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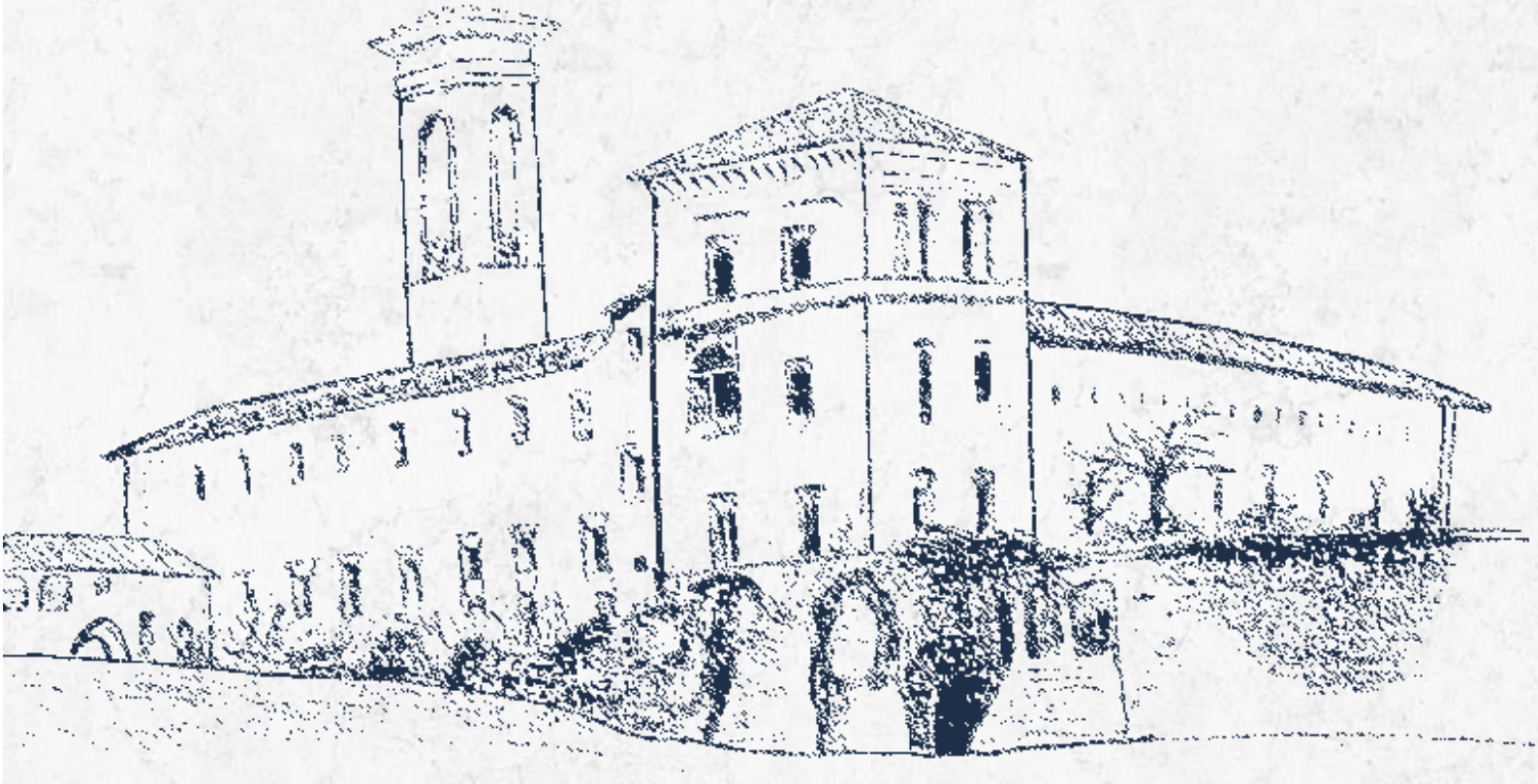

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Index

Contributions

Government as Employer of Last Resort as a Solution to Youth Unemployment in Developing Countries: Lessons from Ghana's National Youth Employment Programme

Timothy Yaw Acheampong [1]

Abstract. Due to the private sector's inability to absorb the growing number of unemployed youths particularly in developing countries, as expected from neoclassical policies, critics of the neoclassical theory – the 'critical view' – have advocated for direct job creation programmes such as the Government as Employer of Last Resort (ELR) as a solution to all forms of unemployment. This paper provides evidence on the ability of Government to tackle youth unemployment based on a study of Ghana's National Youth Employment Programme (NYEP) using features of the ELR proposal as an analytical tool.
Design/methodology/approach. A mixed-methods, case study approach.
Findings. Ghana's NYEP has contributed to building some human capital; however, it does not meet all the criteria of an effective ELR scheme.
Research limitations/implications. Although, the study focuses solely on Ghana's NYEP, lessons from the programme's implementation challenges should serve as a guide for governments and policy makers.
Originality/value. This is the first independent empirical study on the NYEP and the first in Ghana and Africa based on the ELR framework.
Paper type. Original research paper.

Keywords: *Labour Market, Youth Unemployment, Government as Employer of Last Resort (ELR), Ghana's National Youth Employment Programme (NYEP), Developing Countries, Human Capital*

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1. Introduction

According to the latest World Employment Social Outlook Trends 2018 Report of the International Labour Organisation (ILO), global unemployment remains elevated as more than 190 million people are currently unemployed.[2] Furthermore, the lack of employment opportunities for youths under the age of 25 years particularly in developing countries is still a major global challenge that requires the attention of policy makers especially now that decent work targets have been prioritised under the 2030 Agenda for Sustainable Development and it's Sustainable Development Goals (SDGs). In 2019, the number of unemployed people across the globe is projected to grow by 1.3 million. Whereas developed countries are expected to enter their sixth consecutive year of decreasing unemployment rates, in developing countries unemployment is expected to increase by half a million per year in both 2018 and 2019.[3]

Just as the trend has been in the past years, unemployment continues to be more prevalent among the youth as indicated by a current global youth unemployment rate of 13 per cent which is three times higher when compared to the adult unemployment rate of 4.3 per cent.[4] Similarly, two decades ago, in the year 2008 the worldwide youth unemployment rate was 12.1 percent compared to the global and adult unemployment rates of 5.8 and 4.3 percent respectively.[5] Again in the year 2013, the ILO indicated that 73.8 million young people were unemployed globally with another half million projected to be unemployment by 2014. Furthermore, the youth unemployment rate – which had already increased to 12.6 per cent in 2012 – was also expected to increase to 12.9 per cent by 2017 with East Asia, South Asia and Sub-Saharan Africa being the worst affected.[6]

In adopting measures to address the problem of unemployment, governments and policy makers across the globe have been confronted with what has been described as the 'great debate' regarding the appropriate roles of government interventions and free markets in job creation and the achievement of full

[2] ILO. 2018. *World Employment Social Outlook Trends 2018*. Geneva: International Labour Organisation.
[3] Ibid.
[4] ILO. 2018. *World Employment Social Outlook Trends 2018*. Geneva: International Labour Organisation.
[5] Otoo, K. N., & Torgbe, M. A. 2011. *National initiatives on Youth Employment in Ghana working paper no. 2010/01*. Accra: Labour Research & Policy Institute, Ghana TUC.
[6] ILO. 2013. *Global Employment Trends 2013, Recovering from a second jobs dip*. Geneva: International Labour Organisation.

employment. [7] On the one hand, the 'distortionists' perspective argues that government interventions in the labour market, reduce the rate of job creation and generate higher rates of unemployment.[8] This neoliberal perspective, which has formed the basis of IMF policy prescriptions to nations, posits that full employment will be achieved if labour market interventions are completely eliminated to allow market forces to operate.[9]

Evidence from many countries however, indicates that the neoclassical framework does not always lead to job creation and full employment as theorised. For instance, it has been found that 'distortionists' policies such as structural adjustment programmes (SAPs) and financial liberalisation have resulted in uneven and disappointing patterns of socioeconomic development defying the neoclassical prediction that unfettered markets lead to higher growth rates, job creation, decreased poverty and more equitable income distribution. [10]

Increasing deregulation due to SAPs has also led to social safety nets being removed while the demand for labour has reduced creating a new cadre of unprotected workers or 'labour reserves' (especially youths) in the urban informal and rural sectors.[11] Furthermore, the private sector which was also expected to absorb these workers particularly in African and other developing countries have not been able to expand to create jobs due to external competition from globalisation and neoclassical policies.[12]

The inability of the 'distortionists' policies to address the problem of unemployment, has led to 'institutionalists' proposals such as the government as employer of last resort (ELR) as a solution to the problem of unemployment and a means to facilitate equitable labour market outcomes for all.[13] The ELR proposal is based on the critical view of the labour market which posits that many people who are involuntarily unemployed, would be

[7] Ragan, C. T., & Lipsey, R. G. 2007. *Macroeconomics*. Toronto: Pearson Addison Wesley.

[8] Jha, P., & Golder, S. 2008. *Labour Market Regulation and Economic Performance: A Critical Review of Arguments and Some Plausible Lessons for India*. Geneva: International Labour Organization.

[9] Braunstein, E. 2012. *Neoliberal Development Macroeconomics: A Consideration of its Gendered Employment Effects*. Geneva: United Nations Research Institutefor Social Development (UNRISD).

[10] Antonopoulos, R. 2007. *The Right to a Job, the Right Types of Projects, Employment Guarantee Policies from a Gender Perspective*. Annandale-on-Hudson, NY: The Levy Economics Institute of Bard College.

[11] David, W. L. 2011. The Human Right to Development. In L. Keita, & L. Keita (Ed.), *Cited in Philosophy and African Development Theory and Practice* (pp. 37-55). Dakar, Senegal: CODESRIA.

[12] Ibid.

[13] Jha, P., & Golder, S. 2008. *Labour Market Regulation and Economic Performance: A Critical Review of Arguments and Some Plausible Lessons for India.* Geneva: International Labour Organization.

willing to accept an offer of work in jobs for which they are trained, at the going wage rate, if such offers were made to them.[14]

The ELR scheme variously called job guarantee, public service employment, or buffer stock employment programmes is based on the premise that, since demand in the private sector is insufficient to provide full employment as expected from neoclassical policies, governments should use their domestic policy space to mobilise labour resources to engage communities in socially and economically meaningful activities.[15] An effectively designed ELR programme is expected to have the following 5 features namely: an Infinitely Elastic Demand for Labour, Decent Wages and a Benefits Package, Enhancement of Human Capital, Deficit Financing, as well as Socially and Economically Beneficial Jobs.[16]

In line with the 'institutionalists' perspective, the Government of Ghana introduced the National Youth Employment Programme (NYEP) also called the National Youth Job Corps Programme in October 2006 as a response to the problem of youth unemployment which has been identified as the single most important challenge facing policy makers.[17] Since, the NYEP was intended to be a direct job creation programme by government, it can be considered as an ELR initiative.

Based on the tenets of the ELR proposal outlined above, an ELR programme is expected to address all forms of involuntary unemployment including youth unemployment. Thus far, most work on the ELR proposal has remained at the theoretical level.[18] This paper therefore examines prospects of the ELR proposal as a solution to addressing youth unemployment in developing economies by drawing lessons from the implementation of Ghana's NYEP based on an independent evaluation of the programme's outcomes within the ELR framework.

This paper evaluates the employment outcomes of the NYEP with emphasis on its contributions to addressing youth unemployment in Ghana. It identifies

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[14] Kaboub, F. 2009. Employer of Last Resort Schemes. In P. A. O'Hara (Ed.), *Economic Policy Volume II* (Vol. 2, pp. 179-193). Geperu, Perth, Australia: International Encyclopedia of Public Policy.

[15] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization.

[16] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization. See also Tcherneva & Wray 2005; Papadimitriou, 2008; Kaboub, 2009.

[17] Otoo, K. N., Osei-Boateng, C., & Asafu-Adjaye, P. 2009. *The Labour Market in Ghana, a descriptive analysis of the Labour Market component of GLSS V.* Accra: Labour Research & Policy Institute.

[18] Tcherneva, P., & Wray, L. R. 2005. *Employer of Last Resort Program, a case study of Argentina's Jefes de Hogar program.* Kansas City: Center for Full Employment and Price Stability.

the major factors that influenced the success of programme and compares the employment outcomes and implementation of the programme against the 5 key features of an ELR. The paper concludes that although the features of Ghana's NYEP does not meet all the criteria of a truly and effective ELR programme, lessons from its implementation challenges should serve as a guide for governments particularly in Africa and the developing world that intend to undertake youth employment programmes and resort to an ELR scheme as a solution to addressing youth unemployment in their respective countries.

2. Theoretical and Conceptual Issues

The Government as Employer of Last Resort (ELR) proposal for addressing unemployment underpins this study. Dating back to at least the 1800s, several labour market theories have been proposed to explain, to predict, and to prescribe solutions for unemployment as well as for the attainment of full employment.[19] Currently two major sets of conflicting theoretical perspectives are used in labour market analyses.[20]

On the one hand, the neoclassical theory argues that labour markets are basically efficient and fundamentally fair with full employment as the norm; whereas, critics of the neoclassical theory – the 'critical view' – which has been linked to radical and institutionalist theories such as Marxists, Post Keynesian, Feminists and the Segmented Labour market Theory argue that the market system is inherently unfair with unemployment as the norm.[21] The two perspectives disagree over the causes of unemployment, the effectiveness and fairness of the market system in allocating employment opportunities, as well as the role of government interventions and labour market institutions in achieving full employment and equitable labour market outcomes.

The neoclassical theory is based on the Continuous Market Clearing Mechanism (Say's Law), the Rational Expectations Hypothesis, and the Aggregate Supply Hypothesis.[22] The market clearing hypothesis of the neoclassical theory derived from Say's Law posits that supply creates its own demand.[23] This hypothesis argues that when the economy occasionally

[19] Snowdon, B., & Vane, H. R. 2005. *Modern Macroeconomics Its Origins, Development and Current State.* Montpellier Parade, Cheltenham: EdwardElgar Publishing, Inc.
[20] Colander, D. 2002. *The Death of Neoclassical Economics, Middlebury College Economic Discussion Paper No. 02-3.* Middlebury: Department of Economics Middlebury College.
[21] Tilly, C. 2004. Labor Markets. *Essay for Poverty and Social Welfare in the United States: An Encyclopedia,.*
[22] Snowdon, B., & Vane, H. R. 2005. *Modern Macroeconomics Its Origins, Development and Current State.* Montpellier Parade, Cheltenham: EdwardElgar Publishing, Inc.
[23] Sayre, J. E., & Morris, A. J. 2006. *Principles of macroeconomics.* Toronto:McGraw-Hill Ryerson.

diverges from its full employment output, internal mechanisms within the economy will automatically move the demand and supply of labour back to its full-employment output and its natural rate of unemployment.[24]

Another major tenet of the neoclassical model is the rational expectations hypothesis which posits that workers and employers behave rationally, gathering and intelligently processing information about things that are economically important to them in the labour market.[25] Furthermore, since employers and workers are able to gather perfect information about the labour market, it enables them to anticipate and adjust to future economic outcomes including changes in demand and supply of labour.[26]

Closely linked to the rational expectations hypothesis is the aggregate supply hypothesis which posits that changes in employment are determined by the 'voluntary' choices of workers who change their supply of labour in response to perceived temporary changes in the real wage.[27] The aggregate supply hypothesis argues that workers prefer to work more if the current real wage is below the norm, and work less (take more leisure) in the current period in the anticipation of working more (taking less leisure) in the future, when the real wage is expected to be higher. The implication of this hypothesis is that unemployment is as a result of rational and voluntary decisions made by individuals; thus, the neoclassical theory's conclusion that involuntary unemployment cannot exist and that full employment is the norm.[28]

Due to the neoclassical assumptions that individuals in the labour market make decisions rationally, and that the labour market is fundamentally fair and efficient in adjusting labour demand with labour supply, policy makers with a neoclassical orientation have adopted what has been described as a 'distortionist' perspective of labour market policy interventions.[29] According to the 'distortionist' view, any form of government interventions in the labour market, and the existence of labour institutions such as trade unions in general,

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[24] Hubbard, R. G., & O'Brien, A. P. 2006. *Economics.* Upper Saddle River: Pearson Prentice Hall.

[25] Snowdon, B., & Vane, H. R. 2005. *Modern Macroeconomics Its Origins, Development and Current State.* Montpellier Parade, Cheltenham: EdwardElgar Publishing, Inc.

[26] McConnel, C. R., & Brue, S. L. 2008. *Economics Seventeenth Edition.* NewYork: McGraw Hill/Irvin.

[27] Snowdon, B., & Vane, H. R. 2005. *Modern Macroeconomics Its Origins, Development and Current State.* Montpellier Parade, Cheltenham: EdwardElgar Publishing, Inc.

[28] Greenwald, B., & Stiglitz, J. E. 1987. Keynesian, New Keynesian and New Classical Economics. *Oxford Economic Papers, 39*(1), 119-133.

[29] Boyer, R. (2006). *Employment and decent work in the era of flexicure.* New York: United Nations .

would distort the economy, reduce the rate of job creation and generate higher unemployment.[30]

The distortionists' viewpoint therefore advocates for *laissez-faire* policies which minimises the role of government and emphasises the role of the market in addressing unemployment since in this view, regulations affect the freedom of employers to adjust the quantities of resources, one consequence of which is unemployment.[31] The distortionists' viewpoint also supports policies that remove restrictions on labour markets and help individuals to invest in skills as a means of enhancing their chances of accessing employment opportunities.[32]

The neoclassical theory and its' 'distortionist' perspective has been the foundation of the Washington Consensus – the IMF's policy prescriptions which relies largely on markets to deliver economic development and full employment based on the principles of liberalisation, privatisation and macroeconomic stability.[33] The thesis of this policy prescription is that the full employment and optimal social welfare will be achieved if labour market regulations are completely eliminated and competition is encouraged.

Several authors have used evidence from empirical studies of labour markets to contest core assumptions and policy recommendations of the neoclassical theory. For instance, Roberts notes that:

> The predominance of neoclassical logic to labour market research has contributed to the substantial deviation between theoretical models and empirical evidence.[34]

This is because the neoclassical approach leaves little space for acknowledging the influence of power, history, or culture; thus also neglecting sociological and political variables essential to labour market flexibility.[35]

Empirical evidence also indicates that, although increased productivity and economic growth has been experienced globally as a result of neoclassical policies such as structural adjustment and deregulation, the neoclassical policies

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[30] Jha, P., & Golder, S. 2008. *Labour Market Regulation and Economic Performance: A Critical Review of Arguments and Some Plausible Lessons for India.* Geneva: International Labour Organization.

[31] Ibid.

[32] Tilly, C. 2004. Labor Markets. *Essay for Poverty and Social Welfare in the United States: An Encyclopedia.*

[33] Braunstein, E. 2012. *Neoliberal Development Macroeconomics: A Consideration of its Gendered Employment Effects.* Geneva: United Nations Research Institutefor Social Development (UNRISD).

[34] *Roberts, M. J. 2004. An Inclusive Neo-Institutional Model of Labour Market Flexibility: A Case of Singapore.*

[35] Snowdon, B., & Vane, H. R. 2005. *Modern Macroeconomics Its Origins, Development and Current State.* Montpellier Parade, Cheltenham: EdwardElgar Publishing, Inc.

have not been able to generate enough employment opportunities to enable every individual participate in the benefits of growth.[36] The neoclassical policies have rather contributed to a growing informal economy characterised by low wages, poor working conditions, and the absence of social protection particularly in developing countries.[37]

For more than three centuries, neoclassical economists have considered unemployment as only a transitory phenomenon, and have either denied or minimised the existence of involuntary unemployment.[38] However, a study conducted in the UK revealed that 80 per cent of unemployed males and 75 per cent of unemployed females were involuntarily unemployed as result of factors beyond their control including sex, age, ethnicity, health, labour market experience, education, locality, and family circumstances.[39] In this regard,

> many unemployed [especially youths] who are nonetheless actively searching for a job would be shocked to find out that some economists [neoclassical theorists] view them as being voluntarily unemployed![40]

On the basis of the criticisms of the neoclassical theory discussed above, critical theories which include Marxists, Post Keynesian, Feminists and Labour Market Segmentation theories all reject the neoclassical analyses of the labour market.[41] The core argument of the critical theorists is that unemployment is a normal state of affairs within capitalism and therefore market forces are incapable of achieving social justice, and addressing the problem of unemployment.[42] From the institutional, radical, and feminist perspectives (the critical view), the structure of labour markets and other economic and social institutions influence individual actors.[43]

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[36] Antonopoulos, R. 2007. *The Right to a Job, the Right Types of Projects, Employment Guarantee Policies from a Gender Perspective.* Annandaleon- Hudson, NY: The Levy Economics Institute of Bard College.

[37] David, W. L. 2011. The Human Right to Development. In L. Keita, & L. Keita (Ed.), *Cited in Philosophy and African Development Theory and Practice* (pp. 37-55). Dakar, Senegal: CODESRIA.

[38] Kaboub, F. 2009. Employer of Last Resort Schemes. In P. A. O'Hara (Ed.), *Economic Policy Volume II* (Vol. 2, pp. 179-193). Geperu, Perth, Australia: International Encyclopedia of Public Policy.

[39] Burchardt, T., & Grand, J. L. 2002. *Constraint and Opportunity: Identifying Voluntary Non-Employment.* London: Centre for Analysis of Social Exclusion London School of Economics.

[40] Ragan, C. T., & Lipsey, R. G. 2007. *Macroeconomics.* Toronto: Pearson Addison Wesley.

[41] Forstater, M. 2002. *Unemployment, in Elgar Companion to Post Keynesian.* Edward Elgar Publishing.

[42] Tilly, C. 2004. Labor Markets. *Essay for Poverty and Social Welfare in the United States: An Encyclopedia.*

[43] Figart, D. M. 2005. Gender as more than a Dummy Variable, Feminist Approaches to Discrimination. *Review of Social Economy, 63* (3), 509-536.

Contrary to the neoclassical viewpoint that advocates laisser-faire or 'distortionists' policies, the critical viewpoint advocates for what has been described as an 'institutionalists' approach to addressing unemployment.[44] The institutionalists perspective is based on the premise that private markets without proper regulations tend to do a poor job of protecting unemployed workers and vulnerable groups such as the youth; therefore, the 'institutionalists' policy approach advocates for a wide range of labour market regulations to facilitate equitable outcomes.[45] The regulations may take the form of economic, social and judicial interventions that emerge from the legislative machinery of the government and other labour market institutions.[46]
In line with the institutionalist approach to addressing unemployment, some Post Keynesian and Feminist economists have advocated for direct job creation programmes such as Government as an ELR variously called job guarantee, public service employment, or buffer stock employment programme as a solution to achieving full employment and addressing all manners of unemployment.[47]
The ELR proposal is based on the premise that since demand in the private sector is insufficient to provide full employment, governments should use domestic policy space to generate the demand for labour.[48] The implementation of such an employment programme by government is justified on the grounds that:

> ELR can create an infinitely elastic demand for labour at a floor or minimum wage that does not depend upon long- and short-run profit expectations of business. Since only government can divorce the offering of employment from the profitability of hiring workers, the infinitely elastic demand for labour must be created by government.[49]

An ELR scheme can address the problem of youth unemployment and underemployment due to the following features of an effective ELR

[44] Tvrdoň, M. 2007. *Labour Market Flexibility, the case of Visegrad Countries*. Karviná, Czech Republic.
[45] Jha, P., & Golder, S. 2008. *Labour Market Regulation and Economic Performance: A Critical Review of Arguments and Some Plausible Lessons for India.* Geneva: International Labour Organization.
[46] Downes, A. S., Mamingi, N., & Antoine, R.-M. B. 2000. *Labour Market Regulation and Unemployment in the Carribean.* Inter-American Development Bank.
[47] Papadimitriou, D. B. 2008. *Promoting Equality Through an Employment of Last Resort Policy*. Annandale-on-Hudson, NY: The Levy Economics Institute of Bard College.
[48] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization.
[49] Minsky cite Kaboub, F. 2009. Employer of Last Resort Schemes. In P. A. O'Hara (Ed.), *Economic Policy Volume II* (Vol. 2, pp. 179-193). Geperu, Perth, Australia: International Encyclopedia of Public Policy.

programme: Firstly, an ELR is expected to provide an infinitely elastic demand for labour – this means that an ELR should offer a job to anyone who is ready, willing and able to work, regardless of ethnicity, gender, education, work experience, or age.[50] This provision of an ELR scheme would particularly benefit the youth who are more affected by unemployment than other age groups. Secondly, an ELR is also expected to provide a decent socially acceptable wage and benefits package that includes health care and social security.[51] This provision of an ELR would also benefit the youth who are more likely to be underemployed or engaged in poor conditions of work. Thirdly, an ELR is expected to facilitate the enhancement of human capital – that is, an ELR should prepare workers for post-ELR work – whether in the public or private sector by equipping participants with useful work habits and skills.[52] This provision of an ELR would also benefit the youth who face more entry barriers into the formal labour market.

Another feature of an ELR programme is socially and economically beneficial work. Proponents of the ELR posit that in order for government employment programmes to be successful, the employment opportunities should be created in labour intensive services that lead to readily visible public benefits in order to be considered a serious alternative to transfer schemes and to avoid the stigma generally attached to "welfare" programmes.[53]

Finally, proponents of ELR also advocate for deficit financing as the most sustainable funding arrangement to achieve full employment and address unemployment.[54] The deficit financing preposition is based on the premise that since government is a very credible borrower, it can issue fiats to commercial banks, asking them to credit the accounts of participants with the promise to pay back at a later date. Furthermore, since participants would be engaged in productive work and earning income, the government would gain in the form of taxes which could be pumped back into the programme.[55]

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[50] Papadimitriou, D. B. 2008. *Promoting Equality Through an Employment of Last Resort Policy*. Annandale-on-Hudson, NY: The Levy Economics Institute of Bard College.

[51] Ibid.

[52] Tcherneva, P., & Wray, L. R. 2005. *Employer of Last Resort Program, a case study of Argentina's Jefes de Hogar program.* Kansas City: Center for Full Employment and Price Stability.

[53] Dodd, R. A. 2007. *Financial Stability, Social Justice, and Public Employment in the Work of Hyman P. Minsky.*

[54] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization.

[55] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization.

3. Youth unemployment and ELR in Ghana

Available data from the Ghana Statistical Service (GSS) indicates that overall, the youth (between ages 15-24) have the highest unemployment rates in Ghana.[56] The overall unemployment rate in Ghana was 3.6 per cent; however, for young people between the ages of 15 and 24, the unemployment rate was estimated at 4.1 per cent: more than twice the adult unemployment rate (1.9%). In Ghana, unemployment is highest among urban youth particularly in the nation's capital city – Accra. This can be partly attributed to the rural-urban drift in Ghana whereby many people (especially) youths from the rural areas move to the urban centres in search of better opportunities.[57]

Available data indicates that each year about 250,000 youths enter the job market out of which the private sector absorbs just 2 per cent compelling the remaining 98 per cent to seek employment in the informal sector since remaining unemployed is considered too costly particularly for young people in the absence of social safety nets such as unemployment insurance.[58] This clearly suggests that the private sector in Ghana is currently not in the position to address the youth unemployment challenge and therefore justifies the need for government interventions to address youth unemployment in Ghana.

