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# The Primacy of Company-level Agreements in Spain. An Unusual Approach for Continental Europe

Antonio Ojeda Avilés \*

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## 1. The Increasing Relevance of Company-level Agreements in Spain: A Comparison with Italy and France

Numerous labour reforms have been introduced in our country as a consequence of the 2008 international financial crisis. The one explored in the present paper brought about a “conceptual revolution” of unprecedented proportions, not necessarily because it contributed to reforming company-level agreements – a well-established collective tool – negotiated by and in favour of employers, but rather because it gives primacy to plant-level bargaining, breaking with a century-old Spanish and European tradition that assigned relevance to agreements reached at a higher level, as set out in Article 83 of the Spanish Workers’ Statute (ET) of 1980 and as clarified, to some extent, by the *prior in tempore* criterion contained in Article 84.

Thus far, collective agreements at the national or regional (autonomous community) level have determined the criteria used to regulate the relationship between agreements of different levels and other issues concerning the bargaining structure. Yet in the absence of further indications on the matter, the agreement concluded first would prevail, regardless of the bargaining level. The clear purpose of the first-in-time rule was to maintain as long as possible previously established – and presumably worse – working conditions, until quite suddenly the 2008

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financial turmoil turned the tide, with older agreements ending up being the ones actually providing the most favourable working conditions. Consequently, some economists suggested modifying the first-in-time criterion of primacy, adopting the principle of *lex posterior*, but, as expected the proposal was not welcome. The 2011 legislation moves in a different direction, establishing that company-level agreements prevail on certain matters, though being subject to agreements concluded at a higher level, in that those would prevail:

Unless a collective agreement established at the national or regional level pursuant to Article 83.2 provides different rules on the collective bargaining structure or on the relationship between agreements of different level.

After the amendments laid down in Law No. 3/2012, Article 84.2 of the ET reviewed the priority assigned to company-level agreements in clearer terms it rejected the foregoing conditions. According to paragraph 2 of Article 84:

The provisions laid down in company-level agreements – that may be negotiated at any time during the period of validity of higher-level collective agreements – prevail over any sectoral agreement at the national, regional or lower level in the following areas: a) the amount of base salary, bonuses and other allowances, including those related to company performance; b) remuneration for overtime and shift work; c) working hours and working day, the organisation of shift work and annual leave; d) the adaptation at company level of the job classification system; e) some aspects of the hiring procedures that, pursuant to this Law, fall within the scope of company-level agreements; f) measures to promote work-life balance; g) any other measure established by the agreements mentioned in Article 83.2. Equal priority in these matters is granted to collective agreements concluded by a group of employers who band together for organisational or productive reasons and are specifically indicated and referred to in Article 87.1. Collective agreements under Article 83.2 are not granted primacy as established by the present paragraph.

Since its enforcement in 2011, the primacy of company-level agreements was intended to improve the collective bargaining structure, promote a bargaining model that could move closer to companies as well as sectoral-level bargaining that could better adapt to the specific conditions of each economic sector. The 2012 legislation only introduced minor changes in the short preamble devoted to explaining the rationale of the reform: the amendments made to collective bargaining serve the purpose of ensuring that collective bargaining is a useful tool – rather than an obstacle – to adapting working conditions to the specific circumstances of the company, in relation to certain matters which are closely related to the

company, and for which a special regulation is justified as a means to improve labour relations in the productive and economic context to which it refers (Explanatory Memorandum, IV).

Yet the main problem of the Spanish bargaining system – i.e. the proliferation of provincial-level agreements – remains unsolved, despite it being a serious issue leading to the reform not producing the expected results.

There is no consensus among experts when it comes to assessing the benefits of a bargaining structure that prioritises company-level agreements, and, although human resources managers and economists have praised them for their adaptability to the real interests and needs of companies<sup>1</sup>, legal opinions have warned against the “dispersion effect” they may produce, and their impact over both the European as well as the Spanish collective bargaining system. Certainly in need of adjustments, our bargaining system does not deserve to be set aside and replaced by another world-renowned, though totally opposite model – i.e. a horizontal company-level bargaining with no pre-established common criteria – as is the one in the United States<sup>2</sup>.

<sup>1</sup> In 2012, the newspaper *Expansión* carried out some interviews and published the opinions of human resource managers of companies such as Leroy Merlin, Kellogg's, Zurich or NH Hotels.

<sup>2</sup> F. Durán López is a discordant voice. In *Expansión*, he praises the virtues of the provisions on CEPs for their clear and precise formulation and clarifies his position against inter-professional and state- or regional-level agreements. Other critical views include T. Franco Sala *La reforma de la negociación colectiva*, in Various Authors, *La reforma laboral en el Real Decreto Ley 3/2012*, Tirant lo Blanch, Valencia 2012, 64 ff.; J. Gorelli Hernández, *Las nuevas reglas sobre concurrencia de convenios colectivos*, in *Revista General de Derecho del Trabajo y de la Seguridad Social*, n. 28, 2012; Valdés Dal-Ré, *La reforma 2012 de la negociación colectiva: la irrazonable exacerbación de la función de gestión*, in *Relaciones Laborales*, monographic issue on the 2012 labour reform, 221 ff.; L. Mella Méndez, *La nueva estructura de la negociación colectiva en la reforma laboral de 2012*; S. Olarte Encabo, *El papel de los interlocutores sociales ante la reforma de la negociación colectiva: retos y opciones*, in *Revista de Derecho Social*, n. 58, 2012; M. Llano Sánchez, *La negociación colectiva*, in A. Montoya Melgar and J. García Murcia (eds.), *Comentario a la reforma laboral 2012*, Civitas, Madrid, 2012; F. Perán Quesada, *La preferencia aplicativa del convenio colectivo de empresa y sus efectos sobre la estructura de la negociación colectiva* in *RGDTSS*, n. 33, 2012; A. Baylos Grau, J. Cabeza Pereiro, *La lesividad de los convenios de empresa concurrentes con los de sector al amparo del art. 84.2 ET*, in *Revista de Derecho Social*, n. 59, 2012; F. Vila Tierno, *La flexibilidad interna a través de la reformulación de la estructura de la negociación colectiva tras las sucesivas reformas laborales. Del real decreto ley 7/2011 a la ley 3/2012 (de las razones y los efectos)*, in *RGDTSS* 33 (2012); M. Correa Carrasco, *La ordenación de la estructura de la negociación colectiva tras las recientes reformas laborales*, in *Revista de Derecho Social*, 2012, n. 59; E. Blazquez Agudo, M. G. Quitero Lima, *La rauda aplicación del Real Decreto-ley 3/2012, de 10 de febrero (hoy ley 3/2012 de 6 de julio), versus el tormentoso calendario de aplicación de la ley 27/2011, de 1 de agosto. Contrapuntos del*

In the following paragraphs a more detailed analysis of the matter will be provided, though it must be noted at the outset that the primacy of company-level agreements is limited by the structure of collective bargaining and by the size of companies in Spain. Contrary to what is often assumed, the labour reform – dismissed by the Government as “aggressive” – has not followed the guidelines provided by the European Union, setting down its hierarchical criteria to regulate work organisation and employer’s power. Recommendations No. 2, 5, 6 of the European Commission to Spain for 2012, laid down within the framework of Europe 2020, focus on employment issues. Their aim is to achieve a rapid increase in retirement age, to improve labour market and active employment policies particularly those for youth, and, to reduce poverty through specific action. Reference – if general - to the launch of a new era of flexicurity is only made in the European Employment Strategy, where it is argued that it is important to “engage all participants in strengthening the flexicurity components and strengthening control mechanisms of national flexicurity arrangements”.

Measures which are akin to the company-level agreements’ primacy (*convenio de empresa prioritario*, from now on simply as CEP) have been introduced almost concurrently in other European countries such as Italy and France. These measures, differing in many respects from one another, seem to originate from the same assumption, and surely from the attempt to rationalize the business costs.

In France, company-level agreements are called “adaptation agreements” while in Italy – yet with some differences in terms of origins – they are named “proximity agreements”.

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*voluntarismo legislativo actual*, in *RGDTSS*, n. 32, 2012; M. A. Purcalla Bonilla, C. H. Preciado Domènech, *Cambios en la negociación colectiva tras la Ley 3/2012: breves notas para el debate*, in *RGDTSS*, n. 31, 2012; A. Merino Segovia, *La reforma de la negociación colectiva en el RDL 3/2012: las atribuciones del convenio de empresa y novedades en la duración y vigencia de los convenios colectivos*, in *Revista deDerecho Social*, n. 57, 2012. A more technical and neutral approach is provided by A. Sempere Navarro, R. Martín, Jiménez, *Claves de la reforma laboral de 2012*, Thomson-Aranzadi, Cizur Menor, 2012.

## 2. Collective Bargaining Structure

Collective bargaining has its own structure in every country, depending on what is laid down in agreements concluded by social partners, as well as on the negotiating power of large trade unions' confederations and employers' associations.

Over time, social partners have established a hierarchy between agreements of different levels, and although the Government has been tempted to intervene every time the bargaining structure becomes fragmented and dispersed<sup>3</sup>, its involvement into what is considered a fundamental collective right has been scarce thus far, allowing collective bargaining to develop uniquely in each country. Differences in the bargaining structure may arise especially in the presence of company unitary representations, which provide for negotiation practices which are distinct from union bargaining<sup>4</sup>. Generally speaking, collective bargaining has an autonomous structure, with the rules of coexistence between negotiating parties and between the various available collective tools that are established by the industrial relations system itself, as in the definition of J. Dunlop.

On some rare occasions, the legislator has intervened extensively, producing situations bordering on lack of autonomy, up to the point that one might dare speak of "heteronomous" structures. Perhaps Spain is the European country in which the legislator has been most active in establishing rules transforming the bargaining structure, going way beyond the simple setting of framework conditions. Both trade union bargaining and unit bargaining practices are fairly codified, as the Spanish legislator

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<sup>3</sup> By way of example, the Donovan Report in the UK criticized the existence of a formal and an informal bargaining system, that is sectoral and the company-level bargaining, for they frequently provide divergent views despite the prevalence assigned to the former. See The Royal Commission on Trade Unions and Employers' Association, *Report*, Her Majesty's Stationery Office, London, 1968.

<sup>4</sup> The Donovan Report mentioned above sets an example of the numerous amendments made to the system of sectoral agreements, formally prevailing over informal collective bargaining at the company level, by way of company-level agreements, de facto making sectoral agreements progressively powerless. This state of affairs caused the informal company-level bargaining system to exert increasing influence on industrial relations (par. 154). The analysis of the six changes and the prophecy of the necessity to modify the bargaining system through legislative intervention is available in R. Banks, *The Reform of British Industrial Relations: The Donovan Report and the Labour Government's Policy Proposals*, in *Relations Industrielles / Industrial Relations*, n. 2, 1969, 333 ff. See also the interesting analysis by A. Fox, A. Flanders, *The Reform of Collective Bargaining: from Donovan to Durkheim*, in *British Journal of Industrial Relations*, n. 2, 1969, 151 ff.

prefers to define and assign functions *a priori*, rather than intervening afterwards, adopting an approach which characterises International Law in addressing and resolving concurrency conflicts, i.e. by indicating *tout court* the subject or – in this case – the agreement that prevails over the others involved. For our purposes, the most relevant concurrency rules are laid down in the ET:

- a) Principle of favourability, in the case of conflict between rules of different natures - state, collective or individual - (Article 3 of the ET).
- b) Principle of *prior in tempore* in the case of conflicts between collective agreements. According to the first-in-time principle, it is the older agreement that prevails (Article 84 of the ET).
- c) The scope for state- or regional-level agreements to establish other rules regulating conflicts between agreements (Article 83 of the ET).
- d) The scope for company-level agreements to opt out from certain working conditions established in the higher-level agreement in force, on reasonable grounds, such as current or expected economic loss, or persistent decreases in revenue or lower than usual sales (Article 82 of the ET).
- e) The scope to modify company agreements on certain matters, similarly to what we have seen for collective agreements, pursuant to Article 41 of the ET, yet if no amending agreement is reached, the employer can unilaterally take action and modify the agreement.
- f) The scope for some regional agreements to deviate from the provisions laid down in national-level agreements in certain subjects (Article 84 of the ET).
- g) Absolute primacy of company-level agreements in certain matters, pursuant to Article 84 ET, which is the focus of the present analysis.

The reader will surely find these rules unsystematic and even contradictory, though there is a reason for such a complex system. In Spain, collective agreements concluded with the most representative social partners of the sector (50%+1) are extended to all workers and employers in the same industry, a formula that has some parallels with the U.S. system. The application of the *erga omnes* principle dates back to the time

of the General Franco dictatorship, when those who negotiated were on the one hand corporatist unions made up of workers' representatives; and on the other hand were employers who were automatically affiliated to them. Such agreements were equal to laws and for this reason the corporatist legislator required them to abide by rigorous and lengthy state standards. Paradoxically, upon transition to democracy in 1976 the unions preferred to keep the *erga omnes* validity of agreements and the legislator kept some control over them, although all in respect of union and bargaining autonomy as laid down in the Constitution of 1978. Currently, the ET is quite respectful of the freedom of the negotiating parties, but the extraordinary validity of "statutory" agreements (*convenios estatutarios*) has led the legislator to set forth a number of more stringent rules, among which are those that have just been mentioned when referring to the bargaining structure and to cases of conflicting agreements.

### 3. Antecedents in Spanish History

These provisions owe very little to comparative models, which are limited to the French and the Italian case, as we will discuss later. The closest antecedent, although dating back to distant times, is to be found in Spain itself, namely the Collective Agreements Act of 1973, adopted during the dictatorship, which established that Company-level Agreements (capitalized) would apply to the exclusion of any other, unless otherwise agreed (Article 6). This was not intended to set forth the principle of company unity, as it would have been enough to say that one single agreement would apply to the whole company, no matter which level, whereas this was an express reference to company-level bargaining. The legislator came to accept the legitimacy of state-level agreements, and even recognized the power to establish bargaining structure, but it was still wary of agreements between employers and workers to levels higher than company level<sup>5</sup>. Resistance to state-level agreements had led to a proliferation of provincial agreements that have produced a very complex bargaining structure, with an excessive and redundant proliferation of agreements, with intermediate bargaining units that have come to play an increasingly important role in the negotiation process.

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<sup>5</sup> 1958 Collective Bargaining Law Act introduced a *numerus clausus* for bargaining units, which culminated in the interprovincial level regulated by Art. 4.

Against a veritable plethora of agreements, democratic governments have developed a complicated system of weights and counterweights to achieve a more balanced and autonomous bargaining structure. Suffice to recall the primacy of agreements of highest level, recognized since the first 1980 ET, which allowed state and regional agreements to establish the structure of collective bargaining and to set the rules for resolving conflicts between agreements of different levels, also recognizing the principle of complementarity. Although no excessive “imperialism” on the part of highest-level agreements was detected, some Autonomous Communities warned of a possible “tyranny” that led to a modification of the ET, making it possible to derogate from the application of the higher-level agreement principle by means of an agreement of lower level bearing certain characteristics. Against the odds, the reaction to this reform was just the opposite, as state-level agreements drew on an array of clauses on competition and complementarity placing constraints on lower agreements. Evidence can be found in the whole range of limiting and standardising clauses laid down in agreements, but it may be enough to consider that the majority of confederations started imposing a hierarchy between national-level and local-level sectoral agreements, that should in all cases be negotiated by the two main central workers’ federations and employers’ confederation, thus targeting enterprise-level agreements that were mostly negotiated by works councils and the employers.

No distinction is made in our country in terms of what must be negotiated at each level; so that state-level agreements have come to regulate all subjects and all agreements have the power to establish the bargaining structure. In this respect, Spain does not differ much from other European countries, as the purpose of collective agreements has always been that of preventing social dumping, with competition that should be based on the quality of products or on the efficiency of organization, rather than on working conditions, as this may otherwise reach back to the aberrations of the first decades of the Industrial Revolution.

Any opt-out or opening clauses are generally accepted in certain cases, either by law or by sectoral agreements, yet with a difference: whereas in Europe the sectoral agreements generally establish minimum standards at the sectoral level, with company-level agreements containing additional improvements<sup>6</sup>. In Spain the relationship between collective agreements is

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<sup>6</sup> This is the case of Germany. Here, some 250 collective agreements (*Tarifverträge*) were concluded at the national or regional level in 2009, and company-level agreements did not necessarily introduce more favourable provisions for workers. See R. Bispinck, R.

not governed by the principle of the more favourable rule but by *the prior in tempore* principle, since equal status is granted to all agreements regardless of their level. This is a major difference with other countries, in turn offset by the overall effectiveness or *erga omnes* validity of Spanish collective agreements. A system based on uniform standards established at the sectoral level combined with enterprise-level agreements of lower importance breaks down when the American model comes to the fore and begins to exert influence not only in Europe but worldwide. Even in countries like Japan, where unions have strong centralized organization, bargaining takes place at the firm level and simultaneously in the “big spring offensive”. The picture that prevails today in the world is that of an “invertebrate” enterprise-level bargaining, although there do exist some forms of standardisation, such as “model” agreements concluded by large companies, which serve as a point of reference in their respective sector. Concerning Spain, the primacy of state-level agreements was limited by the reform of 2011, when bargaining units were no longer considered complementary to one another but rather of equal relevance. This left state-level agreements with only the power to define the bargaining structure and concurrency criteria<sup>7</sup>. Then, the government in 2012 made a further step forward establishing that highest-level agreements do not prevail over company-level bargaining. The problems arising after the reform’s enactment concerned conflicting company-level agreements – now granted primacy over all others – and state-level agreements, which, according to extant legislation, were prevailing over all others, as will be discussed later.

Undoubtedly, however, the structure of collective bargaining has changed significantly, to the point that Professor Marín Alonso proposed a new criterion to establish primacy, which he termed the “closeness” or “proximity” principle<sup>8</sup>. In this respect, one must bear in mind that

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Schulten, *Sector-level Bargaining and Possibilities for Deviations at Company Level: Germany*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2011, 1.

<sup>7</sup> In this connection, one might note that Royal Decree-law No. 7/2011 repealed the principle of complementarity and established the primacy of company-level agreements, while subjecting company-level agreements to agreements concluded at higher level of bargaining.

<sup>8</sup> I. Marín Alonso, *La progresiva desprotección del trabajador público frente al trabajador común : de las singularidades de la regulación individual y colectiva al desmantelamiento del derecho a la negociación colectiva*, forthcoming; H. Ysàs Molero, *La articulación de la negociación colectiva sectorial y de empresa en Francia : ¿un modelo válido para España?* in *Relaciones Laborales*, n. 3, 2012, 63 ff.

agreements falling under the *prior in tempore* principle (Art. 84.1 ET) or under the principle of highest level (Art. 83 ET) prevail over all other agreements in those subjects that do not fall under the new primacy rule, in addition to other exceptions that will further be discussed in this paper.

#### 4. Comparative Law

The idea of company-level agreements' primacy as a means to address the 2008 crisis is not new, and the first measures of the kind appeared well before the crisis in France, followed by Italy and Spain a few years later, in the summer of 2011. A comparison with these systems will help assess strengths and weaknesses of the Spanish model.

The “principle of substitution” appeared in France through laws 2004-391 and 2008-789, amending Article 132-23 of the Labour Code<sup>9</sup>, as a way to adapt inter-sectoral agreements to specific conditions of businesses or plants. Although with reference to minimum wages, job classification and social security issues, lower-level agreements cannot deviate from the minimum standards set out in higher-level agreements, in other matters: “they can derogate in whole or in part from the applicable standard by virtue of an agreement or arrangement with a wide scope of application in geographical or sectoral terms, unless the higher-level agreement provides otherwise”.

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<sup>9</sup> Article L132-23 of *Code du Travail* (Amended by Law No. 2004-391 of May 4, 2004 - art. 42 JORF May 5 2004 and repealed by Ordinance No. 2007-329 of March 12, 2007 - art. 12 (VD) JORF March 13, 2007/8) states that “*La convention ou les accords d'entreprise ou d'établissements peuvent adapter les dispositions des conventions de branche ou des accords professionnels ou interprofessionnels applicables dans l'entreprise aux conditions particulières de celle-ci ou des établissements considérés. La convention ou les accords peuvent comporter des dispositions nouvelles et des clauses plus favorables aux salariés. Dans le cas où des conventions de branche ou des accords professionnels ou interprofessionnels viennent à s'appliquer dans l'entreprise postérieurement à la conclusion de conventions ou accords négociés conformément à la présente section, les dispositions de ces conventions ou accords sont adaptées en conséquence. En matière de salaires minima, de classifications, de garanties collectives mentionnées à l'article L. 912-1 du code de la sécurité sociale et de mutualisation des fonds recueillis au titre du livre IX du présent code, la convention ou l'accord d'entreprise ou d'établissement ne peut comporter des clauses dérogeant à celles des conventions de branche ou accords professionnels ou interprofessionnels. Dans les autres matières, la convention ou l'accord d'entreprise ou d'établissement peut comporter des dispositions dérogeant en tout ou en partie à celles qui lui sont applicables en vertu d'une convention ou d'un accord couvrant un champ territorial ou professionnel plus large, sauf si cette convention ou cet accord en dispose autrement*”.

The scope to impose less favourable conditions than those detailed in the applicable sectoral agreement is not permitted with reference to minimum wage, and this exception ensures to some extent a standardisation of the main working conditions, although other aspects related to remuneration fall within the scope of enterprise-level bargaining. However, in other areas, such as working hours, there are only a few framework legal provisions. Moreover, sectoral agreements can exert some power over company-level agreements, virtually with the same rules laid down in our 2011 legislation, repealed in 2012.

Almost concurrently, yet with prior consultation with the social partners, that proved unsuccessful in Spain<sup>10</sup>, the Italian government adopted the *Manovra di Ferragosto* with the Decree Law of August 2011, where Article 8 regulated so-called “proximity agreements”<sup>11</sup>. This is a far more complex regulation and almost as radical as the French one, with three main features:

a) Power is assigned to “proximity” agreements to deviate from national-level agreements, as well as from “the legal provisions that regulate the subjects referred to in paragraph 2”, upon compliance with the Constitution as well as EU and International Law. EU and international standards are irrevocable, which raises the question of what solution is to be adopted when neither of them sets minimum standards on a specific issue or when such standards are defined so broadly that enforcement is impossible.

b) Primacy is granted also in very important matters related to the individual or collective termination of the employment contract, with the exception of discriminatory layoff, women’s dismissal in the case of marriage, pregnancy up to one year after childbirth, adoption or parental leave. However, with regard to wages or working weeks, these provisions do not seem to reach much further than the Spanish ones. Other matters

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<sup>10</sup> The Explanatory Memorandum of Royal Decree-Law No. 7/2011 clarifies how social parties required negotiating reform proposals, without however reaching a satisfactory result for months, until the Government intervened. In Italy, the social partners and the government had negotiated a significant reform drawing on the agreement of 2 January 2009 which led to the introduction of the scope for company-level agreements to deviate from national-level agreements. See Di Stasi, *Diritto del Lavoro e della Previdenza Sociale*, Giuffrè, Milan 2011, 16.

