ruolo per il sindacato?*, Ediesse, 2005, which rejected the emphasis of the reform on bilateralism as a sort of Trojan horse that risks destroying the role of trade unions by transforming them into a para-public institution. Against this idea, a large part of academics, including F. CARINCI, *Il casus belli degli enti bilaterali*, in *LD*, 2003; R. DEL PUNTA, *Gli enti bilaterali e modelli di regolazione sindacale*, in *LD*, 2003; P. A. VARESI, *Azione sindacale e tutela del mercato del lavoro: il bilateralismo alla prova*, in DRI, 2004; G. PROIA, *Enti bilaterali e riforma del mercato del lavoro*, in *ADL*, 2004; A. VALLEBONA, *Gli Enti bilaterali: un seme di speranza da salvaguardare*, in *DRI*, 2006; M. LAI, *Appunti sulla bilateralità*, in *DRI*, 2006; M. NAPOLI, *Riflessioni sul ruolo degli enti bilaterali nel decreto legislativo 10 settembre 2003, n. 276*, *Jus*, 2005, A. REGINELLI, *Gli enti bilaterali nella riforma del mercato del lavoro: un primo bilancio*, in *DRI*, 2006 and E. GHERA, *La certificazione dei contratti di lavoro*, in Id. *Il nuovo diritto del lavoro*, Torino, 2006, argue that the new functions recognized to bilateralism do not affect the role and the identity of the trade unions insofar as bilateral bodies continue to be the expression of the collective autonomy of the workers' organizations.

Temporary Agency Work and Telework in Russia: Current Issues and Future Developments

Elena Radevich *

Concepts such as "non-standard employment" and "precarious work" are relatively new for Russia. During the Soviet period, research on these topics was practically non-existent, as in the socialist economy and the widespread notion of "general equality" any departure from standard employment was limited or even prohibited in law. This state of affairs changed in the early 1990s, following Russia's transition towards a market economy, since a vast amount of literature – particularly on economic and then legal matters – pointed out the need to ensure flexibility in the employment relationship.

Adopted in 2001, the Labour Code of the Russian Federation (*Trudovoy Kodeks Rossiyskoy Federatsii*, hereafter: LC RF), which replaced the Code of Labour Acts of the Russian Federation 1971 (*Kodeks Zakonov o Trude Rossiyskoi Federatsii*), favoured such flexibility only to some extent. In spite of the fact that one of the main goals of the LC RF was to set the conditions for the effective functioning of the labour market, including the widening of coverage of non-standard employment, in reality it was passed as a compromise between different political parties and as a result included both provisions corresponding to the realities of a market economy and restrictions inherited from a planned economy.

Soon after, the need to review labour legislation considering recent socio-economic conditions and the increasingly complex nature of the

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employer-employee relationship became apparent, chiefly caused by the rapid pace of technological innovation and globalisation[1].

This is particularly the case in some forms of non-standard employment[2] – viz. temporary agency work and telework – which, although becoming widespread in practice, are currently not fixed in LC RF, leading to both legal uncertainty and vulnerability of those so engaged.

Traditionally, temporary agency work is regarded as a triangular employment relationship in which the agency hires workers, who will provide their services for a third party (the user company) on a temporary basis. As already discussed, temporary agency work is not presently legalized in Russia, although it is argued – both in legal literature and judicial practice – that some provisions of civil and tax legislation de facto allow for employing workers under this contractual arrangement. Although attractive for user companies and employment agencies, this point of view seems to be controversial, so long as pursuant to Article 5 of LC RF, the employer-employee relationship and any other relations directly connected therewith should be governed by labour law provisions, and by LC RF in particular, which is a fundamental piece of legislation in this connection[3].

Interestingly enough, triangular employment relations are not an absolutely new phenomenon for Russia. Unlike most western European countries, commercial agency in the sphere of employment carried out by natural persons and special bureaus was legatimized in the nineteenth

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[1] It is indisputable that labour law provisions should reflect laws of the creation, development and decline of certain systems of social relations (V. M. Lebedev, *Sociological School of Russian Employment Law* (*Sotsiologicheskaya Shkola Trudovogo Prava Rossii*), in *Izvestiya Vysshikh Uchebnykh Zavedeniy*, 2006, No. 4, 68–72).