Over the years several policy and project specific interventions have been initiated by the government of Ghana to address youth unemployment[59]. Some of the project specific interventions include: The National Mass Cocoa Spraying Programme (NMCSP), the ILO Decent Work Programme (DWP), National Forest Plantation Programme (NFPP), Captains of Industry Programme and Students in Free Enterprise Programme (SIFE), Venture Capital Trust Fund and National Youth Fund, Local Enterprise Skills Development Program (LESDEP), Skills Training and Entrepreneurship Programme (STEP), the National Youth Employment Programme (NYEP) and even very recently the Nation Builders Corps (NABCO). Together, these initiatives have sought to offer direct jobs to large numbers of young men and women who otherwise would have remained unemployed in the informal survivalist economy; however, the biggest single youth employment initiative in

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[56] GSS 2008. *Ghana Living Standards Survey Report Of The Fifth Round (GLSS 5).* Accra: Ghana Statistical Service.

[57] UNDP. 2007. *Ghana Human Development Report towards a more inclusive society.* Accra: United Nations Development Programme Ghana.

[58] Otoo, K. N., Osei-Boateng, C., & Asafu-Adjaye, P. (2009). *The Labour Market in Ghana, a descriptive analysis of the Labour Market component of GLSS V.* Accra: Labour Research & Policy Institute.

[59] Otoo, K. N., & Torgbe, M. A. 2011. *National initiatives on Youth Employment in Ghana Working Paper No. 2010/01.* Accra: Labour Research & Policy Institute, Ghana TUC.

Ghana has been the NYEP.[60] This paper therefore focuses on the NYEP as an ELR programme.

4. Ghana's National Youth Employment Programme

As an intervention to address youth unemployment and underemployment, the Government of Ghana launched the National Youth Employment Programme (NYEP) in October 2006 to provide employment opportunities for all unemployed youths in Ghana – Ghana's National Youth Policy defines "youth" as "persons who are within the age bracket 15 and 35".[61] In this regard, the introduction of the NYEP in Ghana can be viewed as an ELR intervention. The NYEP was to be implemented in two phases with the stated objectives to identify and create jobs for the youth nationwide, to check rural–urban drift, create opportunities for self-employment ventures, and to inculcate in the youth good morals, a sense of self-discipline and patriotism.[62]

The first phase of the programme ran from 2006 to 2009 and was expected to create jobs for half a million (500,000) youth across the country in the following employment modules: Youth-In-Agri-Business, Youth-In-Trades and Vocations, Youth-In-ICT, Community Protection Unit, Waste and Sanitation Management Corps, Rural Education Teachers Assistants, Auxiliary Health Care Workers Assistants, Paid Internships and Industrial Attachments, Vacation Jobs, and Volunteer Services Modules. The second phase of the programme began in the year 2010. According to the NYEP's implementation guidelines the second phase "will take a longer view of employment issues within the context of the Growth and Poverty Reduction Strategy".[63]

The management of the NYEP is structured along Ghana's decentralisation concept. The modules were implemented nationwide by different implementing agencies including government Ministries, Departments and Agencies (MDAs), Metropolitan, Municipal and District Assemblies (MMDAs), as well as private companies. For instance, whereas the Waste and Sanitation Module was managed by a private company Zoomlion Ghana Limited, the Community Teaching Assistants, Community Protection Unit, and Health Assistants Module modules were implemented by the Ghana

[60] Otoo, K. N., & Torgbe, M. A. 2011. *National initiatives on Youth Employment in Ghana working paper no. 2010/01.* Accra: Labour Research & Policy Institute, Ghana TUC.

[61] MOYS. 2010. *National Youth Policy, towards an empowered youth impacting positively on national development.* Accra: Ministry of Youth and Sports.

[62] MMYE. 2006. *Youth Employment Implementation Guidelines.* Accra: Ministry of Manpower, Youth and Employment.

[63] MMYE. 2006. *Youth Employment Implementation Guidelines.* Accra: Ministry of Manpower, Youth and Employment.

Education Service (GES), the Ghana Police Service (GPS), and the Ghana Health Service (GHS) respectively, whiles the Paid Internship module was implemented by different MDAs and MMDAs.[64]

6. Methodology

The findings of this paper are based on an independent evaluation conducted on the employment outcomes and operations of NYEP during the first 7 years of implementation. The evaluation utilised both primary and secondary data. The primary data were obtained through interviews and focus group discussions with key informants whiles the secondary data were obtained from officials of the NYEP as well as available reports and documentation. The key informants include all participants of the NYEP and the key social partners in employment within Ghana's labour market. The NYEP participants included programme beneficiaries, past and current managers of the NYEP, and officials of the NYEP's implementing agencies and funding bodies. The social partners included representatives of the Labour Department, the Ghana Employers Association (GEA) and organised labour represented by the Ghana Trades Union Congress (GTUC) as well as officials of Ghana's National Labour Commission (NLC), and the Ghana Statistical Service (GSS). The subsequent sections discuss the findings, conclusions and recommendations of the paper.

7. Employment outcomes of NYEP 2006-2012

Official statistics indicate that the NYEP created job opportunities for 108,403 persons across the country from the inception of the programme in 2006 to December 2008.[65] By the end of the first phase of the programme (2006-2009) a little over 110,000 unemployed persons had benefitted from the programme. This level of employment was however, short of the programme's initial target to create 500,000 jobs within the first phase of the programme by about 80 percent. According to Managers of the NYEP by the year 2012 the programme had recorded 219,150 beneficiaries although more than a million unemployed youths had applied to the programme.

In terms of the nature of jobs created, secondary data obtained from officials of the NYEP indicates that 7 employment modules were implemented in the

[64] NYEP. 2011. *National Youth Employment Program, NYEP.* NYEP Presentation to YEN Ghana. April 9, 2011, Accra.

[65] The Budget Statement and Economic Policy of the Government of Ghana for the 2009 financial year presented to Parliament on Thursday, 5th March, 2009.

first phase of the programme. The modules included the Youth in Paid Internships, Community Health Assistants, Community Protection Unit, Community Teaching Assistants, Afforestation, Waste and Sanitation as well as the youth in Agri-Business modules. According to program officials, in the second phase of the programme, beginning from 2010, additional modules including the Youth in Fire Safety & Prevention, Prison Support Services, Immigration, ICT Mobile Phone Repairs, Dress Making & Fashion, Hairdressing & Beauty Care Services, Road Maintenance, Bamboo Processing, Film Making, as well as the Youth in Grasscutter Rearing modules were added to the programme.[66]

It should however be noted that all of the employment opportunities provided by the NYEP were temporary in nature. According to the NYEP Implementation Guidelines document, beneficiaries were to spend a maximum of 2 years on the programme. This was reaffirmed by managers of the NYEP who said the programme did not offer permanent employment opportunities but rather the programme was intended to be a stop gap measure that prepares youth for permanent employment. However, whilst some beneficiaries had either exited into mainstream employment (with public or private institutions) or were engaged in their own businesses (such as Dressmaking, Agro Farms, Mobile Phones Repairs Centres) as at the time of this study, interviews with some beneficiaries and officials of implementing agencies revealed that several beneficiaries had been on the programme for more than 2 years contrary to programme's implementation guidelines.

It should also be noted that the NYEP did not actually create jobs. The programme played more of a placement role by entering into memorandum of understandings (MOUs) and liaising with the various implementing agencies indicated earlier, who actually engaged programme beneficiaries. Other functions of the NYEP included paying beneficiaries in the paid employment modules such as the Teaching Assistants, Health Assistants, Community Protection, Paid Internships and the Waste and Sanitation modules. In the case of the Agri-Business Module, the NYEP provided beneficiaries with agricultural inputs and fertilizer whereas beneficiaries in the Hairdressing & Beauty Care Services Module for instance were provided with equipment to set up shops upon their exit from the programme. The NYEP also assisted some beneficiaries with funds to either set up or grow their businesses.[67]

[66] NYEP. 2011. *Draft National Youth Employment Programme Strategic Plan Document for The Year 2011-2013*. Accra: National Youth Employment Programme.

[67] NYEP. 2011. *National Youth Employment Program, NYEP*. NYEP Presentation to YEN Ghana. April 9, 2011, Accra.

As at January 2013, beneficiaries in the NYEP were paid monthly allowances ranging from Gh¢50.00 to Gh¢210.00 which was equivalent to about $25.00 to $105.00 a month; however, they did not receive any other benefits. The allowances were allocated based on modules and educational attainment. For instance interviews with participants of the NYEP revealed that in the Paid Internships Module beneficiaries with DBS qualifications received Gh¢110.00 whereas beneficiaries with HND, Bachelor, and Master degrees received Gh¢140.00, Gh¢160.00, and Gh¢210.00 respectively.

At the inception of the programme in 2006, the wages of all beneficiaries were pegged above Ghana's monthly minimum wage which was Gh¢43.20 equivalent to about $47.00 (due to depreciation of the Ghana cedi to the US Dollar by the year 2013 Gh¢50.00 was only worth $25.00). By the end of the first phase of the programme in 2009, over 50% of beneficiaries were being paid wages below Ghana's monthly minimum wage which was Gh¢71.69 equivalent to $51.00. For instance, although Ghana's monthly minimum wage increase to Gh¢83.97 in 2010 and was over Gh¢120.00 by the year 2012, beneficiaries in the Waste and Sanitation Module were still paid Gh¢50.00 per month (below the minimum wage) until January 2012 when their wages was increased to Gh¢100.00. However, this lasted only for about a month because on February 6, 2012 the minimum wage had increased to Gh¢120.96 equivalent to $71.57.

Managers of the NYEP justified the low wages paid to beneficiaries on the grounds that beneficiaries were paid allowances and not wages; furthermore, beneficiaries were considered as apprentices and not permanent employees. The NYEP's Draft Strategic Plan Document 2011-2013 also points out that, "despite the increases announced by the Government, salaries have remained unchanged [in the NYEP] since 2006/7" because the Programme hitherto was not covered by an Act of Parliament, and other supporting documentation such as Legislative Instrument (LI), Conditions of Service, Scheme of Service, Job Inspection and evaluation reports that regulate the levels of salaries adjustments.[68]

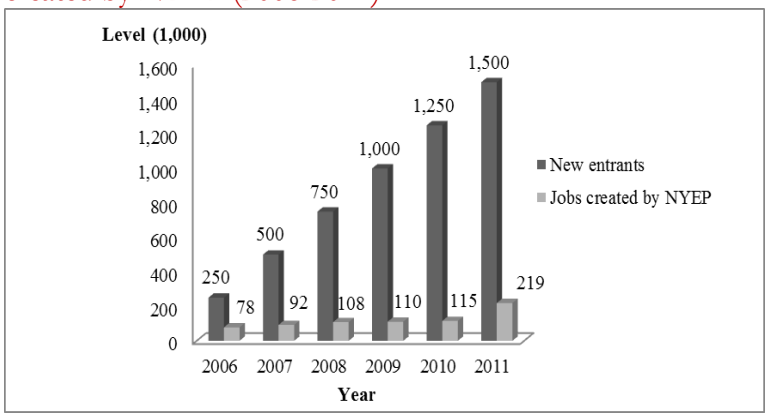
8. Impact of NYEP on Youth Unemployment in Ghana

The NYEP has made some contributions to addressing youth unemployment in Ghana particularly in the areas of enhancing human capital by providing skills training and valuable work experience for many unemployed youths who

[68] NYEP. 2011. Draft National Youth Employment Programme Strategic Plan Document For The Year 2011-2013.

otherwise would not have gained such benefits if it had not been for the programme. Notwithstanding that, the programme has not significantly contributed to reducing unemployment and underemployment in the country. As indicated earlier, within the first 6 years of the NYEP about 219,150 persons benefitted from the programme. However, available data indicates that each year alone, about 250,000 youths enter the job market out of which the private sector absorbs just 2 per cent.[69] Accordingly, within the first 6 years of the NYEP, it is estimated that about 1.5 million youths would have entered Ghana's labour market out of which the NYEP could only absorb about 15 percent of the new entrants. Since, Ghana's private sector can only absorb 2 percent of the new entrants; over 80 percent of the new entrants would still remain unemployed or underemployed in spite of the NYEP as illustrated in Figure 1.

Figure 1: Comparison of estimated unemployed new entrants and level of jobs created by NYEP (2006-2011)



Source: Author's construct computed from NYEP's secondary data 2007-2012; Otoo, Osei-Boateng, & Asafu-Adjaye, 2009.

The inadequacy of the level of jobs in the NYEP to match the level of growing youth unemployment in Ghana has been reiterated by the Draft NYEP Strategic Plan 2011-2013 which states that, "the analysis of data on registered youth from NYEP Regional and District Offices suggests that a million unemployed youth are anxiously waiting for NYEP job placement

[69] Otoo, K. N., Osei-Boateng, C., & Asafu-Adjaye, P. 2009. *The Labour Market in Ghana, a descriptive analysis of the Labour Market component of GLSS 5*. Accra: Labour Research & Policy Institute.

opportunities and urgent actions are required to meet these urgent social, economic and security challenges".[70]

The comparison of the level of jobs in the NYEP against the level of unemployed youths, who enter Ghana's labour market yearly coupled with the observations of the NYEP's Draft Strategic Plan, clearly indicates that the NYEP was unable to solve the problem of youth unemployment in Ghana. These findings are also consistent with an earlier study which observed that "one can aptly come to the conclusion that the NYEP has been deficient and mediocre in solving the problem of youth unemployment in Ghana in a manner that truly promotes the interest of young people".[71]

9. Implementation Challenges of NYEP

The implementation of the programme was confronted with several challenges mainly because the programme was introduced before some of the necessary supporting documents and structures such as a National Employment Policy, a legal framework, institutional linkages with social partners, as well as reliable and consistent funding source(s). When asked why the programme began without the necessary supporting structures, an official of the NYEP explained that:

> We needed to do something to contain youth anger pertaining to youth unemployment. Maybe an Arab Spring or a Ghanaian Spring would have happened before we would implement, if that is what you want. Do you want people to go out on the street and start burning cars before we rush and put a policy together and roll out? The programme was hardly put together on an ad hoc basis but the understanding was that as we move on we address the challenges step by step and all the necessary structures would be put together. If we say we are going to wait for all these structures, we would never take off. [72]

Seven (7) years into the programme, all the relevant structures – National employment policy, legal framework, institutional linkages with social partners, as well as a reliable source of funding were still found to be not in place. The implications of how the absence of each of these structures affected the implementation of the NYEP are discussed next.

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[70] NYEP. 2011. Draft National Youth Employment Programme Strategic Plan Document For The Year 2011-2013.

[71] Gyampo, R. 2012. Youth Participation in Youth Programmes: The Case of Ghana's National Youth Employment Programme. *The Journal of Pan African Studies*, 5(5), 13-28.

[72] Interview with the NYEP's former Deputy National Coordinator in Charge of Communications in Accra April 2012.

9.1 Absence of National Employment Policy

The implementation of the NYEP was not linked to any national employment policy document or development strategy although the NYEP's Implementation Guidelines states the programme was conceived within the broader national policy of addressing unemployment. According to Ghana's National Development Planning Commission (NDPC) as part of GPRS II, the government was expected to adopt an employment policy and national strategy entailing initiatives for social protection, social dialogue, and social inclusion, especially, for vulnerable members of the population such as women, persons with disability, and youths.[73] In this regard, the NYEP's implementation guidelines, notes that the programme was to be absorbed into a broader national framework based on and directed by a National Employment Policy and Strategy in line with GPRS II.[74] However, although the MMYE has formulated a Draft National Employment Policy, the document is yet to be approved by the Parliament of Ghana.

The absence of an approved national employment policy document to govern the operations of the NYEP is problematic because the policy was to serve as a guide to employment creation in the country and also to ensure that the activities of the NYEP would be coordinated within national employment efforts in both the public and private sectors in collaboration with the various social partners as outlined in GPRS II and the Draft National Employment Policy. Furthermore, the policy would have served as a monitoring tool for stakeholders in measuring the impact of the NYEP to addressing the problem of youth unemployment in the country.

9.2. Absence of Legal framework

In addition to the absence of a National Employment Policy, the absence of a legal backing in the form of an Act of Parliament or LI was another factor that affected the implementation of the NYEP. Interviews with both past and current managers of the NYEP as well as document analysis of the NYEP's Strategic Plan revealed that the programme lacked a legal framework to govern its operations and employment practices. Both past and current managers of the NYEP said the absence of a legal framework affected the operations of the

[73] NDPC. (2005). *Growth and Poverty Reduction Strategy (GPRS II) 2006-2009*. Accra: National Development Planning Commission.

[74] MMYE. 2006. *Youth Employment Implementation Guidelines*. Accra: Ministry of Manpower, Youth and Employment.

programme. According to an official of the NYEP, "until its status is enshrined in the constitution of the state, the Programme cannot have the maximum authority needed to take major decisions that will expand activities and also widen its funding sources."[75]

A legal framework stipulating the objectives, target beneficiaries, code of conduct for programme officials, selection criteria, funding sources of the NYEP among other structural and institutional arrangements was necessary to ensure fairness, uniformity and consistency in how the programme was implemented since legal frameworks provide guidelines, regulations and standards to govern the behaviour of programme implementers and limit the exercise of discretion by government officials.[76]

Various stakeholders interviewed were of the view that without a legal framework, the NYEP could be terminated at any time by the government in power without parliamentary approval. For instance, explaining the importance of a legal framework to govern the NYEP, an official of the Ghana TUC observed that:

> More often than not, when governments are out of power, most of their programmes get out with them…So that once you have a policy backed by law, it cannot be thrown out like any other project or programme but it becomes entrenched and so it doesn't matter if you are NDC or NPP, you would have to implement it. [77]

According to Managers of the NYEP, as a consequence of the various challenges associated with the absence of a legal framework, the NYEP was transformed into the Youth Employment and Entrepreneurial Development Agency (GYEEDA) in August 2012 in line with steps stipulated by Cabinet to the sector Ministry to make the programme a permanent entity that is more efficient. According to media reports:

> The National Coordinator of the Programme, Abuga Pele, who announced this in Accra said the new name formed part of measures to restructure the programme. He said the new Agency will improve on the payment structure of beneficiaries, come out with an exit plan and will include more modules that will focus on entrepreneurship. [78]

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[75] Interview with Human Resource and Development Manager of NYEP in Accra, November, 2011.

[76] FAO. 2000. *Legal Framework Analysis For Rural And Agricultural Investment, concepts and guidelines. Rome:* Food and Agriculture Organization of the United Nations, Legal Office.

[77] Interview with the Deputy Secretary General of the Ghana Trades Union Congress (TUC) in Accra.

[78] Myjoyonline news article entitled 'NYEP changed to GYEDA' Published On: August 19, 2012.

It is however, too early to evaluate the impact of this transformation of the NYEP into GYEEDA on the effectiveness of the programme in addressing youth unemployment in Ghana.

9.3 Absence of Collaboration with Social Partners

Another factor that affected the implementation of the NYEP was the absence of formal collaborations with social partners. An examination of NYEP's Implementation Guidelines, Draft Strategic Plan and interviews with the programme's officials and social partners revealed that the NYEP was conceptualised and implemented without collaboration from some of the key social partners in employment – the Labour Department, Ghana TUC, and GEA. The ILO points out it is necessary to include social partners in the design and implementation of youth labour market programmes since social partners play an important role in creating a platform for exchange of ideas and ownership.[79]

Furthermore, Section 112 of Ghana's Labour Act 651 (2003) has established the National Tripartite Committee of social partners - government, employers' organisations, and organised labour in order to promote employment development and peaceful industrial relations in Ghana's labour market. Ghana's Draft Employment Policy as well as the GPRSII document also underscores the need for government to collaborate with social partners in employment creation. However, interviews with officials of both the Labour Department and NYEP confirmed that even the Labour Department was not consulted before the establishment of the Programme although the Labour Department is the government agency with the legal mandate to handle employment related issues and was located in the same sector ministry as the NYEP. Meanwhile the Labour Department has a legal mandate to provide the government with labour market information for policy formulation.

The absence of collaboration and a formal linkage between the NYEP and its social partners led to duplication of efforts and overlapping of functions of various state agencies. For instance, it was found that some functions which the Labour Department is legally mandated to perform as outlined in Section 3 of the Labour Act 651, (2003) were duplicated by the NYEP because of the absence collaboration. According to Ghana's Labour Act, the Labour Department is mandated to register and keep a database of all unemployed persons in the country. The Labour Department is also mandated to provide

[79] ILO. 2008. *Employment Report No. 1, Apprenticeship in the informal in Africa.* Geneva: International Labour Organisation.

information on the demand of labour and thereby facilitate the supply of labour to meet the demand based on requirements of employers.[80] However, the NYEP performed these same functions. For instance, although different agencies operated the various NYEP employment modules, the NYEP also registered unemployed youths and liaised with the employing agencies so that when these agencies declared vacancies, the NYEP responds by supplying them with unemployed youth who had registered with the programme. However, if there was formal collaboration there would have been no need for two different government agencies to carry out the same functions but rather the limited resources could have been used to strengthen existing structures.

The study also found that the absence of collaboration between the various government agencies responsible for employment issues exacerbated the disjointed nature of how employment data is maintain in the country. For instance, it was found that the Labour Department had its own data on registered unemployed persons; however, the Department was not updated on the employment figures of the NYEP although both agencies were under the Ministry of Manpower, Youth, and Employment when the NYEP was launched in 2006. Meanwhile the GSS is another agency that maintains employment data. Although the unemployment data from the GSS is often quoted as the official data of the country, it is different from that of the Labour Department. Interviews with officials of these 2 agencies revealed that meetings had been held with other stakeholders with the view of harmonising labour market information in the country.

All the social partners were of the view that formal institutional linkages and collaboration with the NYEP would have enabled the programme to benefit from a more holistic and clearly defined employment framework informed by data and the needs of both employers and workers. For instance, a representative of the GEA said a relationship with the NYEP would have enabled the GEA to make suggestions to improve the programme especially with regards to the needs of employers and noted that, "if government would give our members tax reliefs and other incentives we would be happy to open our doors for people [NYEP beneficiaries] to get in and acquire the requisite skills and some can be given permanent employment opportunities".[81]

Officials of the Ghana TUC were of also of the view that a formal relationship between the NYEP and workers' unions was very important for the achievement of the decent work agenda. In this regard, an Officer of the Ghana TUC noted that, "our business is to protect the people in the labour

[80] Labour Act 651 (2003). Accra: Ghana Publishing Company, Assembly Press.

[81] Interview with Programme Manager of the Ghana Employers' Association in Accra November, 2011.

market whether they are in the Ghana TUC or not. Once the NYEP has to do with employment and youth, it concerns us. So the relationship is very important".[82] The TUC officer added that, "ideally they are the government so they have to identify all the social partners and bring us on board because their work will inform the type of actions we have to take".[83]

In separate interviews, representatives of the social partners reiterated the value of the NYEP since it aimed to address some of the youth unemployment challenges confronting the nation; however, they questioned why government would make such a very important social intervention in the labour market without seeking input from, and collaborating with the social partners. Input from social partners was necessary to influence the quantity and quality of employment opportunities provided, ensure that the employment practices of the NYEP was in conformity with labour standards, as well as to minimise duplication of effort on the part of various stakeholders.

9.4. Inadequate and unreliable Funding

Inadequate and irregular funds were also identified as major factors that affected the implementation of the NYEP. This challenge was largely as a result of the funding arrangement of the programme. For instance, the NYEP did not programme did not have a single source of funding. The NYEP was entirely financed by public sources of funds. The Ministry of Finance and Economic Planning (MOFEP) provided a portion of its budget to the programme while other statutory funding bodies including the Ghana Education Trust Fund (GETFund), National Health Insurance Levy (NHIL), the Road Fund, and District Assembly Common Fund (DACF) provided portions of their yearly allocations to the NYEP based on Parliamentary approval.[84]

Following an Act of Parliament in 2008, the Communication Service Tax (CST) was also mandated to provide not less than 20% of its revenue to the NYEP. Allocation from each of the funding sources however, varied from year to year. Furthermore, interviews with officials of the NYEP, and funding bodies as well as a document analysis of the NYEP's Draft Strategic Plan 2011-2013 revealed that, funds received by the NYEP from the various sources was inadequate and irregular. Since the NYEP did not have the legal backing to compel the funding bodies, the funding bodies had the discretion

[82] Interview with the Youth Desk Officer of the Ghana Trades Union Congress (TUC) in Accra November, 2011.
[83] Ibid.
[84] The Budget Statement and Economic Policy of the Government of Ghana for the 2007 Financial Year presented to Parliament on Thursday, 16thNovember, 2006.

to determine the time and amount of monies they wanted to allocate to the NYEP. Consequently, the NYEP's Draft Strategic Plan states that, "the perpetual delay and refusal in the releases of allocated funds by the various funding sources continues to distort the Programmers' annual projections and deliveries. These challenges exist as statutorily, funds allocated to the Programme cannot be deducted at source by the Central Government."[85]
Officials of the NYEP indicated that, for a greater part of the year 2008, recruitment into the NYEP had to be suspended due to inadequate funds to implement the programme.[86] Due to the inadequate and irregular nature of the funds received by the NYEP, Ghana's Agricultural Development Bank (ADB) was brought in to assist the programme by pre-financing some of its costs. An official of the NYEP explained the relationship between ADB and the NYEP as follows:

> When we had employed between 10,000 and 40,000 people we could pay all the beneficiaries every month. Then we realised that no, the money that we get every month cannot be sustained. Because we receive our money every four months, we always had four months arrears. So we brought in ADB in 2007/2008 to serve as a bridge. So ADB came to pre-finance. Because ADB belongs to government, government can direct ADB that go ahead and pay. But the government was not able to meet its expected revenues. So along the way ADB also refused to assist us.[87]

As indicated by the NYEP official, the funding arrangement with ADB was also unsustainable due to the government's inability to meet revenue targets. As a consequence, by the year 2011, the NYEP was indebted to the ADB Gh₵23million which is about $12million.[88] According to a report of the ADB:

> As at 31 December 2011, the Bank had an exposure of GH₵28,835,222 (2010: GH₵ 25,316,614) as part of Loans and advances to customers owed by the NYEP.[89]

Funding was still the major challenges confronting the NYEP seven (7) years into the implementation of the programme.

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[85] NYEP. 2011. Draft National Youth Employment Programme Strategic Plan Document For The Year 2011-2013.
[86] Interview with former NYEP Deputy NYEP Coordinator in charge of Administration and Internships in Accra, November, 2012.
[87] Interview with the Human Resource and Development Manager of the NYEP in Accra April 2012.
[88] NYEP. 2011. Draft National Youth Employment Programme Strategic Plan Document For The Year 2011-2013.
[89] ADB. 2012. Annual Report & Financial Statements 2011. Agricultural Development Bank.