<sup>11</sup> “*Sostegno alla contrattazione collettiva di prossimità*”, Art 8 of Decree-Law No. 138/2011 (converted into Law by Act No. 148/2011 and subsequent amendments).

in which the Italian “proximity” agreement can prevail over other agreements are those relating to audiovisual control systems, new technologies, worker tasks, job classification and grades, and the whole universe of possible contractual arrangements as well as the shift from one employment contract to another. A rather unusual series of subjects with respect to what we are used to in our country, as will be seen later.

c) However, in one respect “proximity” agreements do differ significantly from Spanish CEPs, as they refer not only to agreements signed at the company level, but also to those signed at the sectoral level by most representative trade unions or union representatives in the company. These acquire *erga omnes* validity, provided they are signed by the most representative unions. In other words, there is no real opposition between company-level agreements and sectoral agreements at any level, as also these can prevail over laws and national-level agreements. It is a relative “proximity”, therefore, in the sense that an agreement signed at the local or provincial level is certainly “closer” to companies than national-level agreements or than the law itself. To a certain extent, conflict between agreements is limited, as striking as it may appear to us the possibility granted to “proximity” agreements to deviate from the law itself. However, the primary role played by trade unions gives them more power to control bargaining as compared to Spain, where company-level agreements are usually negotiated by the workers’ representatives in the company, much more independent from trade unions than union representatives within the company. Moreover, even though the focus of the paper is not the *erga omnes* validity of agreements, it is still worth pointing out that this system presupposes a considerable additional effort, especially in a country where agreements are usually only applied to the members of the signatory organizations<sup>12</sup>.

A comparison with other countries would be incomplete without an overview of another major continental bargaining paradigm, i.e. the German system. Bispink and Bahn Müller have analysed the progressive decentralization process brought about by opt-out clauses set out in

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<sup>12</sup> One might note that in the public sector the validity of these agreements has been regulated by Legislative Decrees No. 29/1993 and 165/2001, according to which collective agreements in the public sector have *erga omnes* effect when they are signed by trade union organizations representing the majority of workers. A similar trend can be found in Italy and France regarding the criteria for granting unions “representative capacity”. In the Italian case, this is granted if two criteria are met, i.e. the number of members and the number of votes obtained at the elections of union representatives within the company.

sectoral agreements, through which employers can establish less favourable conditions than those fixed by higher-level agreements<sup>13</sup>.

This is why Bispinck calls this phenomenon “controlled decentralization”. The process began in the metal industry during the mid-eighties when the sectoral agreement gave employers the right to organise a working day independently, in exchange for a gradual reduction of the overall working time down to a maximum 35 hours per week.

After the German reunification in 1990, opt-out clauses (“hardship clauses”) were introduced for companies facing difficulties located in the former East Germany<sup>14</sup>, and over time, the practice spread to West Germany as well. In Germany, as well as in Italy, employers can evade the application of collective agreements by pulling out of employers’ associations, a phenomenon that is gathering pace due to the widening gap between employers’ associations and their members. In this way, employers can either independently negotiate with unions less favourable working conditions, thus challenging the role of employers’ associations, or simply cease to apply the relevant sectoral agreement. Significantly, at present and as indicated by Schulten<sup>15</sup>, Germany has one of the lowest levels of bargaining coverage in Western Europe.

Consequently – and quite surprisingly – the recent attempts on the part of the German government to impose less favourable working conditions have been in place for quite some time by means of agreements between unions and employers, whereas the government started no earlier than in the first decade of the 21<sup>st</sup> century with the Hartz strategy to review legal minima and reduce workers’ protection. In addition, the rules regulating agreements’ validity after their expiration are still in place, falling under former Article 4 of the Collective Agreements Act, which extends validity of normative clauses – i.e. *Rechtsnormen* – until a new agreement is reached.

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<sup>13</sup> R. Bispinck, *Kontrollierte Dezentralisierung der Tarifpolitik - Eine Schwierige Balance*, in *WSI-Mitteilungen*, n. 57, 2004, 237 ff.; R. Bahn Müller, *Dezentralisierung der Tarifpolitik - Restabilisierung des Tarifsystems?* In R. Bispinck, T. Schulten, (eds.), *Tarifautonomie der Zukunft. 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick*, publisher VSA, Hamburg, 2010, 81 ff.

<sup>14</sup> For an overview of the process, see R. Bispinck, T. Schulten, *op. cit.*, 2.

<sup>15</sup> T. Schulten, *Das deutsche Tarifvertragssystem in europäischen Vergleich*, in R. Bispinck, T. Schulten, (eds.), *Wohin treibt give Tarifsystem?*, VSA, Hamburg 2007, 217 ff.

## 5. Limitations to the Primacy of Company-level Agreements

The ET mentions company-level agreements with no other details, which can be found instead in the relevant provisions, especially to determine who is authorized to sign agreements and what procedural rules must be complied with to ensure validity. In this respect, the most controversial point of this new regulation relates to the scope to extend primacy to agreements of different nature, that are similar to company-level agreements, but which do not fall under the definition of “company-level agreements” *stricto sensu*, despite the very many commonalities which may bring them closer to “company-level agreements”.

To answer this question, it is first and foremost necessary to better understand what is meant by primacy of collective agreements. From the point of view of the *intentio legis*, primacy involves a preference on the part of the legislator towards tools of this kind, thus leading one to think that a broad interpretation is to be preferred.

However, if the typical approach adopted by case law is taken into consideration, then the notion of “primacy” implies that a type of agreement prevails over all the others, and although theoretically all agreements have the same hierarchical rank, the concept of “company-level agreement” should have a narrow interpretation.

Finally, from a functionalist point of view, one should ponder whether the similar tools in question may serve the same function, which ultimately is that of better adjusting bargaining to the needs of single employers, starting from what is regulated in sectoral agreements. The word “adjusting” refers to the attempt to strike a balance between workers and employer, usually but not necessarily intervening at a lower level, to foster competitiveness, running the risk of fragmentation and destruction of collective standards by allowing market competition to be based on labour conditions.

Some of these tools raise doubts in that respect: enterprise-level agreements, agreements with no *erga omnes* validity (*convenios extraestatutarios*), workplace-level agreements and group agreements, applying only to specific categories of workers in a plant (*convenios de franja*). It seems appropriate, therefore, to briefly analyse their differences in comparison with company-level agreements with the aim to figure out the most appropriate interpretation criteria.

a) Enterprise-level agreements are similar to company-level agreements, being collective informal tools negotiated by workers’ legal representatives

or in some cases by an *ad hoc* committee made up of three workers elected for the purpose<sup>16</sup>.

b) *Convenios extraestatutarios* (in the sense that they do not fall under the ET) usually do not have *erga omnes* validity in Spain, as the union or unions that could give them overall effectiveness abandon or do not participate in negotiations, limiting the scope of application of these agreements to the workers affiliated to signatory unions. Some argue that “yellow unions”, leagued with or sponsored by the employer, are involved in this process, although this is generally not true, for this is only an exceptional case, as otherwise employers would run the risk of incurring legal action against anti-union behaviour. In this context, the limited power of representation of negotiators is counterbalanced by the limited efficacy of the agreement. Yet in terms of effectiveness, they can contribute to solving specific problems arising at the company level which the employer considers of particular relevance.

c) Workplace-level agreements do not have overall validity as company-level agreements either, although negotiators would have the power to do so. When problems are limited to a specific plant – in the field of logistics – an agreement at the plant level can be reached to solve the problem. This type of agreement is also put in place when a specific plant is of particular relevance over all the others, as in the case of some car companies (Seat, Fiat, Volkswagen).

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<sup>16</sup> The ET is not clear about the nature of the collective agreement in question, that is whether it is a statutory agreement or an informal company-level agreement, as it refers to “an agreement between the company and those workers’ representatives entitled to negotiate collective agreements as provided in Article 87.1”, a circumlocution that would have not been necessary if the aim was to give powers only to statutory agreements at the company level. We may therefore conclude that it concerns both types of agreement signed at this level. Could these derogating agreements “erode” the standards established in higher-level agreements up to the point that the employer can unilaterally decide not to comply with minimum standards established in collective agreements? Yet, if the collective agreement is made inapplicable by virtue of such – non-statutory – company-level agreements, these in turn can be made inapplicable according to Art. 41.4 ET, which establishes that it is up for the employer to make the final decision after a period of consultation, as described in section 5. See my own article *Barrenado de convenios y contenido esencial del derecho a la negociación colectiva*, in Borrajo Dacruz (ed.), *El nuevo Estatuto de los Trabajadores: puntos críticos*, in *Actualidad Editorial*, Madrid 1995, 199-217. The importance of such legislative issue has remained in the background during the debate around the role of the National Advisory Commission on Collective Agreements in the case no agreement is reached, Art. 82.3 ET.

d) Group-level agreements (usually applying to the most numerous group of workers performing the same job within the company) may also be better suited to respond to company needs, and they generally apply to groups of workers who have a certain degree of autonomy – such as airline pilots, hospital doctors, professional players, and so on.

In such a context, a traditional narrow interpretation would probably be applied by the courts, in our case admitting only company-level agreements *stricto sensu*, plus the exceptions expressly provided in legislation. However, the boundaries between company-level agreements and other similar tools are blurring and almost impossible to grasp. Workplace-level agreements, for instance, apply theoretically only to a single workplace, as one part of the business, but in reality in Spain, “workplace” and “company” coincide in the vast majority of cases, being businesses mainly small-sized, or being composed of a larger manufacturing plant and a managing headquarter with fewer workers. Only minor differences may be found between the collective company-level agreement and enterprise-level agreements, since in practice there are only formal and procedural changes making them different from each other, although in the negotiation of the latter there could sporadically take part in *ad hoc* committees.

From the functional point of view, one could also assess to what extent a restrictive interpretation can protect workers from being granted less favourable working conditions by means of opt-out procedures, or instead whether a rigid interpretation of company-level agreements contributes to empowering employers to effectively make use of this tool. For instance, if it is only through company-level agreements in a strict sense that it is possible to modify wage levels established in a higher-level agreement, although the required adjustment is limited to a single plant or to a particular group of workers, through a company-level agreement the employer acquires the power to review all salaries within the company. It is then no wonder that in other countries the term “proximity agreements” is used for this purpose, and Marín Alonso introduced the principle of “proximity”, this tool being a mere variant of the old principle of regulatory specialty.

Not only, however, does this interpretation contradict the aim of the legislator, but it also gives company-level agreements more power than necessary. If the parties decide to negotiate an agreement with more limited application, then the company will apply Art. 84.2 of the ET. In

short, under the concept of “company-level agreement” we should broadly expect an agreement that does not extend beyond that boundary. There are two important exceptions in Art. 84 of the ET. Equal primacy of application, as stated in par. 2, will be granted to agreements concluded by corporations or by a plurality of companies linked to each other for organizational or productive reasons, provided their names are listed in the agreement. This could refer to two different situations, namely:

a) Groups of companies, as formally identified for the purpose of corporate or tax law, or groups existing in practice because of common interests which have determined joint management. These now have more room to manoeuvre being defined in the ET as “pluralities of companies”, i.e. businesses gathering for organizational or production reasons, with sporadic and limited coordination most frequently in the form of joint ventures (JVs), created for specific business purposes and for a fixed term. Unlike in the case of proper groups, here coordination is limited and there is no interference with the autonomy of the single companies involved in it.

b) In addition to JVs, there are other types of partnerships between companies. These include Economic Interest Grouping, regulated in Law 12/1991, with a common specific purpose, or Economic Interest Grouping of Port Companies, as laid down in Law 48/2003 and made up of loading and unloading companies, or European Economic Interest Groupings falling under the EU Regulation 2137/1985, where revenues are shared among member companies. Similarly, companies gathering for a specific productive reason, such as in the case of contractor-subcontractor relationship, fall within the above-mentioned definition of “pluralities of companies” gathered for organisational or productive reasons, as provided in Article 84.2 ET.

c) Franchising also involves a partial coordination of activities, since the franchisor or brand set out standards in relation to the service to be provided by the franchisee, often including working conditions to some extent. As indicated by Bescós Torres, the handbooks provided to franchisees by franchise networks usually detail obligations, hiring and firing procedures, personnel training and recruitment, working time, and

so on<sup>17</sup>. Olmo Gascon<sup>18</sup> makes a point that franchising is a kind of deregulation of production which is not subjected to labour laws. Franchising is a method of companies' coordination typical of the present time, but widely neglected by labour law it seems, although labour courts have intervened on several occasions on the matter. An agreement between the franchisor and sectoral unions would fall under the case we are analysing, provided that the agreement specifies *nominatim* all the franchisees involved, as required by the ET.

d) Cases of limited coordination between companies such as those mentioned above, without being proper "groups of companies", are nonetheless groupings of enterprises gathering for organizational or productive reasons which also include supply companies<sup>19</sup> in the case of a joint use of spaces or of shared workplaces. In this case, cooperation is required in implementing work safety standards, as detailed in Royal Decree 171/2004. It is unlikely, however, that only by virtue of limited coordination, these companies can conclude agreements in the subjects regulated by the ET. When this happens, these agreements fall under the cases mentioned above, for instance in cases of agreements regulating shared prevention measures (Article 21 of Royal Decree 39/1997) or in the subjects specified by the law.

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<sup>17</sup> M. Bescós Torres, *La franquicia internacional. La opción empresarial de los años noventa*, BEX, Madrid, 1989, 58.

<sup>18</sup> A. M. Olmo Gascón., *La franquicia: un procedimiento de descentralización productiva desregulado laboralmente*, Tirant lo Blanch, Valencia, 2004. See also E. González Biedma, *Aspectos jurídicolaborales de las franquicias*, in *Revista Española de Derecho del Trabajo*, 1999, n. 97, 665 ff. On the sentences of High Courts, see my book, *La deconstrucción del Derecho del Trabajo*, La Ley-Wolters Kluwer, Madrid, 2010, 252 ff.

<sup>19</sup> Collective bargaining sometimes covers the parent company and subcontractors and/or suppliers. For instance, an International Framework Agreement was concluded for the television channel Eurosport on 10 October 2012 covering its offices in 59 countries, as well as suppliers and subcontractors (EWC ACADEMY, CEE News 4, 2012, n. 9).

## 6. Conflict and Coordination between Agreements

1. Since the law only aims to give primacy to enterprise-level agreements in certain areas, but not in others, uncertainty can arise about which agreement is to be applied in which subjects. A widespread practice, that we will not analyse in detail, is referencing, i.e. the practice of referring back to previous agreements at the time of drafting the new ones, in order to retain important provisions provided in the former. However, the “synallagmatic” nature of any higher-level agreement is broken, when a company-level agreement establishing specific rules on wages, vacation or job classification is introduced.

Probably the government had this in mind when it granted primacy only to company-level agreements that were concluded *after* the sectoral agreement, to make sure that negotiating parties can adapt company-level agreements to their higher-level counterpart, developing a well-articulated and efficient structure through the effective combination of different agreements. Clearly, as we go through this analysis, we may think that, given the whole array of possible combinations, this could engender noticeable degrees of schizophrenia. The structure of collective bargaining is in this way characterised by great instability and complexity, a condition that is far from the desired unity of agreements, for which case law has repeatedly made an argument. It may have been better to proceed in the direction of a simplification of the bargaining landscape, especially at provincial level, rather than taking such a risky roundabout path as the one we have discussed.

2. The second issue relates to the coexistence of different agreements, all granted primacy by virtue of different rules. Although Article 84.2 ET proclaims the inviolability of the primacy principle of company-level agreement, but this holds true only in a limited number of subjects mentioned in legislation, with the power to structure the bargaining system that remains in the hand of state and regional agreements, despite restrictions. Hence, two “primacies” have to coexist at the two ends of the bargaining process. Having said that, however, it does not seem impossible to make the two “primacies” coexist, as highest-level agreements prevail at macro level, by defining the “architecture” of the bargaining structure, while company-level agreements prevail at the micro level.

However, conflicts can still occur between CEPs and regional “amending” agreements (*convenios de afectación*) regulated in Art. 84 in paragraphs 3 and 4. This is quite complex because it determines the primacy of regional

agreements only over state-level agreements and only in certain matters implicitly deductible *a contrario sensu*, since the law exclusively indicates the subjects that cannot be modified<sup>20</sup>. Hence, there are several important issues that can be regulated concurrently by regional agreements and company-level agreements.

It should be noted that the legislator has introduced company-level agreements' primacy with this regulation on regional agreements in mind, as some of the subjects are explicitly excluded from the regulation of regional agreements as provided in par. 4, par. 2 which explicitly establishes the prevalence of company-level agreements. This is true for instance with reference to hiring procedures, which cannot be modified by regional agreements, but fall within the scope of company-level agreements<sup>21</sup>, as well as job classification, that cannot be regulated by regional-level agreements but by company-level agreements that prevail over all the others.

However, when both agreements can regulate a specific subject, this raises the question as to which agreement actually prevails. An argument for giving priority to regional-level agreements goes back to a passionate parliamentary debate over the issue, with the last version of the law that limited the scope of a very broad initial legislation, introducing strict requirements in terms of the representation needed to prevail over national-level agreements.

How could it be that a company-level agreement approved with only a 25% representation prevails over a regional agreement whose approval requires more than 50% of representativeness? Whereas in favour of the primacy of company-level agreements, there is a simple two-line text in

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<sup>20</sup> These requirements seem to have neutralized primacy, except in the case of errors or omissions. Requirements include that a regional-level agreement must be concluded when representativeness in the sector is more than 50%, and no agreement at the highest level (in this case the state-level agreement) providing otherwise should be concluded.

<sup>21</sup> Primacy here seems to be a *flatus vocis*, as it consists in the adaptation to business conditions of all the aspects already handed over by law through company-level agreements. The insubstantiality of the provision is clear also when analysing the subjects that can be regulated by company-level agreements: these are almost all provided in art. 12 ET in relation to part-time contracts, and consist of details that are left in their actual implementation to sectoral agreements "or alternatively, to lower-level agreements". Art. 15 of the ET also makes reference to company-level agreements regarding the regulation of temporary contracts, yet they are given the same relevance as sectoral agreements, for example in identifying jobs or tasks in contracts for works and services, although there are cases in which some subjects are limited to sectoral agreements only, and others more generally to collective bargaining, including company-level agreements and, in our opinion, collective tools other than statutory agreements.

the Official Bulletin of the State: agreements of highest level will not prevail over company-level agreements. So simple, yet so definitive, to the point that it seems to undo all the efforts made to grant regional-level agreements legitimacy through representation. As indicated in the preamble of Act 3/2012, the aim was to prevent the highest-level agreement from hampering decentralization<sup>22</sup>.

### 7. Scope of CEPs

The subjects in which collective agreements at the company level prevail over other agreements reflect the immediate concerns of the legislator towards the economic crisis. The attempt is to promote decentralisation in wage determination but also in other areas closely related to the day-to-day work, such as working time, job classification, contractual arrangements or work-life balance. In comparison with other tools available to companies, such as modification (Art. 41 ET) or opting out (Art. 82 ET), the subjects in which company-level agreements prevail over all the others are in principle much more numerous.

This “generosity” is evident not only from the long list of subjects laid down in legislation, but also from the “closure rule” (*norma de cierre*) that gives higher-level agreements the possibility to add other subjects in which company-level agreements can prevail, something that is not allowed in the case of modifications or opting out clauses.

On the other hand, a significant difference makes modifications and opting out more interesting than company-level agreements. This consists of the possibility of modifying the total amount of working hours, and not just the distribution of working time. This difference works to the detriment of CEPs and shows how the reform has actually played a role in rebalancing the powers between these three collective tools.

This can help us draw some conclusions on the use of CEPs, although for a complete analysis, it should also be noted that, if for modifications and

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<sup>22</sup> The previous labour market reform also sought to modify the bargaining structure giving primacy to company-level agreements over other agreements in a number of subjects that are considered central to the flexible management of working conditions. However, the effective decentralization of collective bargaining was left to state- or regional-level agreements, thus preventing the actual enforcement of the primacy principle. The novelty here is that the reform aims precisely at ensuring decentralisation in order to facilitate “bargaining of working conditions as close as possible to the reality of companies and their employees” (EM, section IV).

opting out a specific cause is required, this does not apply in the case of CEPs. Again, we can observe here the delicate balance achieved by the legislator, although the effectiveness of these measures can only be assessed after a certain observation period. To modify or opt out from an agreement, the ET requires the presence of “economic, technical, organizational or productive reasons” that must be validated by the court, while for company-level agreements no cause or reason is required. This does not automatically imply lower guarantees, since primacy is granted only to agreements negotiated by workers’ representatives, whereas modifications and opting out can be unilaterally imposed by the employer<sup>23</sup>. Safeguards against abuse differ greatly, although they come to be equivalent, being the implementation of agreements justified either by a serious cause or by collective bargaining.

## 8. Transitional Law Issues. The Conflict between Law and Collective Agreement

### *8.1. The Relationship between Existing Agreements after the Enactment of Reform*

As on many other occasions in which a new law has altered the bargaining structure, this reform too was received with some reluctance. This time conflicts have actually been harsher than usual, since the reform impacts a number of aspects, since the aim of the 2012 reform was no less than a radical transformation of the European bargaining structure in favour of a decentralised and unstructured American model. In this connection, it may be convenient to recall what happened when the 40-hour working week was introduced in 1983 when a large number of agreements still applied the 42-hour working day. In this way, we can easily see how the radical reform brought about by the introduction of the company-level agreements’ primacy, as it implies an even more profound and controversial transformation by challenging the hierarchy of higher-level agreements, that used to determine the bargaining structure and the rules on concurrency between agreements<sup>24</sup>.

<sup>23</sup> R. Bispinck, *Kontrollierte Dezentralisierung der Tarifpolitik - Eine Schwierige Balance*, in *WSI-Mitteilungen*, n. 57, 2004, 237 ff.; R. Bahn Müller, *Dezentralisierung der Tarifpolitik - Restabilisierung des Tarifsystems?* in R. Bispinck, T. Schulten, (eds.), *Tarifautonomie der Zukunft. 60 Jahre Tarifvertragsgesetz: Bilanz und Ausblick*, publisher VSA, Hamburg, 2010, 81 ff.

<sup>24</sup> Thus, Art 3 of the Galician Funeral Homes Agreement of 17 February 2012, states that “The parties expressly agree that from the entry into force of this agreement the

However, the reform will not have the same impact on all sectors, as they greatly differ from each other in terms of bargaining structure. Even when provincial agreements prevail, there are differences depending primarily on the size of companies, since in some sectors labour relations are in the hands of large enterprises, while in others, where we only find small-sized companies, labour relations are regulated mainly through sectoral agreements<sup>25</sup>. We will now provide a brief overview of the clauses regulating the bargaining structure laid down in state- and regional-level agreements that led us to such a conclusion.

Numerous sectoral agreements, and not just of highest level, contain inseparability clauses, according to which if any part of the agreement is held invalid or not applied for a court decision, the parties must renegotiate the relevant clauses. It is hardly the case that a company-level agreement leads to the partial annulment of a higher-level agreement, as the ET talks about “modification”, “amendment”, “non-application”, just as French and Italian laws speak of “derogation” from higher-level agreements on the part of “supplementary” or “proximity” agreements. Conflicts arise when enacting these agreements, rather than in terms of their validity, as higher-level agreements are not effective in certain areas, although the introduction of CEPs does not automatically imply the elimination of the provisions laid down in higher-level agreements.