[2] Despite its wide application all over the world, the expression "non-standard employment" is far from clear. In both Russian and foreign literature, there are many approaches to its conceptualization, the most common of which is to define non-standard employment as being the opposite of standard employment. In other words, non-standard employment is concerned with work falling outside the definition of standard employment, the latter being associated with full-time open-ended employment performed at the employer's premises and under its supervision (see e.g., D. Tucker, *"Precarious" Non-Standard Employment: A Review of the Literature*, Labour Market Policy Group of Department of Labour, 2002, 17, (accessed 7 January 2013); D. Brown *et al.*, *Non-standard Employment in Russian Economy* (Nestandartnaya Zanyatost′ v Rossiyskoy Ekonomike), V. E. Gimpel′son, R. I. Kapelyushnikov (eds.), Publishing House of Higher School of Economics (Izdatel′skiy Dom Vysshey Shkoly Economiki), Moscow, 2006, 16).

[3] P. V. Bizyukov, E. S. Gerasimova, S. A. Saurin, *Temporary Agency Work: Consequences for Employees* (*Zaemnyy Trud: Posledstviya dlya Rabotnikov*), Roliks, Moscow, 2012, pp. 16-17.

century. Although their role was not the same as today's agencies, they share some common features with agencies nowadays. Afterwards, triangular employment relations – at the time regulated by Article 534 of the Industrial Labour Regulations 1913 (*Ustav o Promyshlennom Trude*) and Article 32 of Code of Labour Acts of the Russian Soviet Federative Socialist Republic 1922 (*Kodeks Zakonov o Trude Rossiyskoy Sovetskoy Federativnoi Sotsialisticheskoy Respubliki*) – lost their significance as a result of the curtailment of New Economic Policy (NEP) and the prevalence of state-owned property[4]. A revival of interest in such employment arrangements occurred in the post-Soviet period – most notably in the mid-2000s – when the process of modernization of the national economy called for other forms of employment that would balance the interests of employers and employees during the implementation of innovations. Yet one can say that Russian society for the most part was not ready for such a form of employment due to its association with the exploitation of employees, lowering of their employment rights and the absence of objective information on its probable effects[5].

Consequently, Bill No. 451173-5, "On the amendments to some legislative acts of the Russian Federation" (*O Vnesenii Izmeneniy v Otdel'nye Zakonodatel'nye Akty Rossiyskoy Federatsii*)[6], whose drafters suggested strict prohibition of temporary agency work, was submitted to the lower chamber of the Russian Parliament on 8 November 2010 and unanimously approved on first reading on 20 May 2011.

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[4] A. M. Lushnikov, M. V. Lushnikova, *The Course of Employment Law: Textbook 2, Collective Employment Law, Individual Employment Law, Procedural Employment Law* (Kurs Trudovogo Prava: Uchebnik. T. 2, Kollektivnoe Trudovoe Pravo, *Individual'noe Trudovoe Pravo, Protsessual'noe Trudovoe Pravo*), Statut, Moscow, 2009, 386-387.

[5] The information provided on the impact of temporary agency work is very controversial. According to the results of a survey carried out in 2012 by the Centre of Social-Employment Rights (*Tsentr Sotsial'no-Trudovykh Prav*), temporary agency work is generally considered in negative terms by workers as producing unsatisfactory outcomes (for more details, see: P. V. Bizyukov, E. S. Gerasimova, S. A. Saurin, *op. cit.*, 69-170). However, in the same year, the Institute for Social Development Studies of the Higher School of Economics conducted research on the same topic and arrived at a different conclusion: 79 per cent of temporary workers who were interviewed argued that their job suited them (I. M. Kozina, *Temporary Workers: Social Structure and Job Characteristics* (*Lyudi Zaemnogo Truda: Sotsial'nyy Sostav i Kharakteristiki Raboty*), in *Economicheskaya Sotsiologiya*, 2012, 13, No. 5, 30, (last accessed 7 January 2013).

[6] Official Website of the State Duma (Gosudarstvennaya Duma), (last accessed 7 January 2013).

Such a radical legislative proposal did not meet with universal approval. Unsurprisingly, both the user companies and employment agencies were dissatisfied. Yet more unexpectedly, some prominent Russian scholars also opposed the draft law, on the assumption that imposing a ban on temporary agency work would not solve the problem, but avoid it. They took the view that the current labour market and higher unemployment rates call for the implementation of more flexible employment schemes other than traditional employment patterns[7]. Moreover, the way in which temporary agency work is regulated in other countries provides evidence that a legal ban has little effect if there is an objective need for such form of employment[8]. Laying down detailed regulation appears to be a more appropriate avenue to pursue, particularly if this is done from a comparative perspective.