9.5. Influence of Politicians, Cronyism and Corruption

Interviews with participants of the NYEP, social partners as well as media reports revealed that bi-partisan politics, cronyism, nepotism, discrimination, and other corrupt practices affected the implementation of the NYEP. The incidence of discrimination and bi-partisanship particularly in recruitment of programme officials was confirmed by interviews with officials of Ghana's National Labour Commission (NLC) and document analysis of their records.
For instance, the official records of the NLC confirmed the testimonies of former NYEP coordinators who revealed that, when there was a change of government in 2009, all the National Coordinators of the NYEP with the exception of one individual were sacked and replaced with officials of the ruling political party on the grounds that they held a different political ideology from the new government.[90] This resulted in a petition initiated by the aggrieved coordinators and received by Ghana's NLC on the 25 of March, 2010.[91] The NLC ruled judgement in favour of the aggrieved coordinators and ordered the new leadership of the NYEP to pay damages to the affected coordinators for unfair terminations.[92]
The findings above are consistent with an earlier study conducted by some officials of the Ghana TUC which noted that:

> The other major challenge the NYEP faces has to do with the seeming politicisation of the programme. The appointment of ruling party officials as coordinators both at the regional and district levels and the direct involvement of Metropolitan/Municipal/District Chief Executives [who are also political appointees] have greatly compromised the national character of the programme. This has negatively affected how people get recruited into the programme. The nepotism, cronyism and discrimination in the programme and referred to by participants should not be lost on the stakeholders.[93]

In addition to the cronyism and discrimination, the implementation of the NYEP was also affected by several corrupt practices including sexual harassment, improper recruitment, and financial malfeasances which have resulted in the state losing millions of Ghana cedis, several NYEP coordinators

[90] Interviews with past and current Coordinators of the NYEP 2011 to 2012.
[91] Interview with Head of Industrial Relations at Ghana's National Labour Commission in Accra April 2012 as well as document analysis of dockets at the NLC in Accra.
[92] Ibid.
[93] Baah, A. Y., Achakoma, K. A., & Ampratwum, E. F. 2009. *Working Conditions in the National Youth Employment Programme in Ghana*. Accra: Ghana Trades Union Congress and Fredrich-Edbert-Stiftung.

losing their jobs whiles others have faced criminal prosecutions.[94] Some of the reported incidences of corruption include the following: 6 formal coordinators of the NYEP were put to trial at a Kumasi High Court for allegedly stealing 6,638 bags of fertiliser meant for the Youth in Agriculture Module NYEP in 2007; similarly, the Tuna-Kalba District Coordinator of the NYEP in the Northern Region was arrested on May 31, 2007, detained and released on bail by the Sawla Police for allegedly stealing 22 bags of fertilizer belonging to the programme; the Coordinator of the National Youth Employment Programme in the Awutu Senya District in the Central Region was suspended for allegedly extorting monies from newly recruited personnel of the programme in March 2011; also in March 2011, the District Coordinator for Ajumako Eyan-Essiam in the Central Region was dismissed for unlawfully deducting allowance of beneficiaries and pocketing their allowances worth Gh¢7,600; The NYEP coordinator for Bibiani-Anwianso-Bekwai district in the Western region was sacked for illegal recruitment and abuse of office by having sex with female applicants in exchange for jobs; similarly, the Tamale Central Coordinator of the NYEP in the Northern Region was interdicted by the Management of the programme for allegations of sexual misconduct levelled against by some female beneficiaries.

10. Lessons from NYEP with respect to ELR proposal

10.1. Infinitely Elastic Demand for Labour

Firstly, an ELR is expected to provide an Infinitely Elastic Demand for Labour such that anyone who is ready, willing and able to work, regardless of ethnicity, gender, education, work experience, or age is able to get employment.[95] Evidence from the employment outcomes of the NYEP indicates that this criterion of an ELR programme was not met by the NYEP. Out of over a million applicants to the NYEP within the first 6 years of the programme, only 20 per cent have been able to benefit from the programme.

10.2. Decent Wages and a Benefits Package

An ELR is also expected to provide a uniformly distributed decent socially acceptable wage and benefits package that includes health care and social

[94] Interview with Human Resource and Development Manager of NYEP in Accra April 2012.
[95] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries.* Geneva: International Labour Organization.

security.[96] This criterion of an ELR was also not met by the NYEP. NYEP beneficiaries did not receive any form of benefits such as health care or social security. Furthermore, wages in the NYEP were not uniformly distributed whiles many beneficiaries were also paid wages below Ghana's national minimum wage as discussed earlier.

10.3. Enhancement of Human Capital

An ELR is also expected to facilitate the Enhancement of Human Capital by preparing workers for post-ELR work–whether in the private or private sector by equipping participants with useful work habits and skills.[97] The NYEP met this criterion of an ELR because interviews with officials of the GPS, GRA, and GHS as well as some former NYEP beneficiaries who are now permanent employees with the GRA, GPS and the GHS confirmed that some beneficiaries have gained permanent employment opportunities with their respective agencies as a direct result of their participation in the programme. Other beneficiaries have also received formal and informal training as well as practical experience in professions such as nursing, teaching policing, road maintenance, hair dressing, sewing, and grasscutter rearing as a direct result of their participation in the NYEP. The achievements of the NYEP with regards to the enhancement of human capital is not far reaching since only a small fraction of the unemployed youth population and NYEP applicants benefitted from the programme. Furthermore, since there are inadequate jobs in Ghana's labour market, there is no guarantee that training and experience gained from the NYEP will result in permanent employment opportunities for beneficiaries.

10.4. Deficit Financing

Proponents of ELR also advocate for deficit financing as the most sustainable funding arrangement to achieve full employment and address unemployment.[98] The NYEP partial met this criterion of an ELR scheme. The funding arrangement of the NYEP was not based on deficit financing. Although managers of the programme resorted to deficit financing through ADB during the implementation of the programme, the arrangement was unsustainable

[96] Papadimitriou, D. B. 2008. *Promoting Equality Through an Employment of Last Resort Policy*. Annandale-on-Hudson, NY: The Levy Economics Institute of Bard College.
[97] Tcherneva, P., & Wray, L. R. 2005. *Employer of Last Resort Program, a case study of Argentina's Jefes de Hogar program*. Kansas City: Center for Full Employment and Price Stability.
[98] Wray, R. L. 2007. *Government as employer of last resort, could it work for developing countries*. Geneva: International Labour Organization.

because the government was unable to pay back ADB as promised due to the government's inability to meet revenue targets. Furthermore, the wages paid to beneficiaries was inadequate to generate sufficient taxes to be pumped back into the programme as is expected from an ELR scheme. In this regard, although the NYEP resorted to deficit financing in the course of its implementation, it was not designed and implemented as proposed by proponents of ELR.

10.5. Socially Beneficial Jobs

According to proponents of the ELR, in order for government employment programmes to be successful, the employment opportunities should be created in labour intensive services that lead to readily visible public benefits in order to be considered as a serious alternative to transfer schemes and to avoid the stigma generally attached to "welfare" programmes.[99] Based on this criterion, the nature of jobs created in the NYEP conforms to ELR proposal since the services provided by NYEP beneficiaries were socially beneficial. For instance Managers of the NYEP noted that: the Health Assistants Module was initiated to augment the shortage of nurses nationwide; the Waste and Sanitation Module was as also informed by need to clean up the excess waste that waste collection companies are unable to collect and also the need to keep the environment clean; the Community Teaching Assistant Module was also informed by the need for more teachers in the rural areas and deprived schools where many trained teachers refused postings. Consequently, over 2,000 rural and deprived schools have been revived as a result of the implementation of the NYEP.[100] In light of the above, it is clear that the nature of work performed by NYEP beneficiaries is socially beneficial.

It can be concluded based on the assessment of the NYEP's employment outcomes against the 5 key features of an ELR that the NYEP has some attributes of an ELR but the programme cannot be said to be truly an ELR scheme. Nevertheless the challenges encountered in the course of the implementation of Ghana's NYEP provide useful lessons for governments on in Africa and elsewhere who intend to resort to a direct job creation programme to address the problem of youth unemployment.

[99] Dodd, R. A. 2007. *Financial Stability, Social Justice, and Public Employment in the Work of Hyman P. Minsky.*

[100] NYEP. 2011. *National Youth Employment Program, NYEP.* NYEP Presentation to YEN Ghana. April 9, 2011, Accra.

11. Conclusion and Recommendations

The NYEP has been described by all social partners in Ghana as a commendable initiative due its primary objective of addressing the problem of youth unemployment in Ghana. However, empirical evidence on employment outcomes of the after the first 7 years of implementation indicate that the programme is incapable of solving the youth unemployment challenge in Ghana. Although the NYEP builds human capital by providing youths with experiences and skills to make them more employable, inadequate jobs in both the public and the private sectors makes such a smooth transition from the programme into permanent employment unrealistic. In addition to inadequate and irregular funding, the absence of a national employment policy, legal framework, and collaboration with social partners in addition to the existence of politicisation, nepotism, cronyism, discrimination, and corruption were identified as major factors that affected the success of the NYEP.

In view of the challenges and lessons obtained from the implementation of Ghana's NYEP, it is recommended that, in order, for government to successfully serve as an ELR, a national employment policy is required to coordinate all employment activities. A legal framework should also be in place to govern the operations of the employment programme. In addition, government interventions to address youth unemployment must be devoid of partisanship and be based on credible data; this requires that all social partners are consulted in the conceptualisation and implementation of the programme, whilst programme officials are appointed based on competence and not political considerations. Finally, reliable and adequate funding is also required to ensure the sustainability of the programme; however, in order for deficit financing to work, governments must ensure that they will be able to generate enough revenue preferably through the productivity of the employment programme itself to pay back bank loans. The above recommendations are more likely to be realised if government employment programmes are conceptualised and implemented on the basis of the ELR proposal with the aim of achieving full employment and equitable labour market outcomes for all individuals irrespective of their demographic characteristics.

The Highest Skilled Workers of Industry 4.0: New Forms of Work Organization for New Professions. A Comparative Study

Matteo Avogaro [1]

Abstract

Purpose – The purpose of the paper is to investigate the figure of the highest skilled workers of Industry 4.0, the need of protection and more freedom to operate in the labour market, and the possible solution to this issue.

Design/methodology/approach – The paper analyses the evolution of work organization fostered by Industry 4.0, and in particular the juridical figures of strategic employee sharing, new mutualist workers' organizations and the French statutory regulation of 2016 concerning legal protection for workers on platform.

Findings – The paper highlights how the digitization of manufacturing will modify the condition and the requests of its highest skilled workers. To reply to this challenge, the better solution seems to be a flexible approach, regulated by statutory law – possibly integrated by collective bargaining – to allow the parties to choose the best juridical structure for each practical situation, avoiding rigid regulations that could impair the effectiveness of the solutions analysed.

Research limitations/implications – The research uses an analytical and comparative approach based on statutory regulation and workers' organizational praxis, to provide for a detailed description of the considered juridical figures.

Originality/value – This paper analyses the most relevant juridical structures that could be adapted to assure a relevant degree of labour protection to the considered highest skilled workers, allowing them, at the same time, to provide their services to a wide range of customers, highlighting pros and cons of each considered strategy and suggesting an overall approach to this issue, from a European point of view.

Paper type – Qualitative Research Approach has been adopted in this Paper.

Keywords - *Industry 4.0, Highest skilled workers, Strategic employee sharing, Umbrella companies, Associational unionism, Work on platform.*

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1. Industry and Manufacturing are Facing the Rise of a New Paradigm of Workers

The almost global process of evolution and digitization involving manufacturing and in general the industrial sector – known as Industry 4.0 – seems to be destined to influence and transform a vast number of aspects concerning factories organization and, perhaps, the traditional idea of work itself. [2]

The affirmation of a circular interaction between research, production, services, and consumer, is based on the rapid diffusion of smart machinery and commodities[3] that, utilizing sensors, big-data, and mobile internet connections, allows entrepreneurs to know in real time consumers' reactions in the market, leading to just-in-time production, together with the increased possibility to work remotely, by mean of smartphones and tablets. This technology, not requesting the contextual presence of a human operator, will influence, among other elements, the contents of the labor agreements concerning the analyzed productive sector.

In this frame of reference, the employer's power of direction, the distinction between time devoted to work and private life, the level of tasks, the consequent education requests and the structure of retribution are going to encounter a rapid evolution.

Typical employees of Industry 4.0, indeed, will get used to being more autonomous than in the recent past, working in a team, covering different roles and with a problem-solving approach, rather than limiting themselves to execute the employer's instructions.[4] It is possible to envisage that employees will be able to spend part of their business hours outside the factory, thanks to

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[2] See, *inter alia*, with reference to digitization, Industry 4.0 and their impact on work organization, McKinsey Global Institute, *A future that works: automation, employment and productivity*, McKinsey Global Institute, 2017; F. Seghezzi, *La nuova grande trasformazione*, Adapt University Press, 2017; K. Shawb, *The Fourth Industrial Revolution*, World Economic Forum, 2016; M. Weiss, *Tecnologia, ambiente e demografia: il diritto del lavoro alla prova della nuova grande trasformazione*, Diritto delle Relazioni Industriali, 3, 2016, 625 ff.; D. Wetzel, *Arbeit 4.0: Was Beschäftigte und Unternehmen verändern müssen*, Verlag Herder, 2015.

[3] M. Tiraboschi, F. Seghezzi, *Il piano nazionale industria 4.0: una lettura lavoristica,* Labour Law Issues, 2, 2, 2016, I.16. For a reading of Industry 4.0 as a development of technologies adopted from the Eighties, see A. Salento, *Industria 4.0, imprese, lavoro. Problemi interpretative e prospettive,* Rivista Giuridica del Lavoro e della Previdenza Sociale, 2, 2017, 177-178.

[4] R. Del Punta, *Un diritto per il lavoro 4.0*, paper presented during the conference Impresa, lavoro e non lavoro nell'economia digitale, Brescia, 12-13 October 2017, 5-10; for a different point of view, emphasizing the increasing possibilities of coordination and control of work and productive processes brought by Industry 4.0, see A. Salento, *Industria 4.0, imprese, lavoro, op. cit.,* 183-186.

the possibility to instruct or intervene on smart machinery by remote.[5] The added value of these workers will be, therefore, measured, mainly, on the base of their ability to reach personal objectives, with following modification of the essential characteristics of retribution, moving towards more pervasive customization, with a debated reduction of all-embracing treatments provided by collective agreements.[6]

Approaching this scenario, the possibilities to accede to education opportunities will acquire a central role, being the key elements that allow employees to be updated on the rapid mutation of production tools and processes, and permitting them to remain competitive in the labor market, with a possibility to proceed in respective careers.[7]

The aforementioned trend, therefore, seems to be characterized by a long list of pros and cons.

By the side to a work performance becoming more various, independent, creative and, in case of most positive experiences, permitting to well conjugate private and working life, there is the risk represented by an increase of the already ongoing polarization of the labor market. As a consequence, less organized and trained part of workforce appears as destined to be confined in the area of routinely and not well-paid jobs, with the menace to be replaced by robots able to realize their performance in a less expensive way.

In particular, the described phenomenon is highlighted by data collected in the recent OECD survey *Labor market polarization in advanced countries*, which heeds data concerning the labor market of 18 European countries between 1995 and 2010.[8] The outcome of the analysis underlines, among other things, that in the last two decades, when the digitization process was not as fast as today, the

[5] According to some experts, the aforementioned modification of working time imposes also to re-consider the problems connected with work-life balance, and with the increased employees' exposition to risks of diseases, stress and burn-outs. With reference to above, the French and Italian legislators already disciplined, in different manners, a "right to disconnect", to assure to workers a minimum period of effective rest, protected from employer's solicitation, see, *inter alia* R. Di Meo, *Il diritto alla disconnessione nella prospettiva italiana e comparata,* Labour Law Issues, 3, 2, 2017 and M. Avogaro, *Right to disconnect: French and Italian proposals for a global issue*, Revista Brasileira de Previdência, 1, 2018, 97 ff.; for a critical perspective about French framework, C. Mathieu, *Pas de droit à la déconnexion (du salarié) sans devoir de déconnexion (de l'employeur)*, Revue de Droit du Travail, 10, 2016, 592 ff.

[6] F. Seghezzi, *La nuova grande trasformazione*, *op. cit.*, 190-193; R. Del Punta, *Un diritto per il lavoro 4.0, op. cit.,* 14-15.

[7] R. Del Punta, *Un diritto per il lavoro 4.0, op. cit.,* 11-14.

[8] K. Breemersch, J. Damijan, J. Konings, *Labour Market Polarization in Advanced Countries: Impact of Global Value Chains, Technology, Import Competition from China and Labour Market Institutions*, OECD Social, Employment and Migration Working Papers, No. 197, OECD Publishing, 2017, Paris, link http://dx.doi.org/10.1787/06804863-en (last consultation on 30 January 2019).

share of lowest paid employees augmented from 24.1% to 27.9%. Conversely, one of highest paid workers followed a more unusual path, increasing of 7,9 percentage points; this to the detriment of middle-class people, that in 1995 was representing almost a half of the workforce in the considered countries and, in 2010, are reduced to a third.[9][10][11]

Following the statistics, the categories of workers of manufacturing could be split, in the following years, on three tiers. Yet, one group fails to meet and to fall within these parameters. Workers that are generally highly skilled that could decide not to provide their performance for only one company but that, at the same time, are not interested in becoming completely autonomous.

The bottom row is one of the lowest skilled employees, charged with simple and routine tasks. This is the category of workers more subject to the risk to disappear: their activities, indeed, are easily replaceable by new smart machinery, which is not only suitable to realize almost elaborate performances but also able to apprehend from the modifications of the surrounding environment.

According to the research of economists Frey and Osborne, in the study of the United States labor market, employees charged to deliver merchandise, office workers with less qualified tasks, along with employees operating in the industrial and construction field fell within the parameters of the lowest row of workers. Additionally, in the medium-long period, with the expansion of the automation process, also other categories, such as jobs concern education, legal, health services, and information technology, could be added to the said list.[12] The higher category is one of the people involved in the core business of

[9] *Ivi*, 11.

[10] From 27.6% to 35.5%, with the most relevant development concerning, on the first hand, technicians and associated professionals, moved from 13.7% to 17.0%, and traditional professionals, increased from 8.9% to 12.6%, *ibidem*.

[11] *Ibidem*.

[12] C.B. Frey, M. Osborne, *The future of employment: how susceptible are jobs to computerization?*, link: https://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf (last consultation on 30 January 2019), 36 ff. In particular, the Authors consider at risk of automatization or substitution, in one or two decades, by intelligent machineries, 47% of the whole US workers. Corresponding estimations have been realized with reference to European labour market, with an average quota of 40%-60% of workers in peril to lose their jobs in favour of machineries in next years, with a sharpen incidence in the Eastern and southern countries, see C. Degryse, *Digitalisation of the economy and its impact on labour markets*, ETUI aisbl, 2016, 20-21. A more optimistic approach has been shown by Häns Böckler Foundation that, in 2015, estimated a quota of 12% of German workers that could remain unemployed as a consequence of the modifications imposed by Industry 4.0, for a whole amount of 490,000 workers, compensated by about 430,000 new jobs created, see Hans Böckler Stiftung, *Digitalisierung: Kein Grund für Horrorszenarien,* link: https://www.boeckler.de/impuls_2015_17_1.pdf (last consultation on 30 January 2019).

the smart factories. Reference is made to the group, made of "autonomized" employees, used to work in a team, with flexible working time and personalized working conditions. With reference to this category, is worth to analyse the impact of collective bargaining: the increasing customization of the relationships between workers and employers could, indeed, reduce the area covered by uniform treatments identified primarily by national collective agreements, and open the way to a scenario where the individual labor agreement becomes the privileged tool to manage the labor relationship [13].

Finally, the group of the peripheral workers, relevant but not involved in the core activities of the company – and on which will be focused the analysis of this paper – is composed by different kinds of people. A remarkable segment is made of highly qualified workers, with specific and researched competencies, as particular figures of informatics or engineers that, if not implicated in the central business of the smart factory, could become interested not to establish a labor relationship with a specific employer, but to limited periods of collaboration with a number of companies. In this context, an option is the one of the strategic employee sharing, where the worker is hired by a group of companies and is assigned when requested, to a single company of the group to realize his performance [14]. Another way – practicable concerning companies not organized in groups – could be to move from dependency to the condition of autonomous *tout court* [15], providing high-level services not only to one employer but for several companies requesting that expertise. Part of peripheral workers, nonetheless, could also be composed by the expanding category of freelancers and workers on platforms, whose competencies could be utilized by the smart factories only when needed, without establishing with them a continuous labor relationship [16].

The purpose of this paper is to focus attention on the new tools that could be utilized to organize the latter category of workers of Industry 4.0, in order to

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[13] F. Seghezzi, *Lavoro e relazioni industriali nell'Industry 4.0*, Diritto delle Relazioni Industriali, 1, 2016, 204; the work arrangement of this category of employees could be a specific version of the ICT-based mobile work, identified as a «*work arrangements carried out at least partly, but regularly, outside the 'main office', be that the employer's premises or a customised home office, using ICT for online connection to shared company computer systems*», see Eurofound, *New forms of employment,* Publications Office of the European Union, 2015, 72 ff.

[14] Eurofound, *New forms of employment, op. cit.*, 5 ff.

[15] See F. Seghezzi, *La nuova grande trasformazione, op. cit.,* 160; in this sense, see also IBA Global employment institute, *Artificial intelligence and robotics and their impact on the workplace,* 2017, link http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/future_of_Work/EN/_2017-02-03__IOE_Brief_-_understanding_the_Future_of_Work__full_publication__-_web___print_version.pdf (last consultation on 30 January 2019), 52.

[16] See F. Seghezzi, *La nuova grande trasformazione, op. cit.,* 179.

conjugate their request of independence, the evolved working conditions and adequate forms of protection able not to relinquish them in the area of pure self-employment. From this point of view, the contribution will mainly analyze the instances referred to the area of new mutualism, and the respective specific legal structures compatible with upcoming digitized environment[17].

2. Strategic Employee Sharing and Highest Skilled Workers: An Opportunity of Re-Launch of the Residual Legal Institute?

The first option that could be framed in the area of new mutualism, applied to peripheral and highest skilled workers of Industry 4.0, is strategic employee sharing.

This tool does not represent a novelty in some European legal systems but become, in recent years, an instrument that could reveal itself useful, according to a specific analysis realized by Eurofound in 2016, not only to manage work relationship in a different and more flexible way, but even to create new full-time working positions. In the light of above, it is considered an application of flexicurity principles in the context of labor agreements.([18])([19])

The general structure of strategic employee sharing is quite simple, although it needs to be declined. According to regulations of each national legal framework, the analyzing tool consists in a juridical person (the 'employer group') created ad hoc by a number of employers, with the aim to hire one or more workers that will realize their performance, upon request, in favor of the companies that founded the employer group.

The above-mentioned juridical person will have to act for non-lucrative purposes, and all the related costs will be sustained by the participating companies, along with criteria differentiated according to each national

[17] "New mutualism " constitutes an attempt to renew the principle that, at the beginning of XXth century, originated the mutual aid societies, by realising forms of voluntary association of people, with the purpose to reciprocal aid and protection to face the risks related with the digitized working activity; see, *inter alia*, M.W. King, *Protecting and representing workers in the new gig economy,* in R. Milkman, E. Ott (eds.), *New Labor in New York: precarious workers and the future of the labor movement*, 2014, ILR Press, Ithaca (NY), 166 ff. and G. de Peuter, N.S. Cohen, *Emerging labour politics in creative industries,* in K. Oakley, J. O'Connor (eds.), *The routledge companion to the cultural industries*, Routledge, Abingdon-on-Thames, 2015, § 24.

[18] Eurofound, *New forms of employment: Developing the potential of strategic employee sharing,* Publication Office of the European Union, Luxembourg, 2016.

[19] A. Artis, *Le groupement d'employeurs: une réponse à la recherche de flexibilité et de sécurité dans la gestion de l'emploi,* Revue Interventions économiques, 2013, 47, link http://interventionseconomiques.revues.org/1982 (last consultation on 30 January 2019), 2 ff., in part. 5.

experience.[20] In this manner, these companies will have the possibility to dispose of a flexible and less expensive workforce, transferring all the obligations concerning the management of labor relationships to the formal employer they created. At the same time, the workers that adhered to the strategic employee sharing project will have the possibility to relate with only one employer – the employer group set up to this purpose – and to execute with it a dependent labor agreement, in general, full-time and without term.[21] The effective performance, further, will consist of the sum of activities carried out for each company adhering to the employer group.[22]

Therefore, strategic employee sharing will lead to the creation of four different juridical relationships. Firstly, a labor agreement between each employee and the employer group. Secondly, a working relationship involving the aforementioned employee and the utilizing company that adhered to a strategic employee sharing project. Thirdly, a service relationship between the employer group and the workers' users, referred to all the auxiliary and managing activities developed by the employer group in favor and lieu of the participating companies. Finally, an associative obligation, burdening on all the users that have to contribute to costs sustained by the employer group.[23]

Examples of strategic employee sharing could be identified in several European countries those being, Austria, Belgium, Bulgaria, Finland, France, Germany, and Hungary.[24] Among them, the French and German experiences seem to be the most significative ones, both in reason of the dimension of these countries and respective economy, and also to underline the differences between the two models.

In France, strategic employee sharing has been regulated, for the first time, with the law enacted on 25 July 1985, under the name of Groupement

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[20] In general, the participating companies undertake a joint and several liability for all the obligations concerning the workers hired by the employer group; notwithstanding, several countries experimented a different repartition of burdens, as France, that with *loi* of 28 July 2011 introduced the possibility, with specific provisions in the employer group bylaws, to introduce a different repartition of costs related to the work relationships and to social security obligations, i.e. *pro-rata* on the base of hours spent by workers for each company in a specific period of time, see P. Fadeuilhe, *Les groupements d'employeurs: responsabilité solidaire et exigences égalitaires*, Droit Social, 2012, 10, 899 ff.

[21] On this aspect, see M. Antoine, B. Rorive, *Employers pools in Belgium*, Monitoring Innovative Restructuring in Europe, Liège, Belgium, 2006.

[22] Eurofound, *New forms of employment, op. cit.,* 6 ff.

[23] A. Artis, *Le groupement d'employeurs: une réponse à la recherche de flexibilité et de sécurité dans la gestion de l'emploi, op. cit.*, 10.

[24] For a detailed analysis of all European experiences concerning strategic employee sharing, see Eurofound, *New forms of employment,* Publication Office of the European Union, Luxembourg, 2015, 16 ff.

d'employeurs (GE). The analyzed legal institute, aimed initially to allow a group of small or agricultural enterprises to hire one or more workers, has seen its field of application extended with reforms approved by local Parliament on 19 January 2000 and on 28 July 2011.[25] GE has been opened, in particular, to the participation of companies of more than 300 employees and, from February 2005 of local public entities (i.e., *collectivités territoriales)* ([26])([27])

As concerns workers hired by GE, they have right, according to Article L. 1253-9 of *Code du Travail*, to a written agreement, indicating employment, pay, the professional qualification of the employee and a list of potential companies that might utilize the worker, together with the respective places of work. The same rule also provides for, with the last *alinéa*, an equal treatment between the employees directly hired by the utilizing company and the ones provided by the GE: therefore, working conditions of the GE's employee may vary according to each company that recurs to him, provided they are equal to the ones applying to the respective workers. The labor agreement executed between an employee and the GE is, in general, also in reason of the fact that this institute is aimed to contrast precarious work, without term, even though is possible, according to French law, to execute also *contrats à durée déterminée*. Finally, the worker is covered by the collective agreement applicable in the commercial field to whom the GE belongs.

Participating companies, on the other hand, have right to appoint the member of the management board of the employer group, and fix the fees to be paid to each employer when utilizing a GE's employee.[28] Costs concerning the functioning and management of GE, besides the ones related to workers and respective social security contributions, are in general equally burdened by the participating enterprises, but the rigid rule of joint and several liability has been mitigated in 2011, allowing parties to share costs on a pro-rata basis.[29]

In Germany, strategic employee sharing has been introduced in the early 2000s, in the form of *Arbeitgeberzusammenschluss* (AGZ). According to local law, employer groups have not a specific legal basis, and in general, they are created in the form of a temporary agency,([30]) ([31]) although the admitted juridical

[25] G. Auzero, D. Baugard, E. Dockès, *Droit du travail*, Dalloz, Paris, 2018, 399.

[26] V. Xhauflair, *La mutualisation de la main œuvre. Diversité des pratiques et nouveaux enjeux,* in J. Allouche (ed.), *Encyclopédie des ressources humaines,* Vulbert, Paris, 2012.