The labour authority, the tax ministry and collective stakeholders can challenge the legality of agreements (Article 165 of the Law on Social Jurisdiction 36/2011). This process may culminate in a judgment of invalidity immediately enforceable, and third parties may take legal steps to claim damages if they have suffered negative consequences due to the application of such agreements. The weakness of this procedure is that it requires a review of the entire agreement if one of its clauses is considered illegal or damaging or is held invalid<sup>26</sup>. One might think that a full review

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subjects set out in Article 84.4 of the Workers’ Statute as well as the structure and amount of wages and benefits, working day, compensation, and pay of overtime and shift work cannot be regulated by collective agreements referred to in paragraphs 2 and 3 of Article 84 of the Workers’ Statute, i.e. company-level agreements”.

<sup>25</sup> One of the arguments made by the defence in case of contestation of the General Agreement of the Cement Derivative sector was precisely the absence of any conflict, as in that sector no enterprise-level agreements were concluded.

<sup>26</sup> Thus, Art. 9 of the V Agreement of the Building Sector concluded on 20 January 2012 and submitted for registration and publication at the Employment Department on 23 January 2012 states that “2. Whereas the relevant authority, in the exercise of its powers does not approve or reject any provision of this Agreement, the Agreement shall be reviewed and reconsidered in its entirety. To this end, the signatories to this Agreement

is useless as it is merely a means to prevent the application of company-level agreements, and it would be tantamount to restarting the negotiation process. This reasoning however does not take account of Article 84.2 which only extends primacy to company-level agreements concluded after the introduction of higher-level agreements. Questioning the loss of primacy company-level agreements already in place before the review of the higher-level agreement is, in short, only a weak pretext for legal action. More plausible conflicts can arise with reference to procedural rules laid down in state- and regional-level agreements, especially those aimed at resolving concurrency conflicts between agreements at different levels, generally determining the primacy of lower-level agreements in the relevant sector and in the subjects provided. This is what happened in state-level agreements in the Building and Cement Derivatives sector<sup>27</sup>, with the peculiarity that the first agreement was concluded and registered, but not published, before the enactment of the reform, whereas the second was signed some time after it.

Prompted by the desire to “liberalise” the market, as stated during a number of international events, the labour authority and the Directorate General for Employment of the Ministry of Employment and Social affairs urged for the immediate enforcement of the primacy principle, threatening to reject or bring to court agreements not complying with the new regulation or with the provisions of Article 84.2 of the ET<sup>28</sup>. The agreements of the Building and Cement Derivatives sector, highly important for a sector that had been so dramatically hit by the crisis, posed a number of problems in this respect, leading to two different solutions. This is due to the fact that in the first case, the agreement was signed before the enactment of the reform, whereas the second was signed afterwards. In the end, the first managed to be registered and

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undertake to meet within ten working days after the decision in order to solve the problem. If, within forty-five days from that date the parties have not yet reached an agreement, they undertake to schedule meetings to renegotiate the Agreement in its entirety. 3. Collective agreements falling within the areas covered by this Agreement shall include an inseverability clause”.

<sup>27</sup> For example, in its original version, the V General Collective Agreement of the Cement Derivatives sector provided that company-level collective agreements must necessarily conform to sectoral-level agreements in the following areas: collective bargaining structure, working day, pay conditions and economic structure.

<sup>28</sup> On 18 September 2012, Cabeza Pereiro wrote in his blog that “It causes anger that the challenge to the agreement has come from the Directorate General of Employment – and not from an association of employers”.

published<sup>29</sup>, whereas the second was not published and was brought to court for non-compliance, resulting in a judgment of the High Court that will be discussed below.

## 8.2. Court Responses

The labour reform of 2011-2012 provided employers and company-level collective actors with a wide range of tools to use to tackle difficulties at company level. However, this shift has come at a price, as to do so, it has been necessary to dismantle a structure that has worked very well for decades, but which needed to be set aside – hopefully for a limited period of time – because of the emergence on the global scene of countries that do not apply the European social model. What emerges from this trend is a very much unstructured legal edifice, more oriented to providing solutions rather than guarantees.

The role of courts in ensuring the smooth running of newly created labour institutions as well as in determining the primacy of company-level agreements is reinforced, especially if, as it is the case, it is impossible to apply a narrow definition of a company-level agreement. In this context, it is necessary to take into account the entire array of existing agreements. Judges are already unexpectedly playing a relevant role in determining the validity of collective redundancies for economic causes, especially after the elimination of any administrative controls, and they now have similar functions in determining the relationship between CEPs and higher-level agreements.

The intervention of courts in this respect was first required by the labour authority for a case regarding an agreement signed after the reform's enactment without, however, complying with it. This refers to the High Court judgment No. 95/2012, of October 10 relating to the above-mentioned Building and Cement Derivatives sectoral agreement. The recourse, however, has a mere declarative nature, because, as pointed out by the defence, no company-level agreement exists in this sector, thus not giving rise to any prejudice or conflict with other agreements<sup>30</sup>. Despite

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<sup>29</sup> Official Bulletin of the State, 15 March 2012.

<sup>30</sup> This took place although the statement was contradicted by the State Bar on behalf of the Directorate General of Employment during the trial in the High Court. The sentence therefore does not include a statement of the facts found, which would have had great relevance. It should be noted that Cement Derivatives Subsector is not the same as the Cement subsector, which does have a tradition of company-level agreements (Holcim,

that, the reason for challenging the agreement lies in the fact that it does not comply with the legal provisions, regardless of whether it has caused damages that can be subject to sanctions or not. This is why the central labour authority has started a procedure, as the agreement was signed on 21 February 2012, when the Royal Decree-Law 3/2012 had already come into effect on 10 February.

The aim of the recourse was to produce a warning effect directed to those negotiators who attempted to ignore the legislative change, although in practice the sentence could have produced little or no effect. This is not so much for the absence of company-level agreements in that sector, but rather because collective stakeholders can at any time challenge the validity of higher-level agreements including all the acts deriving from it, through later individual or collective action, as pointed out by Art. 163.4 LJS 36/2011.

The real conflict here points to the relationship between law and collective agreements, and this constitutes the focus of our analysis that will leave aside the specific conflict between the above-mentioned agreement and the reform<sup>31</sup>. Specifically, our aim is to determine the moment when the reform starts affecting industrial relations, which are

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Intalcementi, etc.). Art. 4 of the V agreement specifies the functional area: production of concretes and mortars, cement product manufacturing, handling and assembling. On the two-tier bargaining structure, at state and provincial level, P. Ballester, J. Garrigues and V. Palacio, *La Negociación Colectiva en el Sector de la Construcción (Actualización 2005)*, Comisión Consultiva Nacional de Convenios Colectivos, Madrid, 36, state that “The sub-sector of Cement Derivatives is a separate sector, and collective bargaining has undergone rationalization and structuring through national and sectoral collective agreements, which, as happened with the CGSC, comprises two bargaining levels: the CGDC aimed at replacing the OLCVC and provincial or regional collective agreements. As occurred in the other subsector, from the geographical point of view, it is the second-level bargaining, and in particular provincial level over the regional level that prevails. In particular, in the Cement Derivatives sector, there is a provincial level agreement, the Balearic Agreement and the Agreement of the Autonomous Community of Valencia”.

<sup>31</sup> The agreement laid down several clauses that were considered by the labour authorities in contradiction with the reform. These include Art. 58, “Lower-level collective agreements must necessarily adjust pay and economic conditions according to what is established in the present chapter. This adaptation is necessarily made during the first round of negotiations carried out after the entry into force of this agreement, unless otherwise provided by the present chapter. The parties can agree to introduce the terms that best suit them, but must necessarily comply with the present agreement. Pay levels established in the present agreement cannot in any case be reduced in their annual calculation as a result of the application of the present agreement”. The Text of the V agreement is available at <http://www.andece.org/images/ANDECE/vconvenioderivadoscemento.pdf> (Accessed 10 June, 2013).

currently regulated by a collective norm, also considering the general non-retroactivity of laws (Article 2 of the Civil Code), in particular in the case of punitive or unfavourable rules or laws restricting individual rights (Article 9.3 of the Constitution), and in the light of the right to collective bargaining expressed in Art. 37.1. As for the first argument, there seems to be an indication in the Constitution not to modify collective agreements until their expiration. Against that, there is the idea that laws always prevail over collective agreements, and by virtue of that principle, agreements must be adapted to comply with legal provisions.

The Court decided that the parts of the agreement that did not comply with legislation were to be considered null and void. The court followed the principle of the primacy of laws, and deemed the reform immediately enforced, not infringing the principle of non-retroactivity. This means that the law has immediate consequences over the agreements introduced after the reform's enactment, this being "a minimum degree of retroactivity very close to the notion of immediate effect". As a basis for the argument, the court cites a wide repertoire of Supreme Court judgments and two Constitutional judgements, and some scholarly positions. Case law and the constitutional basis of these principles, i.e. the primacy of law and the minimum retroactivity, are such straightforward concepts that do not require further explanations<sup>32</sup>.

But by resorting to the idea of primacy of law and to the principle of non-retroactivity, the sentence has left some points open for discussion. In this case, the law in question is not a law, but rather a Decree, the concurrence of sectoral and company-level agreements does not pose problems in terms of validity, but rather in terms of application, in the case of conflicts between law and agreements, the principle of the more favourable rule usually applies, the challenge of an agreement by the labour authority is a residue of the past, the conflict between sectoral and company-level agreement has no legal consequences in the Cement Derivatives sector, and so on. We will now go into more detail regarding this and examine why the judgement is so doubtful:

a) The judgements the Constitutional Court (CC) put forward to confirm that some parts of state-level agreements contrary to the principle of primacy of company-level agreements must be considered null and void are No. 58/1985 and 210/1990. Both were aimed at solving constitutional

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<sup>32</sup> On 18 September 2012, Cabeza Pereiro wrote in this blog that: "The judgement was predictable, orthodox and in line with the law in force. It is not the judgement being at fault, but rather the law itself".

doubts with regards to substantive laws that had a broad impact on citizens, the first regarding the Additional Provision No. 5 of the ET and forced retirement clauses laid down in agreements<sup>33</sup>, and the second regarding the reduction of the maximum working week to 40 hours laid down in Law 4/1983. In both cases, as well as in another sentence of the Constitutional Court also related to Additional Provision No. 5 of the ET, the 22/1981, initial claims had not been about the illegality of the relevant agreement, but rather on the enforcement or non-enforcement of the law, specifically with reference to layoffs of elderly workers and the failure to adapt to the new working day regulation on the part of the companies affiliated to the Federation of Employers of the Metal Sector of Gran Canaria. It has not been necessary to wait for the decisions of lower courts to raise constitutional complaints, as the judges themselves had raised the issue of unconstitutionality before the High Court. The Constitutional Court confirmed the constitutionality of both legal rules with a variety of arguments, in particular the capacity of the law to limit or promote collective bargaining. Yet even here there were some differences with the judgment under analysis: in the case of layoffs of elderly workers, the Constitutional Court had offset the decision with the requirement that workers could be dismissed only if entitled to a retirement pension, and provided the decision had a positive effect on overall employment levels within the company, in the case relating to the 40-hour working week, the court opted for an immediate reduction in working hours.

None of this occurs in the Cement Derivatives case. No conflict or damage occurred, no employers or workers or unions or employers' associations have challenged the agreement, no question of unconstitutionality was raised by the Court, since the case did not have the same social relevance as those that had required the intervention of courts of highest level, and, finally, the judgment did not introduce any requirement to rebalance the agreement that was being challenged.

b) In addition: the judgment of the High Court fully applies the principle of the primacy of law, and only rejects some articles of the agreements, which were then considered null and void. The court did not think that the attack to the Cement Derivatives sectoral agreement might be

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<sup>33</sup> "It is possible to determine retirement age through collective bargaining, with no prejudice to the provisions related to Social Security". The controversial existence of DA 5<sup>a</sup>, converted into DA 10<sup>a</sup>, ended with its repeal through Law No. 3/2012, yet with a transition period as provided in DT 15<sup>a</sup> of the same law.

disproportionate and unnecessary, as the recourse was only meant to have an “intimidating” effect, rather than restoring legality. We could well understand the decision of the court by referring to what the judgement reports in relation to wage levels. The sectoral agreement was reproducing the same provisions laid down in agreements in force before the reform, being as “a kind of clone of what had already been agreed in the past, and which could have perfectly been avoided, as it had been previously agreed”<sup>34</sup>. In addition, the absence of company-level agreements in the sector, the absence of conflicts and contradictions between collective and individual levels have allowed a judgement that was defined as “orthodox and consistent with the law in force”, in the awareness that without any practical purpose, it would have just been a “pie in the sky”.

Nothing could have been further from reality. The ruling has been hailed by financial newspapers as a “major boost” to the reform and attracted the attention in discussion forums. We will now discuss the issue starting from the prudent approach of the Constitutional Court in imposing the principle of hierarchy in the law-agreement relationships.

c) The primacy of law is not stated in legislation as clearly as the legislator itself would have wished. Surely, in recognizing validity to industrial relations law, it is still the law that sets limits and rules, though with a secondary role limited to providing a framework. It was only until the “awaking” from sleep of the legislator in the nineteenth century that definitions of minimum standards were applied by social parties in the bargaining process. In this respect, the primacy of law is outside the core of labour law and goes beyond fixing working conditions, as has been highlighted in Art. 3 of the ET: the law always prevails over other types of regulations, but between laws of different nature the more favourable rule is applied.

However, Art. 3 of the ET focuses on some elementary principles, and case law and doctrine have considered another aspect of the principle of primacy of law, which is particularly relevant for our discussion, as pointed out in the judgement. This makes the appeal against the judgement subsequently presented by the trade union confederation of workers’ commissions<sup>35</sup> even more relevant. These are cases in which it is

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<sup>34</sup> S.AN. 95/2012, legal basis 5º.

<sup>35</sup> The Appeal to Supreme Court No. 1034104/2012 of 18 December 2012, presented by CCOO to the Board for Social Affairs of the National Court and to the Social Department of the Supreme Court in the case 132/2012. The appeal was signed by counsel D. Lillo Enrique Perez.

impossible to derogate from the law, though this would make collective bargaining unable to improve or worsen the conditions established in the law itself. The examples that are usually mentioned, such as the age for admission to work or the rules of procedure do not give a full account of the extent to which the law can play a role in shaping the internal structure of collective bargaining. The law, in short, can move into the core of collective bargaining as much as it deems it appropriate, and can impose its will. It cannot, however, act “capriciously” and without limitation, as the Constitution and international agreements consider bargaining part of fundamental trade union rights, if not even a fundamental right in itself<sup>36</sup>, in that it is a necessary measure and adjusts the level of intrusion by workers depending on the desired effect, and it must be justified, as any limitation of fundamental rights should be. With regards to the primacy of company-level agreements established by law, no derogation is permitted, as the law does not provide any alternative, but what is questioned here is whether this “pitch invasion” is justified by the attempt to liberalize and adapt to the company level.

It is likely that similar questions have pushed the administrative authority to challenge the Cement Derivatives agreement before it came to actual conflict with a company-level agreement. In that particular case the challenge would have been put forward by a union or a group of workers because of the lower wage established in the latter, and courts would have at least hesitated on what principle was to be applied, whether the hierarchy of law or the most favourable rule. It is a reasonable doubt, and with reference to the issue of the primacy of some agreements over others we have to point out that we are not arguing about the principle of favourability and working conditions, but rather about the structure of collective bargaining (agreements’ concurrency), although from a different perspective, i.e. the subjects in which the primacy principle applies we want to focus resolutely on specific rules and enforced standards that give real content to the principle of favourability. These doubts would have been enough, perhaps, to raise the issue of unconstitutionality and extend the intervention further beyond than what was desired by the Administrative authority.

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<sup>36</sup> On the concept of collective bargaining as part of the fundamental right of freedom of association, see the Constitutional Court, as well as the judgment of the European Court of Human Rights in the *Demir and Baykara*, Case No. 34503/97 of 12 November 2008 and Art. 11 of the European Convention on Human Rights and Fundamental Freedoms. On the idea of a fundamental right in itself, see Art. 28 of the Charter of the Fundamental Rights of the European Union.

There is an additional argument when looking for appropriate solutions. The legislator acts very differently, and in a much more respectful way, when it comes to abolishing the old rule that allowed collective agreements to establish age related layoffs: such layoffs are prohibited according to DT 15 of Law No. 3/2012, starting from agreements signed after the enactment of this law, but with respect of existing contracts, the law becomes effective only upon expiration of the agreement. The reason for abolishing forced retirements in collective agreements, is that of increasing the sustainability of the Social Security system, and is not related to the principle of primacy of company-level agreements, but it is nonetheless important. And although what is common under labour law is not necessarily what is common in other branches of law where a new law is also applicable to previously existing relationships, labour law also takes account of the constant presence of subsequent agreements even recognising the principle of favourability to avoid compliance with laws that no longer exist, following the example of the civil servants law with reference to “acquired rights” and similar formulas as existing in other countries (vested rights)<sup>37</sup>.

If the potential for conflict within the sector did not exist and if the attitude in other cases was more respectful of collective bargaining than the one adopted in this case by the legislator, and if the reform had given entrepreneurs a whole series of tools to opt out, derogate and modify agreements, the consideration that this recourse deserves is that it was a disproportionate and unreasonable challenge. In our view, the action should have been declared inadmissible for lack of purpose or for merely being declarative. Otherwise it would have been necessary to raise the question of unconstitutionality before the Constitutional Court, given the doubts covertly expressed by the court itself<sup>38</sup>.

d) The labour authority intervention in the collective bargaining challenge has been constantly criticised even by judges as an improper action that should have been handed over to the Tax Ministry, yet it “is very difficult to explain that if there are collective representation or stakeholders

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<sup>37</sup> The CCOO appeal refers to the rejection by the Supreme Court in its judgment of 9 March 2004 of the implementation of the new rule prohibiting forced retirement clauses to be included in the agreements, drawing on the DT 2<sup>a</sup> CC, on the basis that “acts and agreements concluded under previous legislation, and complying with it, will be subject to the legislation previously in force”.

<sup>38</sup> “It is clear that, upon entry into force of the above-mentioned rule, it remains valid as long as it is not declared unconstitutional, and collective agreements must comply with it”. (Legal Basis No. 3).

affected by the challenges and enabled by the law to take direct action, there should be a procedure establishing that the Administration acts as intermediary and has the power to initiate such procedure”<sup>39</sup>. It has no constitutional justification, according to Conde Martín de Hijas, a challenge in which the Administration defends a private subject who should actually defend themselves.

The idea that the illegality of an agreement should result in an actual or at least predictable damage to justify the intervention of the administrative authority<sup>40</sup> is backed up by some scholars. So, surely the judgment should in any case restore a legal situation where it is possible to eliminate flaws and correct defects, either by recognizing rights and legitimate interests, or by repairing damages, as indicated by Martín Valverde and García Murcia with the support of Alonso Olea and Miñambres Puig<sup>41</sup>. The intervention of public authorities in this field derives from the time when the Ministry of Labour had the power to control the appropriateness and legality of the agreements that were presented to the register, and which could be rejected also because the time was not deemed right to grant the required improvements<sup>42</sup>.

Now it is time to limit at most the intervention of the labour authority in the area of collective agreements, at least when none of the stakeholders insists on intervention or when there is no apparent damage or prejudice, as is suggested by the majority of scholars<sup>43</sup>. Professor de la Villa

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<sup>39</sup> V. Conde Martín de Hijas, *Proceso de impugnación de convenios colectivos*, in Consejo General del Poder Judicial, *Estudios sobre la nueva Ley de Procedimiento Laboral*, Madrid, 1991, 746.

<sup>40</sup> *Ibid.*, 746. Some scholars justify administrative intervention as a form of collaboration with the tribunals “in the attempt to safeguard the purity of the Legal System” (A. Baylos Grau, J. Cruz Villalón, M. F. Fernández López, *Labor Procedural Law Institutions*, Trotta, Madrid, 1995, 262 and 267), which is meaningless, because in that case it should have also power to safeguard the purity of non-statutory agreements or arbitral awards that violate legality, a rule which is not provided in the Law (Art. 163 LJS 36/2011), although the literature and case law indirectly admit it by way of other collective tools, ex Art. 85.1 ET (J. L. Monero Pérez *et al.*, *Litigation Manual Labor Tecnos*, Madrid, 2010, 293).

<sup>41</sup> A. Martín Valverde, J. Murcia García, *Las impugnación de los convenios colectivos de trabajo*, REDT, 24, 1985, 507; M. Alonso Olea, C. Puig Miñambres, *Derecho Procesal del Trabajo*, Civitas, Madrid, 1994, 266.

<sup>42</sup> Collective Agreement Law of 24 April 1958, Art. 13 and 14, and Art. 19 of the Regulation of 22 July 1958. Control was even stricter towards “internal” unions, under the Ministry of Union Relations as defined under Art. 11.4 of the Regulation. In the case of a refusal, a decision could be put forward “internally”. Control continued further, though with some limitations as laid down in the Collective Agreement Law of 1973 and the Royal Decree-law on Labour Relations No. 17/1977 in its initial version.

<sup>43</sup> On the need to restrict the legitimation of an abstract control of the lawfulness of the agreement, in order to limit the risk of undermining its internal balance by considering

considers the origin of administrative intervention as a residue of a time in which this was a way of controlling collective initiatives, as the initial formulation of Article 90 of ET clearly shows. At the time this was the only viable way to challenge agreements, and this principle is still laid down in the ET, although the literature recognises other ways to challenge agreements, which have been gradually accepted by courts and procedural law<sup>44</sup>.

Despite admitting an abstract control procedure to ascertain legality, as much as this is an extra-ordinary procedure limited to collective agreements, what we object here is the role of the Labour Administration in the process as a last vestige of a foregone era in which the Administration was in charge of both control of legality as well as of the assessment of appropriateness<sup>45</sup>.

e) Such an arguable mechanism is put in place in defence, not of a law, but of a decree-law, being it another weakness in the whole series of weaknesses that the court has not highlighted. Art. 86 of the Constitution is very clear in defining decree-laws: in case of extraordinary and urgent necessity, the government may issue temporary legislative provisions that take the form of decree-laws and which may not affect the basic

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control as an exceptional measure, see M. Valverde, G. Murcia, *La impugnación de convenios colectivos*, 500; F. Durán López, *Los pactos para la retribución de las horas extraordinarias y su consideración jurisprudencial*, in *Documentación Laboral*, vol. 8, n. 63, 1983; M. F. Fernández López, *El control jurisdiccional de la negociación colectiva*, in *VI Jornadas Andaluzas de Derecho del Trabajo y Relaciones Laborales*, Sevilla, 1989, 226; R. Pérez Yáñez, *El control judicial de los pactos colectivos*, Madrid, 1996, 105.

<sup>44</sup> L. E. De La Villa, *Impugnación de los convenios colectivos tras la LPL de 1990*, en Consejo General del Poder Judicial, *Estudios, op. cit.*, 779. According to the author, the doctrinal debate started between Suarez Gonzalez and Ojeda Avilés, followed by the judgments of 1982 and 1983 TCT opening to the opportunity to challenge the agreement through regular collective dispute procedures, although the judgments of the Supreme Court (S.TS. July 12, 1983) and the TCT (S.TCT. November 10, 1986) introduced some restrictions. Subsequently, there has been a progressive opening, until finally the Constitutional Court supported a broad interpretation, through sentences No. 47/1988 and No. 124/1988. On the evolution of case law and on its role in paving the way for a process that was initially monopolized by the administrative authority, see J. A. Bengoechea Sagardoy, *El proceso sobre conflictos colectivos e impugnación de convenios Colectivos*, Consejo General del Poder Judicial, 276 ff.