Thus, some major features related to the recourse to temporary agency work in other countries might be of use also in Russia, most notably:

- for the purposes of reliability, the need on the part of agencies to operate only with a license issued by a relevant authority;
- the need to narrow the scope of application of agency work in order to prohibit its use for some occupations (e.g. those characterized by dangerous work conditions);
- the scope to resort to agency work on a temporary basis in the event of collective action, or to hire agency workers permanently to replace the core workforce operating at the user company.

In spite of the fact that the proposal was put into the pipeline and is in the process of being finalised, one can say that in general the foregoing provisions were eventually taken into account. Indeed, now the underlying principle of the draft law is not to veto temporary agency work, but instead to narrow its scope of application, by setting down some special regulations. It is difficult to foresee the structure of the final draft, particularly because a number of factors are at play, including political

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[7] *It is time to cross one's t's [An Interview with I. A. Kostyan]* (*Pora Uzhe Stavit' Tochki nad «i»),* in *Trudovoe Pravo*, 2010, No. 1, 97-101; V. G. Soifer, *The Legal Regulation of Employer-Employee Relationships: The Tardy Response to Challenges of Reality* (*Pravovoe Regulirovanie Trudovykh Otnosheniy: Zapozdalyy Otvet na Vyzovy Real'nosti*), in *Trudovoe Pravo*, 2010, No. 10, 89-99; Yu. P. Orlovskii, A. Goncharov, *The Alteration of Employment Legislation – A Matter of Time* (*Izmenenie Trudovogo Zakonodatel'stva – Vopros Vremeni*), in *Trudovoe Pravo,* 2011, No. 11, 5-14.

[8] See e.g., E. R. Radevich, *The Legal Regulation of Temporary Agency Work in Italy* (*Pravovoe Regulirovanie Zaemnogo Truda v Italii*), in *Journal of Foreign Legislation and Comparative Law* (*Zhurnal Zarubezhnogo Zakonodatel'stva i Sravnitel'nogo Pravovedeniya*), 2012, No. 1, 19-22.

ones, which may have a say in terms of contents. In this sense, it is to be hoped that those involved in the passing of the provision will be able to balance competing interests eventually.

Telework is another form of non-standard employment the legal nature of which gave rise to a lively debate in Russia. Traditionally, telework is defined as work carried out away from the employer's premises and performed by means of information technology. Although widely practised in large urban areas, this form of employment is not regulated by a specific set of labour law provisions.

Telework is often associated with home work and drawing a distinction between these employment schemes is a complex task in both theoretical and practical terms. Generally speaking, two criteria are usually identified with regard to this correlation:

- telework is considered a form of home work[9], and they share a common legal framework[10];
- telework is seen as different from home work and therefore in need of special regulation[11], because a number of features necessitate such distinction, namely:

a) the type of work, which is premised to be mainly intellectual;

b) the use of different technology devices (fax, phones, Internet access);

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[9] Thus, in order to stress the link between the current forms of telework and early industrial home work, the expression "electronic home work" was used widely to refer to telework in European literature during the 1970s and the 1980s (see L. Qvortrup *et al.*, *Teleworking: International Perspectives* / P. J. Jackson, J. M. van der Wielen (eds.), Routledge, London, 1998, 22). At present, its usage is less common, although sometimes can still be found in the legal literature of post-Soviet countries (see e. g., K. L. Tomashevskiy, *Computer Work from Home as One of the Flexible Forms of Employment in the XXI Century* (*Komp'yuternoe Nadomnichestvo (Telerabota) kak odna iz Gibkikh Form Zanyatosti v XXI v.), in Trudovoe Pravo v Rossii i za Rubezhom*, 2011, No. 3, 32-35).

[10] This model is accepted by the ILO, which defines home work as work carried out by a person referred to as a home worker, (i) in his or her home or in other premises of his or her choice, other than the workplace of the employer; (ii) for remuneration; (iii) which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used (Art. 1 of 1996 ILO Home Work Convention (No. 177)). Evidently, such a loose definition makes it possible to consider telework as a form of home work. On provisions of international labour law devoted to home work and telework, see: K. N. Gusov, N. L. Lyutov, *International Labour Law: Textbook* (Mezhdunarodnoe Trudovoe Pravo: Uchebnik), Prospekt, Moscow, 2013, 464-471.