[27] M.F. Mouriaux, *Du fait eu droit. Diverses figures du temps partagé,* Document de Travail No. 77, Centre d'Études de l'Emploi, Paris, 2006, 12

[28] Eurofound, *New forms of employment, op. cit.,* 17.

[29] See above, note No. 19. In this field see also, with reference to the debate preceding the enactment of reform of 2011, O. Pouey, *Groupements d'employeurs: outil contre la précarité*, *La Semaine Juridique Social,* No. 6, 9 February 2010, 1054. For an analysis of the current discipline, G. Auzero, D. Baugard, E. Dockès, *Droit du travail*, *op. cit.,* 399-400.

[30] Eurofound, *New forms of employment: Developing the potential of strategic employee sharing, op. cit.,* 8.

figures correspond to all legal entities except for associations, whose purpose cannot be mainly an economic activity.[32] This element limited the possibility of expansion of AGZ. First of all, because temporary agencies inflict higher costs and tax to the participating firms. Moreover, collective agreements applicable to these organizations provide, typically, for better treatments – in particular with reference to minimum wage – than the arrangements executed by social partners of the sectors engaged in employee sharing, causing an imbalance between the conditions of shared employees and the ones of the workers already hired by the utilizing companies, revealing the latter as underpaid.([33])([34])
Furthermore, according to the figure and the rules concerning temporary agencies, participating companies are not encouraged to engage mutualist behaviors, since they act only "borrowing" workers from the employer group, neither their joint responsibility for workers' costs and social security obligations is legally anchored.([35])([36])
To compensate the absence of precise rules concerning AGZ, and in order to assure quality of employment, transparency and fair employers' behaviours, social partners – in particular the Federal Association of German Employers' Alliances (BV-AGZ,) and main trade unions – elaborated in 2008 a code of conduct to discipline employer groups.[37] According to this chart, AGZ is committed to offering, when possible, permanent jobs with alternating assignments in the participating companies, equal treatment between shared and core staff workers, clear labor agreements indicating, *inter alia*, working time and schedule, tasks, the duration and period of work in different companies and the geographical distance between them. Participating employers, at the same time, are requested to share joint responsibility for the employees and management of AGZ, and to establish that only their

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[31] K. Osthoff, M. Langbein, *Gemeinschaftliche Arbeitsorganisation im Arbeitgeberzusammenschluss*, Arbeit, 2013, 22(2), 150 ff., in part. 153.
[32] On this point see N. Hädinger, *Juristische Expertise: Der Arbeitgeberzusammenschluss in der Rechtsform des Vereins*, CERGE, Berlin, 2006.
[33] K. Osthoff, M. Langbein, *Gemeinschaftliche Arbeitsorganisation im Arbeitgeberzusammenschluss*, Arbeit, *op. cit.*, 150 ff., in part. 151.
[34] Eurofound, *New forms of employment, op. cit.,* 18-19.
[35] *Ibidem*.
[36] Eurofound, *New forms of employment: Developing the potential of strategic employee sharing, op. cit.,* 8; with reference to this aspect, see also T. Hartmann, *Arbeitgeberzusammenschlüsse in Deutschland – Kooperationsmodell für die Zukunft*, conference presentation, FlexStrat, Dortmund, 20 June 2012, link https://docplayer.org/72821095-Arbeitgeberzusammenschluesse-in-deutschland-kooperationsmodell-fuer-die-zukunft-erfahrungen-loesungen-handlungsempfehlungen.html (last consultation on 30 January 2019).
[37] Bundesverband der Arbeitgeberzusammenschlusse Deutschland e.V., hereinafter "BV-AGZ".

companies will have the possibility to the benefice of services provided by the employer group, excluding, therefore, third-party organizations.[38] The abovementioned code of conduct represents a clear good practice to reinforce the structure and protection provided by AGZ to respective employees; notwithstanding it remains a voluntary agreement, in general subject to the membership of founding companies to BV-AGZ, therefore its general application cannot be assured.

Although employer groups represent a potential right balance between instances of workers' flexibility and employees' requests of economic and juridical protection from working poor and unemployment, their diffusion is not wide and, mainly, not comparable to the one of agency work.

In Germany, the highest number of AGZ contemporary operating was seven, involving about 100 companies and 100 workers; in 2016 there were only 3 active employer groups, while the others ceased their activity for disparate reasons, as unfavorable work conditions, abandonment of the project by participating companies, or success of the initiative that allowed employees to be directly hired by founding enterprises.[39]

In the same year in France the number of GE was about 4,500, employing 35,000 people, for a comprehensive turnover of Euro 650 million; most of them, in any case, were operating in the agricultural sector; excluding this commercial field, the number of GE dropped to 400, involving about 10,000 enterprises and 12,000 employees.[40]

These numbers underline how strategic employee sharing, in recent years, was not able to compete with other forms of a flexible job, as temporary agency work, that involved in 2016 about 700,000 workers in France and about 850,000 in Germany. ([41])([42])

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[38] Eurofound, *New forms of employment, op. cit.,* 15 and T. Hartmann, E. Meyer-Wölfing, *Flexible Organisation der Arbeit und Auswirkungen auf die Beschäftigten in Arbeitgeberzusammenschlüssen, Abschlussbericht*, Project No. 2007-30-3, Hans-Böckler-Stiftung, Berlin, 2008.

[39] Eurofound, *New forms of employment: Developing the potential of strategic employee sharing, op. cit.,* 10-11.

[40] C. Everaere, *Le groupement d'employeurs: pourquoi cette forme d'emploi atypique sécurisante est-elle si marginale?*, Revue des Sciences de Gestion, 2016, 280, 71.

[41] Corresponding to 2.7% of 26,584,000 employed people; for the first data see Eurostat, *Temporary employment agency workers by sex, age and NACE Rev. 2 activity*, link http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do (last consultation on 30 January 2019); for the information concerning employed population in France see OECD, *Labour Force Statistics 2018,* link https://doi.org/10.1787/oecd_lfs-2018-en (last consultation on 30 January 2019), 73.

[42] Corresponding to 2.1% of 41,267,000 employed people; for the first data see Eurostat, *Temporary employment agency workers by sex, age and NACE Rev. 2 activity*, *op. cit.*; for the information concerning employed population in Germany see OECD, *Labour Force Statistics 2018, op. cit.*, 76.

Reasons could be found, beyond a general lack of awareness of the characteristics and potentialities of the commented institute , also in its nature and characteristics.[43] It represents a "win-win" strategy, assuring both flexibilities and, to employees, better protection than agency work, deriving from the increased tendency to execute labor agreements without term between the worker and the employer group, and by the income security and decent wage levels for involved workers.[44] These benefits are in any case compensated by higher levels of stress caused by the need to operate in different places and work contexts, and in the consequent lower possibility to participate to company union activities. Notwithstanding, strategic employee sharing also requires an additional effort to companies, which disheartened its utilization. This effect is caused, in principle, by the need for participating companies to reach an agreement in organizing the working hours and respective periods of utilization of shared workers.[45][46] In addition, risks connected to workflow and work organization, the joint and several liabilities of all employers – usually not so extended in agency work – and the suspicion raised in competing enterprises by the idea to share the same worker that could, even accidentally, reveal market secrets to the counterparties,[47] play a role.

In any case, several studies concerning strategic employee sharing [48] highlight that this form of work organization involves, in particular, medium and well-skilled workers, while other kinds of flexible jobs are directed to the lowest part of employment scale.

This element might represent a relevant added value in the age of Industry 4.0. In this context, are precisely the most skilled workers, interested in emancipating from their preferential relationship with only one employer, electing employer groups as the instrument to provide their services for a number of companies without losing all the protections related to the status of

[43] Eurofound, *New forms of employment: Developing the potential of strategic employee sharing, op. cit.,* 28.

[44] With specific reference to the French case, A. Artis, *Le groupement d'employeurs: une réponse à la recherche de flexibilité et de sécurité dans la gestion de l'emploi, op. cit.*, 11.

[45] That could entail the necessity to dispose of an HR manager, not always present in small enterprises, that could be discouraged to the perspective to burden the respective costs, Eurofound, *New forms of employment: Developing the potential of strategic employee sharing, op. cit.,* 19-20.

[46] On this aspect, with reference to the risk of lack of immediate substitution of a worker provided by an employer group that has finished his shift, see C. Everaere, *Le groupement d'employeurs: pourquoi cette forme d'emploi atypique sécurisante est-elle si marginale ?, op. cit,* 72.

[47] Therefore, a good practice could consist in organising employer group founded by companies operating in different commercial fields and of different dimension, in order to reduce at minimum risks of conflicts of interest; these issues are addressed by F. Delalande, L. Buannic, *Groupements d'employeurs, mode d'emploi,* Éditions Eyrolles, Paris, 2006.

[48] Eurofound, *New forms of employment, op. cit.*, 25.

a dependent worker. Nevertheless, most advanced companies might be forced to recur to this institute because skilled workers could not be available in a different context, as through agency work.
Therefore, the modification imposed to work organization by Industry 4.0 could lead to a new season of development for strategic employee sharing that, in any case, to spread positive effects at EU level could request a uniform and transparent regulation, not relinquished to the mere consent of the parties, that could find in the French discipline a valid model.

3. Highest Skilled Workers on Platforms: The Example of Upwork and the Possible Efforts to Conjugate Performance on Demand and Stability of Work

A second relevant sector that, in recent years, gathered the attention of highest skilled workers, is the one of work on platform.
Albeit in general associated with gig-workers and working-poor conditions, online platforms attract, indeed, some professionals with a demand for elaborate performances, medium-high wages, and dedicated services.
With reference to above, people providing for professional services are – according to the data collected through the COLLEEM survey conducted in 2017 by DG Employment and the Joint Research Centre in Seville of the European Commission,[49] the second group active on web platforms, after "Online clerical and data entry", corresponding to about 30% of the overall number of interviewed workers operating through this system .[50] From a more detailed point of view, among analyzed people, 32.1% of women and 26.3% of men providing professional services are high-skilled workers.[51] The impression made by the considered category is also confirmed by the analysis of wage levels, where a quota between 10% and 16% of platform workers is placed in the top decile of remuneration, while in the analogical context the average level of people scoring the abovementioned results corresponds to 10%.[52]

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[49] For an outline on COLLEEM survey see Eu Science Hub, *COLLEEM. COLLaborative Economy and EMployment,* link https://ec.europa.eu/jrc/en/colleem (last consultation on 30 January 2019). The inquiry, in particular, analysed data collected through interviews realized in 14 European countries (Germany, Netherlands, Spain, Finland, Slovakia, Hungary, Sweden, United Kingdom, Croatia, France, Romania, Lithuania, Italy, Portugal) and involved 32,409 people (around 2,300 per country), representative of all internet users between 16 and 74 years old.
[50] A. Pesole, M.C. Urzí Brancati, E. Fernández-Macías, F. Biagi, I. González Vázquez, *Platform Workers in Europe*, Publications Office of the European Union, Luxembourg, 2018, doi:10.2760/742789, 37-38.
[51] *Ivi*, 38.
[52] *Ivi*, 50-51.

In order to respond to the broad request of freelancers' and high-skilled services provided online, some specific platforms, as UpWork, Fiverr, PeoplePerHour, Freelancer, has been developed. Among them, one of the most relevant examples of online platform directed to attract (also) highest-skilled workers is UpWork.

It consists of a global freelancers' platform, founded in 2015, that allows business and independent professionals to collaborate remotely, and that reached about 12 million of registered freelancers[53]. In particular, it allows customers to public posts containing job offers referred to self-employed workers, in general based on specific tasks to be realized; it could also involve employees, in the form of contracted work. The platform may also elaborate a shortlist of potential candidates on the base of customers' requests, or demand to freelancers to submit bids, in order to allow interested clients to choose the best proposal; finally, it eases and reinforce transparency of payments, acting as withholding agent in lieu of the end users.[54]

From the freelancers' point of view, UpWork allows them to create their profiles, indicating respective skills, attitudes and services they would provide for; the platform consequently will highlight for them ideal jobs; nevertheless, they will have the possibility to search for projects, and respond to clients' invitations[55]. The fee to be paid for these services, owed by the freelancers, will be charged on each invoice decreasing, after the worker will have overcome fixed thresholds of income[56].

Finally, the platform provides for additional services to the parties, as discounted education opportunities, investment plans and a specific payroll system for employees.

The role of highest skilled workers in this system is underlined by the categories of freelancers available, comprehending, among others, architects and floor planners, software developers, and a wide range of engineering, legal and accounting professionals.[57]

What described above raises two considerations: first of all, the attention focused on the role of highest-skilled professionals in platform economy shall

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[53] E. Pofeldt, *Upwork's new pricing model sparks outcry,* www.forbes.com, 7 May 2016, link https://www.forbes.com/sites/elainepofeldt/2016/05/07/freelance-giant-upworks-new-pricing-model-sparks-outcry/#2875eb7e4a20 (last consultation on 30 January 2019).

[54] UpWork, *How it works. An overview of hiring and freelancing on UpWork. If you are hiring,* link https://www.upwork.com/i/how-it-works/client/ (last consultation on 30 January 2019).

[55] UpWork, *How it works. An overview of hiring and freelancing on UpWork. If you are freelancing,* link https://www.upwork.com/i/how-it-works/freelancer/ (last consultation on 30 January 2019).

[56] The fee witheld corresponds to 20% up to 500 USD invoiced to the same client, 10% from 500.01 USD to 10.000 USD and 5% for a sum of 10.001 USD and more, *ibidem.*

[57] UpWork, *Browse top freelancers by category,* link: https://www.upwork.com/i/freelancer-categories-all/ (last consultation on 30 January 2019).

not conceal the problems related to different kinds of workers and by different ways to exploit effective performance through online systems, that request specific policies and intervention by the competent legislator. Although, with Industry 4.0 and the progressive "autonomization" of employees of manufacturing, the number of highest-skilled professionals working online could grow specifically in the above-described area of peripheral workers that, in reason of their capabilities and their potential market, could decide to provide their services not for only one employer but numerous companies — moreover requesting not to lose all protections of dependent work to shift in the direction of pure self-employment.
In this context, two possible solutions on the field of new mutualism could be investigated: umbrella companies and associational unionism.[58]

a) Umbrella companies: a possible way to conjugate professional activities on platforms and wage labor protections?

As Umbrella companies are intended specific entities created, first of all, with the purpose to formally hire platform workers, besides providing them with several forms of assistance. In this way, is possible to catch two goals: extend to the aforementioned workers the protections set forth by national legal frameworks for dependent work and, at the same time, allow them to manage their activity as freelancers.
A useful way to understand how these entities work is to consider a practical, and notorious, example: the Belgian-French company Société Mutuelle pour artistes (SMart), founded in 1998 and involving, nowadays, about 90,000 people in 9 different European countries.[59]
The field of action of the company, that initially was limited to workers in the domain of arts, gradually widened, according to limits set by local legislation,

[58] The origin of the term "associational unionism" can be find in C.C. Heckscher, *The new unionism*, Basic Books, Inc., New York, 1988, 177 ff.; see also P. Ichino, *Le conseguenze dell'innovazione tecnologica sul diritto del lavoro,* Rivista Italiana di Diritto del Lavoro, 4, 2017, 529-530.

[59] SMart Belgium, *La coopérative en pratique?*, link http://smartbe.be/fr/la-cooperative-en-pratique/ (last consultation on 30 January 2019) and SMart Belgium, *Historique*, link http://smartbe.be/fr/a-propos/historique/ (last consultation on 30 January 2019). Even if SMart is one of the most relevant umbrella companies in Europe, other similar experiences have been developed, mainly in France, as Copaname, Grands ensemble, and in Italy, with the cooperative company DocServizi; see, *inter alia*, J.L. Dayan, *Nous ne somme pas une couveuse d'entreprise mais une mutuelle de travail*, Metis. Correspondances européennes du travail", link http://www.metiseurope.eu/nous-ne-sommes-pas-une-couveuse-d-entreprises-mais-une-mutuelle-de-travail_fr_70_art_30268.html (last consultation on 30 January 2019) and F. Martinelli, "Doc Servizi e l'Europa", DocServizi, 2017, 9 ff.

involving the area of independent contractors and, therefore, could reasonably be enlarged also to peripheral workers of Industry 4.0.[60]

In general, the national subsidiaries of SMart adopt the juridical structure of a cooperative company.[61] Platform workers seeking to join the "umbrella system" have to become affiliated with the company. In this way, they are also allowed to execute with it an additive labor agreement.

The worker, therefore, acquires an employee status. In the meantime, he is allowed to continue acting in the labor market as a self-employed, being free to manage his relationship with clients and, in case of Industry 4.0, with different companies requesting his specific services, as software programming or maintenance of smart machinery.

Only when an arrangement between the customer and the "umbrella worker," regarding the content of the latter's performance and on the respective compensation, is reached, the platform worker is required to ask the counterparty to execute a specific arrangement ascribing the working performance to SMart. Therefore, the performance will, in concreto, be invoiced to the customer by Smart; still, the umbrella company will provide the worker with the payment of the agreed sums, that can be delivered as a lump amount, or an ongoing basis.

To become affiliated to the cooperative company, the minimum fee required is about 50.00 Euro. In addition, an amount between 6.5% and 8.5% of each sum invoiced by the cooperative company in place of the freelancer is retained by SMart, in order to finance the organization.[62]

The core service provided by the company grounds its roots in the idea of new mutualism: each associated is benefited with the possibility to have the wage deriving from the respective autonomous activity paid by SMart within seven days after each performance has been realized, also in case of the customer's default. [63] This service is mainly financed through part of the 6.5-8.5 % as mentioned earlier withholding on each invoice issued by SMart on behalf of the freelancer. The mutualist element relies on the fact that all the funds raised

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[60] S. Graceffa, *Rifare il mondo… del lavoro*, DeriveApprodi, 2017, 103-104.

[61] In Belgium, the legal form adopted is the *Société coopérative à responsabilité limitée à finalité sociale*, regulated by the *Loi modifiant les lois sur les sociétés commerciales, coordonnées le 30 novembre 1935* issued on 13 April 1995 and its following amendments; see the respective corporate bylaws at link http://smartbe.be/media/uploads/2017/01/Statuts-SMart-Coop-FR.pdf (last consultation on 30 January 2019); in Italy SMart adopted the legal form *Società cooperativa a mutualità prevalente*, subject to the legislation of *impresa sociale*, regulated by Law 3 July 2017, No. 112, see the respective corporate bylaws at link http://smart-it.org/media/uploads/2017/03/STATUTO-SMart-Italia.pdf (last consultation on 30 January 2019).

[62] The amount varies on the base of the SMart subsidiary analysed.

[63] See footnote No. 59.

among SMart associated are gathered, and then utilized on a case-by-case basis, to help the ones of them in trouble in reason of a third customer's breach of contract.
As indicated above, SMart does not provide for platform workers only with financial sustainment. The additional services at the disposal of SMart affiliates concerns relevant aspect of their profession: insurance against professional liability and referred to the tools and instruments utilized by the worker to realize his or her performance; free of charge courses aimed to strengthen workers' skills and other education opportunities and personalized advice on tax, administrative and social security issues and juridical consultancy services. 646566

Umbrella companies, therefore, seem to be a powerful instrument to assure, also to highest-skilled platform workers, relative freedom of movement in the market combined with protections recalling the ones of the traditional single-employer dependent labor agreement. Nonetheless, leaving the management of this tool wholly to market dynamics increases risks to go to the detriment of its added-value, subject to mutations of platforms' intentions. Besides that, some national regulations could prevent workers – in particular, the ones obliged to adhere to professionals organizations – to use this instrument.[67] Therefore, experts are urging for statutory regulation of the considered matter in some European countries, in order affirm the full lawfulness of the specific agreement to regulate the relationship between the platform worker and the umbrella company and to set it as mandatory. A similar solution could, indeed, encourage the development of these organizations, preventing them from objections that could be raised by courts or administrative bodies.[68]

[64] SMart France, *Des services mutualisés*, link http://www.smartfr.fr/des-services-mutualises/(last consultation on 30 January 2019).
[65] As an example, SMart Belgium offers courses concerning intellectual property law to allow "creative" freelancers to better manage their activity, see SMart Belgium, *Sessions d'information*, link http://smartbe.be/fr/services/sessions-dinformation/ (last consultation on 30 January 2019).
[66] SMart Belgium, *Conseil individuel*, link http://smartbe.be/fr/services/conseil-individuel/(last consultation on 30 January 2019).
[67] SMart Belgium, *Service juridique*, link http://smartbe.be/fr/services/juridiction/permanence-juridique-contacts/ (last consultation on 30 January 2019).
[68] See, as concerns the Italian debate, P. Ichino, *Una legge per i platform workers e per le umbrella companies*, link http://www.pietroichino.it/?p=46512 (last consultation on 30 January 2019).

b) The "new" associational unionism: digitized cooperation to strengthen the position of self-employed workers in the labor market.

The other favorite kind of freelancers' organizations falls under the category of "associational unionism," representing new models of workers' associations experimenting with alternative strategies from the binomial collective bargaining and strike.[69]
In the same way of umbrella companies, the above mentioned organizations gather "analogic" and digitized jobs, and could reasonably involve also workers on platform of Industry 4.0.
The juridical form in general employed by these entities is one of the associations: members do not modify their juridical condition, remaining self-employed, but they are allowed to accede to exclusive services and resources.
Associational unionism can be framed in the area of new mutualism as well: joining together, freelancers can obtain benefits at a lower price and have more force to sustain their claims for better working conditions.
The most notorious example in this category is Freelancers Union, the association of freelancers founded in 1995 by Sara Horowitz [70].
Membership of Freelancers Union is virtual, opened to, among others, freelancers, consultants, independent contractors, part-timers, contingent employees and self-employed. An entrance fee is not required, while members are invited to provide for an optional donation. Since affiliation is not a relevant source of funding, the organization sustains itself utilizing grants and other support provided by public and private entities.[71]
Three are the main areas in which the activity of the organization is conducted: benefits, resources, and advocacy.
Benefits provided by Freelancers Union to its members mainly correspond to a wide range of insurance agreements. Among them, the most relevant is favorable professional liability insurance, providing for the affiliated customized protection, based on the characteristics of his/her business, up to USD 2,000,000, in case of negligent performance or unfounded client's

[69] C.C. Heckscher, *The new unionism*, Basic Books, Inc., 1988, 189-190.
[70] Freelancers Union counts, in the United States, more than 350,000 affiliates; on the main issues it deals with, see S. Horowitz and T. Sciarra Poynter, *The Freelancer's Bible: Everything You Need to Know to Have the Career of Your Dreams*, Workman Publishing Company, 2012.
[71] Among them, *inter alia*, New York City and State, Ford Foundation, J.P. Morgan Chase Foundation and Rockefeller Family Fund. See, in detail, Freelancers Union, *Funding,* link https://www.freelancersunion.org/about/ (last consultation on 30 January 2019).

claims.[72] Other remarkable benefits are shaped on the particular conditions of independent workers in a liberalized legal framework as the American one: therefore, they concern health protection primarily.

Resources provided by the association are mainly finalized to improve workers' education, simplify their day-by-day activity and let them have easy access to tax and legal advice. Interested members are granted with access to online guides concerning intellectual property law, their right to be paid and tips to this purpose, and instruction to correctly fulfill tax obligations. Also, specific assessment and advice services referred to matters as public health insurances are provided. Remarkable, in this field is, finally, the app which allows the worker to find, in a rapid way, a lawyer in case of need to assistance.[73]

Fair work conditions and timely payments for freelancers are the most important goals pursued by Freelancers' Union advocacy. The association promoted, in particular, several campaigns culminated with the enactment, by the City of New York, of the Freelance Isn't Free Act .[74] The bill set forth rules concerning a broad category of freelancers operating in the City of New York, or under its law,[75] and perceiving more than USD 800.00 over four weeks of work: remarkable guarantees adopted in favor of the aforementioned independent workers are the right to be paid in 30 days after the work is delivered and the prohibition, for the customers, to refuse to execute a written agreement.[76]

Finally, Freelancers Union assists its members in case they are attempting to expand their network, providing them with guides and organizing specific sessions, called Spark, aimed to promote meetups to create and develop freelancers' communities.[77]

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[72] In this section is offered also a favourable general liability insurance, protecting freelancers from third party claims, see Freelancers Union, *Liability*, link https://www.freelancersunion.org/benefits/liability/ (last consultation on 30 January 2019).

[73] For a complete list, see Freelancers Union, *Resources for freelancers – All resources*, link https://www.freelancersunion.org/resources/ (last consultation on 30 January 2019).

[74] Freelance Isn't Free Act, local law No. 140 of 2016, in force from 15 May 2017, link: https://www1.nyc.gov/assets/dca/downloads/pdf/about/Freelance-Law.pdf (last consultation on 30 January 2019).

[75] § 20-927 of the Freelance Isn't Free Act expressly excludes from the field of application of this law, sales representative, lawyers and people licensed for the medical profession.

[76] In case of law violation, specific sanctions are charged on the employer, as a fine of USD 250.00 for the absence of a written agreement, double damages and ad hoc civil penalties that could be imposed by a competent judge, see §§ 20-933 and 20-934 of the Freelance Isn't Free Act.

[77] Freelancers Union, *Spark*, link https://www.freelancersunion.org/spark/ (last consultation on 30 January 2019).

To summarize, private activism seems to be working well, but a temporary, solution to soothe the precarious condition of platform workers. Nevertheless, the recourse to "new mutualism," nowadays, cannot be considered a definitive reply. The absence of a consistent discipline concerning, at least at European level, umbrella companies, and the persisting obstacles limiting, both in Europe and in the U.S.A., unionism of autonomous workers, undermine the effectiveness of the solutions analyzed above, varying on the base of regulations adopted by different countries. For these reasons, in several legal frameworks, statutory intervention in this field appears, nowadays, as the most reasonable solution to the considered issue.

4. The Example of the French Statue Concerning Work on a Platform: A Legislative Way to Improve Protection of Peripheral Workers of Industry 4.0?