<sup>45</sup> A distinction between a critique against the abstract control of the lawfulness and the legitimacy to exert such control can be found in F. Lopez-Tarruella Martínez, *Autonomía colectiva y control judicial de los convenios colectivos: el miedo a la impugnación de los convenios*, in Various Authors, *El proceso laboral. Estudios en homenaje al profesor Luis Enrique de la Villa Gil*, Lex Nova, Valladolid, 2001, 534.

institutions of the State, as well as rights, duties and freedoms of citizens provided in Title I, Autonomous Communities, or the general electoral law. In other points, the reform is justified by an extraordinary and urgent need, but not in relation to company-level agreements' primacy, and even less in the case of non-existent company-level agreements, such as in the Cement Derivatives sector. There is more. Decree-laws cannot introduce limits to fundamental rights: "Through an exceptional norm that requires a constitutional justification that is based on urgent need such as a Decree-law, it is not possible to regulate the structure of collective bargaining"<sup>46</sup>. To prevent abuse in the recourse to decree-laws, courts have some powers of control<sup>47</sup> - similarly to those of the Constitutional Court - to override the Decree-law *ultra vires*<sup>48</sup>.

The Cement Derivatives sectoral agreement will undoubtedly serve as a "leading case" to give direction in the field. The appeal could end up with a question of unconstitutionality, but the most likely result could be a partial annulment of the judgement. Contrary to what one might think at first glance, a judgment of appeal is not useless: although in this case Royal Decree-law 3/2012 was converted into Law 3/2012, a declaration of the validity of the agreement is certainly of paramount importance, as the agreement extends the period of validity of the provisions laid down in a temporary decree-law, although the agreement itself was considered in contradiction with the decree-law by the High Court. In this situation, there should be another challenge from the labour authority, which would be difficult to accept.

In the meantime, a challenge of unconstitutionality was made against CEPs and other aspects of Law No. 3/2012 for which an admission by

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<sup>46</sup> This is the justification supplied by the court of appeal against the AN judgement on the CCOO AN concerning the unconstitutionality of Royal Decree-Law No. 3/2012.

<sup>47</sup> Arts. 1 and 25 ff. of Law No. 29/1998.

<sup>48</sup> See the interesting report by J. Lahera Forteza, J. C. Garcia Quiñones *Informe 254. Argumentos jurídicos para una eventual impugnación del Real Decreto-Ley 8/2010, de 20 de mayo, por el que se adoptan medidas extraordinarias para la reducción del déficit público*, 2010, [www.feteugt.blogs.upv.es/files/2010/07](http://www.feteugt.blogs.upv.es/files/2010/07), 2, on the power of the Constitutional Court to reject, in the case of presumed abuse or arbitrary use on the part of political bodies of the concept of extraordinary and urgent necessity, a Decree-Law, which can be declared unconstitutional for absence of urgent reasons or because the government is exerting the powers reserved to Parliament by the Constitution (SSTC 29/1982, of 31 May 111/1983, of 2 December 23/1993, of 21 January 182/1997, of 28 October; 137/2003, of 3 July 189/2005, of 7 July and 329/2005, of 15 December).

the Constitutional Court could make the appeal in the high court superfluous<sup>49</sup>.

### 9. Concluding Remarks: *Intentio Legis* versus *Voluntas Legislatoris*

At the beginning of this paper, we analysed the role of CEPs as defined in the Explanatory Memorandum of Law No. 3/2012, similar to the Royal Decree 3/2012, namely that of better adapting labour relations to the economic and productive environment in which they operate. The mistaken perspective underlying the norm is that labour relations develop only within the economic and productive context of the company, though this statement is relativised by globalization and by the structure of businesses, whereby many of the important decisions are made at supra-company level. Leaving aside that for a moment, we would like to focus briefly on another dichotomy, that of the potential divergence between *intentio legis* and *voluntas legislatoris*. As in many other cases, the stated intention of a norm may differ from the real will of the legislator, as it may be clear by the express statements of legislator holding the parliamentary majority supporting the law, or through comments expressed in the socioeconomic scenario.

In the previous section we explained that the management of labour relations at company level cannot take place in the sector analysed and which served as a point of reference due to the absence of company-level agreements claiming primacy according to the most recent legislation. It is useless to give power that cannot be exerted. Furthermore, we do not know whether there is another intention to this, a point that we have also analysed. It may be useful to think, however, that what happened here may be different in the rest of the economy, because most of the agreements in our country are bargained at company unit level, (72.8% in 2012, which makes only 27% at local or sectoral level). The sector that we have analysed here is therefore the absolute exception to the rule, since

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<sup>49</sup> Appeal accepted for consideration on 30 October 2012, presented by the Grupo *Socialista and the Izquierda Plural (IP)* against seven articles and two provisions. These gave the National Commissions on Collective Agreements the power to deviate from provisions laid down in collective agreement, giving preference to company-level agreements, establishing a probationary year in the new permanent contract for SMEs and eliminating the clause establishing the payment of salaries accrued by dismissed workers during court proceedings, i.e. while waiting for a judgement on the lawfulness of their dismissal, among other issues.

the overwhelming majority of agreements have been concluded at enterprise level, with a small minority signed at the sectoral, mainly provincial level.

Yet, on the one hand, the number of agreements signed at company-level has little to do with labour relations in our country if we look at the number of workers who are covered by one or the other agreements. In 2012 only 8.1% of Spanish workers were covered by company-level agreements, with around 92% of workers that were covered by sectoral agreements<sup>50</sup>. The distance between the two is actually increasing every year, to the point that “in terms of collective bargaining structure, it emerges that the relative weight loss of company-level agreements, despite the labour reform of 2012 has strengthened their role”<sup>51</sup>. In addition, the figure on the overall number of agreements is misleading, as is in relation to sectoral agreements, a 72.8% of company-level agreements are overwhelming, they constitute only 1% of all enterprises in Spain. Company-level bargaining is merely episodic, corresponding to about 20,000 companies that have negotiated agreements at company level from 1959 to today, compared to 3,246,986 of companies surveyed only in 2011<sup>52</sup>. It must be said, as pointed out by the Spanish Confederation of Business Organizations a few years ago, that enterprise-level agreements are typical of larger-sized companies, with an average of 305 workers, whereas sectoral agreements include smaller-sized companies, with an average of seven workers<sup>53</sup>.

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<sup>50</sup> Comisión Consultiva Nacional de Convenios Colectivos, *Boletín del Observatorio de la Negociación Colectiva* n. 36, 2012, 2 and 3. The bulletin refers to the workers “covered” by agreements.

<sup>51</sup> Comisión Consultiva, *Ibid.*, 4. The data provided refer that the number of workers covered by enterprise-level agreements was between 2006 and 2012, at 11.8%, 10.9%, 10.2%, 9.6%, 8.6%, 8.9% and 8.1%, while simultaneously an increase was reported of the number of workers covered by state-level agreements. The decline “corresponds both with the disappearance of businesses and jobs resulting from the crisis that began in late 2007, as well as with the delay on the part of collective bargaining that is due to the difficulties posed by the crisis in reaching new agreements between employers and employees”. And, both the number of agreements concluded, as well as that of workers covered by them has been declining with the crisis, whereas between 1985 and 2006 the number of company-level agreements had increased from 2,590 to 4,271, and the workers covered from 1,062,500 to 1.1879.000 (CEOE, *Balance* cit., 21).

<sup>52</sup> Data taken from the Bulletin of the Lex Nova blog of 25 September 2012, *El convenio de empresa manda*.

<sup>53</sup> CEOE, *Balance de la Encuesta CEOE sobre Negociación Colectiva 2007. Estructura y Contenido de los Convenios Colectivos en España*, Madrid, 2008, 20.

The purpose of the legislator cannot be, for the above that of adapting labour relations to company needs, when the vast majority of them and of their workers fall under the application of a sectoral agreement. It remains to find out what may have been the real intention of the legislator, as denying one thing does not make the opposite true, and we need to find an answer, running the risk of making mistakes.

The perspective of the legislator is not company-based, but rather oriented towards the macroeconomic situation, as Law No. 3/2012 was introduced in response to the international financial crisis. Whether it is for external impulse on the part of international creditors, or for the firm conviction of the parliamentary majority that brought the rule forward, the primacy of company-level agreements is only one of the tools used, along with other collective tools provided in the law, including opting out, amendment and modifications to change the industrial relations model, which has now become sharply individualised, leaving behind social dialogue as a means to regulate labour conditions. The dismantling of collective standards, considered necessary to compete in a globalized economy, leads to increased, even temporarily, of disorganization and labour conflicts<sup>54</sup>, as well as to a rise in unemployment, which after all can undermine the expected recovery. For the sake of flexibility, as pointed out by Vila Tierno, attempts are made to dismantle the rules that we have been having since 1994 (and in many cases even from the original version of ET in 1980)<sup>55</sup>. According to Perán Quesada, one of the most unjust accusations made to our bargaining model and therefore to the social actors that support it, is that it is not only an inappropriate tool for adapting working conditions to the specific circumstances of the company, but that it is “an obstacle”, especially with regard to wage levels. It is argued that union empowerment has a negative effect on wage determination, and that wages do not go down, or do not go low enough in periods of economic crisis. And, certainly, to shift collective bargaining to the company level will certainly make union action weaker and bargained working conditions less favourable to workers<sup>56</sup>.

Destroying a system based on social dialogue and collective bargaining, which has produced good results in Spain as well as in other EU countries and which lies at the foundation of the European social model and of EU

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<sup>54</sup> The news agency Europa Press reported that there have been 36,000 demonstrations in the first year of the Conservative government, nearly 120 daily, mostly related to labour issues, without trade unions taking a leading role in organizing them.

<sup>55</sup> F. Vila Tierno, *op. cit.*, 4 (original version).

<sup>56</sup> S. Perán Quesada, *op. cit.*, 4 (original version).

primary law should not occur so thoughtlessly. The fact that social dumping prevails today in the global economy should not make us forget that other European countries, and significantly Germany, are able to overcome the crisis through social dialogue and codetermination<sup>57</sup>. However, this is a different topic distant from the focus of the present paper, which brings us to the conclusion of our analysis of company-level agreements' primacy.

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<sup>57</sup> A remark on the achievements of the Hartz reform in Germany, or Agenda 2010, with the clear statement that the positive outcomes in the country are mainly due to the active participation of trade unions in the management of companies and the good performance of the manufacturing sector in Germany is available in H.D. Köhler, *El mito de las reformas en Alemania*, in *El País*, 4 January 2013, 35.

# The European Social Model: Revitalizing the Debate about its Prospects

Mirella Baglioni \*

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## 1. Introductory Remarks

The aim of this paper is to present and interpret the various approaches to the European Social Model (ESM) through an industrial relations perspective, in order to discuss its present state and future prospects<sup>1</sup>.

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\* Mirella Baglioni is Associate Professor of Sociology of Economics at the University of Parma. I am grateful to the anonymous referees for their useful comments and suggestions. I also wish to remember Antonio Dornelas who has recently passed away. He first discussed this paper with me during the IREC-ESA RN17 Conference in Lisbon (September 2012) and strongly encouraged me to refine my approach to the subject and to publish my contribution.

<sup>1</sup> The European Social Model is defined as a combination of economic and social progress. The effective interconnection of these two factors is the result of harmonious labour relations in promoting industrial democracy and the dissemination of solidarity across Europe. In addition to the definitions laid down in official documents such as the Charter of Fundamental Rights, the 1994 EC White Paper, the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), reference is also made to the ESM in the documentation issued by social partners – which often takes the form of social dialogue – studies and researcher in industrial relations and labour law. See <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialmodel.htm> (Accessed March 10, 2013). The neoliberal regulation and the different economic crises have shifted the attention to the negative effects of interest representation postulated in the ESM. The criticisms focused on the mechanism for governing labour markets, and the obstacles towards flexibility posed by the social partners operating within the limits of a unique social model, see A. Sapir, *Globalization and the Reform of the European Social Models*, Working Paper for the Ecofin, Manchester, September 2005. <http://econpapers.repec.org/paper/brepolcon/31.htm> (Accessed February 28, 2013).

The ESM has been the subject of critical analysis from a number of scholars who have investigated the development of European institutions<sup>2</sup>. Furthermore, a great deal of criticism – yet of a more political nature – has also been raised by the social partners themselves who – being an intrinsic component of the model – have frequently expressed their disappointment with the limited success of the ESM. In addition, the economic downturn which at different times marked the new millennium narrowed down the room for critical debate on EU socio-economic developments, and likewise limited any leeway to manoeuvre provided for social policy at EU level, with the claims of social partners which have thus far been neglected.

As far as the European Commission is concerned, one might note that the Directorate of Employment Social and Economic Affairs has lost its grip in comparison with the previous decades. It is likewise noticeable that over the last two years, the European Foundation for the Improvement of Living and Working Conditions (Eurofound) – the main European agency on labour issues – has undergone a reorganisation process resulting in its Industrial Relations (IR) Research Program focusing on short-term adjustments concerning restructuring, rather than on the overall trends of labour relations.

The current state of the ESM is impacting on labour relations across Europe at a time when processes of deregulation required by neo-liberal governments, and rising unemployment provoked by the recession, are causing a substantial reduction of the legal and contractual protection of labour. This is progressively altering the principles of socio-economic regulation within the EU.

The academic debate about the ESM – which often results in strong reservations about the scope of its compliance with institutional requirements at EU level – deserves far more attention from industrial relations scholars.

In this sense, much research has been conducted, yet a methodological divide exists between the academic and institutional approaches taken, with little to no dialogue between these two worlds. Evidently, this state

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<sup>2</sup> See W. Streeck, *Neo-Voluntarism. A New European Social Policy Regime?* *European Law Journal*, n. 1, 1995, 31-59; B. Kittel, EMU, *EU Enlargement and the European Social Model: Trends, Challenges, and Questions*, MPIfG Working Paper, 2002, n. 1, Cologne, www.mpifg.de; F. W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity* MPIfG Working Paper 2002, n. 8, www.mpifg.de; T. Blanke, J. Hoffmann, *Towards a European Social Model. Preconditions, Difficulties and Prospects of a European Social Policy*, ETUI Working Paper 2007, n. 2; P. Pochet, C. Degryse, *Social Policies of the European Union. Global Social Policy*, n. 3, 2010, 248-257.

of affairs is the result of different aims and audiences. However, particularly in times of crisis it might be of use to enhance the exchange of ideas and to be open to different views in order to help overcome challenges and dispel the doubts about the future of what has been termed the “European project”.

In view of the above, this paper makes an attempt to move away from the debate on the ESM, giving priority to its impact on IR and the role of scholarly work in stimulating a process of adaptation of its scope and coverage which meet the needs of the EU citizens. Academic and joint research conducted by scholars and practitioners at a European level points to past convergences and a current divide on both methodological and conceptual developments of the ESM. A growing state of uncertainty concerning the role of labour relations in Europe and the ongoing economic crisis impact the future of the ESM and is progressively changing its extent and main features.

## 2. Economic and Social Europe

Recent developments in EU policy have raised serious concerns about social Europe. The imbalance between economic and social policies<sup>3</sup> is further aggravated by the Fiscal Compact which acts as a stumbling block to national autonomy in terms of social policy-making. Experts of political science and sociologists have already pointed to the historical gap between the economic and social competence of the EU.

Most notably, Scharpf<sup>4</sup> has analyzed the asymmetry between social and economic policy fields, with special reference to the difficulty of harmonization between different social rights across the EU as long as persisting national sovereignty causes much differentiation between the social policies of the Member States (MS). Besides the historical asymmetry between social and economic policies, Scharpf also points out the perverse consequences of economic and fiscal constraints, which, by eroding the social budget at a national level, weaken to various degrees the

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<sup>3</sup> This imbalance has been analysed by A. Sapir, *op. cit.*, as a consequence of the different degrees of efficiency and sustainability of the national social models.

<sup>4</sup> The concept of asymmetry between economic and social policies was elaborated by F. W. Scharpf, *op. cit.*, in 2002 and further developed in relation to the dualism between nation states and European policies. See also F. W. Scharpf, *The Double Asymmetry of European Integration*. Or: F. W. Scharpf, *Why the EU Cannot be a Social Market Economy*, MPIfG Working Paper 2009, n. 12, [www.mpifg.de](http://www.mpifg.de) (Accessed January 31, 2013).

social policies of the Member States. He also insists that European policy will be unable to reduce this differentiation and converge towards a common minimum social standard because of the diversity of national social protection systems, and particularly “the political salience” of these differences.

Whereas Scharpf focuses on the unbalanced development of the European project, Streeck<sup>5</sup> indicates the serious consequences of European neo-liberalism on social Europe. In the author’s view, social Europe neither regulates nor governs the socio-economic development, but relies on the principle of voluntarism which requires that national policies and social partners comply autonomously with social guidelines agreed at EU level<sup>6</sup>. This led on the one hand to the impossibility of governing a process of convergence towards common standards and, on the other hand it gave rise to competition between different social regimes in the EU, as well as forms of social dumping.

The Europeanization of labour relations was viewed as a substantial possibility by IR scholars in the mid-1990s, with scepticism arising from Streeck’s analysis which was not widely shared. Unfortunately, such “Europtimism” gave way to more pessimistic views during the new millennium. As predicted by Scharpf, the EU Fiscal Compact is narrowing down the spending autonomy, and the achievements of Social Europe – if not significant – are also increasingly under threat because of cuts in national social budgets. One outcome of the neo-liberal approach taken by the European Union is the progressive convergence towards the deregulation of workers’ rights and the rolling back of the welfare state<sup>7</sup>. The negative effects of this convergence are particularly affecting the

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<sup>5</sup> See W. Streeck, *The Internationalization of Industrial Relations in Europe, Politics and Society*, vol. 26, n. 4, 1998, 429-459.

<sup>6</sup> This argument is also put forward in a famous article which summarizes the results of research carried out on European Works Councils. See W. Streeck, *Neither European Nor Works Councils: A Reply to Paul Knutsen, Economic and Industrial Democracy*, n. 18, 1997, 327-337.

<sup>7</sup> Starting from the 1990s, the sustainability of welfare states has been the subject of a long-standing debate which has first focused on flexibility in the labour market and then moved to the sustainability of existing features of the European welfare state regimes. On grounds of a comparison of the different degrees of efficiency and equity embedded in the different social regimes across Europe, A. Sapir, *op. cit.*, 389, specifically points at the low performances of the Mediterranean countries. The recommendation of the author is that “Member States must also proceed in parallel with national reforms of labour market and social policies geared towards improving the capacity of their economies and their citizens to take full advantage of the opportunity offered by the changes associated with globalization”.

citizens of the Member States which suffer a debt crisis. Yet the social deficit of the project on economic integration is perceived all over the EU. The main question to be addressed is how and who will ever fill this deficit.

Social partners, in cooperation with a number of European bodies have not been able to help social Europe to progress. First, the failure to move in the direction of minimum social standards/rights needs attention, also in consideration of the stalemate situation of the Europeanization process involving social partners and the state of uncertainty surrounding the role of the European Trade Unions' Confederation (ETUC). Indeed, the sound management of the changing labour relations calls for either strategic decision-making which might bring about the demise of national sovereignty or the retention of the existing balance of power at the expense of a European strategy. Second, such a debate also challenges the institutions supporting and monitoring of the ESM. In addition to the academic debate, there exists at the level of European institutions a vast amount of empirical findings on national social policies. These studies have produced a number of analytical reports, which formed the basis of the Lisbon strategy and, subsequently, caused the amendments made to the European social strategies over the last decade. Although scholars and policy-makers acknowledge the profound changes taking place within the European societies, there is a need to update the conceptual model to be employed at the time of defining social inclusion and solidarity.

### **3. Europeanization and National Identities**

The history of the twentieth century bears witness to the central role played by class conflict and interest representation in building social solidarity and consolidating democracy in the Western European countries. Yet more recently, international capitalism has radically changed the rules of the game, downplaying the role of social economic representation in policy-making. As a result, social partners and policy-makers in the new millennium have to renegotiate the terms of their social contract.

The attempt to replicate provisions regulating national socio-economic conditions also at European level was made successful by a number of initiatives, among which were the Delors social program, the Maastricht Treaty and the European Directive on European Works Councils (EWCs).

After carrying out research on the establishment and the functioning of EWCs, Streeck<sup>8</sup> expressed further scepticism about the future of social Europe, yet he stood alone among the IR scholars community. To the contrary, a vast amount of relevant research focused on the prospects of “Europeanizing” IR and provided an extensive analysis of the process of social dialogue and the experiences of workers’ participation in EWCs. Surveys by EWCs looked at the dissemination of works councils and emphasized the difficulties of workers’ representatives in establishing themselves at a European level rather than pursuing national interests. They also gave account of the progress made in companies operating in line with legislation safeguarding consultation and promoting mutual trust between workers and managers<sup>9</sup>.

The time-consuming revision process of the Directive – along with the slower pace of the transposition process – are illustrative of the difficulties in widening the scope of EWCs and reinforcing and consolidating European employee representation against the resistance of the employers’ associations. From the very beginning, the critical point was the content of information and consultation of workers’ representatives, and this issue was made increasingly sensitive by the production crisis and consequent restructuring in many European plants. Restructuring has in

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<sup>8</sup> R. Joel, W. Streeck, *Works Councils: Consultation, Representation and Cooperation in Industrial Relations*, Chicago University Press, Chicago, 1995.

<sup>9</sup> W. Lecher, B. Nagel, H.W. Platzer, *The Establishment of European Works Councils: From Information Committee to Social Actor*, Ashgate, Aldershot, 1999; W. Lecher, H.W. Platzer, S. Rüb, K. Weiner, *European Works Councils: Developments, Types and Networking*, Ashgate, Aldershot, 2001; W. Lecher, H. W. Platzer, S. Rüb, K. Weiner, *European Works Councils: Negotiated Europeanisation. Between Statutory Framework and Social Dynamics*, Ashgate, Aldershot, 2002; M. Carley, and P. Marginson, *Negotiating European Works Councils under the Directive: A Comparative Analysis of Article 13 and Article 6 Agreements*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2002; M. Carley, M. Hall, *European Works Councils and Transnational Restructuring*, European Foundation for the Improvement of Living and Working Conditions, Dublin, 2006; M. Whittall, H. Knudsen and F. Huijgen (eds.), *Towards a European Labour Identity. The Case of the European Works Council*, Routledge, London and New York, 2007; P. Marginson, *The Euro-Company and Euro Industrial Relations*, *European Journal of Industrial Relations*, vol. 6, n. 1, 2000, 9-34; T. Müller, A. Hoffmann, *European Works Councils Research: A Review of the Literature*, *Warwick Papers in Industrial Relations*, WP, n. 65, 2001, University of Warwick; B. Keller and H.W. Platzer (eds.), *Industrial Relations and European Integration. Trans- and Supranational Developments and Prospects*, Ashgate, Aldershot, 2003; V. Telljohann (ed.), *Quality Inventories on the Operation and Results of European Works Councils*, Fondazione Istituto per il Lavoro, Bologna, 2005; J. Waddington, *What do Representatives Think of the Practices of European Works Councils? Views from Six Countries*, *European Journal of Industrial Relations*, vol. 9, n. 3, 2003, 303-325.

many cases been undertaken by corporate management following a strategy of *divide et impera*, whereby information is issued selectively and no consultation is permitted. This strategy deprives the employees' representatives of their role, and upholds the relative strength of industrial relations conducted at a national level.