[11] See e. g., European Framework Agreement on Telework, which was signed in 2002, Official Website of the European Commission, (accessed 7 January 2013).

c) the workplace – which is not limited to one's household as in traditional home work – but may be in different premises away from those of the employer[12].

In this connection, Bill No. 88331-6 "On the amendments to the Labour Code of the Russian Federation and Article 1 of the Federal Law on the Digital Signature (*O Vnesenii Izmeneniy v Trudovoy Kodeks Rossiyskoy Federatsii i Stat'yu 1 Federal'nogo Zakona «Ob Elektronnoy Podpisi»*)"[13] is based on the assumption that telework and home work are two different employment arrangements. This draft law was debated and passed by the lower chamber of the Parliament on 16 October 2012. The proposed draft would amend LC RF by including a separate chapter (Chapter 49^1) devoted to the regulation of telework, which presumably will follow chapter 49 of LC RF on home work.

Pursuant to the draft proposal, telework will only be regulated by four articles of the LC RF (Articles 312^1 to 312^4)[14]. Most notably, Art. 312^1 of the LC RF provides the definition of teleworkers (*distantsionnye rabotniki*) as those who have entered into an employment contract and undertaken to perform work away from the employer's premises by making use of the Internet and other IT tools. As for Art. 312^2, it makes it possible to conclude an employment contract with teleworkers which can be issued in a digital format if accompanied by the electronic signature of both parties. The digital format is indeed an innovation as Article 67 of the LC RF specifies that in Russia an employment contract must only be concluded in writing. However, the draft provision determines that where an employment contract is entered into electronically the employer must

[12] A.M. Lushnikov, *Legal Regulation of Telework and Home Work: Comparative Analysis* (*Pravovoe Regulirovanie Teleraboty i Nadomnogo Truda: Sravnitelnyy Analiz*), Paper presented at the Second Perm′ Congress of Scholars-Lawyers, Perm′, Russia, October 2011.

[13] Official Website of the State Duma (Gosudarstvennaya Duma), (accessed 7 January 2013).

[14] Interestingly enough, Chapter 49, which is devoted to home work consists of just three articles, namely Articles 310 to 312. This makes it rather difficult to govern it properly, as those articles only make provision for 1) the legal definition of home workers as those who entered an employment contract to work at home using tools and devices provided by the employer or purchased by home workers at their own expense 2) giving an opportunity for home workers to perform their work with the assistance of family members 3) the employer's duty to compensate deterioration of home workers' tools and devices if used in the employment 4) requirements that the tasks assigned to home workers should not be detrimental to their health and should be carried out in compliance with safety rules; 5) allowing the termination of the employment contract with home workers on the basis of grounds specified therein.

provide teleworkers with a certified copy of the document to be sent by post within three days from the date of conclusion. Organisation of working time and time off is left to the discretion of the workers, unless otherwise provided by the employment contract (Article 312[4]). In addition, pursuant to the draft law, the termination of the employment contract can take place for reasons detailed in the contract itself, besides those specified in the LC RF (Article 312[3]). One might note that the new proposal does not touch upon all-important issues for teleworkers such as health and safety rules, data protection, their training and right to privacy. It is to be hoped that this legal vacuum will be filled on second reading.

Transforming European Employment Policy; Labour Market Transition and the Promotion of Capability by Ralf Rogowski, Robert Salais and Noel Whiteside. *A Review*

Sonja Bekker [*]

Transforming European Employment Policy sets an ambitious goal: to generate ideas for an alternative European reform agenda by calling for a revision of the content and the functioning of European employment policy. As a result, it provides a critical assessment of both EU-level policies and practices at national and company level. The proposals put forward are largely built on two theoretical approaches, the transitional labour market approach (TLM) and the capabilities approach.

In essence, the book deals with a very pressing and complex question: How to transform European labour markets in such a way that both the EU, its Member States and its citizens maintain a proper level of security while being – or taking part – in a competitive and globalised economy. This question is relevant not only in light of the recent economic crisis, but also considering the long-standing trends towards more labour market flexibility, the growing emphasis placed on economic demand and the

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declining financial means to sustain post-war welfare states. The main question of the work is as challenging as its attempt to provide an answer within the scope of just one book.