At the end of the analysis of possible remedies to improve protections of peripheral workers of Industry 4.0, the model of the French legislative "charter" of work on the platform has to be considered.
Reference is made to the specific regulation introduced, at Article L. 7341-1 ff. of *Code du Travail,* with the extensive revision of the labor law framework provided by the *loi* of 8 August 2016.[78]
The reform as mentioned earlier applies to all self-employed people working with an online platform defined according to Article 242 bis of *Code général des impôts*. [79] The platform considered are, therefore, the ones aimed to establish a commercial relationship between people, concerning among other things

[78] For a general reflection on the effects of the reform of 2016 – as regards work on platform – and on problems related to the digitization of a wide area of working activity concerning selling of goods and providing services, see I. Desbarats, *Quel statut pour les travailleurs des plateformes numériques? La RSE en renfort de la loi,* Droit Social, 2017, 11, 971 ff.
[79] Article 242 bis, alinéa 1, of *Code général des impôts,* set forth "Les entreprises, quel que soit leur lieu d'établissement, qui mettent en relation à distance, par voie électronique, des personnes en vue de la vente d'un bien, de la fourniture d'un service ou de l'échange ou du partage d'un bien ou d'un service sont tenues de fournir, à l'occasion de chaque transaction, une information loyale, claire et transparente sur les obligations fiscales et sociales qui incombent aux personnes qui réalisent des transactions commerciales par leur intermédiaire. Elles peuvent utiliser, dans ce but, les éléments d'information mis à leur disposition par les autorités compétentes de l'Etat. Elles sont également tenues de mettre à disposition un lien électronique vers les sites des administrations permettant de se conformer, le cas échéant, à ces obligations". With reference to the wide category of workers on platform attained by the reform of 2016, see, C. Frouin, *L'entreprise face au numérique : indicences de la loi travail et de la loi pour une République numérique,* Gaz. Pal., 2015, 81 ff.

selling of goods or providing services, where the characteristics of the object of the work performance, and the respective price, are fixed by the platform itself.
In the light of above, the considered legal framework is, hence, potentially relevant also to high-skilled workers of Industry 4.0 that, after having abandoned their dependent work, seek a wide range of clients, as self-employed workers, through a dedicated online platform.
In this case, the French law introduces specific rights concerning the said professionals, with respective burden weighing on platform.
More specifically, a platform will be, first of all, obliged to sustain professionals' education costs, in case the turnover of the worker would overcome the threshold defined by a Decree, nowadays corresponding to EUR 5,099.64 [8081].
In addition, particular attention is dedicated to trade union rights of the considered workers. Indeed, Articles L. 7342-5 and L. 7342-6 of the *Code du Travail* bestow them with a sort of right of strike,[82] preventing the platform to interrupt the relationship with the workers, to engage their contractual liability or in any case to subject them to sanctions, whether they should give rise to protest movements to sustain their professional claims – and the expressed possibility to organize themselves in collective associations to defend their interest by mean a form of trade unions.[83]
As concerns the obligations weighing on the platform, these entities are requested to indicate the characteristics of the services offered and the respective price, paying an indemnity to the worker for the periods spent in educational activities and, above all, contributing – in the limit of a plafond

[80] Article L. 7342-3 of the *Code du Travail,* "Le travailleur bénéficie du droit d'accès à la formation professionnelle continue prévu à l'article L. 6312-2. La contribution à la formation professionnelle mentionnée à l'article L. 6331-48 est prise en charge par la plateforme. Il bénéficie, à sa demande, de la validation des acquis de l'expérience mentionnée aux articles L. 6111-1 et L. 6411-1. La plateforme prend alors en charge les frais d'accompagnement et lui verse une indemnité dans des conditions définies par décret".
[81] Décret no. 2017-774 of 4 May 2017 "Relatif à la responsabilité sociale des plateformes de mise en relation par voie électronique", link https://www.legifrance.gouv.fr/eli/decret/2017/5/4/ETST1710240D/jo/texte (last consultation on 30 January 2019). The sum of EUR 5,099.47 corresponds to 13% of the plafond of social security insurance, set by Article 1.
[82] Article L. 7342-5 of the *Code du Travail*, "Les mouvements de refus concerté de fournir leurs services organisés par les travailleurs mentionnés à l'article L. 7341-1 en vue de défendre leurs revendications professionnelles ne peuvent, sauf abus, ni engager leur responsabilité contractuelle, ni constituer un motif de rupture de leurs relations avec les plateformes, ni justifier de mesures les pénalisant dans l'exercice de leur activité".
[83] Article L. 7342-6 of the *Code d Travail,* "Les travailleurs mentionnés à l'article L. 7341-1 bénéficient du droit de constituer une organisation syndicale, d'y adhérer et de faire valoir par son intermédiaire leurs intérêts collectifs".

fixed by a Decree, to the costs sustained by the worker to be insured against accidents that may occur during his activity [8485].

The solution provided by the French loi Travail is, therefore, a hybrid reply to issues analyzed in this essay. Article L. 7341-1 of the *Code du Travail* seems to remark that workers on platforms are considered, by law, as self-employed. However, the legal framework introduced with the reform of 2016 attempts to move the condition of workers on platform closer to the one of wage labor, providing rights – as trade unions rights and participation of the platform to costs connected to social security insurance – typical of dependent work.

Although several French experts underline that the considered reform is still partial and has to be enshrined in a broad landscape of extensive modifications to local welfare, concerning the envisaged universalization of unemployment treatments and public health insurance, it represent a remarkable element to be considered in the framework of a possible solution to the contemporary request of protection and more independence of peripheral workers of Industry 4.0[868788].

[84] Article L. 7342-2 of the *Code du Travail,* "Lorsque le travailleur souscrit une assurance couvrant le risque d'accidents du travail ou adhère à l'assurance volontaire en matière d'accidents du travail mentionnée à l'article L. 743-1 du code de la sécurité sociale, la plateforme prend en charge sa cotisation, dans la limite d'un plafond fixé par décret. Ce plafond ne peut être supérieur à la cotisation prévue au même article L. 743-1. Le premier alinéa du présent article n'est pas applicable lorsque le travailleur adhère à un contrat collectif souscrit par la plateforme et comportant des garanties au moins équivalentes à l'assurance volontaire en matière d'accidents du travail mentionnée au premier alinéa, et que la cotisation à ce contrat est prise en charge par la plateforme".

[85] A partial exception to the obligation to sustain individual insurance costs is represented by the case in which the worker adhered to a collective agreement, signed also by the platform, providing for the same service. In this case the platform will be not bound to contribute to individual outlays, as it already pays for the service guaranteed by the collective arrangement, see Article L. 7342-2 of the *Code du Travail,* alinéa 2.

[86] Among them, I. Desbarats, *Quel statut pour les travailleurs des plateformes numériques? La RSE en renfort de la loi,* Droit Social, 2017, 11, 971 ff., in part. 981.

[87] The extension of public sustainment for unemployment periods also to self-employed people and to dependent workers that voluntarily interrupted their previous labour relationship was an explicit objective indicated in the electoral program of President Emmanuel Macron, see En Marche!, *Le programme d'Emmanuel Macron le travail et l'emploi,* link https://en-marche.fr/emmanuel-macron/le-programme/travail-emploi (last consultation on 30 January 2019).

[88] On this point see D. Tabuteau, *La protection universelle maladie (Puma): une trasnsfiguration législative de l'assurance maladie,* Revue de Droit Sanitaire et Social, 2015, 1058 ff.

5. Conclusions

The variety of options analyzed allows appreciating the different nature of possible solutions functional to improve the condition of high-skilled and peripheral workers of Industry 4.0.
In particular, strategic employee sharing and the different methods to reinforce the position of professionals working on platforms seem to represent two different, but not opposite, ways to provide professional services for a plurality of customers of the next industrial sector.
Strategic employee sharing has its strengths in the possibility to guarantee, in most cases, to the concerned workers, a wage labor agreement without term, and even to create new workplaces, although requesting to share the daily performance between different companies, with a consequent augmentation of stress, and imposing to the participating enterprises to cooperate with the aim to manage employees' shifts and business hours. Additionally, it seems not to be suitable for competing companies, that might not be favorable to share the same professionals, with the risk of – also involuntary – disclosure of company secrets or reserved details.
On the other hand, work on platform – both in its version assisted by umbrella companies/associational unionism and in the one where statutory regulations as in France enhance protections – entails that involved peripheral professionals of Industry 4.0 will have to enter in the area of self-employment with a – at least partial – renunciation of the more protected status of employee. Notwithstanding, as indicated by COLLEEM survey, also work via platform might assure, to most educated workers, consistent earnings, also permitting them to operate in the broader market, without restrictions typical of strategic employee sharing, as the obligation to cooperate exclusively with participating companies.
Progressive digitization of industries and manufacturing will provoke, also in the sector of concerned highest skilled jobs, a modification of the traditional paradigm: workers will become more autonomous, flexible, with a less rigid organization of business hours, and with interest – and in some cases the need – to work for more customers rather than to only one employer. To provide for protection concerning these categories, the only private initiative, although supported by trade unions as in the case of strategic employee sharing, appear as not sufficient.
Therefore, a legislative intervention seems necessary.
In this direction, the best way could be represented by an articulated initiative at European level, in order not to permit market distortions, able not to exclude neither strategic employee sharing nor protected work on platform from the area of solutions reinforced, and so promoted, by law.

A statutory solution with the capability to promote both models, allowing the parties of labor relations to freely choose between the said different options, regulating by law the most general aspects of each institute, and relinquishing to social parties the discipline of organizational details, could be considered the best way to address, concerning highest skilled workers, the future technological evolution, in a way to hold together freedom to choose the way in which acting on the market without, at the same time, totally depriving this category of workers from the protections against risks related to work, characterizing traditional wage labor.

Socio-Economic Impact of Bonded Child Labour in Pakistan

Ashfaq U. Rehman, Muhammad Iqbal Shah, Khalid Khan, Ihsan Ullah Khan[1]

Abstract

Purpose – The purpose of this paper was to investigate the impacts of bonded child labour in the brick kiln industries. It aimed to analyse that how these children are exploited for less wages and increased work hours so that to highlight the complete violation of human rights in Pakistan.

Design/methodology/approach – The paper analyses the literature on the socio-economic conditions of the children particularly in Khyber Pakhtunkhwa, Pakistan and engages its theoretical development.

Findings –The paper analyses that the socio-economic conditions of the poor masses especially the children in KP, Pakistan are deteriorating day by day. Moreover, the poor policies of the government both federal and provincial to cater the needs of the underprivileged class are further worsening the situation.

Research limitations/implications – The research uses an analytical approach based on some empirical data to probe into the heart of this issue.

Originality/value – This paper traces out the policies being formulated by the government of Pakistan from time to time. However, there is a strong dichotomy between what the government is trying to convey and the ground realities in different parts of the country. This paper, therefore, investigates four distinguishing points: social conditions of bonded labour, exploitative strategies used for bonded labour, the extent of bonded child labour, pessimistic effects of hazardous child labour on the personality of the affected children.

Paper type – Mixed Method Approach (Quantitative and Quantitative data collection) has been adopted in this Paper.

Keywords - *Labour Reforms, Bonded Child Labour, Advance Money, Brick Kilns and Loan Burden.*

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1. Introduction

Children are prospective assets for every nation irrespective of their social and economic conditions. Their significance neither can be denied nor ignored since they are the future of a particular country. If a nation ignores the status of its children, it cannot compete the rest of the world in terms of socio-economic uplift of its citizens. Keeping in view the importance of this asset in the future prosperity of a country, they should be given proper conditions and environment whereby their personalities can be groomed for their future responsibilities. However, many children from poor and deprived background suffer the harshness of working conditions in many developing countries including Pakistan. Child labour is an evil and a serious problem in today's world. It has assumed a manipulative and/or exploitative aspect all over the world and Pakistan has no exception in this regard. Children are not only socially oppressed but also suffer moral corruption especially in Pakistan where there is no check and balance by the government. According to the World Bank survey, Pakistan lines the sixth most populous country in the world with 173.8 million people; Literacy rate in 2008 stood at 53% whereas infant mortality rate was noted to be maximum among South Asian countries. The right to education, health and opportunities for standard physical development are basic to every member of a state; however, these rights have been denied in Pakistan. As a result, millions of children are living under poverty line and this situation exits even in the 21st century in Pakistan, claims Afzal (2006).

A study by Chaudhry and Garner (2007) reveals that exploitative child labour in pathetic working conditions is one of the burning and serious problems of Pakistan nowadays. Khyber Pakhtunkhwa is a hub of bricks kilns, where hundreds of child labourers are employed with their parents. In Pakistan, an average of eight family members are consuming the earning of a single person. Moreover, since the inflation rate in the country is high, it becomes very difficult for such families to sustain their livelihood. Child labour is increasing throughout the country in general and, due to certain social factors, it is on the rise in particular in Khyber Pakhtunkhwa and FATA (Federally Administer Tribal Areas) and PATA (Provincially Administered Tribal Areas) i.e., Malakand Division.

Among the early efforts, the United States of America has made legislation for the elimination of child labour in the world. In this connection, one of the important acts is 'The Child labour Deterrent Act in 1992'. This bill is widely known as Harkin Bill (ILO, 2004).

Child Labour

ILO (2004) defines child labour as "the labour where such work deprives children of their schooling, entertainment, childhood, their potential dignity and that is hazardous to their mental and physical development."

Bonded Labour

According to the Report of National Coalition Against Bonded Labour, "Bonded labour refers to the work which is performed by any member of the debt bondage family for their Master/Owner on nominal wages on weekly payment until the loan is repaid. In the contract period of "Peeshgi" (advance payment), the debt-bonded family neither can seek employment on any income generation source and nor can move freely work outside." (Rogaly, 2008).

Forced Labour

Forced Labour refers to "All works or services which are taken from any person under the menace of any penalty and for which the said person has not offered himself voluntarily" (ILO, 2006). Human Rights Commission of Pakistan (HRCP), in a press release on June 25, 2012, Lahore, highlights that bonded labour remains one of the most reprehensible and widespread forms of exploitation in Pakistan even 20 years after promulgation of the law to abolish it. Therefore, the state and civil society must redouble their efforts to eliminate the evil.

The tradition of Bricks Production

According to Iqbal (2006), "Bricks production had a long history in the subcontinent and across the world. In the case of Indus valley civilization (2500-1500 BC), people of this era had a culture of bricks production and they were using bricks in their building construction e.g. the ancient people of Egypt and Mesopotamia had used bricks in the construction of large monument and even in their residential buildings" (p. 3).
In the bricks kilns business, "peeshgi" (Peeshgi is an advance received by the labourers prior to taking up bricks process activities for their Master/ Owner) mechanism is frequently used and the labourers and owners of brick kilns have adopted it as a tradition. Debt bondage is in the form of "peeshgi" and it is a century-old practice in Pakistan. It defines a verbal contract which is in accordance with the seasonal calendar of brick kilns. Laborers received "peeshgi" through "Jamadar"--Jamadar is an important middle labourer

(influential person) who is responsible for organizing the working force for the owner. In Punjab, he is known by the "Labour Mate", who is responsible for entering into an agreement of "peeshgi" between the Owner and labourers. Such practice has several obligations on the working class and on the owners as well. Although the more disadvantaged and vulnerable status is of the workers class, the owners are still exploiting the energies of his labourers. Every member of the bondage family is trying to reduce the burden of debt, but, unfortunately, due to certain social and cultural circumstances, the labourers are highly suffering from the work load and work period of this contract. The burden of debt is so chronic that people could not get rid of the debt for a generation even by engaging their female and children as well (Afzal, 2006).

2. The Extent of Bonded Labour in the Brick Kilns in Pakistan

According to a report by Pakistan Institute of Labour Education and Research (PILER), there is about 90% of brick kilns in the rural areas of Pakistan where the owner of bricks kilns engaged several families for bricks making. The Owners of kilns take full advantage of the cheap labour force. The PILER has identified that up to 5000 bricks kilns are in the Province of the Punjab and more than 6000 in other Provinces of the country (Ali and Hamid, 1999).

Bonded child labour has already been banned and outlawed in Pakistan after a convention of the UN on human rights. However, still, it is in practice in different provinces of Pakistan. Global Slavery Index 2014 shows that approximately 2,058,200 people are engaged in bonded child labour or in other words engaged in slavery in Pakistan. Pakistan is ranked third among 167 countries where slavery or bonded labour is at its peak. After China and India which are world top populated countries, Pakistan is placed on the third position having the largest number of individuals who are living in worst conditions of debt bondage which can be defined as slavery of modern times. It is also noticed that the combined bonded labourer found in Thailand, Pakistan and India, are almost equal to half of estimated 36 million people that trapped in bonded labour or slavery around the globe (Ali, 1999).

An individual becomes a bonded labourer when he/she takes a loan, or he/she is tricked or compelled to do so. Afterward, the person asked to repay the debt and for that he/she is forced to work for long hours, even seven days a week. Hence, he gets stuck in the web and never makes to get out of it. This debt never gets paid and it passes from one generation to the other. They are so much pressurized that they cannot even think to escape form this slavery (Iqbal, 2006). Like other South Asian countries, Pakistan is also marked for debt bondage which remained an ugly part of other medium scale industries

for example carpet weaving industry, agriculture, brick kilns, fisheries, shoemaking, workshops, stone crushing, scavenging. Statistics show that eight million children are working in different sectors of Pakistan. However, this data is based on earlier sources and the new data can be different from it since no steps have been taken to eliminate this curse from the country.
The practice of bonded labour or debt bondage in brick kilns is a common phenomenon all over Pakistan. Majority of this practice is carried out in the province of Punjab (Ercelawn and Karamat, 2002). In a report issued in 2013, Pakistan has been declared among those countries which are included in the 'Slavery's List of Shame'. Among the total 185.13 million people in 2014, the Global Slavery Index reported that more than 1% of people are enslaved in Pakistan. Recently a campaign has been launched by Punjab government on August 26, 2015 for the enrolment of those children in school who work in brick kiln. The basic objective of the campaign was to enrol all the students' up to 14 years of age in schools near to brick kilns till the end of October 2015 (Ercelawn and Karamat, 2002).

3. Literature Review

Socio-Economics Perspective of Child Labour

In developing countries, there are several factors which can be considered as root causes for increasing trend of child labour. Many researchers opine that poverty is responsible for child bonded labour. These researchers have conducted various studies in the socio-economic dimensions of child labour and have analysed both primary and secondary data. All findings of these studies indicate that poverty, large family units and single parenthood are the main factors which are playing a detrimental role in child labour which automatically lead to exploitations. Moreover, there are other social and cultural forces which influence the rise of child labour in developing countries including Pakistan (Irfan and Hamid, 1981; Khan, 1982; Basu and Kaushik, 1999 and Ali & Hamid, 1999). Bhalotra (2007) has examined the association between poverty and child labour. She had used a large household survey from rural Pakistan and estimated labour supply models for boys and girls in wage work. She had found that "poverty is associated with the supply of child labour into the active workforce".
Behera (2007) associated the problem of child labour with poverty, insufficient educational system, and unemployment. She argued that child labour is the highly noticeable problem in the 21st Century in South Asia. Many of the children are working in various fields and pooling their families' economy. They are working in highly miserable conditions and exploited by their owners.

She has, also, pointed out that child labour is both the cause and consequence of poverty. However, she acknowledges the role of society and cultural discourse in the increase in child labour and it is in the shape of traditional practices and gender disparity.

Research Discourse on Child Labour in Pakistan

In the previous two decades, both academic and action-oriented organization had carried out several researches in which the focus is to explore the phenomena of child labour prevalence in Pakistan. Many researchers have tried to provide their input in sorting out this issue; however, there are still many areas of investigation which demands analysis to find out why an answer to the question of why an increasing number of children are at the workforce. Shaheen (1982) carried out research, "Exploitative Child Labour in Auto Mobile Workshops in district Peshawar", Khyber Pakhtunkhwa, highlighting the links between poverty and large family unit; single parent family and illiteracy. It was also found that the parents' wishes were also one of the factors responsible for child labour in the informal industry.

The Government of Pakistan and Federal Legislation on Child Labour

The state of Child Rights in Pakistan is a matter of high concern. To protect the rights of children, the government of Pakistan has pledged that it will be working with International Organizations to eradicate this issue. In this connection, the Government of Pakistan has legislated on the Worst Form of Child Labour. Article 11 (3) of the constitution of Pakistan prohibits work by a child below the age of 14 years in the formal and informal industry and hazardous working environment (ILO, 2006).

Economic Perspective of Child Labour

Basu and Van (1998) have presented the first formal economic theory and have explained the economic perspective of child labour. Theoretically, they described two important observations; "one that most families would prefer not to send their children to work; and second that most families that do send their children to work because of dire necessity. Both researchers have indicated both facets which are exploitation by the employers and the parent's decisions for sending their children for work (Hugh, 2009). Emerson and Souza (2003) have explained the child labour and economic relation in their dynamic model of child labour in which they indicated that drop out in education sector of Pakistan. This practice can be repeated through

generations, and consequently, families can get fixed in a "child labour trap". It is obvious that parents who were once child labourers will have to send their own children to work, and thus such families can get trapped in a cycle of poverty and child labour.

Debt Bondage

The notion in which people are obliged to work for someone from whom he or she has received an advance is termed as "debt bondage". In this regard, an advance is used as a tool of intimidation to compel people to work for an owner; whereas borrowing money from an employer is not strange. In bonded labour system the debt is imposed through exploitation and refusals of rights. Generally, in all debt bondage practices, the debt is advance money which is taken by (labourers) or given by (owners) other than the regular wages. This system is very exploitative for the workers and the owners take advantage of the advance money he/she has given. (ILO, 2012).

Debt Bondage and Self Determination

Bondage is a type of modern slavery in the case of cash advance and inability to repay the advance money to the masters; it automatically clenched the hands of family members and they are bonded with their owners. They are not allowed to go anywhere without the consent of their owners. The owners have regularly forced them to work on minimum wages or no wages. Thus, bondage families are always at the mercy of their masters and at risks of high exploitation in terms of low wages or no wages, physicals harassment. Children and wives are used as domestic servants (ILO, 2012).

Debt Bondage and Forced Labour

Debt bondage is generally deemed as a type of forced labour but is usually not entirely involuntary. In numerous cases, families who are bonded to deliver services for their employer under some form of commitment /contract or agreement to which they have consented. For some, consent is a matter of tradition and history in societies in which they live. It is obligatory for the workers that they may be doing labour in any circumstances or situations for which the owners of industry to fix (ILO, 2012). As soon as the honour and dignity of the individual, either child or adult, is so evidently infringed, it is patent that the individual choice cannot be used to tie up them to serve which is exploitative and which violates their rights. Thus, it is not steady with the guidelines of laws and conventions of human rights that an individual can

pledge, commitment or contract in which they are not empowering for their freedom. In short, in South Asia, the bonded labour mechanism is the oldest type of forced labour and accounts for the maximum number of forced labourers in the modern world (ILO, 2012).

Impacts of Bonded Child Labour

Upon engaging children into bonded labour force can results very bad impacts on their social, psychological and physical development. Children in the bondage contract fall into the stream of abuses and violation of their rights. Though, the impacts of bondage on bonded child labourers is not a unique one, as children in all working settings are the prey of vulnerability and exploitation in the same manners (ILO, 2012).

4. Material and Methods

This study is related to the problems of bonded child labour in brick kilns/industry at Peshawar, Pakistan. It is a quantitative research which has been carried out through random sample as a data tool. According to an ILO report (2012), there were 05 hundred brick kilns industries, among them only 380 were functional and 60 brick kilns were selected as a sample size from a total 380 brick kilns. From 60 brick kilns 2 children, 2 parents and 1 owner from each kiln were selected on simple random sampling, thus total sample size was 300 i.e. 120 children, 120 parents and 60 owners through Sekaran (2003) table of sample size. The interview schedule was used as a tool for data collection from different respondents. After the collection, the data then analysed through Statistical Package for Social Science (SPSS) and a statistical Chi-square test was used to test the hypothesis i.e. Higher the debt bondage, greater would be exploitation of parents' and children's services by brick kilns owners.

Ethical Consideration

Ethics in research activity is considered as the guidelines of the research. Research ethics play a very important role in conducting any research activity. In this study the researchers strictly followed the ethical considerations. It was a very sensitive topic because in this the minor or children were interviewed along with their parents and the owner of the brick kilns. The researchers took consent from the owner of the industries, bonded child labour, and their parents. The researchers said to them that the information will be used only for academic activity. The researchers will not share any information with other

people. The researchers assured that all the information will be kept confidential and their names will be not mentioned in the study.

Hypothesis

For this hypothesis, the association between independent and dependent variables has been tested through Chi-square, where p values are 0.169, 0.003, and 0.000, which shows a strong association between the variables. Hence, the hypothesis is proved valid. In the analysis, the hypothesis is then tested through Chi-square test to find out the relationship between dependent variable (bonded child labour) and independent variables (financial problem, loan burden, and total advance money). Higher the debt bondage, greater would be the exploitation of parents' and children's services by brick kilns owners.

5. Analysis and Discussion

The study analyses the primary data collected in comparison with the existing literature through some tables along with a detailed discussion as follows:

Table No 01. Chi-Square Tests Showing an association between Financial problem and Bonded Child Labour

	Value	Df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	2.118[a]	1	0.146		
Continuity Correction [b]	0.941	1	0.332		
Likelihood Ratio	3.586	1	0.058		
Fisher's Exact Test				0.333	0.169
Linear-by-Linear Association	2.082	1	0.149		
N of Valid Cases	60				

a. 1 cells (25.0%) have expected count less than 5. The minimum expected count is 1.50.
b. Computed only for a 2x2 table

In the table number 01, the result shows that there was significant (p=0.169) association between the financial problems facing by children and the bonded labour. In this variable, most of the respondents were of the view that bonded child labour did not face any type of financial problems while the owner of the brick kilns industries provided enough money to these children. The findings of Behera (2007) did not support the result of the table in comparison to the problem of child labour with poverty, employment, and financial problems. She argued that child labour is the highly noticeable problem in the 21st Century in South Asia. Many of the children are working in various fields and pooling their families' economy. They are working in high miserable conditions and exploited by their work owner. She also pointed out that child labour is both the cause and consequence of poverty. However, she acknowledges the role of society and cultural discourse in the increase in child labour and it is in the shape of traditional practices and gender disparity.

Table No 02. Chi-Square Tests Showing an association between Total Advance Money and Bonded Child Labour

	Value	Df	Asymp. Sig. (2-sided)
Pearson Chi-Square	52.549[a]	5	.000
Likelihood Ratio	42.784	5	.000
Linear-by-Linear Association	14.845	1	.000
N of Valid Cases	60		

a. 8 cells (66.7%) have expected count less than 5. The minimum expected count is .30.

A highly significant (p=0.000) association was found between the children takes the advance money and the bonded child labour. Most of the respondents replied that bonded child labour takes advance money from the owner of the industries. After giving the advance money by the owners to the bonded child labour then the owners exploited the children in working hours. They took more work from the children and provided less money. If any of the bonded children demanded his rights, then the owners said not to come for work by next day and also demanded the remaining amount paid him in advance. According to Rogaly (2008), this study was supported by the Report of National Coalition Against Bonded Labour, "The State of Bonded Labour in Pakistan, "Bonded labour refers to the work, which is performed by any member of the debt bondage family for their Master / Owner on nominal wages on weekly payment; until the loan is repaid; In the contract period of "Peeshgi" (advance payment) the debt-bonded family cannot seek employment

or any income generation source and move freely outside". After analysing the whole primary data, the results show that the hypothesis proved valid.

Table No 03. Chi-Square Tests Showing an association between Loan Burdon and Bonded Child Labour

	Value	df	Asymp. Sig. (2-sided)	Exact Sig. (2-sided)	Exact Sig. (1-sided)
Pearson Chi-Square	13.958[a]	1	.000		
Continuity Correction[b]	9.818	1	.002		
Likelihood Ratio	9.769	1	.002		
Fisher's Exact Test				.003	.003
Linear-by-Linear Association	13.725	1	.000		
N of Valid Cases	60				
a. 1 cells (25.0%) have expected count less than 5. The minimum expected count is .90.					
b. Computed only for a 2x2 table					

The last table of the hypothesis shows a significant (p=0.003) association between loan burden and bonded child labour. In this table, most of the respondents said that owner of the industries did not provide enough money on proper time to bonded child labour. Due to this most of the children borrowed money from other people to fulfil the basic needs of their family. When the owner provides them with their salary then they return the loan money and through this borrowed cycle they become poorer day by day. The study supported by the findings of Afzal (2006). According to Afzal in the bricks kilns business, "peeshgi" mechanism is of frequent use and the laborers and owners of brick kilns have adopted it as a tradition. Debt bondage is in the form of "peeshgi" and it is a century-old practice in Pakistan; it defined a verbal contract which is usual on the seasonal calendar of brick kilns. Labourers received "peeshgi" through "Jamadar" in Punjab that person also called labour Mate, who is responsible for entering into an agreement (verbal) of "peeshgi" between owner and labourers. Such practice has several obligations on the working class and on the owners as well. Though the more disadvantaged and vulnerable status is of the workers class and the owners are exploiting the energies of their labourers. Every member of the bondage family is trying to reduce the burden of debt but unfortunately, due to certain social and cultural circumstances, the labourers are highly suffering. The burden of

debt is so chronic that people could not get rid of from the debt for a generation even by engaging their female and children as well.