An alternative view is that European trade unions are often viewed as the victims and those primarily responsible for the failures of IR Europeanization. By employing different approaches and with varying degrees of pessimism, Hyman and Erne<sup>10</sup> have examined the crisis of European trade unionism resulting partly from the difficulties inherent in social Europe and partly from union participation in the European policy-making process.

These complexities show that IR resists evolving from its national roots; a problem frequently analysed by Hyman with particular reference to the European dimension of IR and to the wavering role played by European trade unions in the process of Europeanization. Hyman notes that the history of social Europe is extremely controversial, and that its recognized values are derived from workers' rights legitimised at national level and taken as a shared benchmark for building a European society. He acknowledges the distinctiveness of employment protection provided statutorily and reinforced by extensive public welfare systems, the acceptance of collective interests and their representation giving a role to social partnership in defending and constructing the model and "extending these rights and protection through harmonisation and upward standardisation of outcomes across the Community"<sup>11</sup>. Nevertheless, he also points to a number of factors which have already altered the trends of extending workers' rights and social protection: the prevailing neo-liberal economic policy of the EU; the assertiveness of European fiscal policy and labour market flexibility; the budget austerity and the reshaping of the welfare state. Hyman is of the opinion that by agreeing to negotiate within the neo-liberal paradigm, trade unions have weakened the prospect for building a social model across Europe and transformed their role into a defensive and bureaucratic routine.

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<sup>10</sup> R. Hyman, *Trade Unions and the Politics of the European Social Model*, *Economic and Industrial Democracy*, vol. 26, n. 1, 2005, 9-40; R. Erne, *Euro-Democratization and its Alternatives. An Analytical Framework for Organised Labour*, in F. Garibaldo, M. Baglioni, C. Casey, V. Telljohann (eds.), *Workers, Citizens, Governance*, Peter Lang, Frankfurt, 2012, 29-48.

<sup>11</sup> R. Hyman, *The Labour Policies of the European Union: Questions of Governance*, in F. Garibaldo, M. Baglioni, C. Casey, V. Telljohann (eds.), *Workers, Citizens, Governance*, Peter Lang, Frankfurt, 2012, 63-78.

The absence of trade union initiative and their “Euro-technocratisation” are also described by Roland Erne. Erne acknowledges unions’ undoubted contribution to democracy building at the level of nation-state, yet emphasizing their inability to devise a political mobilization strategy and contribute to the process of Euro-democratization. He also argues that their move towards “Euro-technocratisation” not only hinders European trade union empowerment, but this state of affairs also has certain political implications, viz. the narrowing down of the social and political scope of labour. In Erne’s words “Indeed, unions might increasingly become narrow-minded actors that operate in very limited policy areas, neglecting their broader original values of economic, social and political emancipation”<sup>12</sup>. The struggle faced by social Europe has been further compounded by the accession of the new MS – which is extremely varied in its structuring – thus making harmonising cultures and values even less feasible<sup>13</sup>. Hyman’s analysis of the referendums on the Constitutional Treaty<sup>14</sup> and the stress on the citizens’ negative perception about the reform of European governance, also suggests that the contrast between the union leaders campaigns and the votes of the rank and file can be attributed to a dissatisfaction with social Europe and – more precisely – to a more general sense of distrust about the compliance of trade unions with the architecture of the existing Europeanization. Streeck has often criticised<sup>15</sup> the option for soft harmonisation which did not ease the making of social Europe, but has rather enhanced competition between different social regimes. In addition, recently he has asserted that this competition might serve to the function of demising the democratic capitalism<sup>16</sup>.

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<sup>12</sup> R. Erne, *op. cit.*, 42.

<sup>13</sup> F. W. Scharpft, *op. cit.*

<sup>14</sup> R. Hyman, *op. cit.*

<sup>15</sup> See W. Streeck, *The Internationalization of Industrial Relations in Europe: Prospects and Problems. Politics and Society*, vol. 26, n. 4, 1998, 424-429 and W. Streeck, *Industrial Citizenship under Regime Competition: The Case of the European Works Councils*, *Journal of European Public Policy*, 1997, vol. 4, n. 643-664, W. Streeck, *Neo-Voluntarism. A New European Social Policy Regime? Op. cit.*; W. Streeck, *Works Councils: Consultation, Representation and Cooperation in Industrial Relations*, *op. cit.*

<sup>16</sup> W. Streeck, *The Crisis in Context. Democratic Capitalism and its Contradictions*. MPIfG Discussion Paper, 2011, n. 15 in [www.mpifg.de](http://www.mpifg.de) (Accessed January 31, 2013).

#### 4. Labour Protection in Times of Neo-Liberalism

Already during the 1990s, neo-liberal policies produced a narrowing down of labour protection in the old MS, which the EU tried to govern by putting forward a set of measures combining liberalization and protection in the labour market (flexsecurity). In fact – as the Lisbon strategy confirmed – employment flexibility in itself did not give rise to more and better jobs, but it often caused increased dualism in the labour market and growing levels of social exclusion within national societies. This affected the old MS in important respects, the result of different levels of ability to deal with economic growth and reform social governance.

Adjustments to EU policy to keep up with neo-liberal trends produced different outcomes. The European Employment Strategy (EES) adjustments towards a more competitive economy were included in the 2000 Lisbon Strategy, and more importantly, there was a progressive acknowledgment of a trend towards increasing social inequality within the EU which would bring the risk of increasing social exclusion. Lisbon 2020 maintains and reasserts the ambitious goal of more and better employment for all the European citizens. The accession of the new MS accentuated the economic and social divide within the EU: social dumping in labour protection caused relocation of production to the Eastern countries and loss of employment in “protected” labour. Trade unions in Europe responded by intensifying efforts of negotiations on restructuring processes and by launching a mid-term strategy to anticipate change. Both responses were assisted by the EU institutions and by EUROFOUND, which set up a company restructuring observatory to promote research on managing change, and widened the scope of its observatory on working conditions. At the same time as the ambitious attempt to create more and better jobs was made unrealistic by the numerous crises which originated during the new millennium, the European fiscal policy was detracting the resources available to the MS for their own social policy.

This leads to the key point of this article, the investigation of today’s industrial relations system as part of the ESM. Very little remains of the set of statements, analyses, deliberations and joint policy-making produced in the 1990s on labour regulations and protection. Industrial relations, modelled as they were at the national level, are progressively losing their role in highly globalized economies in terms of socio economic regulation. A consequence of this state of play is that the influence of industrial relations on the terms and conditions of the social contract has diminished.

Yet, while IR scholars express major concerns about the future of social Europe, the institutions at a European level – even in a state of uncertainty – cannot but confirm their long-term choices which rely on a building strategy where interest representation, collective autonomy and social dialogue play a crucial role. Indeed, these three themes have been the subject of the 2012 Labour Day message “Looking at Europe’s Social Model - Today and Tomorrow” delivered by the European Commissioner for Employment. The message further stresses the importance of social Europe, as well as the role of social partners in the Lisbon 2020 strategy, in EU governance and decision-making and in developing social dialogue in the new MS. It also underlines the need for social partner commitment to co-managing the crisis and being “on board for any long-term recovery plan and any labour market reform”. The President of the European Central Bank, Mario Draghi, had previously stated that “The European social model that provided the basis for European prosperity since the Second World War has already gone”. Nevertheless, the European Commissioner made an attempt to link the past and future of social Europe by revamping a European social model based on solidarity and devised by both social partners and civil society representatives.

### **5. The Crisis of Solidarity and the Problem of Interest Representation**

How can contemporary Europe develop new shared values which could countervail the dominant and overemphasized principle of market and competitiveness? The answer provided by the EU institutions was to carry out research in order to analyse and foster solidarity among EU citizens. At the academic level, the principle of solidarity has become the subject of increasing and renewed attention also by IR scholars<sup>17</sup>. This article suggests that a new binding concept of “citizen’s solidarity” should replace the principle of “class solidarity”. This concept should serve the purpose of encompassing contemporary social needs which transcend the working class in order to enclose transnational citizenship.

Whereas in times of crisis the nation states struggle for their own survival, the proposal for a social and economic citizenship at the European level appears to be unattainable. No one seems in the position of providing this

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<sup>17</sup> See V. Pulignano, *Identity, Solidarity and Non-Market Values: Prospects for Social Democracy in Europe*, in F. Garibaldo, M. Baglioni, C. Casey, V. Telljohann (eds) 2012, 181-200, *op.cit.*

new public good. Neither social partners nor civil associations consulted by EU institutions can promote creative and shared values leading to a new social contract for the European citizens.

The inter-professional and sectoral development of social dialogue has only marginally interpreted the expectations on IR Europeanization. Uncertainty and veto power dashed hopes connected to the role assigned by the Maastricht Protocol to cooperation among the social partners. Neo-liberal policies have further limited the contribution of social partners in defining the contents of social Europe: labour market reform and flexibility have taken control of the whole debate and confined the initiative of trade unions within a number of committees and bureaucratic practices. This state of plays has widened the gap between the representatives and their members, thus impacting on their legitimacy.

In order to address the issue of lower levels of socio-economic representation, the EU official process of consultation underwent revision<sup>18</sup> and the range of legitimate interests was enlarged so as to produce a revised database. Indeed, the consultation process envisages two separate and distinct processes, while social partners maintain their privileged role. The project of social Europe is dependent upon the scope of labour and capital representation in defining priorities and implementing shared contents related to employment regulations and social protection. Closely linked to interest representation is the concept of “autonomy”, which is in principle guaranteed by representativeness and certified by union membership. This criterion has favoured social partners over other groups with ill-defined organisational profiles, and still retains its relevance despite the decline of social partner organisations. In this sense, the way social dialogue is constructed is based on representation of interests allowing social partners to express autonomous views and contribute on behalf of the represented interests to the making of social Europe.

Nevertheless, the legitimacy of social partners has been increasingly called into question by a number of associations which set themselves up as representative of the social needs of the European citizens. By undertaking the initiative of enlarging the scope of interest representation, the EC acknowledges the necessity to fulfill the democracy deficit of the decision-making at the European level and to achieve a smarter mix of policy tools by encouraging the synergies between social dialogue, civil

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<sup>18</sup> European Commission, [http://ec.europa.eu/civil\\_society/interest\\_groups/docs/v\\_en.pdf](http://ec.europa.eu/civil_society/interest_groups/docs/v_en.pdf) (Accessed May 28, 2013).

dialogue and the Open Method Cooperation (OMC)<sup>19</sup>.

However, the European Commission defends the established rules of the social dialogue game by making a distinction between social dialogue carried out by representatives of trade unions and employers and civil dialogue performed by other interest groups in the EU. While social partners play their role in accordance with the rules of the TFEU<sup>20</sup>, the Commission applies minimum standards on consultation with all stakeholders. The new social agenda endorses social inclusion. To this end, proposals are put forward concerning the modernization and improvement of social protection based on the widest possible consultation of economic and civic representation. The recent social agenda takes account of the fact that groups of civil interest have gained more prominence in EU policy implementation, particularly in combating discrimination at the workplace. On these grounds, the consultation process must be based on “synergies between the social dialogue, civil dialogue and OMC in a comprehensive approach and a ‘smarter mix’ of policy tools”<sup>21</sup>.

## 6. Analysing Social Europe and IR

Despite the provision of a large amount of data, the establishment of observatories and the monitoring of social indicators, the cooperation between European institutions and academic research which characterized “Europtimism” is becoming less and less fruitful. Socio-economic research increasingly focuses on medium and long-term studies that help reconstructing the cycles of socio economic regulation in Europe as dependent on globalization impacts<sup>22</sup>. Comparison among different

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<sup>19</sup> European Commission, *Renewed Social Agenda: Opportunities, Access and Solidarity in 21st Century Europe*, Brussels, 2008.

<http://ec.europa.eu/social/main.jsp?catId=547> (Accessed February 19, 2013).

<sup>20</sup> Art.154(1)(2).

<sup>21</sup> European Commission, *op. cit.*, 15.

<sup>22</sup> In the new millennium the academic debate has to a large extent developed in response to the book by P. Hall, D. Soskice, *Varieties of Capitalism: the Institutional Foundations Of Comparative Advantages*, Oxford University Press, Oxford, 2001. See B. Hancké, *Debating Varieties of Capitalism*, Oxford University Press, Oxford, 2009; and C. Crouch, *Capitalist Diversity and Change. Recombinant Governance and Institutional Entrepreneurs*, Oxford UP, Oxford, 2005. Most European scholars have dwelled upon the institutions of socio- economic regulations in continental Europe, thus researching extensively on the experiences of tripartite regulations in social pacts. See M. Regini, *Social Pacts in the EC Report on Industrial Relations in Europe*, in M. Biagi (ed.), *Towards a European Model of*

systems of socio-economic regulations is making use of methodologies – such as Qualitative Quantitative Analysis<sup>23</sup> – which help provide stylised facts on the long-term trends.

In addition, many European agencies – e.g. EUROFOUND – are turning their attention towards short-term analyses in order to monitor the consequences of the crisis on employment and labour relations. Many of the numerous reports and surveys published by European IR Observatories draw on national reports based on questionnaires handed out to correspondents operating at a national level. Over the years, EUROFOUND has refined the methodology approach and focussed particularly on contingent problems. Yet comparison in the field of IR remains difficult because indicators are constructed in order to capture both quantitative and qualitative factors. Similar problems can be found in the EIRO reports. EIRO keeps updated information on what is happening in the MS and compiles annual reports on industrial relations and working conditions. The reports summarize the key issues covered by collective bargaining at national level, such as the different stages of the restructuring process and the impact of the crisis on labour relations and welfare indicators. They also discuss the main European trends in employment legislation and policy, and the progress made in terms of social dialogue. Nevertheless, cross-country comparison is often hindered by the mere description of different qualitative indicators employed in distinct MS which prevent the identification of “common interweaved interrelations and a dynamic between the levels”<sup>24</sup>.

While fiscal policy shapes overall socio-governance in Europe, employment relations are confined to short-term strategies which largely overlap with restructuring. The skeptical attitude shown by a limited number of social scientists in a time the ESM was very popular – e.g. in

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*Industrial relations?*, Kluwer Law International, 2001; see also M. Rodhes, *The Political Economy of Social Pacts. Competitive Corporatism and European Welfare Reform*, in P. Pierson (ed.) *The New Politics of Welfare State*, Oxford University Press, Oxford, 2001, 165-96; D. Natali, P. Pochet, *The Evolution of Social Pacts the EMU Era. What Type of Institutionalization?*, *European Journal of Industrial Relations*, vol. 15, n. 2, 2009, 147-166; S. Avdagic, *When Are Concerted Reforms Feasible? Explaining the Emergence of Social Pacts in Western Europe*, *Comparative Political Studies*, vol. 43, n. 5, 2010, 628-657.

<sup>23</sup> L. Baccaro, C. Howell, *A Common Neo-Liberal Trajectory: The Transformation on Industrial Relations in Advanced Capitalism, Politics and Society*, vol. 20, n. 10, 2010, 1-43.

<sup>24</sup> European Foundation for the Improvement of Living and Working Conditions, *European Works Councils in Practice*, Luxembourg: Office for Official Publications of the European Communities 2004, 21, <http://www.eurofound.eu.int/publications/htmlfiles/EF04109EN.pdf> (Accessed February 4, 2013).

the 1990s – is nowadays shared by an increasing number of researchers who welcomed the Social Protocol annexed to Maastricht Treaty, the European Directive No. 45/94 on EWC and the EES as expressions of a move towards IR Europeanization. However, hampering factors to this attempt were the IR persisting national identity of actors and socio-economic regulations – either in the form of legislation, customs or practices – and the low-profile approach purposely taken by interest organizations in Europe.

The attitude towards Eurooptimism resulted in a great deal of research on EWCs carried out by academics, the European Union and EUROFOUND. The scholarly work strongly supported the establishment and monitoring of EWCs as institutions, while qualitative research was also encouraged concerning their functioning, internal dynamics and evolutionary trends. The foregoing qualitative indicators, while confirming a weak European identity among employee representatives, also emphasized the contribution of EWCs to cultural exchange and mutual learning, which in the medium-term could lead to the bottom-up consolidation of IR Europeanization.

Unfortunately, cultural processes take place in the longer term, while crises blow up abruptly and do not have the same impact on people. Redundancies and unemployment originate in some countries more than in others, thus creating division among employee representatives and sometimes pushing negotiations at a national level. It has been frequently the case that this trends has affected the positive developments made in information and consultation. As highlighted earlier, the increase in knowledge resources to monitor and interpret restructuring<sup>25</sup> appears to be shaping the current IR development in the EU. However, it also points to the fact that workers' representatives in EWCs have gained experience in information sharing, mutual consultation and also in negotiating framework agreements in order to govern the processes of restructuring<sup>26</sup>.

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<sup>25</sup> Eiro, *European Commission Launches New Consultation on Restructuring*, 2012, [www.eurofound.europa.eu/eiro/2012/01/articles/eu1201041i.html](http://www.eurofound.europa.eu/eiro/2012/01/articles/eu1201041i.html) (Accessed November 28, 2012).

<sup>26</sup> See I. da Costa, V. Pulignano, U. Rehfeldt, and V. Telljohan, *Transnational Negotiations on Employment: Successes and Failures of EWC-Union Coordinated Strategies*, in M. Baglioni, B. Brandl (eds.), *Changing Labour Relations*, Peter Lang, Frankfurt, 2011.

## 7. Conclusion

What we learn from scholarly work is that the history of social Europe is extremely controversial, and that its recognized values stem from workers' rights legitimised at national level and taken as a shared benchmark for building European society. However, political leaders as well as social partners have a tendency to resist any form of devolution on sovereignty. Moreover, the objective of harmonising cultures and values became even more difficult after the accession of the new MS, their lower labour costs and reduced welfare provisions.

What remains of IR Europeanization? How can criticism be constructive and conducive to a new research agenda which might promote real socio-cultural innovation? To what extent can social dialogue institutions adapt their modus operandi and risk reforming their consolidated mode of policy-making? In its 2012 work program, the Commission acknowledged that its social strategies have fluctuated between two extremes. On the one hand, short-term strategies have been laid down which respond to the needs arising from the crisis. On the other hand, there is the necessity to tackle structural problems in a situation in which policy-makers, investors and citizens rely on the Commission to move beyond the present state and help shape prosperous and sustainable Europe for the years ahead. Creating sustainable growth, high levels of employment and a fair society are cited as key and ongoing priorities for the EU<sup>27</sup>.

Accordingly, there appears to be long-term projects and short-term consequences, yet in order to provide more robust responses to the crisis, the setting up of a research agenda becomes a matter of urgency. A baseline of inclusive minimum social standards should be planned, to be formulated by both social partners and NGOs. EU trade unions need to invest in a project which is able to amend some of the consolidated *acquis* of social Europe, the result of consensus between capital and labour.

A considerable number of national surveys on working conditions and research papers on social exclusion and sustainable development are already available<sup>28</sup>. They already provide a background for formulating

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<sup>27</sup> European Commission, *Program 2012: Delivering European Renewal*, 2012, [http://ec.europa.eu/atwork/pdf/cwp2012\\_en.pdf](http://ec.europa.eu/atwork/pdf/cwp2012_en.pdf) (Accessed May 28, 2013).

<sup>28</sup> See for example: the European Research Group, *European Social Model. Platform Proposal for a Better Economic and Social Cohesion*, Rome, 2009 [ec.europa.eu/citizens\\_agenda/social\\_reality.../docs/contrib109-1.pdf](http://ec.europa.eu/citizens_agenda/social_reality.../docs/contrib109-1.pdf), and the European Project GUSTO, *Meeting the Challenges of Economic Uncertainty and Sustainability*, [www.gustoproject.eu](http://www.gustoproject.eu) (Accessed November 30, 2012).

hypotheses on social needs and creating a research platform to assist social and cultural innovation of social partners and civil society, and supply new contents for solidarity. Aside from the state of inertia that affects many organizations, obstacles to this platform include the European cultural deficit, which is apparent in comparative research and statement on the part of social partners which nearly always refer to their national domains. Yet in harmonizing social research, European agencies could provide an important contribution to fill this vacuum.

# A Blueprint for Union Revival? Strategy and Structure in a Successful Organising Union

James L. Tierney and Christina Cregan \*

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## 1. Aims and Methods of Study

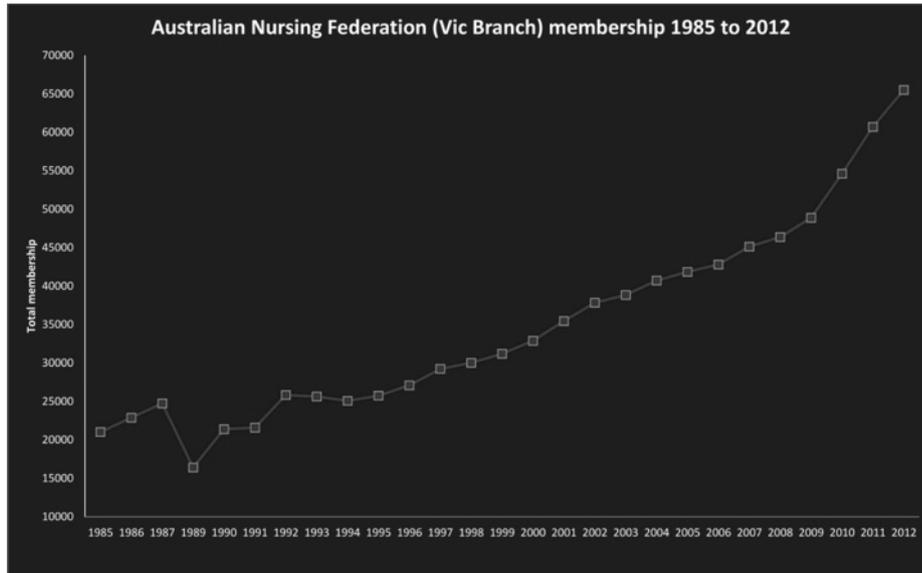
The aim of this study was to examine the organisational strategies and structures of the Victorian Branch of the Australian Nursing Federation (ANF(Vic)) that were put into place over the period 1989-2010 to support the development of the organising model of recruitment and retention. During this time, Branch membership climbed steadily. Since 1989, there have been just two Branch Secretaries of the ANF(Vic): Belinda Morieson and Lisa Fitzpatrick. At the start of Morieson's tenure in 1989, membership stood at 15,712. By the time she relinquished the position in December 2001, membership had doubled to reach 30,464. Fitzpatrick oversaw a further major expansion as membership more than doubled yet again, reaching 50,000 in 2010. By December 2012, membership was 65,500. This prolonged rise was in sharp contrast to trends in most unions

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in Australia and most other developed countries where long-term declines were experienced (see Figure No. 1).