By producing an edited volume, an effort is made to consider the several facets of the employment policies. The chapters collect theoretical as well as empirical contributions by authors from different academic backgrounds. The book is broken down into two sections that follow some introductory remarks. Section I describes and compares the TLM and the capability approaches. Section II emphasizes the implications for European policies, by outlining the 'integrated approach to employment' which – according to the Authors – thoroughly reviews the bases of current approaches.

Apart from clarifying the overall aim of the book and its different sections, Chapter I also presents a critical assessment of the role of the EU in dealing with the social policy agenda, painting some rather bleak prospects for social Europe. For instance, it is argued that "[…] social Europe is incomplete and threatened with disintegration under the advancing encroachment of market principles" (p.10) . The Authors provide some trenchant critiques on the increasing use of quantitative indicators to coordinate employment policies. Moreover, they find that EU policies tend to transfer the burden of adjustment upon the individual by advocating employability and activation.

The rather critical and pessimistic nature of the introduction could have set the tone for the subsequent contributions. Yet, the collection of chapters reveals a more nuanced view of the state and future of social Europe. The chapters providing an empirical analysis show that there is a gap between the ideal state of social Europe and reality. However, they also demonstrate that a number of initiatives need to be implemented which might serve as a starting point for the building up of social Europe. By way of example, Wotschack points out that whereas the distribution and utilisation of working-life time accounts are inadequate and that too much initiative is left upon the employer, the mere existence of such schemes offers a basis for developing better functioning systems. By the same token, Deakin, Rogowski and Salais highlight the shortcomings of EU-level policies and legislation, while concurrently signalling that the Treaty provides important pieces of labour law and that EU employment policy is not only about enhancing flexibility.

The authors put forward the TLM approach and the capabilities approach as major components for improving employment policies. This choice is a fruitful one. The contributions successfully argue in favour of leaving the flexibility pathway behind and place more attention on securing individual

transitions to and within the labour market. The TLM approach reveals that the current labour market is different from that of ten years ago.
Original solutions have to be explored to meet the new needs of people in this ever-changing labour market. In this connection, Schmid gives a list of alternatives such as setting up institutional arrangements that enhance transitions within labour markets. Such institutions would include new social rights that go beyond employment– for example the right to training or care leave and income protection – considering and seek for governance methods that would relate labour market actors to social policy. Further, with regard to the TLM approach, Kaps and Schütz question the effectiveness of privatization of placement services to support activation measures and argue for a more optimal public-private integration. As for the capabilities approach, Bonvin puts forward some criticisms to the simplistic view on responsibility of most activation programmes that merely aim at a quick reinsertion of people in the labour market. He argues that responsibility should entail having access to or offering adequate resources and opportunities to act as well as having effective freedom to choose one's life path. These are important ingredients for future employment policies.
A number of chapters are devoted to revealing that the EU is far from being the only actor of charge in coordinating European labour markets. National governments, employers and workers also contribute to the labour market and jointly shape its character. Zimmerman's chapter for instance deals with corporate social responsibility. And even though its conclusion is that corporate social responsibility is still in its early stage, important initiatives spring from employers. What needs to be done – and this is a conclusion that may be drawn from nearly every chapter – is to investigate approaches to safeguard fundamental rights or set minimum standards to secure some level of social security and to prevent unwanted deviating behaviour. However, not only legislation should contribute to future employment policies, but also debates should become less dominated by economic and financial perspectives. Inspiration for such more balanced debates may be found in the past, as shown for instance by Whiteside and by Salais. The original vision of the founding fathers of the EU included an economic as well as a social union, and earlier public interventions in urban economies combined both economic and social action.
Although *Transforming European Employment Policy* hosts a range of interesting chapters that somehow contribute to the aim of the book, expanding some of the main concepts therein might have been particularly useful to the reader, especially with regard to certain

contributions. Moreover, a concluding section at the end of the book could have added value as providing a more concise idea of the 'integrated approach to employment' the book wants to develop, and incorporating a research and policy agenda. Perhaps the editors found it too early to give such a definite overview. Rather, they actively call upon us, researchers and actors in the civil, economic and social spheres, to "[…] take responsibility for opening up new paths and publicising them so that fellow citizens can appropriate them"(p. 16). Hopefully, many readers will be motivated by *Transforming European Employment Policy* and start actively contributing to an overall framework for social and economic prosperity throughout the EU.