6. Conclusion and Suggestions

It is concluded from the whole study that bonded labourers face a lot of problems; they do not fulfil the basic needs of their family easily. For the fulfilment of their needs, they are working as a bonded labour and most of them are the children. Poverty and unemployment are the main causes of the bonded child labour because these children and their family faces financial problems to overcome these problems they take advance money from their owners. When the owners provide them advance money/peeshgi then the owners use the according to their own will as they take more work from these bonded children and give them a very low salary. First, these bonded labours returned the peeshgi and this becomes a cycle of giving and taking money in advance from owners. This type of loan money becomes a burden on these bonded labours and through this way they become poorer day by day. It is recommended that children are the future of the society and policymakers must have to take some positive steps for their rights. Political leaders must focus on the violation of the rights of these children by the owners of the brick kilns/industries. To provide free and compulsory primary education, income generation schemes, implementation of bonded labour abolition Act 1992 including other labour laws and Conventions on the Rights of Children (CRC) Ratifications.

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Benefits Connected with the Development of Professional Qualifications by Employees and the Social Policy of the State on the Example of the Regulations of the Polish Labour Code

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Abstract

Purpose. The aim of this paper is to illustrate the social character of the statutory benefits connected with the development of professional qualifications in the Polish labour law. This issue is analysed from the perspective of the social policy of the State, social human rights and the interests of employers who bear the financial burdens of such social benefits.

Design/methodology/approach. We examine the role of the development of professional qualifications in the social policy of the State and the legal framework under Polish law.

Findings. It is necessary to notice multiple social aspects of benefits connected with the development of professional qualifications by employees. The issue is also connected with the proportionality of burdening the employers with them.

Research limitations/implications. This research provides a critical debate about the current legal construction of training leaves in Polish law.

Originality/value. The study presents a review of the arguments on social character of the analysed benefits to employees, analyses existing Labour Law literature, jurisprudence and enacted acts.

Paper type. Research paper

Keywords: *professional qualifications, Poland, Labour Code*

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1. General remarks

Labour law is always connected with the social policy of the State. It is one of the key fields of its implementation[2]. Supporting the development of employees' professional qualifications is important from the standpoint of the social policy of the State, as its goal is full and productive employment[3]. Constant improvement of employees' qualifications is a requirement of our times and a standard on the current labour market, which is especially important in the context of international relations and the new technologies that continue emerging in the workplace. Undoubtedly, the prospect of improving one's qualifications at work is a significant motivating factor for employees themselves, whereas for the employer the actions taken in this filed constitute an element of the human-resources policy by motivating the employees and strengthening their attachment to the company, hence creating the company's image.

In this case, private interests of both parties to the employment relationship as well as the public interest collide. On the one hand, there exists a private interest of both employees and employers, and the space for implementing a public interest on the other – an individual's right to education and improving qualifications is every individual's social right (one of the so-called second generation human rights). Improving one's professional qualifications is in the general social interest and bears significance in each country's rational and productive labour market policy. Higher and broad qualifications of employees affect their swift job-to-job mobility and prevent unemployment.

In the case of employees who perform public tasks, *e.g.* public sector employees or the employees working in the field of science and education, the issue of continuous improvement of qualifications is also especially significant from the standpoint of the interest of citizens and of the public interest. Some of the Polish business pragmatics imposes on the employees such duties directly[4]. In the case of employers in the private sector, a duty to improve employees' qualifications is not expressed in Polish law explicitly. However, it can be inferred from employees' general duties as the duty of loyalty or the

[2] The earlier literature on labour law already tackled the issue of labour law as an instrument of social policy: *cf.* T. Zieliński, *Prawo pracy. Zarys systemu [Labour Law. An Outline of the System]. Part I. Overview*, Warszawa-Kraków 1986, pp. 51 *et seq.* and pp. 264–265; also: W. Szubert, *Zarys prawa pracy [Outline of Labour Law]*, Warszawa 1976, p. 58 *et seq.*

[3] According to article 10 § 3 of the Polish labour code, the State pursues a policy with the goal of full productive employment.

[4] For example, article 6 point 3-3a The Teachers' Charter of 26 January 1982 r. (Dz.U. [Journal of Laws] 2018, item 967).

duty to comply with work-related instructions (article 100 § 1, § 2 point 4 of the labour code).
The considerations in this article are limited to the employees' and employers' duties included in the general regulations of the Polish labour code that apply to the development of professional qualifications and which occur in practice most frequently, in the private sector in particular. The aim of this article is to show the social nature of employee benefits relating to the development of their professional qualifications, to which Polish employers were obliged, and an evaluation of their construction, especially the costs of such benefits in relation to the social human rights and the social policy of the State.

2. The right to the development of professional qualifications as a human right of the second generation

In the international legislations, the right to education and culture is treated as a human right of the second generation, thus one that is included in the broad category of social rights. It is also the case in the Constitution of the Republic of Poland[5]. Many international acts make a reference to such social rights as an individual's right to education, the school system, and culture.
Article 26 item 2 of the Universal Declaration of Human Rights[6] declares that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. Article 27 states about human rights to culture.
The International Covenant on Economic, Social and Cultural Right[7] declares that technical and vocational guidance and training programmes are instruments of the full right to work for everyone, as one among of the guaranteed social human rights. The human rights to education and culture are mentioned in the articles 13-15 of the Covenant.
The right to the development of employees' qualifications is of interest to the European Union. Article 15 of the Community Charter of Social Rights of Workers[8] declares the right of every worker to have an access to vocational

[5] See: article 70 of the Polish Constitution of 2 April 1997 (Dz.U. [Journal of Laws] No. 78, item 483, as amended).
[6] The Universal Declaration of Human Right proclaimed by the United Nations General Assembly in Paris on 10 December 1948.
[7] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27 (Dz.U. [Journal of Laws] 1977, No. 38, item 169 attach.).
[8] Adopted on 9 December 1989 by a declaration of all Member States of the European Community, with the exception of the United Kingdom, established the major principles on which the European labour law model is based and shaped the development of the European social model in the following decade.

training and to benefit therefrom throughout their working life; there may be no discrimination on the grounds of nationality. Also, there is an important role of the competent public authorities, undertakings and two sides of the industry in enabling this human right.

Article 14 § 1 of the Charter of Fundamental Rights of the European Union (CFR)[9] includes the right to equal access to education and vocational training; it protects the right to compulsory education and the freedom to find educational establishments. The explanations to CFR indicate as a source of the above regulations both constitutional traditions that are common to all Member States, Additional Protocol No. 1 to the European Convention on Human Rights [10] (article 2) as well as the Community Charter of Social Rights of Workers (point 15) and the European Social Rights Charter)[11] (article 10). Article 53 TFEU [12] forms a legal basis through the EU's implementation of the citizens' freedom of establishment. The issue of mutual recognition of qualifications has significance for the European Union citizens who use the right to freedom of movement for workers and services[13]. Especially significant in this context is the system of recognizing professional qualifications of employees, which makes it possible to perform one's profession acquired in one's country of origin on the territory of another Member State of the European Union[14].

The International Labour Organisation (ILO) Convention No. 14[15] and ILO Recommendation 148[16] of 1974 of the same name define the general standards of paid training leaves[17]. The Preamble of the Convention constitutes that paid training leave should be considered as one of the means of meeting the real

[9] The Charter of Fundamental Rights of the EU of 7 December 2000 brings together in a single document the fundamental rights protected in the EU. It was proclaimed in 2000 and was entered into force by the Treaty of Lisbon in 2009 (OJ of EU C 83 of 30 March 2010).

[10] The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Dz.U. [Journal of Laws] 1993, No. 61, item 284, as amended).

[11] The European Social Charter of 18 October 1961, made up in Turyn, ratified partly by Poland in 1997.

[12] The Treaty on the Functioning of the European Union (consolidated version: OJ of EU L 202 of 2012, p. 47).

[13] M. Szwarc-Kuczer, in: A. Wróbel (ed.), *The Treaty on the Functioning of the European Union, volume I,* Warszawa 2012, p. 895.

[14] This is regulated by Directive 2005/36, amended by Directive 2013/55/EU.

[15] Concerning a paid training leave adopted in Geneva on 24 June 1974 (Dz. U. [Journal of Laws] 1979, No. 16, item 100)

[16] Adopted on 5 June 1974. See: MOP [ILO] No. 148 concerning a paid training leave, http://www.mop.pl/doc/html/zalecenia/z148.html.

[17] A. M. Świątkowski, *Międzynarodowe prawo pracy, t. I, Międzynarodowe publiczne prawo pracy. Standardy międzynarodowe, vol. 2* [*International labour law, vol. I, International public labour law. International standards,* vol. 2], Warszawa 2008, p. 552.

needs of the individual workers in a modern society. This means breaking the link between training and work. The meaning of training refers to the "society" that justifies the perception of the issue as a human right rather than just a worker's right[18]. The institution of the paid training leave in principle is aimed at facilitating one's acquiring, improving and adjusting their qualifications that are necessary to pursue a profession or occupation in accordance with the requirements resulting from developments in science, technology, and economic and social changes. The aforementioned legal acts are uniform in their definition of the paid training leave. It is a leave an employee is granted for training purposes for a specific period of time during one's working hours and involves a provision of the appropriate financial benefits. The convention obligations haven't decisive nature for the member states which have ratified it because the state has a duty to only carry on the policy that aims at supporting paid leaves for workers who wish to improve their professional qualifications and whose development and implementation should take place by way of cooperation between public authorities of member states, organizations of employers and employees, institutions, or governing bodies[19]. ILO Convention 140 leaves the manner and sources of financing of training leaves to member states to regulate them in the national law of the member states.

In turn, Article 10 § 3 of the European Social Rights Charter obligates the Member States to facilitate training opportunities for adult workers and the attention was drawn to the need for special facilities to train adult workers alongside the technical advancements and when new tendencies appear on the labour market. This duty is relative in its nature and the assessment of the need to introduce appropriate instruments was allowed at the discretion of the member states.

The aforementioned legal acts allow one to draw a general conclusion that every person who works has the right to develop their professional qualifications. Furthermore, all instruments under labour law as regards facilitating the employee's professional qualifications have a cross-society dimension. The facilitations within solutions under labour law, in particular, a training leave or a leave of absence during working hours to participate in the educational activities not only aim at the improvement of one's qualifications (necessary or required at a given employer's) but at improving everyone's general qualifications. The aims are, therefore, typically social. Consequently, we can say about the implementation of the rights of a working individual (who performs a gainful work that constitutes the individual's source of

[18] See: Ł. Pisarczyk, *The obligation of facilitating to employees of development their professional qualifications,* in: *Praca i Zabezpieczenie Społeczne [Work and Social Protection]* 2003, issue 4, p. 29.
[19] A.M. Świątkowski, *Międzynarodowe prawo pracy* [*International labour law]*, p. 543.

income), rather than private interests of an entrepreneur only. The above also justifies the view that the payment of any benefits to employees by employers is, in this respect, and to at least some extent, social in its nature. At the same time, all said legal acts give member states a lot of flexibility as to the implementation of the facilities in this matter.

3. The development of professional qualifications and the social policy of the State in the system of education

The market and social dimensions of improving one's qualifications also require attention. Developing professional qualifications by an employee is an integral part of the state's policy concerning the labour market. The literature on the subject correctly points out that vocational education increases the worker's ability to adapt not only within a work establishment but also within the entire labour market by making it possible for them to change the type of work they provide, including finding new employment after a loss of the previous one. At the same time, trainings are also attractive for the employers as they prevent a constant rotation of staff, bind the employee to the company and increase competitiveness[20].

The ILO report *Global Employment Agenda*[21] indicates that one of the priorities of the global employment policy is the ability to find oneself in the employment market and to adjust to its changing conditions. The goals are to be achieved by the actions promoting continuing education as an instrument that allows an individual to prepare for employment at present and in the future.[22]

The development of professional qualifications leads, therefore, to the increase of the employee's adaptability within the work establishment (so-called functional flexibility)[23] and on the labour market. In this way, the an employee

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[20] See: A. Ludera-Ruszel, *Podnoszenie kwalifikacji zawodowych przez pracowników na gruncie kodeksu pracy oraz wybranych ustaw szczególnych* [*The development of employees' qualifications in the Polish labour code and some selected statutes*], Warszawa 2016, p. 274 *et seq.*

[21] Presented during the Global Forum on labour which took place in Geneva in November 2001.

[22] See: I. Boruta, *Strategie zatrudnienia organizacji międzynarodowych UE [Employment Strategies of EU International Organizations], MOP, OECD*, Warszawa 2002, pp. 23–25.

[23] Functional flexibility is based on the assumption of comprehensive preparation of employees who, if necessary, can perform other work or work on a different position, which in consequence makes it possible to avoid redundancies – see: Ł. Pisarczyk, *Przeobrażenia prawa pracy i jego funkcja ochronna [Amendments to labour law and its protective function],* in: B. Wagner, E. Hofmańska (eds.) *Studia prawnicze. Rozprawy i materiały [Legal Studies. Dissertations and materials*, Krakow 2010, p. 29.

is better protected from the undesired unemployment after the end (for various reasons) of the current employment[24].

In the era of the digital society and globalization, knowledge has become a universal substitute, a precious commodity comparable to a capital[25]. Contrary to the industrial economy, in the knowledge economy the main resource – a product of strategic value are the people, their skills, the know-how and the experience that they have[26]. The performance of the transnational businesses and corporations in the global market of products and services depends, to a large extent, on the level of education of their workers. Continuous training of the employees and their flexibility in adjusting and changing their qualifications according to the needs of the economy is, still, a significant instrument of regulating the supply and demand on the labour market. On the one hand, it contributes to the reduction of the unemployment levels among those who do not have a job, as it offers the possibility to retrain and acquire the missing professional qualifications. On the other hand, it prevents this phenomenon from occurring in the future among the persons who are professionally active and who, while being under-qualified, could lose their employment[27]. Ultimately, the investment in the employee training indirectly contributes to the economic development of the country.

4. The employee's right to the development of professional qualifications in the regulations of the Polish Labour Code

The employee's right to the development of their professional qualifications is implemented under the regulations of the Polish labour code. In accordance

[24] Functional flexibility is based on the assumption of comprehensive preparation of employees who, if necessary, can perform other work or work on a different position, which in consequence makes it possible to avoid redundancies – see: Ł. Pisarczyk, *Przeobrażenia prawa pracy i jego funkcja ochronna [Amendments to labour law and its protective function]* p. 29.

[25] Analyst A. Toffler believes that 'knowledge is an ultimate substitute for all other resources of every organization. Tkanks to knowledge, modern enterpresises achieve greatest successes and people have careers; see: J. Podlowska, *Jakość kształcenia zawodowego – priorytetem w Europie [Quality professional education – apriority in Europe]* Meritum 2006, No. 2(2), p. 22.

[26]See: E. Skrzypek, *Wiedza jako czynnik sukcesu w nowej gospodarce [Knowledge as a success factor in the new economy],* in: E. Skrzypek, A. Sokół (eds.), *Zarządzanie kapitałem ludzkim w gospodarce opartej na wiedzy [Human resources management in the knowledge-based economy]*, Warszawa 2009, p. 139; K. Kuźniar, *Stan i perspektywy rozwoju społeczeństwa informacyjnego w Polsce w świetle dążeń do gospodarki operatej na wiedzy [State and perspectives in the developing of information society in Poland in the light of the pursuit to knowledge-base society],* in: *Zarządzanie kapitałem ludzkim w gospodarce opartej na wiedzy [Human resources management in the knowledge-based economy]*, Warszawa 2009, p. 3.

[27] I. Ostoj, *Wpływ wykształcenia na kształtowanie się bezrobocia [Effect of education on unemployment]*, in: *Nierówności Społeczne a Wzrost Gospodarczy [Social Inequalities and economic growth]*, 2005, No. 6, pp. 303, 306-307.

with Article 17 thereof, employers are obligated to enable employees to improve their professional qualifications. The duty to facilitate the development of the employees' professional qualifications in the above-mentioned article of the labour code is qualified as one of the fundamental principles of labour law (Chapter II of the labour code)[28]. The duty is repeated in article 94 point 6 thereof, which defines the fundamental duties of the employer. The counterpart to the obligation of the employer is the right of the employee to use the facilities enabling the development of their professional qualifications.

In this context a question arises, whether and when the employers' obligations to facilitate the development of employees' professional qualifications (arising from art. 17 and art. 94 point 6 of the labour code) are indeed demanding in their nature. As judicial decisions point out, the concept of "facilitating" cannot be interpreted as an absolute duty to organize, conduct or pay for the training chosen by an employee. Despite the imperative wording of the regulation, the employer, in principle, does have a duty to create conditions for obtaining specific qualifications[29], including the duty to bear the costs of the employees' education. In fact, the only duty that employer has towards all his employees is related to the regulations on health and safety at work (articles 237^2–237^5 of the labour code)[30] and the employed adolescents[31]. The duty described under art. 94 point 6 of the labour code does not mean that an employee may demand a specific support from the employer in developing his/her professional qualifications, for instance, organizing and conducting a computer training by the employer. The employee's right is not recognised as a claim which makes it considerably more difficult to pursue. The employer does not have a duty to train employees; however, the employer has the duty to enable them to improve their qualifications if they wish to do so. It is stressed that it is the employee who should be primarily interested in improving their

[28] This rule is stated in Chapter II labour code: Fundamental Principles of Labour Law.

[29] Supreme Court Judgment resolution of 10 March 2005, II PZP 2/05; see also: Supreme Court Judgment of 25 May 2000, I PKN 657/99, OSNAPiUS 2001, No. 22, item 660, with gloss by E. Engel-Babska, OSP 2002, No. 6, item 89.

[30] Pursuant to article 237^3 § 1 of the Polish Labour code no employee shall be allowed to perform work without the qualifications and skills required to perform that work, and without the sufficient knowledge of the provisions on and principles of occupational health and safety. An employer shall provide induction training in occupational health and safety before an employee is allowed to perform any work, and shall organise periodic training in health and safety at work. The above trainings shall be conducted during working hours and at the employer's expense.

[31] Improving their qualifications is the employer's primary duty. See: *e.g.* E. Maniewska, commentary to art. 17 labour code, in: K. Jaśkowski, E. Maniewska, *Kodeks pracy. Komentarz. [Labour code. Commentary]*, LEX 2012. *Cf.*: regulations of section 9 of the Polish labour code.

qualifications, thereby showing their own initiative and engagement in the process, whereas the employer has a duty to make this easier for the employee[32]. The employer is obligated to facilitate the employee's gaining qualifications provided that this will not be in a significant conflict with the work the employee is entrusted with. And yet, even in this case, the possibility of terminating a contract of employment without notice (article 55 § 1^1 labour code) should be considered as doubtful. Judicial decisions indicate[33] that creating a positive atmosphere for learning and avoiding unjustified refusals for any form of education chosen by an employee also means that the employer is enabling employees to develop their professional qualifications. The employee, on the other hand, will be able to use the claims arising from the violation of the principle of non-discrimination if they are able to prove that, as regards creating a possibility to develop professional qualifications, they were not treated equally with other employees. In accordance with article 18^{3a} § 1 of the Polish labour code, employees should be treated equally in relation to the promotion opportunities and access to training in order to improve professional qualifications.

On the other hand, it cannot be disregarded that the legislator clearly specified the employers' duty to facilitate their employee's professional qualifications development as set forth in art. 17 and art. 94 point 6 of the labour code. Therefore, within their duty, the employer should implement at least all the organizational solutions to enable self-developing employees to participate in the trainings, as far as it does not collide with their duties and work organization within the company. In my opinion, the claiming nature of this duty could be possible, however hard to prove, e.g. in case when the employer was able, without significant organizational and staff-related obstacles, to organize the employee's work in a different way or to enable him/her to work additional hours as a compensation for the leave taken for training, on the condition that the employee him/herself proposes such a solution and shows interest in implementing it.

In practice, under Polish labour law, most frequently the duty to improve one's professional qualifications takes on a concrete demanding character if the employer's duties are regulated by the normative internal regulations at a work establishment's, *e.g.* collective agreements or rules and regulations, in an employment contract, or in code-regulated agreements on improving qualifications concluded between an employee and the employer (art. 103^1-103^6

[32] Supreme Court Judgment of 25 May 2000, I PKN 657/99, OSNAPiUS 2001, No. 22, item 660.

[33] See: rationale of the Supreme Court Judgment of 10 March 2005, II PZP 2/05, OSNP 2005, No. 16, item 240.

labour code). Only in such cases, the employee may demand, with no additional stipulations, that the obligations imposed on the employer and concerning the latter's facilitating the professional development of employees can be demanded.

Articles 103^1–103^6 of the labour code made the form of the employer's duty to facilitate improvement of professional qualifications more specific. As follows from the articles, the development of professional qualifications is understood as acquiring and implementing the knowledge and skills by the employee, by the employer's initiative or by his consent (art. 103^1 § 1). In other cases, we can speak of an employee acquiring or updating their knowledge according to other principles (art. 103^6 of the labour code). Furthermore, only in the case of his improving professional qualifications by the employer's consent or initiative, the employee is entitled to benefits relating thereto, *i.e.* training leave and release from the whole or part of working day for the time needed to come on time to the obligatory classes as well as for the time of their duration (art. 103^1 § 1 of the labour code[34]). Furthermore, the employer may grant additional benefits to an employee who improves their professional qualifications; in particular, he may cover education fees, travel, handbooks and accommodation (art. 103^3 labour code). In such a case, the additional benefits are subject to tax exemption[35]. The employer's granting obligatory statutory benefits in the form of a paid leave and training leave as well as the introduction of a tax exemption for additional benefits that employers pay in connection with improving professional qualifications is an expression of the legislator's promoting developing professional qualifications by employees. At the same time, the legislator clearly settled that it is the employer who is the entity which decides about the use of this form of training by the employee.

[34] Pursuant to article 103^1 of the Polish labour code, improving professional qualifications is understood as acquiring and implementing the knowledge and skills by the employee by the employer's initiative or by his consent.
The employee improving his professional qualifications is entitled to:
1) training leave,
2) a leave of absence from the whole or part of working day for the time needed to come on time to obligatory classes as well as for the time of their duration.
The employee retains the right for remuneration for the time of training leave as well as for the time of leave of absence for the whole or part of working day.

[35] See: article 21 paragraph 1 point 90 of the act of 26 July 1991 on personal income tax (Dz.U. [Journal of Laws] 2018, item 1509), pursuant to which the value of benefits awarded under separate regulations and granted by the employer for improving one's professional qualifications is tax exempt, save the remuneration received for the time of leave of absence from the whole or part of working day and for the time of training leave.

5. The Social benefits connected with the development of professional qualifications under Polish Labour Code

Article 103^1 § 1 of the Polish labour code, which introduces the definition of improving professional qualifications, makes no distinction as to the kind of the employee qualifications. Therefore, these can be both qualifications that are necessary for one to perform their current work and general qualifications as well. It is the employer that shall decide whether or not a given form of improving one's qualification shall be subject to paid benefits under the labour code.

The Polish legislator also decided that whenever employee improves his qualifications with the consent of the employer or on the employer's initiative, thus in the meaning of the articles 103^1 -103^5 of the labour code, the employer is obligated under the act to bear the financial costs connected with the work of a social character that are not strictly a remuneration for work, *i.e.* the costs of remuneration for training leave and remuneration for a leave of absence for the entire working day or any part thereof, as required to attend mandatory training on time, and covering the time of that training. The employer can release himself from the costs because they were imposed upon him by the legislator. The duty to cover the costs has, therefore, a social aspect.

The length of a training leave will be dependent on a kind of examinations with which a given form of training ends. In accordance with article 103^2 § 1 of the Polish labour code, the training leave referred to in article 103^1 § 2 point 1 to which an employee is entitled shall be as follows:

1) 6 days - for an employee taking external exams,
2) 6 days - for an employee taking secondary school final exam,
3) 6 days - for an employee taking an exam confirming professional qualifications,
4) 21 days within the last year of the studies in a tertiary education institution - to write a diploma thesis and to take the final exam.

Training leave is granted on the employee's working days according to the agreed working time schedule. The employee is entitled to training leave in the amount allowed in the act and only in the cases of the indicated exams whereas a release from work in an unlimited amount in so far as it corresponds with the purpose, *i.e.* exclusively for obligatory classes arising from the training schedule.

The question could thus be raised whether the adopted construction and its social and labour market aspects are justified.

Firstly, it should be noted that the regulations in the code are constructed in such a way that they do not provide for a possibility to refund the remuneration paid for the period of the leave taken by the employee to

improve his/her professional qualifications, even in the case where the employee has failed to comply with the duty of loyalty. Although the employer may, under a separate so-called loyalty agreement (article 103^4 of the labour code), obligate the employee to remain employed upon completion of the training leave, but in no case longer than 3 years (article 103^5 point 2 of the labour code). However, in the event of the employee violating this provision, the employer cannot seek reimbursement of the costs of the statutory benefits paid to the employee for the training. The duty to work for a certain time period upon completion of the training that was financed by the employer based on a loyalty agreement can refer *de facto* to so-called additional allowances (additional to the ones arising from law) only, such as the payment of expenses related to education, travel, books and accommodation *etc.* In no case, however, does the employee have to work off the costs of statutory social benefits, *i.e.* not the cost of remuneration for training leave and the cost of remuneration for a leave of absence to attend mandatory training on time and covering the time of that training.

Despite the fact that improving professional qualifications in the meaning of the labour code (under articles 103^1 – 103^6 of the labour code), thereby the ensuing training leave and a leave of absence, takes place at present only on the employer's initiative or with the employer's consent, thus being *de facto* an element of additional work-related contract, arguments exist that speak for it that both benefits paid by the employer do have a social nature. For such a nature of the benefits also speak the general social purposes connected with the implementation of social rights of an individual as regards the access to education as well as their role in the social policy of the state. It should be pointed out, that covering the costs of the employees' absence for the time of trainings or the training leaves by the employer, is not a form of remuneration for employees work performed under article 78 of the labour code[36], but it constitutes other social work-related benefit. Section III[37] and article 77^1 of the labour code clearly differentiate the remuneration for work and other work-related benefits. Other benefits of a social character, the employer is obligated to pay, include, *e.g.,* remuneration for the time of the leave, pension or retirement severance pays, death benefits or temporary incapacity benefits. Their common feature is lack of equivalency, non-reciprocity, obligatory and

[36] Pursuant to article 78 § 1 of the Polish labour code, remuneration for work is calculated in such a way that it corresponds in particular to the type of work performed and the qualifications required to perform it, as well as reflecting the amount and the quality of the work performed.

[37] The section is titled "Remuneration for work and other benefits."

statutory character, and social purpose[38]. The criteria for establishing remuneration for work under article 78 of the labour code do not apply to them. They are similar to the social benefits in the meaning of a social policy[39]. Social policy indicates that special benefits are the measures to fulfil the needs of individuals and families and that are not connected to their own work. The right to social benefits is one of the fundamental human rights[40].

Furthermore, it is necessary to answer the question on reciprocity of both statutory benefits connected with improving professional qualifications. The possibility of concluding a loyalty agreement with an employee in connection with the additional benefits covering the cost of a training undoubtedly speaks for taking into consideration the business interest of the employer and introduces an element of reciprocity. However, this reciprocity is not reflected in the costs of the granted training leave and a leave of absence because they are not subject to reimbursement[41]. In case when the employee does not fulfil the conditions of the loyalty agreement and does not work for agreed time after completing the training, only additional allowances qualify the employer for reimbursement (article 103^3 of labour code). The introduction of the condition of the employers' consent or initiatives in this respect defends the legislator against the allegation of this proportionate encumbering of the employers with social costs but, at the same time, it does not exclude the social axiology in the social nature of the discussed benefits.