*Figure No. 1 – ANF(Vic) Membership, 1985-2012.*



*Source: Australian Nursing Federation (Victorian Branch) Archives, 2013.*

In response to continuing state government proposals for financial cutbacks in healthcare, nursing shortages and workload expansion, Morieson and Fitzpatrick set out to transform the union through the principles of the organising model. They implemented industrial action in the form of a strategically-planned long-term series of mobilisation campaigns as a prelude to enterprise bargaining negotiations. In order to support this policy, they transformed the union's organisational strategies and structures.

An extensive case study was conducted of the ANF(Vic) from October to December 2009. Interviews of staff members, past and present, and observations of procedures were conducted by the primary researcher who spent three months on a full-time basis at union headquarters in Melbourne. Union archives and media reports were examined. Observations of processes and procedures (for example, meetings and interviews) took place. Follow-up visits were conducted in early 2010. An in-depth analysis was also carried out of archival data, and secondary sources. This report presents findings of the case study to explain how

Branch Secretaries directed the adoption of the organising model in relation to the development of the strategies and structure of a highly effective trade union.

## **2. Union Organising and Transformational Leadership: Definitions**

From the early 1990s, the executive - that is, the Branch Secretary in conjunction with the Branch Council - of the ANF(Vic) consciously developed the organising model of union recruitment and retention. The organising model emphasises the role of elected job representatives in attracting other workers to the union by involving them in workplace disputes to solve their problems. Union organisational structures become decentralised as the union is transformed into a membership-driven recruitment machine.

The inspirational elected leaders envisaged by union organising can be described as transformational leaders. Transformational leaders are not selected by bureaucracy but arise from within the group; they are exceptional; they elicit intense trust and commitment from group members; they motivate members to disregard their self-interests and pursue the goals of the collective; their role is to change the group by developing a vision for the future. Transformational leaders may exist at different levels of a union's organisation. This study investigated the role of the leadership of the executive, in the form of the Branch Secretaries. Both Morieson and Fitzpatrick were nurses who emerged from the rank-and-file as elected job representatives. Both were elected to the position of Branch Secretary, Morieson in 1989 and Fitzpatrick in 2001. Each of them consciously directed the application of organising principles in the ANF.

The characteristics of the organising model are most unlike those of the conventional servicing model of union recruitment whereby, using a centralised structure, the union provides experts to negotiate wages and conditions, settle disputes, protect jobs, and provide advice for members. The paid officials of the servicing model are described as transactional trade union leaders.

### 3. The Transformation of Strategies and Structures

The ANF(Vic) is a union with a largely professional membership of nurses. It is affiliated with the Australian Council of Trade Unions, but not with the Australian Labor Party. Traditionally a conservative union, in 1984, nurses voted to remove the union's "no-strike" clause. Nurses walked off the job for the first time in 1985. In 1986, a historic 50-day strike took place. Although the strike was a major achievement which resulted in wage gains and a clear career structure for nurses, victory came at a price. Mass withdrawal of labour from hospitals caused divisions in the ANF(Vic), the union movement, and public opinion. When elected in 1989, Morieson and her Council set about adapting the organising model to suit the aspirations of its professional membership whose average age is 44. This strategy was continued and developed by Fitzpatrick and her Council.

#### *3.1. The Creation of an Industrial-professional Union*

The ANF encouraged nurses to view themselves as defenders of essential public services and the quality of patient care. Public sympathy was sought by extensive publicity that linked nursing shortages to a decline in health standards. In the late 1990s, nurses engaged in concerted industrial action across the State as part of their enterprise bargaining strategy, which resulted in hospital bed closures and the cancellation of elective surgeries. Mandatory nurse-patient ratios were a fundamental aspect of the ANF's log of claims. In 2000, after a period of sustained industrial action and tension between the ANF and the State government, the Australian Industrial Relations Commission issued the "Blair decision", in which the Commission introduced a mandatory nurse-patient ratio of 1:4 in all "A" Hospitals; different ratios were introduced in level B, C, and D hospitals. Continuing attempts by successive governments to undermine the ratios resulted in an ongoing series of mobilisation campaigns, in the form of state-wide mass meetings, stop-work meetings and overwhelming support for bed-closures. Ratios are highly valued by individual nurses and entrenched feature of patient care in Victoria.

The advancement of professional goals of nurses was also located within the ANF(Vic). The union became a professional educational body. In 1992, the ANF(Vic) Education Unit was opened and became a registered training organisation with ongoing education programs for nurses and midwives. By 2010, professional training was carried out over two floors

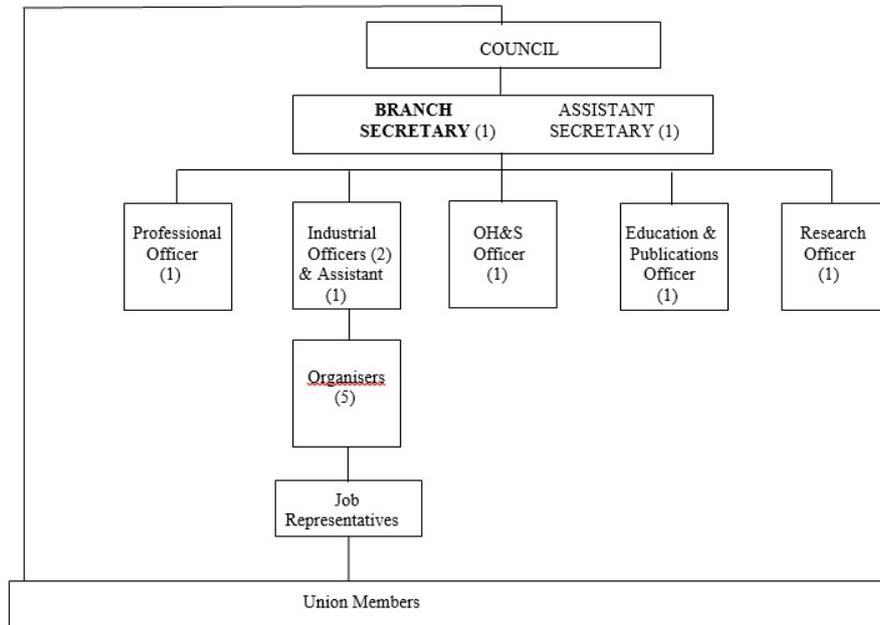
of the ANF(Vic)'s headquarters. The program includes a wide variety of professional and skill-based courses. Finally, professional services – available only to members – were introduced and developed to encourage membership. Professional indemnity insurance was re-introduced in February 1989. Through its association with Ryan Carlisle Thomas, the union provided legal advice and representation to any nurse charged with professional misconduct. In 1995 an office of the legal firm was established within the ANF headquarters, allowing members easy access. The Victorian Nurses Health Program was set up in 2006 by the ANF (Vic) together with the Nurses Board of Victoria to treat nurses and nursing students experiencing substance use and mental health issues. Under the program, confidential assessments were conducted, individual management plans were developed and treatment was co-ordinated, including the arrangement of appropriate referrals.

In summary, the leadership of the ANF adopted strategies whereby the professional and industrial goals of nurses were aligned through union membership: industrial action was equated with patient care; an educational unit was established, offering professional qualifications and advancement; and professional union services available only to members were developed.

### *3.2. Job Representative Stake Centre-stage*

Under the traditional servicing model, unions negotiated wage gains and provided services (such as the settlement of disputes) to workers in return for the payment of fees. The role of paid officials was central, in particular, that of Industrial Officers who argued cases and negotiated disputes. In 1985, prior to the development of the organising model, non-executive ANF(Vic) roles comprised Industrial Officers and Organisers (paid union officials), and unpaid elected job representatives (see Figure No. 2).

Figure No. 2 – Organisational Structure of the ANF(Vic) in 1986.



Source: Australian Nursing Federation (Victorian Branch) Archives, 2013.

In the organising model, however, elected job representatives (or delegates) – not paid officials – took centre stage. Shaping, developing and supporting the changing role of job representatives, therefore, became a key part of the ANF(Vic)’s organising strategy. In consequence, the recruitment, training, support and mentoring of job representatives to undertake their workplace recruitment and activist roles were seen to be fundamental issues. From the early 90s, the ANF(Vic) devoted considerable resources to job representative training based on organising principles. The role of Training Officer was created in 1992. Training officers conduct seminars for job representatives throughout the year. Training programs are also held in regional Victoria. Two specialist training programs aimed at identifying and training “passionate” job representatives were adopted. The Anna Stewart Program gives female delegates the opportunity to experience the union working environment. The Belinda Morieson Program, open to men and women, allows committed job representatives to work “in house” within the ANF Branch. The roles of existing paid officials were adjusted to focus on the recruitment and support of the job representatives. Although advocacy

still forms a major part of the job, Industrial Officers also developed strategic forms of industrial negotiation, supervising and co-ordinating a team of Organisers. As well as carrying out their industrial work, Organisers were also to seek out new job representatives. Support and encouragement for job representatives, allowing their voice to be heard, was achieved through the creation of the Delegates' Conference. The first conference took place in a small meeting room at Dallas Brooks Hall in Melbourne in 1993 and was attended by 40 job representatives. The 2009 conference was attended by 459 delegates. Job representatives can pass resolutions at the conference by pure majority and although these decisions are not binding, as of early 2010, the Council had endorsed every resolution that had been passed. Council is the policy and governing body of the ANF.

In summary, formal training programs for job representatives were established, the roles of Organisers and Industrial Officers were refined to facilitate the union's core function of job representative mobilisation of the rank-and-file, and the Delegates' Conference helped ensure that the "voice" of job representatives was heard.

### *3.3. The Union Becomes a Recruitment/Retention Machine*

The entire union organisation became involved in recruitment/retention in a number of ways. Every ANF(Vic) officer was expected to actively recruit continually. A series of visits to workplaces was instituted: ANF officers visited every ward in every hospital annually. Prior to this, wards would only be visited if a representative or member raised an issue; mandatory twice-yearly visits by Organisers to every workplace within their purview were introduced; organisers visited workplaces together with the newly appointed Recruitment Officer in targeted roadshows to promote the union and advise nurses of the range of benefits available. Organisations that had a relationship with the ANF were invited to take part and outline the specific benefits they offer members; officials visited universities and technical and further education colleges to deliver information regarding both professional and industrial issues; visits provided an opportunity to gather accurate membership statistics.

Communication with existing members became a priority. The information service, InfoLine, was expanded. Its function was to respond directly to telephone queries from members. In 2005, the union began to regularly survey its members about nursing and employment issues. Email updates provided members with professional information and indicated

what the ANF was doing for them. In 1997, the union commenced calling un-financial members to encourage them to become financial again. By 2010 the union called each new member, welcoming them and addressing any concerns regarding membership entitlements. Advertising campaigns were an ongoing part of the ANF activities, targeting current issues such as the right to claim overtime.

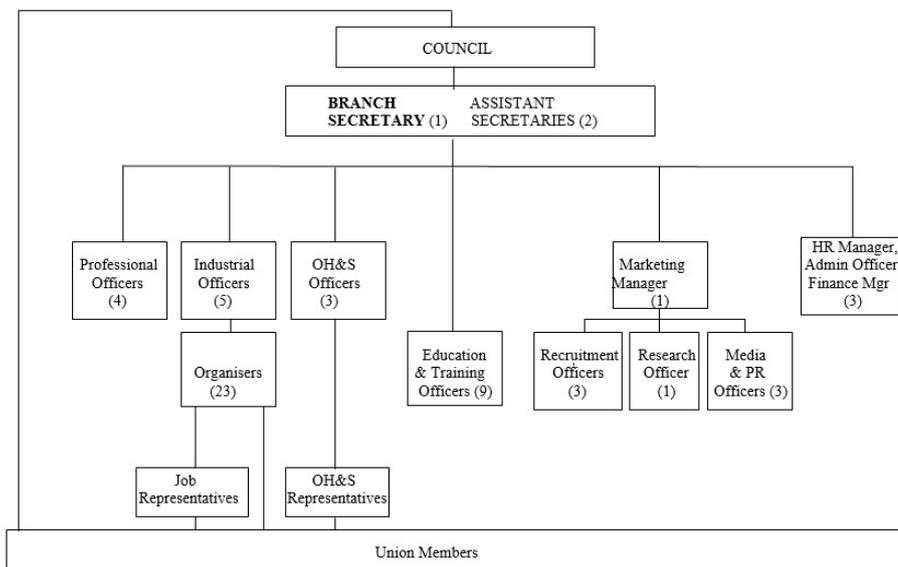
The union collected, analysed and publicised membership records. A computerised system was established in 1999. Under Morieson industrial and professional staff were presented with figures and trends at every staff meeting. This practice was continued and further developed under Fitzpatrick. Copies of the Membership Statistical Report were distributed. Membership numbers per month were tallied for each Health Service Provider, and also for each hospital. Figures were also presented for the regions for which each Organiser was responsible. The Organisers and Industrial Officers discussed membership fluctuations. Any major increase in membership resulted in applause – communal recognition of achievement – for the relevant Organiser. Job representatives who achieved 100% membership in their ward or unit received \$10 per member to spend on rewarding the staff.

In summary, the entire union became a recruitment and retention machine. Ongoing direct contact with members took place; all union staff were involved in recruitment/retention, often by workplace visits; membership figures were accurately recorded and reported on a continual, formal basis.

#### *3.4. Decentralisation of a Member-driven Organisational Structure*

The adoption and development of the strategies to transform the ANF (Vic) into an organising union led to the emergence of a more complex and decentralised organisational structure (see Figure No. 3) as pre-existing roles were changed and new roles were introduced.

Figure No. 3 – Organisational Structure of the ANF(Vic) in 2010.



Source: Australian Nursing Federation (Victorian Branch) Archives, 2013.

The ANF bureaucracy grew considerably, reflecting the rise in membership and the growth in the diversity of roles and functions of officials. At the end of this study (early 2010), the union employed 97 full-time staff to deal with issues concerning 1990 job representatives and 3000 workplaces. In almost all instances, Fitzpatrick followed and developed Morieson's policies. The growing numbers in the union, began to pose administrative problems for the leadership and, in two instances, Fitzpatrick adopted an innovative approach. In 2009, a Marketing Manager was appointed. The office-holder was not a nurse and previously worked in the corporate world. In the same year, a Human Resource (HR) Manager was also employed. Following business practices, the brief was to implement and refine the Federal ANF's newly formulated "benchmarks" which specified performance indicators for each role within the union's organisation. The HR Manager planned to use the benchmarks as a framework to develop and administer performance appraisals of union staff – initially on a voluntary basis. Other HR practices were also in development: a strategic plan and a mission statement.

In summary, strategic changes in the roles of ANF staff members, reflecting the member-oriented focus of union organising, brought about the emergence of a decentralised structure, characteristic of the organising

model. The growing bureaucracy led to the adoption of some corporate roles and functions. There was an awareness, however, that these roles should be carried out in the spirit of a trade union and not a business organisation. The functions of pre-existing roles in the “transformed” organisation and the new roles that were created (1989-2010), are presented in the Appendix.

#### 4. Conclusions

From 1989 onwards, the Branch Secretaries of the ANF – Morieson and Fitzpatrick – adopted the organising model of recruitment and retention whereby workers are encouraged by job representatives to take ownership of their workplace by participation in industrial action to solve their grievances. The organisational strategies and structure of the ANF were adapted to support the model. Although the foundations of strong professional-industrial unionism had been constructed by previous Branch Secretaries, Barbara Carson and Irene Bolger<sup>1</sup>, Morieson and Fitzpatrick directed the transformation of the ANF’s organisation structures. Professional goals – the quality of patient care – were allied with industrial goals to heal existing rifts and gain public support. New organisational roles were created; existing roles were adapted and realigned. The entire union was turned into a recruitment and retention machine through the development of an organisational structure in which

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<sup>1</sup> During the early 1980s, prior to the adoption of the organising model, foundations had already been laid. The election of Barbara Carson as Branch Secretary in 1980 had heralded an ideological shift within the ANF (Vic) which had traditionally been a conservative organisation. A program of college-based training with professional examinations was introduced and Carson persuaded Council to allow students to apply for union membership. A policy of concerted industrial action was adopted with bans on non-nursing duties. In 1984, Carson lobbied successfully for the removal of the “no-strike clause” from the Branch Rules and, in 1985, led the first nurses’ strike ever carried out in Victoria. When Carson took office, there were 13,000 members. When she resigned in January 1986, membership had risen to 21,148. Under Irene Bolger, who succeeded Carson, a historic 50-day 1986 nurses’ strike occurred. The 1986 strike was a major catalyst in shifting the internal focus of the Branch from servicing to organising. Bolger developed the role of job representatives. The role of the Organiser was expanded. They were explicitly taught industrial strategy and how to “whip up” support for industrial action amongst members. They were required to report in writing to her, and were assessed on how many new members they could sign. She established “Infoline”. Most ANF officials credit Bolger with establishing and developing an industrial consciousness amongst members and also nurses in general.

the capacity for mobilisation was embedded. Growth in numbers and complexity of organisational roles led to the emergence of a decentralized organisational structure. A shift in focus occurred with the establishment of democratic, membership-based decision-making at all levels.

These findings support the view that “managed activism”<sup>2</sup> has been important for effective organising in the ANF(Vic). While union officials and Organisers directed and supported the process<sup>3</sup>, the source of union renewal lay in the rank and file through participative democracy<sup>4</sup>. Our results found no tension between these influences. Transformational central leadership developed organising strategies and structures that allowed the voice of the rank and file to be heard. Morieson and Fitzpatrick transformed the union’s bureaucracy so that, in turn, workplace leaders could transform the union. Drawing their power from the rank-and-file – as elected leaders, through resolutions of the Delegates’ Conference and mass meetings of nurses – they used their personal executive and administrative leadership qualities to persuade Council to develop an organisation structure that would allow for the development of a collective consciousness. Collectivism, therefore, overcame the constraints associated with the gender-based stereotype that had previously rendered many nurses passive or uncertain with regard to participation in struggle. By 2010, the ground was prepared for more overt and risky forms of industrial conflict.

There were some differences between Morieson and Fitzpatrick, but these may have been due to changing organisational imperatives rather than personal inclination. Fitzpatrick’s introduction of roles usually associated with business corporations – Marketing and HR Managers – were a direct response to the effectiveness of the organising strategy, in terms of growing numbers. However, unlike business organisations, the union’s membership-driven structure provided a check on oligarchical tendencies. Like the Justice for Janitors movement in the United States, the ANF (Vic) could offer a strategic and structural blueprint for unions intent on developing an organising model. Unions that have the potential to develop and harness strong grassroots activity might benefit from adopting the ANF(Vic)’s approach. At a time when people seriously began to debate the possibility of the end of trade unionism, Morieson

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<sup>2</sup> M. Simms, *Managed Activism: Two Union Organising Campaigns in the Not-for-Profit Sector*, in *Industrial Relations Journal*, n. 38, 119-135, 2007.

<sup>3</sup> E. Heery, J. Holgate, M. Simms, *Union Voices: Tactics and Tensions in Union Organizing*, Cornell University Press, Ithaca, 2013.

<sup>4</sup> P. Fairbrother, *Unions at the Crossroads*, Mansell, London, 2000.

and Fitzpatrick's direction of the ANF(Vic) provided a new form of representation. It institutionalised the capacity of a female-dominated union in a "caring" profession to undertake unusually effective ongoing grassroots mobilisation that brings about continuing gains for nurses and patients alike.

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## Appendix: Roles of Union Officers in 2010

### *Existing roles*

**1. Professional Officers** are qualified nurses. They support member concerns in relation to all matters of a professional nature, including the improvement of standards of nursing care and education. All Professional Officers have specialised portfolios, for example, aged care, drugs/poisons, and midwifery. They also advise on industrial matters. They assist Organisers with member issues. Their knowledge of the Nursing Board of Victoria (NBV – since replaced by the Nursing and Midwifery Board of Australia: NMBA on 1 July 2010) scopes of practice is particularly important with regard to industrial issues. It allows them to advise members, help members in negotiations with management, and to convince management to develop more efficient and appropriate policies. They attend bargaining negotiations and members' meetings with Industrial Officers and Organisers, acting as an advisory resource on standards of care and legislation. They visit workplaces in a recruitment capacity.

**2. Industrial Officers** are responsible for negotiating enterprise bargaining agreements. Advocacy forms a major part of their role. Industrial Officers do not need to seek Secretarial or Branch Council approval before taking industrial action, but usually inform Branch Council. They supervise and co-ordinate a team of Organisers and advise Organisers on how to deal with member complaints, referring matters to Fair Work Australia, and meeting with senior hospital officials where necessary.

**3. Organisers** are responsible for specific hospitals and other care facilities, and therefore, for groupings of job representatives. The Organiser's main role is to implement Branch policies and enforce compliance with negotiated conditions within the workplace, contained in the Enterprise Bargaining Agreement (EBA). Organisers are also required to respond to and resolve complaints and concerns brought to them by their job representatives and members. If an individual member concern is likely to reflect a common concern (for example, where a term of the EBA is being breached), the Organiser will liaise with their Industrial officer and seek to formulate a collective response. Organisers can call and conduct members' meetings if industrial action is required. But, following the member-oriented character of union organising, Organisers may not implement industrial action themselves but only initiate members' meetings about such action. They are required to maintain an active presence in the workplace, engage in recruitment and retention of representatives and members, and be responsive to rank-and-file concerns and views.

**4. Occupational Health and Safety (OH&S) Officers** advocate and support members, representatives and other Branch officials in the specialist areas of OH&S, workers' compensation and return-to-work issues. They provide professional advice to other parties on the current practices relating to OH&S, nursing and midwifery. They provide approved OH&S training to ensure that Health and Safety representatives to guide them in their voluntary capacity. They develop and deliver seminars and conferences on contemporary issues faced by members in the workplace. They campaign for nurses and midwives to have improved workplace health and safety and compensation in external forums such as WorkSafe Victoria, Department of Health and other stakeholder organisations.

**5. New roles** The new roles are: Recruitment Officer (1992), responsible for the development and co-ordination of recruitment policy and practice throughout the ANF and, by 2009, each officer specialising in recruitment, retention or graduate/financial support; Education and Training Manager and Officers (1992); Media/Public Relations Manager(1997); Research Officer (2005); Marketing Services and Events Manager (2009) – to manage the recruitment team; Human Resource Manager (2009) and an additional Assistant Secretary (2009).



# Domestic Work in the UK: A Raw Deal for Migrants

Ismail Idowu Salih \*

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## 1. Foreword

Cross-border migration, which has received increased attention in the last century<sup>1</sup>, is facilitated by globalisation (IOM, 2003; Keeley, 2009; Tacoli & Okali, 2001; Wickramasekara, 2008) an improved mode of transportation and global alliance. Globalisation “offers great opportunities for human advancement, new opportunities for trade, investment and capital flows, advances in technology including information technology and offers great potential for raising living standards around the world; however, it also entails a considerable risk”<sup>2</sup>.

Some people are forced to migrate<sup>3</sup>. Others choose to do so, perhaps in search of better opportunities<sup>4</sup>. The movement of people for labour purposes is being given increasing attention on a global level and it ranks

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<sup>1</sup> M. Sargeant, E. Tucker, *Layers of Vulnerability in Occupational Safety and Health for Migrant Workers: Case Studies from Canada and the UK*, Policy and Practice in Occupational Health and Safety, CLPE Research Paper N. 8/2009, vol. 7, n. 2, 2010, 51-73.