Reconnected to Work: Policies to Mitigate Long-term Unemployment and Its Consequences by Lauren D. Appelbaum. *A Review*

Christopher Leggett [*]

Reconnecting to Work: Policies to Mitigate Long Term Unemployment and Its Consequences (from here on *Reconnecting to Work*) is a compilation of presentations made at a conference, *Reconnecting to Work*, held by the Institute for Research on Labour and Employment at the University of California, Los Angeles in April 2011. The focus of the conference was on the long-term consequences of prolonged unemployment, from national and international perspectives, but particularly in the United States. The keynote speech to the conference by economist Richard B. Freeman is formalised in *Reconnecting to Work* as the "Forward" and "sets the stage" for and for the most part the sentiment of this volume. An inclusive overview of its themes is provided by the editor's "Introduction" (Chapter 1).

In accordance with the focus of the original conference there is much that is common in the six subsequent chapters of *Reconnecting to Work* but each has a unique take on the common issue it addresses. In order to acquaint the reader with the distinctive approaches this review provides sequential synopses of each of the chapters. Chapter 2 "Job Displacement in Recessions: An Overview of Long Term Consequences and Policy

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Options" by Till von Wachter of the University of California, Los Angeles draws on the literature on previous recessions to identify and analyse the consequences of layoffs and unemployment. The consequences include: earning substantial reductions for 15 to 20 years, and an instability of employment that leads to declines in health and life expectancy (a prediction on the effects of unemployment on mental health is researched by Diette et al. in Chapter 4), and also affects the wellbeing of family members. After an exhaustive evaluation of the range of possible policy measures and mechanisms Von Wachter concludes that the long-term costs of job loss and unemployment make "preventive measures to avoid massive layoffs […] a policy option worth considering". An interesting observation in this chapter is that job loss interrupts the intrinsically and extrinsically beneficial phase of a worker's early career of up to ten years of searching and finding a suitable employment match.

Chapter 3 "Labor Market Policy in the Great Recession: Lessons from Denmark and Germany" by John Schmitt of the Centre for Economic and Policy Research reviews the experience of 21 OECD economies and seeks possible explanations of the different unemployment experiences in the Great Recession. Its main observation is that, "Once a negative demand shock has hit and macroeconomic policy has been deployed in response, the path of employment and unemployment depends largely on the labour market", in the case of Denmark one of so labelled *flexicurity* with active labor market policies (ALMPs) endorsed by unions and employers. However the onset of the Great Recession caused the Danish system "to suddenly lose its lustre". Denmark's numerical labour market flexibility paradoxically helped to increase unemployment. In contrast, in Germany with an inflexible labour market, when the Great Recession hit unemployment dropped "because labour market adjustment fell entirely on hours, not employment (or wages)". This phenomenon is attributed to several institutional features of the German labor market including short time working (STW). The lessons (for the US) of these two countries experiences are highly qualified, although that of Germany "looks to offer a better way forward".

Whether the poor mental health of the unemployed is caused by their unemployment is the issue that Chapter 4 "Causality in the Relationship between Mental Health and Unemployment" by Timothy M. Diette and Arthur H. Goldsmith of Washington and Lee University, Derek Hamilton of The New School and William Darity Jr. of Duke University aims to try and resolve. By drawing on two large national data sources the authors estimate "the impact of both short term and long-term unemployment on a broad measure of emotional health". Referring to the "extensive

empirical literature…that documents a negative association between unemployment and psychological health" Diette et al. caution that unemployment "can be the consequence of poor mental health", i.e. reverse causality. In their analysis of the data they distinguish "resilient" and "vulnerable" jobless and find that long-term but not short-term unemployment most likely generated psychological distress among resilient individuals.

The authors of Chapter 5 "Work Together to Let Everyone Work: A Study of the Cooperative Job-Placement Effort in the Netherlands" by Hilbrand Oldenhuis and Louis Polstra of the Centre of Applied Labour Market Research and Innovation at the Hanze University of Applied Sciences pose the research question of "which factors determine employers" willingness to cooperate with social services (in the Netherlands) and provide unemployed people with jobs? As a framework they apply the social psychology theory of planned behaviour (TAB), a theory of intent to do something. Unsurprisingly perhaps, they found that large companies based their intent on economic considerations while small ones based theirs on personal ones.