Additionally, it should be noted that the conclusion of a loyalty agreement is not obligatory. If it is not concluded, we can say that there are only statutory benefits that are facultative in their nature as they are contingent upon the employer's consent or initiative. Even if, however, an agreement on loyalty is concluded (article 103 of the labour code) then we pay an employee for the loyalty and we do so from a statutory level rather than from a contractual one.

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[38] The literature remarks that the term 'social benefits' should be understood as all cash, tangible goods and services which serve to satisfy the individual needs of an individual and their family. A distinguishing feature of those benefits from among the benefits connected with labour is that they do not constitute remuneration for work because they are acquired on a non-equivalent basis. *Cf.* B. Rysz-Kowalczyk, *Leksykon polityki społecznej [Lexocon of social policy]*, Warszawa 2002, p. 208. See also: A. Sobczyk, *Konstytucyjne podstawy zakładowej działalności socjalnej [Constitutional foundations of social activities of the employer],* in: J. Stelina, A. Wypych-Żywicka (eds.), *Człowiek, obywatel, pracownik. Studia z zakresu prawa [Man, citizen, employee. Sudies in law]*, Vol. XVII, Gdańsk 2007, p. 224.

[39] I elaborate on social benefits in labour law in my new monograph titled *Społeczny charakter świadczeń w polskim prawie pracy* [*Social nature of work-related benefits in Polish labour law],* Warszawa 2019.

[40] J. Wojnowski (ed.), *Wielka Encyklopedia PWN [Great PWN Encyclopaedia]*, Warszawa 2001.

[41] See: articles 103^4 -103^5 of the labour code.

I believe that the significant shortcoming of the current regulations of the labour code in regard to the social construct of the benefits the employer grants to the employees is lack of their mandatory feature arising from law, even in the narrowest extent. The employee in principle has no claim to get a leave of absence or training leave if the employer does not express consent or take the initiative concerning the employee's improving his/her professional qualifications. Only under a rule deriving from the code which enables employees to develop their professional qualifications under article 17 and the duty arising from article 94 point 6 of the labour code, the employee has the right to demand facilities of an organizational character like changing his working schedule or giving him an unpaid leave of absence, which can be qualified as nonmonetary benefits of a social nature[42]. Even development of the employee's knowledge or skills on terms and conditions other than those defined in articles 103^1 to 103^5 of labour code shall be defined in an agreement between the employer and the employee, especially the term and the length of an unpaid training leave or a leave of absence shall be defined in a such agreement (article 103^6 of labour code). Claims of cash social benefits are, in principle, optional.

Furthermore, it should also be noted that in the case of some regulations connected with improving qualification by certain professional groups (researchers, defence attorneys, legal counsels), trainings that are fully paid by the employer were provided for regardless of the profile of the employer's activity. In my opinion, such regulations require special attention.

One of the examples can be the remuneration for the period required prior to the defence of the doctoral thesis. In accordance with article 196 of the act of 20 July 2018 on higher education and science[43], an employee who is not a member of the academic staff or a researcher, upon his/her own request, is entitled to:

1) a 28-day leave of absence to write a doctoral dissertation or to prepare to the defence procedure of the thesis that is granted them within the deadline agreed with the employer, the days being the employee's working days in the meaning of separate regulations; and

2) leave of absence from work for the defence of the doctoral thesis.

The employee retains the right to remuneration for the time of the training leave and the leave of absence. The remuneration is paid according to the same rules as the remuneration for the time of statutory annual leave.

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[42] M. Skąpski, *Funkcje prawnej regulacji podnoszenia kwalifikacji zawodowych pracowników i zakres ich realizacji w Polsce [The functions of legal regulations on improving professional qualifications and the scope of their implementation in Poland],* in: L. Florek, Ł. Pisarczyk, *Współczesne problemy prawa pracy i ubezpieczeń społecznych [Contemporary issues in labour law and social insurance]*, Warszawa 2011, p. 252.

[43] Dz.U. [Journal of Laws] 2018. item 1668.

The provisions of article 196 of the law on higher education and science are specific regulations (*lex specialis*) in relations to labour code regulations of training leaves (*lex generalis*) and subsequent regulations (*lex posterior*) and are at the same time more advantageous for the employees; thus, they exclude the application of the provisions of the labour code that regulate training leave. It applies the conflict-of-laws rule: *lex speciali derogat legi generali,* which means that more specific and detailed law must be applied before the more general law.

A doctoral leave is an entitlement that every employee who meets the requirements has a right to be granted, regardless of the employer's profile of activity and of the employer's size. It is not relevant whether the employer expressed consent to the doctoral studies or whether the employee entered into an agreement that defined the mutual rights and obligations of the parties to the development of professional qualifications.

Similar entitlements are provided for legal professions. In accordance with article 34 item 3 of the act of 6 July 1982 on legal counsels[44], an employee has a right to take a leave of absence that is 30 calendar days long and is paid in 80% of one's remuneration, to prepare for the legal counsel's exam. This right can be exercised only once. Furthermore, the employee is entitled to a leave of absence while keeping the right to remuneration to take an entry exam to the profession of a legal counsel. A similar solution is provided for in article 78c of the law on advocates of 26 May 1982.[45]

Therefore, the legislator starts from the assumption that work and activities of an individual have a special social significance. The costs of their benefits are mandatory by the act and, regardless of the type of their activity, should be fully paid by entities that are employers. Furthermore, the legislator does not provide for any exclusion for smaller employers for whom this type of costs can be a significant burden. The payments have a construction that is typical

[44] Dz.U. [Journal of Laws] 2017, item 1870. Pursuant to this regulation, an employee who is on the list of trainee legal counsels who obtained the employer's consent to attend legal counsel training is entitled to be released from providing work to attend mandatory classes while keeping the right to remuneration. An employee who is on the list of trainee legal counsels who did not obtain the employer's consent to attend legal counsel training is entitled to be released from providing work to attend mandatory classes without keeping the right to remuneration. An employee is entitled to paid leave of 80% of his remuneration and lasting 30 calendar days to prepare to legal counsel exam. He can use the entitlement only once. An employee is entitled to a leave of absence with the right to remuneration to take entry and legal counsel exams.

[45] Dz.U. [Journal of Laws] 2018, item 1184. Pursuant to this regulation, an employee is entitled to paid leave with 80% of his remuneration and lasting 30 calendar days to prepare of the advocate exam. He can use the entitlement only once. An employee is entitled to a leave of absence with the right to remuneration to take entry and advocate exams.

for social benefits (mandatory, statutory, and nonreciprocal) that are made within an employment relationship.

The above solutions provoke questions about the validity of the current construction of an employee's training leave and employee's leave of absence for trainings in the Polish labour law. Imposing on the employer the duty to grant a training leave in connection with the employee's undergraduate or graduate studies in the amount of as many as 21 days can seem as an excessive burden and discourage the employers from showing initiative or expressing consent to the employees in this regard. In practice, financing such studies can appear as too expensive for the employers from the standpoint of the costs and organization; therefore, employers can approach the studies with particular caution. It has an adverse effect on the young people who, more often than not, work and carry on extramural studies at the same time. Doubtful is also the need to introduce into legislation a training leave to study for extramural exams or for the secondary school final exams in the meaning of separate regulations and which are *de facto* hardly used. In the current labour market realities, the majority of people who start their professional lives already have a high school education. Additionally, disputes exist whether the notion of a "professional examination" means every kind of a training that ends in an exam or just an exam so defined in the meaning of separate laws.

Furthermore, at present the Polish legislator does not provide for a possibility to pay only additional benefits to the employee arising from article 103^3 of Polish labour code, like fees for education[46], without the employee's taking a training leave. Moreover, at present the Polish legislator does not provide for a possibility to grant the employee a training leave that is shorter than the statutory one. Such benefits should be treated as the employee's additional income under the employment relationship.[47]

In my opinion, due to the fact that statutory benefits are accompanied by the social axiology and also due to the significant connection to the social policy of

[46] The payment alone of the costs without granting a training leave and a leave to attend classes provided for in the labour code would be controversial anyway in the context of article 103^6 of the labour code, which states that an employee who acquires or implements the knowledge and skills according to the principles other than the ones determined in articles 103^1 to 103^5 can be granted:

1) release from the whole or part of working day without retaining the right to remuneration,

2) unpaid leave

- in the amount set up in an agreement concluded between the employer and an employee.

Thus, the article does not mention a possibility to pay the studies fees if the employee acquires his knowledge or skills on terms and conditions other than those defined in articles 103^1 to 103^5 of the labour code.

[47] *A contrario* to art. 21 item 1 point 90 of the act on personal income tax.

the State, their current construction, for these reasons among others, is not entirely correct and requires a change toward giving the statutory duty of the employer to improve professional qualifications of the employees a more realistic dimension. I believe that this could take place in particular by the introduction of a statutory obligatory paid training leave or paid leave of absence to improve one's professional qualifications every year, thereby the statutory duty to pay social benefits therefor. In such a case, a leave or leave of absence should be reduced, *e.g.* a few days a year for the forms of professional training indicated by the legislator and organized by qualified institutions, and that they would be general and on demand.

In the case of smaller employers, it remains to be considered *de lege ferenda* subsidizing such costs by the State. Such a solution would fully correspond with the construction of social benefits for this purpose and the social axiology of the discussed benefits. The norms of article 17 or article 94 point 6 of the labour code could also take a more realistic dimension. It should be noted that, under the aforementioned special regulations applicable to some groups of employees working in field of science and in the legal field, such mandatory benefits were provided for, with their scope being controversial especially in the case of smaller employers.

6. Conclusions

The development of the employee's qualifications can be considered both in the context of private employees and employers as well as in the context of the general social interest. The possibility of improving employees' professional qualifications constitutes an additional motivating element within the employment relationship. Frequently, the improvement of employees' professional qualifications can also rest in the interest of the employers. The purpose of this entitlement is to make it possible for employees to improve their own competences and skills to the widest extent possible and, consequently, their full professional development. The entitlements in this respect constitute at the same time the emanation of the right to education as second-generation human rights. The duties imposed on the employers to facilitate the improvement of professional qualifications by employees include a public-law element, namely the continuing education of the employees contributes to the growth in the competitiveness of the labour market and its intensified growth. Therefore, we can speak of the State's implementing a social policy.

A significant shortcoming of the current solutions in the Polish labour code is the adopted by the legislator construction of the employee's training leave and employee's leave of absence for working time for training purposes. As shown

above, a number of arguments exist for the fact that such benefits have a social character; so, they have a construction that is close to social benefits in the meaning of social policy.

At the same time, the conducted analysis leads to the conclusion that the current construction of paid training leaves and paid leaves of absence for training purposes in the Polish labour code is controversial. In particular, their dependence on the consent or initiative by the employer that has to be given each time (hence lack of statutory training leaves on demand) stirs doubts as it makes these solutions typically business-like, putting aside their social character, which in turn is noticed in numerous regulations of the international law. On the other hand, the mandatory combination of the employer's consent or initiative with a fairly high amount of statutory leave for training, which is seen most frequently in practice in the case of preparing oneself for writing diploma theses and taking diploma exams, can cause unwillingness on the part of the employers to finance this form of improving professional qualifications by employees, which nowadays involve high costs of social benefits imposed by the legislator. In my opinion, the leaves should be of a general nature to at least a minimum degree but decidedly smaller than the one imposed by the legislator. One's combining extramural studies with providing work is a frequent phenomenon, especially among younger people. In such situations, the leaves that are general and on demand could play a significant social role in the education path among these employees.

For these reasons and *de lege ferenda*, it seems justified to introduce a mandatory general annual training leave (optionally to be used together with the release from the duty to provide work) for each employee to apply professional improvement that is specific for adult employees, for instance a few days. Furthermore, legitimate is to limit a combined amount of training leaves and releasing from the duty to provide work granted annually to an employee for training purposes[48]. Such a solution would not preclude a possibility to give additional leaves for training or other benefits under a contract with the employer. Such a solution would also fully reflect the social construction of the benefits without going beyond the principle of proportionality of burdening the employers with social costs.

[48] Such a solution is provided for in, for instance, German law.

Collective Relations in the Gig Economy

Matthieu Vicente [1]

Abstract: This contribution aims at analyzing the collective actions of platform workers through the prism of classical industrial relations law structures, and in relation with international standards.
Design/methodology/approach: A mapping exercise is conducted to distinguish between platform-based and sector-based actions. This brings up questions related to the international protection of the right to collective bargaining and the right to strike, particularly in relation to competition law within the European Union. Particular attention is drawn to the British case-law *IWGB v. Deliveroo*.
Findings: It appears that judges may play a major role in the protection of platform workers pursuing collective action. A dynamic interpretation of freedom of association might thus be necessary to guarantee the effectiveness of those collective rights, especially by widening the scope of application of the personal work contract.
Research limitations/implications: The research presents some assumptions and invites to pay particular attention to the development of case-law, especially from the European Court of Justice.
Originality/value: The paper develops an analysis of international collective labour rights in relation with domestic contractual arrangements in the European Union.
Paper type - Conceptual paper.

Keywords: *Gig Economy, Platform Workers, Industrial Relations, Collective Bargaining, Freedom of Association, Competition Law, Independent Workers Union of Great Britain (IWGB)*

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Introduction

Digitalisation and robotization seem to be shaping a new world of work[2]. As technology is increasingly used as a support for work relations, relations of production and conditions of employment are evolving. The so-called "sharing economy"[3], or "platform-mediated work"[4], is on the rise[5]. While it is still in an embryonic stage, some have argued that it is "an early glimpse of what capitalist societies might evolve into over the coming decades"[6]. Such a stance implies that both employment law (i.e. the legal framework regulating the personal work relation based on an employment contract between a worker and an employer) and industrial relations law (i.e. the legal framework regulating relations between a group of workers often institutionalised by a union, and one or many employers) are to be seen as relics from the industrial age[7]. This contribution aims at putting into perspective the regulation of workers' collective actions within platform capitalism[8] in the European Union. While "sorting the old from the new"[9], it seeks to demonstrate that industrial relations law may ultimately be suitable for gig workers – especially for on-demand workers using platforms.

1. Organising Platform-mediated Work: A Mapping Exercise

Platform-mediated work has given birth to an unusual structuring of the workforce. At first glance, digitally or platform-intermediated work appears as

[2] *Shaping the new world of work*, Conference report, ETUI-ETUC Conference, Brussels, 2016. C. DEGRYSE, *Digitalisation of the economy and its impact on labour markets*, ETUI Working Paper, 2016.

[3] A. SUNDARARAJAN, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism*, MIT Press, 2016.

[4] A. ALOISI, *Commoditized Workers. Case Study Research on Labour Law Issues Arising from a Set of 'On-Demand/Gig Economy Platforms*, Comp. Labor Law Policy, 2016, vol. 37, no. 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2637485

[5] J. PRASSL, *Humans as a Service. The Promise and Perils of Work in the Gig Economy*, Oxford University Press, 2018.

[6] A. SUNDARARAJAN, op. cit.

[7] J. BARTHELEMY, G. CETTE, *Travailler au XXIe siècle: L'ubérisation de l'économie ?*, Odile Jacob, 2017.

[8] S. ABDELNOUR, S. BERNARD, *Vers un capitalisme de plateforme ? Mobiliser le travail, contourner les régulations. Présentation du Corpus*, Vv. Aa., *Le salariat : mort ou vif ?,* J. DIRRINGER, *Quel droit social en Europe face au capitalisme de plateforme ?,* Nouv. Rev. Trav., 2018, n° 13.

[9] G. VALENDUC, P. VENDRAMIN, *Work in the digital economy: sorting the old form the new*, ETUI Working Paper, 2016, no. 3, https://www.etui.org/Publications2/Working-Papers/Work-in-the-digital-economy-sorting-the-old-from-the-new

a sub-genre of a wider category: non-standard work[10]. However, the concept of labour platform marks a paradigm change: whereas non-standard work is defined in contrast to standard contractual arrangements (particularly in accordance with the national legal taxonomies of personal work relations[11]), platform-mediated work encompasses a wide range of contractual arrangements, from the traditional employment contract to atypical arrangements. In most cases however, platforms outsource their principal activity to a group of self-employed workers[12]. Moreover, platforms generally comply with the following pattern[13]: 1) a digital platform connects a client and a service provider; 2) the service provider is an independent contractor; 3) the platform sets the price and the main characteristics of the service provided. This pattern applies to the individual relationship between an independent contractor and the platform. Theoretically, as this is a bilateral contract, there should be room for individual negotiation. In fact, pre-formulated standard contracts are imposed by the platform, leaving no scope for individual negotiation.

In response to this unilateral relation, platform *workers'*[14] collective actions have flourished. From the "Independent Drivers Guild" in New York City[15] to Amazon Mechanical Turk's Facebook feeds, the so-called sharing economy has given birth to a great diversity of coalitions[16]. Exhaustive classifications of the main categories of platform workers' collectives have been proposed. To that end, a distinction must be made between "crowdsourcing" and "on-demand

[10] *Non-standard employment around the world: understanding challenges, shaping prospects*, INTERNATIONAL LABOUR ORGANISATION, 2016, International Labour Office.

[11] M. FREEDLAND, N. KOUNTOURIS, *The Legal Construction of Personal Work Relations*, Oxford Monographs on Labour Law, 2011.

[12] For that reason, platforms have systematically been suspected of purposely attempting to avoid domestic and international regulatory frameworks related to personal work relations. At the EU level: CJEU, *Asociación Profesional Elite Taxi/Uber Systems Spain SL*, case C-434/15, 20 December 2017. Prassl, *Uber devant les tribunaux. Le futur du travail ou juste un autre employeur ?*, Revue de Droit du Travail, 2017, p. 439. Very recently: Cour de cassation, Chambre sociale, 28 November 2018, case no. 17-20.079.

[13] B. GOMES, *Le crowdworking: essai sur la qualification du travail par intermédiation numérique*, Revue de Droit du Travail, 2016, vol. 7, p. 464.

[14] "*Notwithstanding the challenges surrounding employment classification, we hold that labour performed under the banner of apps and platforms should be recognized as work, and that the people performing on-demand labour must be recognized as workers*", H. JOHNSTON, C. LAND-KAZLAUSAS, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy*, INTERNATIONAL LABOUR ORGANISATION, Conditions of Work and Employment Series, n°94, 2018.

[15] https://drivingguild.org/about/

[16] H. JOHNSTON, C. LAND-KAZLAUSAS, *op. cit.*

work"[17]. "Crowdsourcing" is the performance of micro-tasks through online platforms on a global scale[18]. Considering how scattered these workers are, crowdsourcing is organised mostly informally (for example through online forums[19] and worker centers). By contrast, "on-demand work" refers to localised activities, mostly services such as transportation, delivery, cleaning or repairing. A real appetite for collective organisation has been observed among on-demand workers[20]. Consequently, institutionalized groups of interests, such as cooperatives and, naturally, unions[21], are booming.

During the last few years, renewed forms of strike and, to a lesser extent, of collective bargaining[22], have become topical. These can be divided into two categories. As a first step, a number of platform-based collective actions were launched. In the wake of the emblematic protests of Uber drivers, which began in 2014, coalitions and strikes have flourished. Indeed, food delivery couriers launched their first strike in London in 2016[23]; it then spread to Brighton in 2017[24], Brussels[25] and Paris[26]; soon all the main cities across Europe followed suit. New methods have been experimented, such as massive "log-offs", which

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[17] V. DE STEFANO, *The Rise of the 'Just-in-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'*, Social Science Research Network, 2015, https://papers.ssrn.com/abstract=2682602.

[18] The most emblematic example is undoubtfully Amazon Mechanical Turk. D. CARDON, A. CASILLI, *Qu'est-ce que le Digital Labor ?*, INA Éditions, 2015.

[19] E. g. http://www.wearedynamo.org/

[20] S. GREENHOUSE, *On Demand, and Demanding Their Rights*, American Prospect, 2016.

[21] H. JOHNSTON, C. LAND-KAZLAUSAS, *op. cit.* About the unions' strategies: K. VANDAELE, *Les syndicats sur le qui-vive pour soutenir les travailleurs des plateformes : l'exemple des livreurs de repas*, Chronique Internationale de l'IRES, 2017, no. 160, 85.

[22] E. g. "historic" collective agreement between the Danish platform Hilfr.dk and the trade union 3F. https://blog.hilfr.dk/en/historic-agreement-first-ever-collective-agreement-platform-economy-signed-denmark/. V. DE STEFANO, *Collective bargaining of platform workers: domestic work leads the ways*, Regulating for Globalization, Wolters Kluwer, 2018. http://regulatingforglobalization.com/2018/12/10/collective-bargaining-of-platform-workers-domestic-work-leads-the-way/. Or recently: https://www.gmb.org.uk/news/hermes-gmb-groundbreaking-gig-economy-deal

[23] For a detailed analysis: C. CANT, *The wave of worker resistance in European food platforms 2016-17*, Notes From Below, https://notesfrombelow.org/article/european-food-platform-strike-wave

[24] C. CANT, *Brighton Deliveroo Workers Strike Against Exploitation*, Transnational Social Strike Platform, https://www.transnational-strike.info/2017/11/28/brighton-deliveroo-workers-strike-against-exploitation/

[25] RTBF Info, https://www.rtbf.be/info/societe/detail_plus-de-130-coursiers-de-deliveroo-en-greve-a-bruxelles-et-a-liege?id=9810361

[26] G. KRISTANADJAJA, *Mobilisation des livreurs Deliveroo : « On était là la semaine dernière, on reviendra la semaine prochaine »*, Libération, 2018, https://www.liberation.fr/france/2018/10/19/mobilisation-des-livreurs-deliveroo-on-etait-la-la-semaine-derniere-on-reviendra-la-semaine-prochain_1686538

could be defined as wildcat strikes with the aim to disrupt the platform's algorithm, or, more classically, demonstrations at the firm's headquarters. This first *genre* of collective actions may thus correspond, from a teleological perspective, to plant-based collective actions.

A step towards wider action was subsequently made: the shift from platform-based action to sector-based action. This was the case for example when UberEats, Deliveroo, Stuart, Glovo and Foodora couriers simultaneously went on strike in Paris during the 2018 World Cup[27]. Even more significant were the events that took place on 4 October. On that day of "historic coordinated fast food strike action"[28], strikes were simultaneously launched by food delivery couriers (Deliveroo and UberEats), who are formally independent contractors, and employees of traditional fast food franchises (McDonalds and TGI Fridays) across the United Kingdom[29]. Joint picket lines were held[30]. This industry-wide phenomenon has significant implications in terms of legal analysis. Indeed, the bargaining counterpart switched from a single platform to a group of platforms[31], or, more accurately, to *a group of employers including platforms*. This finding dramatically reduces the specificity of platform-based work. Joining workers from a well-established economic sector, platform workers have contributed to the resurgence of industry-wide collective action[32] in a well-established economic sector[33].

2. Regulating Collective Relations: Between Human Rights and Competition Law

"Strike", "plant-based", "industry-wide"; using this terminology without further specifications would be a source of errors. Indeed, all actions engaged by platform workers do not fall into the realm of the legal regulation of industrial actions in national systems. They do match the historical definition

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27 http://www.leparisien.fr/economie/deliveroo-ubereats-les-livreurs-a-velo-appeles-a-la-greve-pendant-le-mondial-07-07-2018-7810941.php

28 BBC News, https://www.bbc.com/news/business-45734662

29 C. CANT, *McNetworks: Two current modes of struggle*, Notes From Below, 2018, https://notesfrombelow.org/article/mcnetworks-two-current-modes-struggle

30 J. WOODCOCK, L. HUGUES, *The View from the Picket Line: Reports from the food platform strike on October 4th*, Notes From Below, 2018, https://notesfrombelow.org/article/view-picket-line-reports-food-platform-strike-octo

31 E.g. the "Carta de Bologna" bringing together food delivery platforms, http://bologna.repubblica.it/cronaca/2018/05/25/news/bologna_carta_rider-197310179/

32 ""*The fact that UberEats drivers have decided to strike on the same day as us shows that low pay is an issue that affects people across the industry*" said a spokesman from the Bakers, Food and Allied Workers Union (BFAWU).", BBC News, *ibid.*

33 In the matter at hand, the fast food service sector.

of strikes "in the broad sense", that is to say "collective stoppages of work undertaken in order to bring pressure to bear on those who depend on the sale or use of the products of that work"[34], but still remain on the margins of labour law. This applies even more to collective bargaining. As long as the workers gathered in the union are independent contractors, no collective agreement between the workers and the platform could legally bind the bargaining parties – this might actually be prohibited. In a broader perspective, independent contractors who simultaneously agree to cease work, or to enter into collective bargaining, may be subject to another set of rules. On the one hand, they may fall within the scope of competition law; on the other hand, they may be protected by collective fundamental rights. Those two perspectives will be briefly analysed below.

Part of the European Union's body of economic regulation targets unfair price-fixing that could harm the consumers' rights: this is the role of competition law. According to article 101 of the Treaty on the Functioning of the European Union ("TFEU"), "all agreements between undertakings, decisions by associations of undertakings and concerted practices", in particular those which "directly or indirectly fix purchase or selling prices or any other trading conditions", "shall be prohibited". Whether platform workers are "undertakings" remains doubtful. The European Court of Justice ("ECJ") defines an undertaking as "any entity carrying on an economic activity regardless of its legal status"[35]. This broad definition includes, among others, self-employed persons[36]. The equation is clear: if the platform workers getting together in a union are categorised as self-employed persons, the agreement signed with the platform will be considered as a prohibited association of undertakings. A minimum piece rate fixed by such an agreement will be analysed as a "purchase or selling [price]". In other words, it would constitute a *cartel*.

Still, in a more recent case the ECJ stated that if the service providers are in fact "false self-employed", "they can be part of a collective labour agreement"[37]. This precision is not strictly limited to bogus self-employment according to national legal systems. A substantial margin for interpretation is left to the judges. To this end, the ECJ has developed a "functional"

[34] K. G. J. C. KNOWLES, *Strikes: a study in industrial conflict, with special reference to British experience between 1911 and 1947*, New York: Philosophical Library, 1952.

[35] ECJ, Joined cases C-180/98 to C-184/98, *Pavlov and others*, [2000] ECR I-6451.

[36] Commission Decision of 30 January 1995 relating to a proceeding under Article 85 of the EC Treaty, 95/188/EC, Official Journal L 122. See also A. J. BRAAKMAN (ed.), *The Application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States*, European Commission, 1997.

[37] ECJ, case C-413/13, *FNV Kunsten Informatie en Media*.

approach[38] of the "worker" under the meaning of EU law, which is not affected by formal national legal classifications[39]. A "worker", according to the ECJ, is not free to choose the time, place and content of his work[40], does not share his employer's commercial risks[41], has no capacity to determine his own conduct on the market independently [42] or, more significantly, is incorporated into the undertaking concerned and forms an economic unit with it[43]. Therefore, and considering the latter, the ECJ could still recognize independent contractors using platforms as workers under the meaning of EU law, through an interpretative approach. Given that recognition, they would be legally allowed to engage in industrial actions.

The protection of collective rights as fundamental rights may lead the judges in Luxembourg to rule in that direction[44]. Collective bargaining and collective actions are recognised as fundamentals within the EU legal order[45]. The ECJ has confirmed that the right to take collective actions is a fundamental right in a series of famous cases, albeit with the aim to restrict its exercise[46]. Many other international organisations affirm the fundamental dimension of collective labour rights in order to protect workers. Most notably, the International Labour Organisation (ILO) seeks to guarantee due application of both freedom of association and the right to collective bargaining[47], in line with

[38] A. ALOISI, E. GRAMANO, *Non-standard workers and collective rights*, Industrial Relations in Europe Conference (IREC), Leuven, 10-12 September 2018.