<sup>2</sup> A. Bonilla García, J. V. Gruat, *Social Protection: A Life Cycle Continuum Investment For Social Justice, Poverty Reduction and Sustainable Development*, Social Protection Sector, ILO, Geneva, November, 2003, 6.

<sup>3</sup> Reasons for this may include: war, famine, prosecution, persecution, ethnic cleansing, and other forms of human expulsion.

<sup>4</sup> See O. Muñiz-Solari, W. Li, and Y. Schleicher, *Migration Conceptual Framework: Why Do People Move to Work in Another Place or Country?* In M. Solem, P. Klein, O. Muñiz-Solari, and W. Ray, (eds.), AAG Center for Global Geography Education, 2010.

amongst the most contested public policies<sup>5</sup>. Perhaps one of the effects of cross-border migration is that it has changed the scope of contemporary domestic work in the UK through the introduction of a foreign component. Domestic work, which “is rooted in the global history of slavery, colonialism and other forms of servitude”<sup>6</sup> has become a form of gainful employment for some 52 million people around the world, the majority of whom are women<sup>7</sup>. The International Labour Organisation (ILO) defines a domestic worker as a “wage earner working in a [private] household, under whatever method and period of remuneration, who may be employed by one or several employers, and who receives no pecuniary gain from this work”<sup>8</sup>. It follows that doing one’s daily chores and or looking after one’s children may not be considered remunerable labour. Migrant workers from the less developed countries are taking on the role that is highly unlikely to be occupied by British and or European Union (EU) workers<sup>9</sup>. For the purposes of issuing UK visas, the UK Border Agency (UKBA) sets forth that “domestic workers may include cleaners, chauffeurs, gardeners, and cooks, those carrying out personal care for the employer or a member of the employer’s family and nannies, if they are providing a personal service relating to the running of the employer’s household”<sup>10</sup>. This broadened description allows many jobs to fall under the definition of domestic work. Given that the list of tasks that could be regarded as domestic work is an extensive one, it is not surprising that many occupations have also been internationally classified and recognised as domestic jobs<sup>11</sup>.

<sup>5</sup> B. Anderson, M. Ruhs, B. Rogaly, and S. Spencer, *Fair Enough? Central and East European Migrants in Low-wage Employment in the UK*, Joseph Rowntree Foundation, York, 2006.

<sup>6</sup> ILO, *Decent Work for Domestic Workers*, Report IV (1), International Labour Conference, 99th Session, ILO, Geneva, 2010, 1.

<sup>7</sup> See ILO, *Domestic Workers across the World: Global and Regional Statistics and the extent of Legal Protection*, ILO, Geneva, 2013.

<sup>8</sup> ILO, *The Status and Conditions of Employment of Domestic Workers*. Meeting of Experts, Geneva, 2-6 July 1951, Report 3, Document MDW/8.

<sup>9</sup> See for instance, the International Organisation for Migration, *World Migration 2005: Costs and Benefits of International Migration*, IOM, Geneva, 2005. See also R. Münz, T. Straubhaar, F. P. Vadean, N. Vadean, *What are the Migrants’ Contributions to Employment and Growth? A European Approach*, Research Report, HWWI Policy Paper, N. 3/3, 2007, 5-7.

<sup>10</sup> See UKBA, *Domestic Workers in Private Households, Border Force Operations Manual*, November 2011.

<sup>11</sup> The ILO, *International Standard Classification of Occupations*, Group 9131, ISCO-88, ILO, Geneva, 1990 classified a domestic worker as “a person employed part-time or full-time in a household or private residence in any of the following duties: cook, servant, waiter or waitress, butler, nurse, child minder, carer for elderly or disabled persons, personal

Ironically, household work is different from that performed in other workplaces. This is because the household is unusual, hidden or invisible<sup>12</sup> to the public. Those operating in the domestic work industry are among the lowest paid in the UK<sup>13</sup>. Domestic workers are considered unskilled, and often they are not acknowledged. Perhaps, this is due to the fact that “very little is known about the people who do such jobs or about the conditions in which they work”<sup>14</sup>. Household work is largely unregulated and falls within the informal labour sector. Although the exact figure for Overseas Domestic Workers (ODWs) in Europe is not known, “with rising female employment rates, changes in family structures and an ageing population leading to higher dependency ratios in the Organisation for Economic Co-operation and Development (OECD) countries, the need for household services is expected to increase”<sup>15</sup>. In the UK, data published by the Home Office shows that in 2011, around 16,432 visas were issued to ODWs and their dependants<sup>16</sup>. According to a parliamentary standard note, around 429 migrants entered the UK with a Tier 5 visa (International Agreement) in 2010/11<sup>17</sup>. In addition, it is difficult to quantify the numbers of those who were trafficked to the UK for the purpose of domestic servitude<sup>18</sup>; those who

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servant, barman or barmaid, chauffeur, porter, gardener, washerman or washerwoman, guard”.

<sup>12</sup> See A. Blackett, *Making Domestic Work Visible: The Case for Specific Regulation*, Labour Law and Labour Relations Programme Working Paper N. 2. ILO, Geneva, 1998. See also J. Elias, *Making Migrant Domestic Work Visible: The Rights Based Approach to Migration and the ‘Challenges of Social Reproduction’*, in *Review of International Political Economy*, vol. 17, n. 5, 2010, 840-859.

<sup>13</sup> The low-paying sectors are defined “as those industries or occupations with a large number of minimum wage workers or those in which a high proportion of jobs are paid at the minimum wage”. See *National Minimum Wage: Low Pay Commission Report 2010*, Cm 7823, 25<sup>th</sup> March 2010, London: The Stationary Office, par. 44.

<sup>14</sup> See Y. Evans, J. Herbert, K. Datta, J. May, C. McIlwaine, J. Wills, *Making the City Work: Low Paid Employment in London*, Department of Geography, Queen Mary University of London, November 2005, 6.

<sup>15</sup> See ILO, *Report VI, Towards a Fair Deal for Migrant Workers in the Global Economy*, International Labour Conference, 92<sup>nd</sup> Session, 2004, 57.

<sup>16</sup> The Home Office, *Statistical News Release: Immigration Statistics*, 24 May 2012. <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q1-2012/> (Accessed May 11, 2013).

<sup>17</sup> See M. Gower, *Immigration: Migrant Domestic Workers*, SN/HA/4786, Home Affairs Section: House of Commons Library, 20 March 2012.

<sup>18</sup> According to the United Kingdom Human Trafficking Centre (UKHTC) Provisional Statistics 2012, the UK National Referral Mechanism (NRM) introduced in 2009 as part of the Council of Europe Convention on Action against Trafficking in Human Beings,

are working in breach of their immigration condition; and those who are working outright illegally. The previous Minister of State for Immigration, Damian Green (2010-2012) was of the view that low-skilled workers such as cooks and care workers are no longer welcome in the UK. He argued, as part of the coalition government strategy, that only the brightest and the best should come to Britain<sup>19</sup>. Consequently, a change in the UK immigration policy towards domestic workers in place since April 2012 has led to the deletion of ODW visas previously issued under part 5 of the UK Immigration Rules. Considering that the total number of migration flows to the UK in 2011 was estimated at 566,000<sup>20</sup>, the 16,432 visas issued to ODWs will represent approximately 3% of inward migration. Since migrant domestic workers constitute a small fraction of migration flows to the UK, it is not clear how the eradication of ODW visas would assist the government in meaningful migration curtailment.

While employers could still sponsor their domestic workers to work in their private households in the UK, the latter would only be allowed a maximum of six month residence permit after which he/she must leave the country or face criminal prosecution and deportation.

According to Kalayaan<sup>21</sup> this drastic change in policy towards migrant domestic workers sets the UK back to the years before 1998, when the abuse and exploitation of migrant domestic workers was endemic. In the UK, documented domestic workers are entitled to limited employment rights. UK laws that regulate labour issues exclude domestic workers from the protection they offer to the workers; and where protections do exist, there are either weak or lack enforcement mechanisms<sup>22</sup>.

Such exclusion from protection exposes both documented and undocumented domestic workers to high risks of vulnerability. However,

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received 1186 referrals of potential victims of trafficking (PVoT) in 2012. This represents a 25% increase on 2011 referral totals.

<sup>19</sup> The speech delivered at the Policy Exchange on Thursday 2<sup>nd</sup> February 2012 <http://www.homeoffice.gov.uk/media-centre/speeches/making-immigration-work> (Accessed May 10, 2013).

<sup>20</sup> OECD, 2012, *International Migration and the United Kingdom Report of the United Kingdom SOPEMI Correspondence to the OECD* (Accessed May 10, 2013).

<sup>21</sup> Kalayaan is an NGO that specialises in the interests of migrant domestic workers in the UK. The Organisation which is recognised by the Home Office has published a number of papers on migrant domestic workers dilemmas in the UK. See the link [www.kalayaan.org.uk](http://www.kalayaan.org.uk).

<sup>22</sup> For more on the government failure to enforce tax, see R. Croucherand, G. White, *Enforcing A National Minimum Wage: The British Case*, Policy Studies, vol. 28, n. 2, 2007, 145-161.

illegal migrants are more vulnerable to exploitation “due to the fear of job loss, incarceration, and deportation”<sup>23</sup>. The fact that domestic chores are often considered unimportant<sup>24</sup> could explain the complexity in dealing with the problems facing migrant domestic workers. One of the reasons migrant domestic workers lack respect is the failure of most of society to recognise domestic work as “real work” and the attribution of low value to the work and to those performing it<sup>25</sup>. Another reason why migrant domestic workers are often underrated in society is because very little or no attention is given to their economic importance. Although domestic work does not constitute a “productive” labour market activity<sup>26</sup>, it contributes to the national economy all the same. In the UK, domestic workers on the pre-April 2012 ODWs visas must provide evidence of tax and national insurance contribution payment to the Home Office before their visas could be renewed. It must therefore be safe to argue that domestic workers contribute to the UK economy by paying tax and national insurance contributions. ODWs visas prohibit workers from claiming state benefits; all expenses borne by ODWs in the UK thus contribute to boosting the national economy. Further, the services rendered by ODWs allow their employers the opportunity to keep up with their daily activities without having to struggle or combine household chores, including child minding, with paid jobs<sup>27</sup>.

On 16 June 2011, the ILO adopted Convention No. 189 aimed at setting a framework to deal with the dilemmas of domestic workers around the world<sup>28</sup>. The UK government has argued that the convention was not compliant with national legislation on Health and Safety<sup>29</sup> and did not

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<sup>23</sup> J. Benach, C. Muntaner, C. Delclos, M. Menéndez, C. Ronquillo, *Migration and “Low-Skilled” Workers in Destination Countries*. PLoSMed, e1001043, vol. 8, n. 6, 2011.

<sup>24</sup> See B. Anderson, *A Very Private Business: Employment in Private Households*, in *European Journal of Women’s Studies*, vol. 14, n. 3, 2007, 247-264.

<sup>25</sup> ILO, *The Gender Dimension of Domestic Work in Western Europe / Maria Galotti*; International Labour Office, International Migration Programme, International Migration Papers N. 96, ILO, Geneva, 2009, 1.

<sup>26</sup> See ILO, *Measuring the Economic and Social Value of Domestic Work: Conceptual and Methodological Framework / Debbie Budlender*, Conditions of Work and Employment Series N. 30, ILO, Geneva, 2011, 13.

<sup>27</sup> See A. Venturini, C. Villosio, *Labour Market Effects of Immigration: an Empirical Analysis Based on Italian Data*, CHILD Working Papers wp17\_04, CHILD – Centre for Household, Income, Labour and Demographic economics – ITALY 2004.

<sup>28</sup> ILO, C189 – *Decent Work for Domestic Workers, Domestic Workers Convention*, 2011 (N. 189), 100th ILC session (16 Jun 2011), ILO, Geneva, 2011.

<sup>29</sup> Gov. UK, *Explanatory Memorandum on European Council Document 7939/13, COM (2013) 152 Final*, Cabinet Office, London, (Accessed May 11, 2013).

vote in favour of it. Notably, the European Commission has also presented a proposal for a Council Decision authorising Member States to ratify the Convention<sup>30</sup>.

The UK government maintains that there are enough protective mechanisms in the UK which safeguard domestic workers. Yet a more detailed analysis of employment law and labour related regimes would suggest otherwise.

In *CN vs. United Kingdom*<sup>31</sup>, the European Court of Human Rights (EctHR) ruled in favour of the applicant – a Ugandan woman – who was forced into labour in the UK. The Court rebuked the UK government for failing to safeguard domestic workers, primarily by not implementing measures capable of criminalising forced labour and servitude which are contrary to Article 4 of the European Convention on Human Rights (ECHR). Although the UK has since implemented Section 71 of the Coroners and Justice Act<sup>32</sup> to enable the prosecution of anyone who traffics people in the UK for domestic servitude, the victims of trafficking are still left with very limited means of seeking remedy from their traffickers. The doctrine of illegality in the UK, which prevents those who work illegally from suing their employers plays well into the hand of traffickers<sup>33</sup>. Nonetheless, the ILO Convention 189, which has been ratified by a few countries and is due to come into force on 5<sup>th</sup> September 2013 is yet to be recognised by the UK government. This lack of recognition means that domestic workers in the UK are unlikely to benefit from the Convention provisions. Paradoxically, the UK, which has been widely praised for its immigration policy on migrant domestic workers since 2008<sup>34</sup>, has missed the opportunity to convince the world that it is committed to the protection of vulnerable workers, such as migrant domestic workers. Consequently, unlike other workers in the UK private and public sectors, domestic workers are left with a raw deal, which further exposes them to increased vulnerability and uncertainty.

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<sup>30</sup> European Commission, *Proposal for Council Decision*, COM(2013) 152 final, Brussels, 21.3.2013.

<sup>31</sup> *Application N. 4239/08*, ECtHR, Strasbourg 13 November 2012, FINAL 13 February 2013.

<sup>32</sup> *The Coroners and Justice Act 2009*, c. 25. London: Office of Public Sector Information. Available online <http://www.legislation.gov.uk/ukpga/2009/25/contents> (Accessed June 12, 2013).

<sup>33</sup> See *Elisabeth Kawogo v. the United Kingdom* (n. 56921/09) Communicated to the Government in June 2010.

<sup>34</sup> See the Human Right Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States*, June 2001, vol. 13, n. 2 (G), 39.

## 2. The Dilemmas of Migrant Domestic Workers

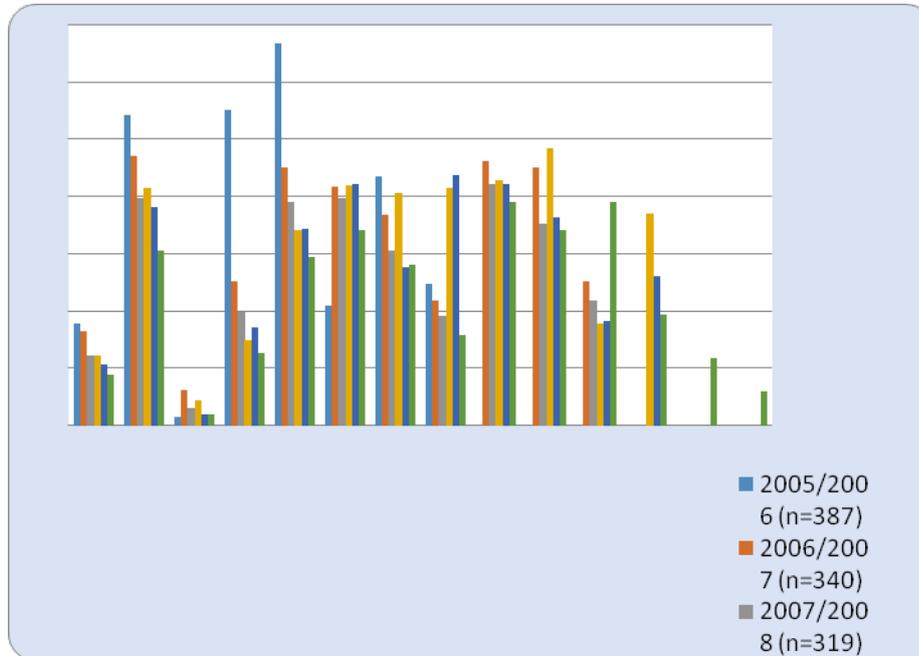
The data obtained from the Kalayaan database confirms the argument put forward in various documents – either printed or digital – that migrant domestic workers experience a high level of abuses and exploitation. Of the 281 domestic workers that approached Kalayaan in 2011, more than 50% reported psychological abuse by their employers (see Table No. 1 and 2). It could be inferred that domestic workers often work long hours without sufficient rest. They do not receive payment for on-call labour; and their accommodation is inadequate. Their passport is often retained by their employers who do not let them out of the household.

*Table No. 1: Problems reported to Kalayaan by service users 2005-2011.*

<b>PROBLEMS REPORTED</b>	<b>2005/2006 (n=387)</b>	<b>2006/2007 (n=340)</b>	<b>2007/2008 (n=319)</b>	<b>2008/2009 (n=356)</b>	<b>2009/2010 (n=343)</b>	<b>2010/2011 (n=281)</b>
<b>Physical abuse</b>	89	82	61	61	53	45
<b>Psychological abuse</b>	271	235	198	207	191	153
<b>Sexual abuse</b>	8	31	16	22	10	10
<b>Food deprivation</b>	275	126	99	75	86	64
<b>Work over 16 hrs. / Day</b>	333	225	195	171	172	147
<b>Not allowed out</b>	105	208	198	210	211	171
<b>No own room</b>	217	184	153	203	138	141
<b>Passport retention</b>	124	109	96	207	218	79
<b>No day or time off</b>	n/a	231	211	214	211	195
<b>No meal break/ On call</b>	n/a	225	176	242	182	171
<b>No own bed</b>	n/a	126	109	89	91	195
<b>Paid below £50 / Week</b>	n/a	n/a	n/a	185	130	97
<b>Paid below £100/Week</b>	n/a	n/a	n/a	n/a	n/a	59
<b>Received no salary</b>	n/a	n/a	n/a	n/a	n/a	30

*Source: Kalayaan database.*

Table No. 2: Problems reported to Kalayaan by service users between 2005 -2011.



Source: Kalayaan database.

### 3. Conceptual Framework

To elucidate the dilemma faced by migrant domestic workers in the UK, it would be necessary to adopt a suitable conceptual framework. There are different types of conceptual frameworks in the study of migration and employment. Muñiz<sup>35</sup> uses the Migration Conceptual Framework (MCF) to examine why people move to work in another place or country. However, the reason for migration, and perhaps the effect of migration in itself, could not explain why some migrant workers in the UK are more vulnerable than others. The ‘power imbalance’ framework was introduced

<sup>35</sup> O. Muñiz, *Labor Migration Patterns*. In O. Muniz, Chile: Research Trends in Geography, AAG Panel on US and Latin America. Collaboration in Geographic Research and Education. Race, Ethnicity, and Place Conference, Texas State University, San Marcos, 1-November 4, 2006. Available online. [http://www.aag.org/galleries/project-programs-files/US and Latin American Collaboration.pdf](http://www.aag.org/galleries/project-programs-files/US%20and%20Latin%20American%20Collaboration.pdf) (Accessed July 12, 2013).

by Bewley and Forth<sup>36</sup> in their investigation of the features that make employees more or less vulnerable to adverse treatment in the workplace. The self-restricted nature of this framework to the relationship between the employer and the employee makes it inadequate to explore the dilemma of domestic workers.

Domestic workers' vulnerability is not limited to the workplace, because the factors that predispose them to vulnerability are both workplaces and non-workplace related. Given that every individual on this planet is vulnerable at various stages in their life<sup>37</sup>, vulnerability can be understood as being on a "continuum"<sup>38</sup>. Further, vulnerability could be referred to as "a dynamic and relative concept that varies over time and across space and is not evenly distributed amongst all men and women"<sup>39</sup>. According to Fitzgerald *et al*<sup>40</sup>, vulnerability comes in varying degrees such that all vulnerable workers are not exposed to the same degree of risk. It is thus possible that workers who are in the same precarious employment and perform similar tasks may not be susceptible to vulnerabilities in the same way<sup>41</sup>. Consequently, the experiences of individual domestic worker may vary significantly.

Luna argues that vulnerability is not a label but a kind of layer, which is influenced by economic, social and political exclusion<sup>42</sup>. Luna employs the "layers of the vulnerability framework" to study the experience of migrant workers and concludes that this might originate from different variables. The "layers of vulnerability framework" have also been described by the OECD as a life cycle where the nature and degree of vulnerability change

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<sup>36</sup> H. Bewley, J. Forth, *Vulnerability and Adverse Treatment in the Workplace*, Employment Relations Research Series 112, Department for Business Innovation and Skills, London, 2010, 6.

<sup>37</sup> See United Nations, *Report on the World Social Situation, Bureau of Social Affairs, International Labour Office*, United Nations Department of Economic and Social Affairs, New York, 2001.

<sup>38</sup> H. Bewley, J. Forth, *op. cit.*, 6.

<sup>39</sup> A. Bonilla García, J. V. Gruat, *op. cit.*

<sup>40</sup> I. Fitzgerald, J. Stirling, I. Manborde, *How Vulnerable is it up North?* Paper for Annual Conference of the British Universities Industrial Relations Association (BUIRA), 2010, 2, London: Manchester Metropolitan University.

<sup>41</sup> See TUC, *Commission on Vulnerable Employment*, Hard Work, Hidden Lives: The Full Report of the Commission on Vulnerable Employment, TUC, London, 2008.

<sup>42</sup> F. Luna, *Elucidating the Concept of Vulnerability: Layers Not Labels*, *International Journal of Feminist Approaches to Bioethics*, in *Transnational Dialogues*, vol. 2, n. 1, 2009, 121-139.

with time<sup>43</sup>. In their assessment of risks of occupational health and safety hazards amongst migrant workers, the layers of vulnerability framework were also used by Sargeant and Tucker<sup>44</sup>, who found that migrant workers are exposed to the risk of wage theft, exploitation and occupational health and safety hazards in varying degrees. The authors explained that this risk could intensify in accordance with the treatment the workers receive from their employers.

It follows that the layers of vulnerability framework could provide a more adequate perspective through which the dilemmas of domestic workers could be understood. This framework could also assist in elucidating the precarious nature of domestic work and its many impacts on the vulnerability of domestic workers.

#### 4. The Vulnerability of Domestic Workers

According to the UN, vulnerability is “a state of high exposure to certain risks; a reduced ability to protect oneself against these risks; as well as the ability to cope with their negative consequences”<sup>45</sup>. Nonetheless, when we talk of vulnerable workers, we often refer to those groups of workers with the highest layers of variables which predispose them to the risk of vulnerability. Being an unusual workplace, the household is the least regulated and/or scrutinized location<sup>46</sup>; hence, employment in this sector predisposes workers to a greater risk of vulnerability<sup>47</sup>. The historical link of domestic work to the unpaid household chores<sup>48</sup> could explain the complexity in dealing with the problems facing today’s migrant domestic workers.

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<sup>43</sup> E. Cain, *Social Protection and Vulnerability, Risk and Exclusion across the Life-Cycle*, in *Promoting Pro-Poor Growth: Social Protection*, Organisation for Economic Cooperation and Development, DAC Network on Poverty Reduction (POVNET), Paris, 2003, 129-153.

<sup>44</sup> See M. Sargeant, E. Tucker, *op. cit.*

<sup>45</sup> United Nations, *op. cit.*, 201.