Chapter 6 "Stabilizing Employment: The Role of Short-Time Compensation" by Vera Brusentsev of Swarthmore College and Wayne Vroman of Urban Institute reflect on the increased reliance on short-time compensation (STC) linked with unemployment insurance benefits – for example by work-sharing – in several OECD countries to stabilize employment in the wake of the Great Recession, and the potential of an expanded STC for future recessions. An analysis of the relatively low use of STC in the United States is followed by comparisons of its use in Canada where it was broadened with the onset of the Great Depression, Germany where its utilization was high during the Great Recession, Belgium where STC operates in conjunction with other benefit schemes, and a belief that "STC needs to be more widely utilized in the United States in both equity and efficiency grounds".

The purpose of the final chapter, Chapter 7 "Labour Market Measures in the Crisis and the Convergence of Social Models" by Michele Tiraboschi and Silvia Spattini of the University of Modena and Reggio Emilia is to "identify whether there were particular legal devices and policies that helped some EU member states […] better than others". It applies the EU conceptual language of "social partners" and "social dialogue" not found in the other chapters that focus on the United States. After analysing the effectiveness of labour market measures – to create employment and to promote reintegration, to support the incomes of the unemployed, to maintain employment – this chapter gives consideration

to EU members' social models and their relationship to labour market performance. A distinction is made between those members social model is a welfare system and those who use the flexicurity system. The authors conclude that the adjustment to the "crisis" resulted in a convergence of the two social models.

Reconnecting to Work mostly addresses the economic and human problems of long-term unemployment in the United States. In doing so it offers and invites comparisons with the recessional unemployment and how it is addressed in other economies. It is apposite that the chapter by Tiraboschi and Spattini raises the concept of convergence in what otherwise might be a list of apparently disparate national responses. *Reconnecting to Work* deserves to be read by all who are concerned with the workings of labour markets.

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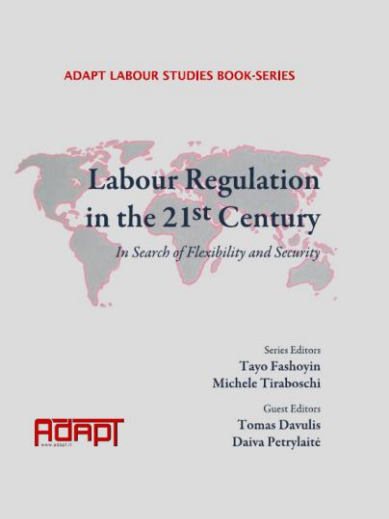
Cambridge Scholars Publishing



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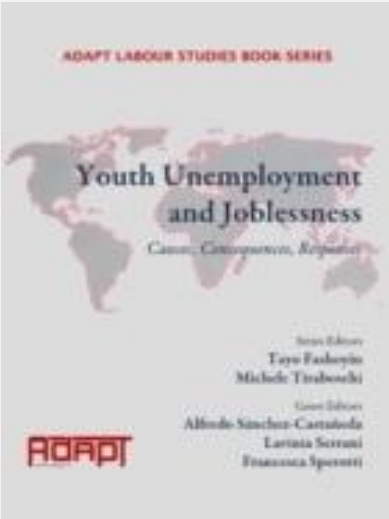

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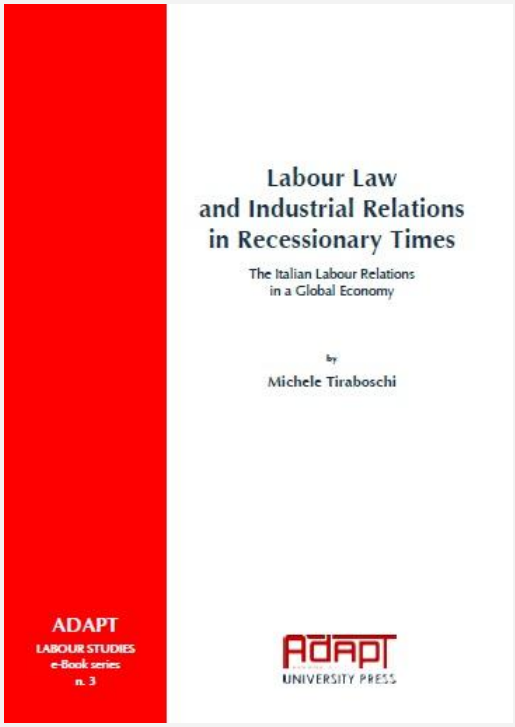

Labour Law and Industrial Relations in Recessionary Times

The Italian Labour Relations in a Global Economy

By Michele Tiraboschi

Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo

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