[39] ECJ, case C-256/01, *Debra Allonby v Accrington & Rossendale College and Others.*

[40] Ibid.

[41] ECJ, case C-3/87, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Agegate Limited.*

[42] ECJ, case C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio.*

[43] ECJ, case C-22/98, *Becu.* This criterion is somewhat similar to the notion of business integration developed by the United States District Court, Northern District of California, No. C-13-3826 EMC, *Douglas O'Connor et al. v. Uber Technologies.*

[44] V. DE STEFANO, *Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach, Industrial Law Journal*, Vol. 46, No. 2, 2017.

[45] Community Charter of the Fundamental Social Rights of Workers, art. 11, 12 and 13. V. PAPA, *The Dark Side of Fundamental Rights Adjudication?: The Court, the Charter and the Asymmetric Interpretation of Fundamental Rights in the AMS Case and beyond*, European Labour Law Journal, 2015, vol. 6, n° 3, 190.

[46] "*Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions*", ECJ, case C-341/05, *Laval.* Also, ECJ, C-438/05, *Viking Line.* B. BERCUSSON, *The Trade Union Movement and the European Union: Judgment Day*, European Law Journal, 2007, vol. 13, n° 3, 279.

[47] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). Right to Organise and Collective Bargaining Convention, 1949 (No. 98). ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998. The Committee on Freedom of Association, established in 1951, is fully dedicated to examining complaints pertaining to collective rights violations.

the Declaration of 1998. In this way, a collective agreement negotiated with artists unions on minimum tariffs, and including freelancers, was considered as violating Irish competition law in 2004. This elicited a debate within the Committee on the Applications of Standards ("CAS") of the ILO, during which the Vice-Chairperson of the CAS called for specific collective rights for independent contractors[48]. Even if no consensus was reached on that matter, this opinion reflects the commitment of the ILO in the protection of collective rights[49]. Finally, the European Court of Human Rights, alongside the ILO[50], plays a major role in enforcing freedom of association in Europe and beyond. Article 11 of the European Convention of Human Rights (ECHR) has in particular been used to allow platform workers to enter into collective bargaining in the United Kingdom. This case law will require further scrutiny.

3. Towards a Dynamic Approach of Collective Fundamental Rights

In 2016 couriers grouped in the Independent Workers' Union of Great Britain ("IWGB") submitted an application in North London in order to be recognized for collective bargaining purposes with the Deliveroo platform. In November 2017, the Central Arbitration Committee ("CAC") denied their right to collective bargaining[51]. In December 2018, the High Court dismissed the claim for judicial review[52]. While it may seem anecdotal, this case is arguably emblematic for two main reasons.

So far, two major arguments have been legitimately formulated by scholars: as a fragmented or "dispersed" workforce[53], platform workers would be unlikely

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[48] J.-B. MAISIN, *L'Irlande, l'occasion d'un débat sur la liberté de négociation des travailleurs indépendants. Confrontation entre la jurisprudence de l'UE et les principes de l'OIT*, Bulletin social et juridique, Vol. 570, 7, 2016.

[49] The Irish Competition Act was amended in 2017, and now provides collective bargaining rights for the concerned categories of self-employed workers. H. JOHNSTON, C. LAND-KAZLAUSAS, *op. cit.*

[50] European Court of Human Rights, 34503/97, *Demir and Baykara v. Turkey*. For a detailed analysis on Article 11 ECHR: F. DORSSEMONT, *The Right to Form and to Join Trade Unions for the Protection of his Interests under Article 11 ECHR. An Attempt "to Digest" the Case-Law (1975-2009) of the European Court on Human Rights,* European Labour Law Journal, Volume 1, 2010, No. 2, 185.

[51] *IWGB v. Deliveroo*, [2018] I.R.L.R. 84. M. VICENTE, *The right to collective bargaining and the worker category in the UK*, Regulating for Globalization, Wolters Kluwer, 2018. http://regulatingforglobalization.com/2018/07/20/right-collective-bargaining-worker-category-uk/

[52] *IWGB v. CAC*, [2018] EWHC 3342.

[53] A. ALOISI, V. DE STEFANO, *Digital Age. Employment and working conditions of selected types of platform work. National context analysis. Italy.* European Foundation for the Improvement of Living and Working Conditions (Eurofound), 2018.

to organise in an independent, lasting association; and, even if they were willing to do so, the platform's discretionary power to terminate the workers' contract would prevent them to move forward in this direction. While these are insightful points, they do not entirely hold water.

On the one hand, Deliveroo couriers have demonstrated that platform workers are able to meet classical industrial relations criteria. According to the Trade Union and Labour Relations (Consolidated) Act of 1992 ("TULRCA"), the location and the contours of the bargaining unit must be identified precisely[54]. To this end, the IWGB successfully demonstrated that the platform's algorithm defines delivery zones, with proper pay structures[55], proper management, and within which each courier is assigned to perform his work. "The need for the unit to be compatible with effective management"[56] was thus fulfilled. The Union then had to prove it had sufficient support. For that purpose, the CAC had to determine whether members of the Union made up at least 10% of the workers in the bargaining zone, and whether a majority of couriers *would be likely to favour recognition* of the Union as a bargaining agent, for example if a poll were to be taken. Considering this rather high level of unionisation (19,16%), the CAC recognised that the IWGB met these conditions.

On the other hand, this success is to be assessed in light of Deliveroo's active anti-Union strategy. Undoubtedly, the structure of the platform's workforce and the risks of discriminatory "logouts" constitute major obstacles. Platform workers remain unprotected against anti-union discrimination[57]. Yet, the CAC's analysis, which noted a strong "appetite and interest in collective bargaining" among the couriers, also proved that the platform was unable to successfully prevent the couriers to organize. Although a disinformation campaign was staged, and vouchers have been offered to divert couriers from attending union meetings, unionizing rates have continued to grow. This has demonstrated that industrial relations law is flexible enough to accommodate the specificities of gig workers, and that discrimination campaigns are not sufficient to prevent those workers from unionising.

None of the CAC's formal requirements have been reconsidered by the High Court. The CAC's decision reaffirmed the centrality of the worker's status in the application of collective rights. Dismissing the claim for a full judicial

[54] TULRCA, 1992, Schedule A1, 19A (2).

[55] For example, in the "Camden-Kentish-Town" zone, couriers were paid £3.75, whereas in the "Battersea" zone, riders were paid £7 an hour.

[56] TULRCA 1992, Schedule A1, para. 19B.

[57] N. MOIZARD, *La frontière entre « travailleurs » et « travailleurs indépendants » et le droit des discriminations de l'Union européenne,* in S. BARBOU DES PLACES, E. PATAUT, P. RODIERE (eds.), Les Frontières de l'Europe Sociale, Cahiers européens, n°11, Editions Pedone, 2018.

review, the High Court confirmed the narrowness of the definition of the personal work contract in the UK[58]. The CAC underlined the existence of a significant personal dimension in the formal engagement between Deliveroo and the drivers. However, as the platform formally allowed couriers to engage a substitute, their engagement was no longer considered to be of a personal nature. To that extent, Deliveroo couriers could not be qualified as 'workers' and were excluded from the scope of application of industrial relations law[59]. This reasoning brought to light the contradiction between the wide scope of application of fundamental collective rights and the strait gate of the "worker" category. Union Counsel John Hendy argued that the right to collective bargaining is underpinned by Article 11 ECHR, according to which "Everyone has the right to form and to join trade unions for the protection of his interests". The Human Right Act 1998 ("HRA") incorporates Convention rights set out in the ECHR into UK domestic law, and Section 3 of the HRA provides that "So far as it is possible to do so" domestic legislation must be read "in a way which is compatible with the Convention rights". The due implementation of international protection of collective human rights might require a less narrow definition of the "worker" category. However, the proper dynamics of Article 11 ECHR did not succeed in shaking the grounds of the cornerstone of industrial law, i.e. the personal work contract. Personal service requirements were thus reinforced. The restrictions imposed by the TULRCA were declared necessary "*to the objective of preserving freedom of business and contract*"[60].

Regardless of the outcome, lessons can be learned from this jurisdictional encounter between platform-based work and the industrial relations system. There certainly are many obstacles standing in the way of effective implementation of the right to strike and the right to collective bargaining in the gig economy. Practical difficulties such as the dispersion of the workforce, harsh anti-union discriminations, or legal hurdles such as the narrow definition of the personal work contract and competition law are hindering platform workers from fully benefiting from the industrial relations legal framework. However, leaving aside value judgements, the rise of collective actions within the gig economy is indisputable. As the classical frameworks of industrial action based on trans-sectorial workforce coordination are resurfacing, new forms of action involving the algorithms' functions are spreading. Platform workers did not choose between the "old world" of industrial relations and the

[58] M. FREEDLAND, N. KOUNTOURIS, *Some Reflections on the 'Personal Scope' of Collective Labour Law*, Industrial Law Journal, Volume 46, March 2017, 52.
[59] TULRCA, 1992, Schedule 296 (1).
[60] *IWGB v. CAC*, *op. cit.*, no. 41.

"new world"[61] of the sharing economy: they come from both. In this respect, the foundation of the Transnational Federation of Couriers, bringing together 34 organisations from 12 European states, in October 2018, is part of a constant broader reorganization of industrial relations law[62].

[61] A world where "*work is rebranded as entrepreneurship, and labour sold as a technology*", J. PRASSL, *Humans as a service, op. cit.,* 4.

[62] S. LAULOM (ed.), *Collective Bargaining Developments in Times of Crisis*, Bulletin of Comparative Labour Relations, Wolters Kluwer, 2017. And notably A. LAMINE, J. PRASSL, *Collective Autonomy for On-Demand Workers? Normative Arguments, Current Practices and Legal Ways Forward*, in S. LAULOM, *ibid.*

Monitoring of Employees' Personal Communications at Work. Practice of the ECtHR

Stefan Stanev [1]

Abstract: The purpose of this paper is to advance a conceptual, analytical framework to help explain employment regulation as a dynamic process and the link between the privacy of workers and the ECtHR practice.
Design/methodology/approach: the concept of privacy, article 8 ECHR and workers' privacy, video surveillance at the workplace
Findings – the interpretation of Article 8 leads to the protection of a number of labor and social right.
Research limitations/implications – The research proposes an analytical framework and invites future empirical investigation.
Originality/value: The paper explores the link between labor law and the European Convention on Human Rights
Paper type - Conceptual paper.

Keywords: *Privacy, Labour law, the European Convention on Human Rights (ECtHR), Surveillance at the Workplace, Employment Relations.*

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Introduction

Scrutiny of the topic is necessary, (1) allowing for the development of new technologies, which significantly influences all spheres of the private lives of citizens (including at their workplace) — applying primarily to the inviolability of their correspondence. Whether or not control over correspondence is acceptable depends fundamentally on its nature (private or business), the reason for initiating the monitoring and its appropriateness.
The Strasbourg Court examines this issue under Article 8 of the European Convention on Human Rights (ECHR), which has been organized for the respect for one's private and family life, home, and correspondence, as well as the conditions on the basis of which the rights in paragraph one can be restricted. Article 8 ECHR states:

Right to respect for private and family life

1. Everyone has his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this such as is with the exercise of this right except such as is in accordance with the law and is law necessary in a democratic society. In the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

In order to rely on Article 8 paragraph 1, the applicant must prove that his application falls within the scope of one or more of the four interests identified in the article – private life, family life, home or correspondence. For the preliminary research, it is necessary to examine first the concepts of private life and correspondence, as well as their application to personal data protection.
As notions of private life are hitherto broad, the precise scope yet has been determined. Nevertheless, even in their early case law under Article 8, the Strasbourg authorities used a broad interpretative approach, which focused on the opportunity to live life without arbitrary interference.
In the fundamental case of Niemietz, which helped develop the Human Rights Doctrine, the Strasbourg Court regarded that it would be too restrictive to limit the idea of private life to an inner circle within which the individual can live their private life as they wish, but exclude the entire outside world. Respect for private life should include to a certain extent the right to establish and maintain relationships with other people.
In the case of Peev v Bulgaria, the European Court of Human Rights (ECtHR) had the opportunity to define further the scope of "private life" as regards the

workplace. The case related to the search of the office premises of an employee of the Supreme Public Prosecutor's Office of Cassation. The Strasbourg Court held that the employee could reasonably have expected his workplace or at the very least his desk and his cupboards where he kept his personal belongings, to be treated as "private property."

It should be noted that the ECtHR adopts a similar broad interpretative approach regarding the term "correspondence," from which it follows that the concept is not restricted to traditional forms of communication, but should be interpreted in light of all new technological developments.

The most important approach to interpreting Article 8 of the ECtHR used by the Court is the teleological interpretative approach. The Court interprets the Convention in light of its purpose and intent: to offer "actual and effective" guarantees to individuals. The teleological approach to interpretation is especially appropriate when a broad interpretation of the concepts in the Convention is required. Which undoubtedly makes the Convention an instrument for the protection not only of fundamental civil and political rights but also of a number of new rights arising out of technological developments including socio-economic rights, and the right to personal data protection of employees. In 1978, the Court emphasized the fact that it cannot ignore the changes and developments after the creation of the ECHR: "[…] The Convention is a living instrument, which […] must be interpreted in light of the current day and age." The Court cannot ignore scientific progress and significant changes in morals, relationships, and technological achievements since 1950.

It is precisely technological changes that pose many challenges to the privacy of employees, which has led to several cases heard by the ECtHR. According to European law, specific information contains personal data when the individual is either identified or identifiable (although not identified, the individual is described in such a way as to be identified following further research). This approach, laid down in the General Data Protection Regulation, is followed accordingly by the Strasbourg authorities. The ECtHR has had the opportunity to note that the protection of personal data is of great significance for the right to respect for personal and family life of individuals.

It can be concluded from the legal definition of "personal data" that states have the negative obligation not to interfere arbitrarily with the private lives of citizens, as well as the affirmative obligation to ensure that there are legal guarantees for the protection of the rights under Article 8. The concept of the affirmative obligations of the state is especially critical in employment relationships, which for the most part are between individuals. In order to hold states liable under Article 8 of the ECHR, the applicant must prove the lack of effective means of protection – the absence of legislation regulating privacy at

the workplace, the absence of a controlling authority which should have been created, the absence of administrative, conciliatory or judicial forms of protection, or any other obligation arising from European law.
The concept of certain obligations was adopted in the case law of the Court in 1979 in the Marckx case. In the case, the ECtHR held that the state is not only obliged to refrain from interference with protected rights but also, in addition to this negative obligation, may have affirmative obligations suitable for the adequate protection of private and family life.
Having established an interference with the protected right to respect for private life and correspondence, the Court examines the restrictive measure on the basis of the so-called three-step test of permissibility, considering in turn whether the measure was in accordance with the law, whether it pursued a legitimate aim and whether it was necessary for a democratic society. The ECtHR leaves a margin of appreciation to the Contracting Parties, as well as to the national legislature and those bodies, including the judicial bodies, tasked with the interpretation and enforcement of the current legislation. The national authorities have to make the initial assessment of the existence of a pressing social need and take such actions as they consider necessary. This freedom to make an assessment is unlimited and in any case can be controlled by the Strasbourg authorities, which check not only if the measures are in accordance with the law, but also if it pursued a legitimate aim (proportionality and necessity in a democratic society).

How Does the ECtHR Interpret "in accordance with the law"?

Strasbourg Court adopts a broad interpretation of the concept "law," as it includes a variety of acts of the state authorities creating rights and obligations of the citizens. The law includes all normative acts – constitutional, statutes, bylaws, written and unwritten. The Court considers "law" to include case law, as well as the ethical rules of associated organizations. It should be noted that, as far as respect for private life and correspondence, the ECtHR considers the "law" to be the legislation of the European Union.
The existence of a "law" is not enough to justify interference with private life. In all cases, the ECtHR considers its quality.

First, according to the principle formulated in the Sunday Times case, the law should be accessible: citizens should be able to receive adequate guidance in light of the specific circumstances regarding the content of the legal norms applicable to the case. Second, a norm cannot be considered a "law" unless it is formulated with sufficient precision to enable citizens to regulate their behavior. In the Olson v Sweden case, the ECtHR held that a law which allows

an administrative body to have discretion, by itself, is not incompatible with the requirement for foreseeability if the scope of its discretion and the way it is used are established with reasonable clarity in view of the legitimate aim of the specific measure in order to ensure adequate protection against arbitrary interference.

In the context of employment relations and personal privacy, the ECtHR applied these principles in the Copland v UK (62617-00) case. The applicant complained that her telephone calls and her e-mail correspondence had been monitored. According to the government, the measure pursued the legitimate aim of protecting the rights and freedoms of others by ensuring that no abuse took the place of the material base provided by an employer-funded with state finances. Secondly, the interference had a legal basis as the college, is an institution established by a special law, had the right to exercise reasonable control over the funding provided to it in order to ensure that it can perform the functions bestowed upon it by law. The legislation regulating this issue came into force after the events of the case took place. Therefore, it follows that the applicant did not have a reasonable expectation of non-interference with her private life and no laws were regulating the conditions on which her private correspondence could be monitored. After the legislation regulating surveillance at the workplace came into force, the employers could record and monitor the communications of their employees without their consent, but only when the latter had been duly informed.

In the Rotaru v Romania case the ECtHR concluded that the national legislation in Romania did not specify the types of information that could be processed, the categories of people who could be subject to such measures, or the procedure that had to be followed. Therefore, the Romanian national legislation was not in accordance with the requirement of foreseeability.

The aforementioned cases should not be understood to mean that states are obliged to prohibit or restrict considerably control over employee correspondence. On the contrary, control over correspondence is a significant part of the employer's right to control the actions of their employees and workers. If the company has adopted rules for the use of information technologies and equipment in general, the breach of these rules can be the basis for imposing disciplinary sanctions. Undeniably, a specific feature of such measures for control is that they protect the property of the employer and the ordinary course of employment relations.

As regards correspondence, the Strasbourg Court has noted that it is of great significance whether that correspondence is private or work-related. Business correspondence is part of the employment obligations of the employee or the worker, it is created for the employer and can be controlled. Private correspondence, unlike business correspondence, is created and used outside

the place where the employee performs his or her employment obligations. This distinction is adopted by many employers, who understand electronic correspondence from a work e-mail to be business correspondence, created for the purposes of the employer and therefore subject to control. In the Libert v France (588/13) case, the ECtHR deemed that there was no breach of article 8 of the Convention as the files in the employee's computer were work-related and the employer had the legal right to demand that they are used for business purposes. The ruling would be acceptable insofar as the employee had not explicitly informed the employer that specific files or correspondence were of a personal nature. There was no express prohibition, and, as often happens, the same email account was used both for personal and for business purposes. In such cases, the employer is deemed to give express or implied consent. However, if an email account is created for business purposes, on the express orders of the employer, then the employee cannot reasonably expect the correspondence not to be controlled. That is why the ECtHR accepts that the employer is entitled to open the files saved to the hard drives of computers provided by the former to his or her employees to fulfill their obligations, but cannot open files designated as private unless the specific employee is present.
In the cases mentioned above the ECtHR limited itself to considering only whether the measure was "in accordance with" the law. However, as is evident in paragraph 2 of Article 8 of the Convention, any measure must be proportionate to its specific purpose, as well as necessary in a democratic society.
These requirements arise from the principle that the law must be used for beneficial purposes, so it must form a quantitative causal link between the means and the purposes, aimed at achieving a desirable result.
The Strasbourg Court follows the definition given by the Court of Justice of the European Union (CJEU) in the Fromancais case, which noted that in order to establish that a certain measure is following the proportionality principle it must first be established. Whether the means for the attainment of the corresponding objectives to the significance of that objective and second, whether they are necessary for achieving it. In its decision in the Soering case the Court confirmed that the principle of proportionality is one of the founding principles of the Convention mechanism:

[…] intrinsic in the entire Convention is the pursuit of a fair balance between the needs arising out of the common interests of the public and the requirement for the protection of the basic rights of individuals.

National authorities comply with the proportionality principle when the measure adopted by them is suitable for the purpose it is carried out. Secondly,

the measure must be necessary – there should be no alternative mechanism for achieving the set purpose. Lastly, the measure cannot be disproportionate to the restrictions it imposes on the individuals.

The critical case of Barbulescu v Romania (2) illustrates the approach of the ECtHR to balancing the right of the employer to organize the business activities in the interests of his or her property, on the one hand, and the right of the employee to privacy.

Throughout several years, the applicant worked for a private company. As part of his work responsibilities, he had to create a work account in Yahoo Messenger. The internal company rules expressly prohibited the use of the work account for personal correspondence. Nevertheless, printouts provided by the employer showed that the applicant repeatedly used the account for personal correspondence. After he was warned that he was in breach of the company rules, the employer imposed the harshest sanction on his – dismissal.

The applicant appealed against the decision to the Romanian courts, which held that control over correspondence was the only effective means for the employer to monitor the enforcement of the internal rules.

In its decision of 12 January 2016, the ECtHR held (with one dissenting opinion) that there was no breach of Article 8 as the applicant did not have a justified, reasonable expectation of personal privacy when using the work account. As it was created specifically for business purposes, the employer expects to find only work-related correspondence. Regardless, the Court noted in its decision that the right to respect for private life and correspondence continue to apply to the workplace, although they are subject to certain restrictions. Furthermore, this case can be distinguished from the Copeland case, in which the ECtHR established that the applicant had been monitored without her knowledge.

The Romanian courts correctly concluded that in this case, according to the documents presented to them, the employer had initiated disciplinary proceedings against the applicant. The employer had demanded from the employee to give written explanations twice, stating the purpose, date, place and time of the meeting, as well as that the applicant could present arguments in his defense in respect of the alleged misconduct, judging from the two notes presented in the case.

The right of the employer to monitor his or her employees at the workplace is part of the broader right, regulated in employment legislation, to control the fulfillment of their professional obligations. This control is necessary due to the risk of employees causing damage to the company's information technologies or carrying out illegal activities on social media platforms, and throughout cyberspace.

In his dissenting opinion, Justice Pinto de Albuquerque emphasized the absence of a surveillance policy over Internet browsing, created by the employer. He further noted the sensitive and private nature of the messages, which should have been protected from control. Therefore, the issue required a more thorough assessment.

The decision of the ECtHR is not interpreted uniformly by many authors as it does not take into account several significant factors in employment relations, especially those arising from technological advancements. The Court did not extend enough protection to the right to respect for the private lives of employees, which poses the risk of the adoption of similar practices using new and innovative methods of control. It should be noted that the Strasbourg authorities had to decide whether in the specific case it was possible to create a monitoring system based on less intrusive methods and infringing the privacy of the employees and the workers to a lesser degree.

It is apparent that new technologies have made the control over the personal data of employees and workers, including their dissemination, significantly more accessible. Means of business communication provided to employees in the course of and for the purpose of the fulfillment of their obligations and the information contained in them should be used only for the audit. Although numerous technical measures of control exist over correspondence, this does not mean that such control is acceptable in all circumstances, even if it is in accordance with the law, albeit its function of employee protection primarily characterizes European employment law. Considering the high standards of personal data protection in the EU, the Grand Chamber of the ECtHR heard the same case again.

The main point in the case was whether employees have a reasonable expectation of personal privacy at the workplace. The Grand Chamber held that there is such a reasonable expectation when the employer expressly allows the use of the company equipment for personal use, or when such use is tolerated. In any case, the selected method of personal data processing should be carried out with as little interference with the privacy of employees as possible.

The ECtHR held that employment legislation has unique characteristics which had to be taken into account. The relationship between the employer and the employee is contractual, with individual rights and obligations of each party, and is characterized by the subordination of the employee.

The Romanian government noted that messages sent by an employee using technical means provided by the employer have to be considered work-related unless the employee has designated them as private. The applicant, in turn, claimed that the Romanian courts had not given enough consideration to specific facts in the case, for example, the specific features of Yahoo

Messenger, including the absence of an internal policy for the use of the company equipment. He further argued that a distinction had to be made between using the internet for profit, on the one hand, and personal conversation which did not cause any damage to the employer, on the other.
The French government, which gave an opinion in the case, relied on the particular French understanding of the scope of the affirmative obligations of the national authorities to guarantee the protection of the private lives of employees. Moreover, it presented a broad overview of the applicable regulations in the French court, employment, and criminal law; in this context, as well as the case law of the French Court of Cassation. Holding all data processed, sent or received, using the electronic equipment of the employer are to be considered business-related unless the employee has clearly and precisely designated them as personal.

The French government claimed that states should have broad discretion in this context, as the aim is to achieve a balance between the interests in question. The employer can monitor the employee correspondence on the condition that there is a legitimate purpose and in any case, it is proportionate to that purpose.
The European Confederation of Trade Unions claimed that the protection of privacy at the workplace is of critical significance, keeping in mind the fact that employees are dependent on the employer. Furthermore, in the current technological era, using the internet should be considered to be a human right, and the protection against arbitrary interference with the privacy of employees should be strengthened.
The ECtHR noted that the Romanian courts had not established whether there had been alternative means of control over the activities of the employee and whether there had not been another mechanism of achieving the same goal, as well as whether it had been possible to affect the concerned individual to a lesser degree. Therefore the Court in Strasbourg defined the affirmative obligations of states concerning the respect for the confidentiality of the correspondence of employees. Individually, it should be considered whether the employee had been informed of the possibility that the employer may initiate surveillance of his or her correspondence. Furthermore, the national authorities should consider the scope of the monitoring and the degree of interference with the private life of the employee. Lastly, the national authorities should check if the employer had given valid reasons to justify the monitoring and whether it would have been possible to create a surveillance system based on less intrusive methods, as well as whether the employee has an opportunity to defend himself or herself before the employer and the national administrative and judicial bodies. It is precisely because the national

courts in Romania did not apply the proportionality principle that the Grand Chamber of the ECtHR held that there had been a breach of Article 8 of the Convention.

From the case law of the ECtHR discussed above, the following conclusions and recommendations can be made. Firstly, it is recommended that employers prohibit the use of business correspondence for personal use altogether. They can do this by enforcing an internal company policy or through a suitable alternative, for instance by issuing an order. If nevertheless there is correspondence which may be deemed personal, it is recommended that employees designate it as such. Thus in the course of a potential audit, the employer would not be entitled to process the private correspondence of the employees, only their business correspondence. Secondly, employers should implement suitable alternative measures to control the activities of their employees, and control over correspondence should be eventual and always the last resort. Control over correspondence will only be acceptable when it is in accordance with the national legislation (and the European personal data protection law), or a case of reasonable suspicion of severe disciplinary misconduct or crime.

In all cases of doubt, the employer should check whether any form of monitoring would be necessary for the attainment of the objective. Employers are obliged to inform company employees not only of the possibility of control over their correspondence but also when such control is initiated — allowing for a preventative function. The principle of transparency demands that all information related to the processing of correspondence be easily accessible and understandable. Employees should be aware of the scope of the actual or potential control over their correspondence, as well as of the rights they have in respect of such forms of control. Suitable technical and organizational measures should protect the information contained in the correspondence of employees.

It is of quintessential importance that the privacy of employees cannot be entirely restricted in the workplace. Legal certainty dictates that the protection of the right to respect for private life and correspondence of the weaker party in an employment relationship should be strengthened. The deciding argument in favor of this position is that the founding idea of employment law is that factual inequality should be transformed into legal equality.

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