<sup>46</sup> H. Lutz, *When Home Becomes a Workplace: Domestic Work as an Ordinary Job in Germany?* In H. Lutz, (ed.): *Migration and Domestic Work: A European Perspective on a Global Theme*. Ashgate, Aldershot, 2008, 43-60.

<sup>47</sup> R. Fevre, T. Nichols, G. Prior, I. Rutherford, *Fair Treatment at Work Report: Findings from the 2008 Survey*, Employment Relations Research Report N. 103, Department for Business Innovation and Skills, London, 2009.

<sup>48</sup> See for instance, B. Anderson, *A Very Private Business: Employment in Private Households*, in *European Journal of Women’s Studies*, vol. 14, n. 3, 2007, 247-264.

### 5.1. Occupational Hazards

The link between precarious employment – such as domestic work – and occupational health and safety hazards has been extensively discussed in literature (Clarke et al, 2007; Scott-Marshall and Tompa, 2011; Kim *et al.*, 2008; Santiago and Carvalho, 2008; Underhill and Quinlan, 2011). The UK Health and Safety law excludes the household from its jurisdiction. Consequently, employers of domestic workers are not legally liable for any workplace injury sustained by their employees. In addition to psychological problems and physical injury, migrant domestic workers in the UK are prone to sleep deprivation and inadequate rest<sup>49</sup>.

The impact of domestic work on health includes a high risk of occupational hazards such as musculoskeletal pain, cuts, burns, trips and falls. According to the Trade Union Congress (TUC), about “20,000 people die prematurely each year as a result of injury or illness caused by the work they do”<sup>50</sup>. Since employers do not have to report to the Health and Safety Executives (HSE)<sup>51</sup>, the injuries suffered by their household workers are not tracked and recorded adequately. As a point of comparison, in Singapore the injuries sustained by domestic workers in the private households are well documented, some of which have been fatal<sup>52</sup>. More importantly, the data available on the EU Injury Database show that more than 40% of all home and leisure accidents occur “at home” (residential area)<sup>53</sup>, (See Figure No. 1).

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<sup>49</sup> See V. Wittenburg, *The New Bonded Labour? The Impact of Proposed Changes to the UK Immigration System on Migrant Domestic Workers*, Kalayaan and Oxfam, Kalayaan, London, 2008.

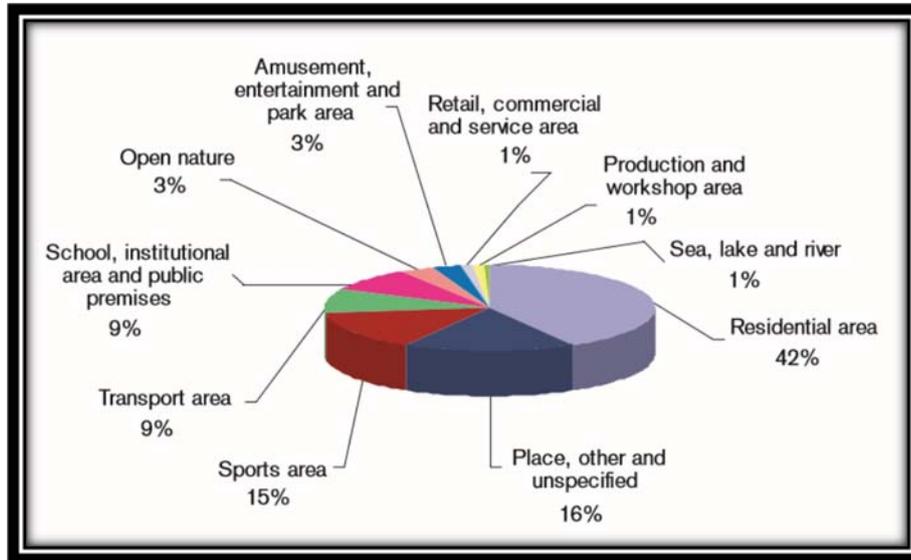
<sup>50</sup> TUC, *The Case for Health and Safety*, TUC Publications, London 2010, 11.

<sup>51</sup> Section 51, Health and Safety at Work etc. Act 1974, c.37, London: OPSI.

<sup>52</sup> See report by D. Choo on Yahoo News, Yahoo! Newsroom - Saturday, April 28, 2012 which suggests so far in 2012, up to 8 foreign domestic workers in Singapore have fallen to their death whilst cleaning windows, <http://sg.news.yahoo.com/eighth-foreign-domestic-worker-falls-to-her-death.html> (Accessed April 17, 2013).

<sup>53</sup> European Association for Injury Prevention and Safety Promotion (EuroSafe): *Injuries in the European Union Statistics summary 2002 – 2004*, EU Injury Database, EuroSafe, Vienna, 2006.

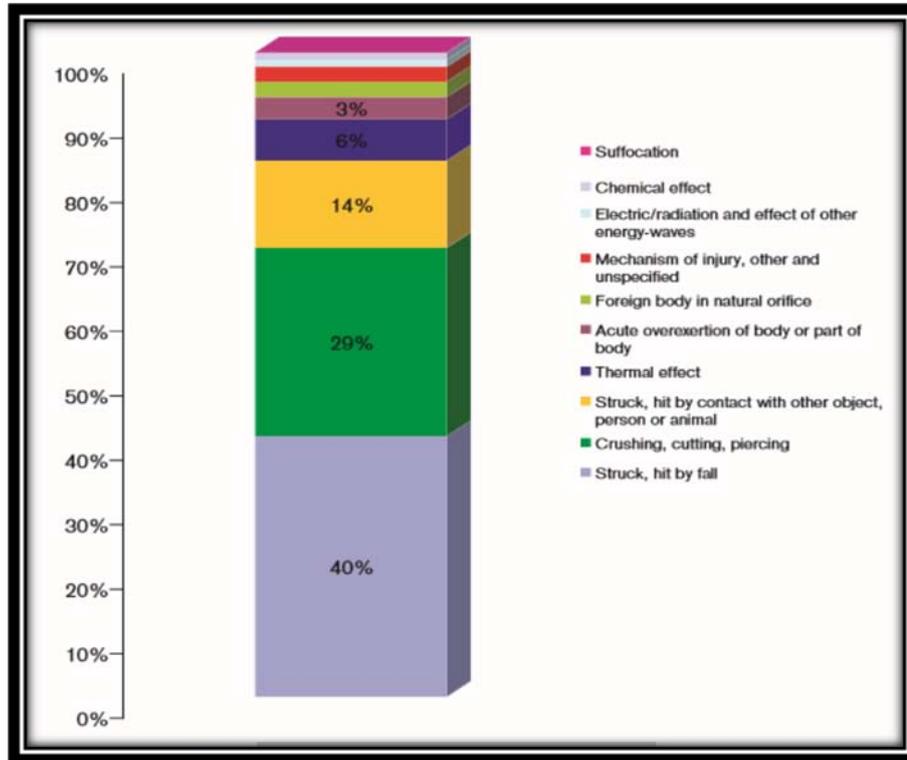
Figure No. 1 – Place of Occurrence at the Time of Injury.



Source: IDB Hospital treated patients – Absolute numbers; Place of occurrence at the time of injury; AT, DK, FR, IT, IE, NL, PT, SE, UK; 2002 – 2004; ( $n=983800$ ).

The EU Injury Database further shows that the most frequent causes for accident in domestic work are falls (40%), “crushing, cutting, piercing” 29% and collisions 14% (see Figure No. 2 and 3).

Figure No. 2 – Domestic Work and Injury Mechanism.



Source: IDB Hospital treated patients – Absolute numbers; Domestic work and injury mechanism at the time of injury; AT, DK, FR, IT, IE, NL, PT, SE, UK; 2002 – 2004; (n=50082).

Figure No. 3 – Domestic Work and Products Involved in the Accident.



Source: IDB Hospital treated patients – Absolute numbers; Domestic Work and product involved in the injury; AT, DK, FR, IT, IE, NL, PT, SE, UK; 2002 – 2004 Only cases where a product was involved in the injury (35%) are included; (n=17583).

The HSE 2009/10 report shows that workplace illness costs the public about £8.5 billion, while workplace injury in the same year costs up to £5.4 billion<sup>54</sup>. Migrant domestic workers are insecure due to their exclusion from health and safety protection as well as other legal safeguards provided to other workers, leaving them with a raw deal. According to the relevant literature, most migrant domestic workers are the breadwinners of their family<sup>55</sup>.

Whereas a migrant domestic worker becomes incapacitated and the employer refuses to remunerate him/her – or supply adequate compensation upon dismissal – the effects would be devastating for the worker and his/her family. In a survey conducted on domestic workers in London, Clark and Kumarappan found that more than a third of those surveyed had suffered injuries at work and nearly three-quarters suffered

<sup>54</sup> HSE, *Costs to Britain of Workplace Injuries and Work-related Ill Health: 2009/10 Update*, Health and Safety Executives, London.

<sup>55</sup> See R. S. Parreñas, *Migrant Filipina Domestic Workers and the International Division of Reproductive Labor*, *Gender & Society* vol. 14, n. 4, 2000, 560-80. See also Pei-Chai Lan, *Maid or Madam*, *Filipina Migrant Workers and the Continuity of Domestic Labor*, *Gender & Society*, vol. 17, n. 2, 2003, 187-208.

from regular aches and pains. Clark and Kumarappan argue that society often turns a blind eye at the suffering of domestic workers<sup>56</sup>. Considering that the UK government refused to sign ILO Convention No. 189 on domestic workers on the ground that it would interfere with UK Health and Safety law, domestic workers in the UK are at a continued risk of occupational hazards. Despite increasing media coverage on the plights of migrant domestic workers<sup>57</sup>, there appears to be very little support for their cause; and government policies towards them are often less sympathetic, if at all.

### 5.2. Wages Thefts

Migrant domestic workers are often “overworked and underpaid”<sup>58</sup>. According to Maitre *et al.*, “low-paid employees are much more likely to be in vulnerable households than those who are not low paid”<sup>59</sup>. Research conducted by the ILO has shown that the majority of migrant domestic workers are unprotected by labour law<sup>60</sup>. Migrant domestic workers in the UK are paid well below the national minimum wage, and there is evidence of “wage theft”<sup>61</sup> by unscrupulous employers. Perhaps what gives some employers the audacity to pay their domestic workers lower than the

<sup>56</sup> N. Clark, L. Kumarappan, *Final Report Published: 'Turning a Blind Eye: The British State and Migrant Domestic Workers' Employment Rights'*, Working Lives Research Institute, Nuffield Foundation, London, 2012.

<sup>57</sup> See BBC Radio 4 Programmes – File on 4, *Domestic Servitude*, 27 June 2010, (Accessed May 5, 2013); H. Khaleeli, *How Domestic Workers Become Slaves*, *The Guardian* 6 August 2010, (Accessed May 5, 2013). A. Fishburn and H. Garlick, *Migrant Domestic Workers: 'I was in a Prison, a Cage, just like a Slave'* in *The Times*, January 21, 2010 (Accessed May 5, 2013).

<sup>58</sup> Trade Union Congress, *Overworked, Underpaid and Over Here: Migrant Workers in Britain*, TUC, London, 2003.

<sup>59</sup> B. Maitre, B. Nolan, C. Whelan, *Low Pay, In-work Poverty and Economic Vulnerability: A Comparative Analysis Using EU-SILC* (“Statistics on Income and Living Conditions”), *The Manchester School*, vol. 80, n. 1, 2012, 112.

<sup>60</sup> A. D’Souza, *Moving Towards Decent Work for Domestic Workers: An Overview of the ILO’s Work*, Bureau for Gender Equality, Working Paper 2, ILO, Geneva, 2010.

<sup>61</sup> The term wage theft is commonly used in the USA to mean an unauthorised deduction of wages. See US Government Account Office (GAO), *Wage and Hour Division’s Complaint Intake and Investigative Processes Leave Low Wage Workers Vulnerable to Wage Theft*, Testimony before the Committee on Education and Labour, House of Representatives, Department of Labour, USA, 2009.

national minimum wage is their legal exclusion from the Minimum Wage Regulations<sup>62</sup>. This exclusion has been recognised by UK Courts<sup>63</sup>. In *Nambalat v Taber and Udin v Chamsi-Pasha*<sup>64</sup>, the Court of Appeal adopted the ‘officious-bystander’ test in holding that a worker would not be entitled to minimum wage payment if the employer could show on the balance of probability that the domestic worker was treated as a ‘family member’. A requirement must be satisfied according to which the tasks shared by the employer and the domestic worker are in the proportion that it is equitable to infer a ‘family member’ relationship. It is therefore possible that domestic workers could be legally paid below the national minimum wage. Domestic workers are in a position of disadvantage also when it comes to working time, rest period and holiday pay<sup>65</sup>. Migrant domestic workers are not entitled to extra payment for working after hours or being on call without enough or adequate rest. A report published by Kalayaan also reveals that most migrant domestic workers work between 16-20 hours a day.<sup>66</sup> Despite case laws<sup>67, 68</sup> indicating that time spent on-call could constitute payable working time, many migrant domestic workers are still negatively treated by their employers. It follows that “while some workers are excessively privileged, others are excessively exploited even to the point of death”<sup>69</sup>.

<sup>62</sup> Under Regulation 2 (2) (ii) of the National Minimum Wages Regulation 1999, Statutory Instrument, N. 584, London: OPSI; if a domestic worker is treated by the employer as a member of the family, the employer does not need to pay him/her according to the national minimum wage.

<sup>63</sup> The Employment Appeal Tribunal in *Julio & Ors v Jose & Ors* UKEAT/0553/10/DM ruled that a household worker who is treated as a family member is not entitled to national minimum wage. However, what remains unresolved is the definition of “family member”; in this instance, the court held that the sharing of any task which is outside the contract of employment would suffice it.

<sup>64</sup> [2012] EWCA, Civ 1249.

<sup>65</sup> Under part III of the Working Time Regulations 1998, Statutory Instrument N. 1833, London: OPSI, domestic workers in private households are excluded from the safeguards available to other workers, whereby exposing them to a high degree of vulnerability.

<sup>66</sup> See V. Wittenburg *op. cit.*, 17.

<sup>67</sup> *Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (C-303/98) [2001] All E.R. (EC) 609 applied in the Employment Appeal Tribunal case of *MacCartney v Oversley House Management* [2006] I.C.R. 510.

<sup>68</sup> *Gallagher v. Alpha Catering Services Ltd* (t/a Alpha Flight Services) [2004] EWCA Civ 1559.

<sup>69</sup> J. O’Reilly, J. MacInnes, T. Nazio, J. Roche, *The United Kingdom: From Flexible Employment to Vulnerable Workers*, in *Gender and the Contours of Precarious Employment* (GWDCPD), Working Paper Series, 2009.

It would therefore appear that “the lack of legal protection sends the message that treating workers unfairly and unequally is acceptable”<sup>70</sup>.

The Trade Union Congress refers to vulnerable workers as “those who are in the bottom third of the hourly income distribution and who do not have their pay and conditions determined by a trade union agreement”<sup>71</sup>, finds support from Pollert, who describes a vulnerable worker as “someone who is earning below median pay and lacking collective voice and labour power in terms of scarce skills or seniority”<sup>72</sup>.

The majority of migrant domestic workers are not trade union members and they are not aware of their right to membership. The Justice for Domestic Workers<sup>73</sup>, Kalayaan, and the Trade Unions have been raising awareness on domestic workers, however it is difficult to integrate all domestic workers with a good number of them still hidden in households. Being a union member would empower migrant workers, allowing them to familiarise themselves with their rights. Further, it would send a strong signal to employers that they should not exploit or abuse their domestic workers, in a way shifting the balance of power towards the workers.

## 5. Factors of Vulnerability

The 2007 European Parliament Policy Statement identifies the three main factors of vulnerability as risk, personal, and environmental<sup>74</sup>. Risk factors relate to the job or task to be performed. Some workers are exposed to avoidable risks due to their personal characteristics and the type of job in

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<sup>70</sup> TUC, *op. cit.*, 8.

<sup>71</sup> TUC, *The Hidden One-in-Five: Winning a Fair Deal for Britain's Vulnerable Workers*, in M. Hudson, *A Report for the TUC by the Policy Studies Institute*, TUC, London, September 2006, 7.

<sup>72</sup> A. Pollert, *What Do Unorganised Workers Do About Problem at Work?* Paper presented to the 24<sup>th</sup> Annual International Labour Process Conference April 10-12, Based on research funded by ESRC 2006, 6.

<sup>73</sup> The Justice for Domestic Workers (J4DW) established on 15<sup>th</sup> March 2009 is an organisation of migrant domestic workers who work in private houses in the UK. See more information on their [website](#) (Accessed May 7, 2012).

<sup>74</sup> European Parliament, Directorate-General Internal Policies Policy Department C, *Citizens Rights and Constitutional Affairs: The Conditions in Centres for Third Country National (Detention Camps, Open Centres as well as Transit centres and Transit Zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States*, STEPS Consulting Social study for European Parliament, December 2007 (Accessed April 30, 2013).

which they are engaged<sup>75</sup>. Personal factors relate to the individual attribute such as immigration, age, gender, disability – physical and mental health condition – religion, education, language and family status. Environmental or job factors are those inherent in the workplace<sup>76</sup>.

### 5.1. Job Factor

The informal sector or informal economy, which continues to thrive in the UK<sup>77</sup> includes employment in the household. The household provides employment for both documented and undocumented workers<sup>78</sup>. However, its cloistered nature means that abuses of these workers are often not visible to the public. Migrant domestic workers are often required to perform tasks lasting over long hours, as is evident from the data collected by Kalayaan (see Table No. 1 and 2). Domestic work often includes the “three-D” jobs – dirty, dangerous, and demanding<sup>79</sup> – and it is also characterised by uncertainty and insecurity. Any “employment that is uncertain, unpredictable, and risky from the point of view of the worker” is a precarious job<sup>80</sup>. Precarious employment exposes workers to the risk of vulnerability, “erosion of earnings potential, exposure to workplace hazards and social risks, or to a broader spectrum of social risks”<sup>81</sup>. In addition, precarious employment “gives rise to instability, lack

<sup>75</sup> See B. Barrett, M. Sargeant, *The Health, Safety and Well-being of Vulnerable Workers*, in M. Sargeant, M. Giovannone, (eds.) *Vulnerable Workers, Health, Safety and Well being*, Gower Publishing, Surrey, 2011, 1-20.

<sup>76</sup> For more on vulnerability factors, see M. Sargeant, *Health and Safety of Vulnerable Workers in a Changing World of Work*, Associazione per gli Studi Internazionali e Comparati sul Diritto del lavoro e sulle Relazioni Industriali (ADAPT), Working Paper ADAPT, 27 novembre 2009, n. 101, 2.

<sup>77</sup> See, for example, the article by S. Chant, *The Informal Sector and Employment*. In V. Desai and R. Potter (eds.) *The Companion to Developmental Studies*, Hodder Education, London, 2002.

<sup>78</sup> See for instance, K. Cuff, N. Marceau, S. Mongrain, J. Roberts, *Optimal Policies with an Informal Sector*, *Journal of Public Economics*, vol. 95 n. (11/12), 2011, 1280-1291.

<sup>79</sup> A. Belin, T. Zamparutti, K. Tull, G. Hernandez, *Occupational Health and Safety Risks for the Most Vulnerable Workers*, Study, Directorate General for Internal Policies, Policy Department A, Economic and Scientific Policy, Committee on Employment and Social Affairs, IP/A/EMPL/ST/2010-03, Brussels: European Parliament, August 2011, 96.

<sup>80</sup> A. L. Kalleberg, *Precarious Work, Insecure Workers: Employment Relations in Transition*, *American Sociological Review*, vol. 74, 2009, 2.

<sup>81</sup> See D. Weil, *Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach*, *Journal of Industrial Relations*, vol. 51, n. 3, 2009, 412.

of protection, insecurity, and social and economic vulnerability”<sup>82</sup>. This further exposes them to the risk of physical and psychological abuse, exploitation and discrimination. The precarious nature of domestic work, coupled with workers’ vulnerability, shifts the balance of power in favour of their employers.

### 5.2. *The Migrant Factor*

It is settled that the immigration status of a worker could have a significant effect on his/her degree of vulnerability in the host country<sup>83</sup>. Consequently, anyone who works outside the remit permitted by his/her immigration status is deemed to have worked illegally. This illegality could expose the worker to a series of criminal and civil liabilities. It could also constitute a constriction to the worker’s entitlement and access to justice. The Citizens Advice Bureau<sup>84</sup> argues that migrant workers are the most vulnerable ones in the labour market.

Research has shown that migrant workers in the UK are faced with two major barriers<sup>85</sup>. On the one hand there is exploitation on the part of their employer, and on the other hand, a certain form of retribution by politicians and the general public, who see them as job grabbers. However, what is unclear is how many British passport holders would be interested in working as live-in domestic workers<sup>86</sup>. Although, the previous Immigration Minister, Damian Green agreed on the fact that immigration has enriched the British culture and strengthened its economy, he was of the opinion that stiffer immigration controls must be

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<sup>82</sup> E. Tompa, H. Scott-Marshall, R. Dolinschi, S. Trevithick, and S. Bhattacharyya, *Prearious Employment Experiences and Their Health Consequences: Towards a Theoretical Framework*, *Work*, 28, 2007, 209.

<sup>83</sup> See for instance, D.G. Papademetriou, M. Sumption, W. Somerville, *Migration and Economic Downturn: What to Expect in the European Union*, Migration Policy Institute, Washington DC, 2009.

<sup>84</sup> Citizens Advice Bureau, *Nowhere to Turn – CAB Evidence on the Exploitation of Migrant Workers*, CM 5387, CAB, London, 2004.

<sup>85</sup> See for instance, A. Morgan, J. Finnear, *Migrant Workers and the Changing Psychological Contract*, in *Journal of European Industrial Training*, vol. 33, n. 4, 2009, 305-322.

<sup>86</sup> See R. Münz, T. Straubhaar, F., Vadean, *What are the Migrants Contributions to Employment and Growth: A European Approach*, OECD, 2007 (Accessed April 30, 2013).

implemented for government to gain public confidence in the immigration system<sup>87</sup>.

Prior to 1998, migrant domestic workers in private households could accompany their employers to the UK under visitor-like visas, which allowed them to only work for a specific employer. Domestic workers in diplomatic households are also unable to change employers. Their visas, which are issued under the Vienna Convention on Diplomatic Relations, are under the Tier 5 (Temporary Worker International Agreement) points-based system. Following a series of campaign by various Non-Governmental Organisations (NGOs), trade unions, and other campaign groups which exposed the extent of abuses and exploitation of migrant domestic workers, in 1998 the UK government changed the conditions attached to ODW visas to allow the workers to change employer in the UK. The concession also allowed domestic workers to settle in the UK after a period of qualifying residence. The then government agreed that the concession would allow domestic workers to escape ruthless employers, whereby reducing the risk of exploitation and abuses. In 2002, this concession was subsequently incorporated into part 5 of UK Immigration Rules<sup>88</sup>. The international community, especially the International Labour Organisation and the UN Special Rapporteur on the Human Rights of Migrants praised the UK government for taking the lead in protecting domestic workers<sup>89</sup>. With the persistent abuse and exploitation of domestic workers, and the intention on the part of the current coalition government to limit migration flows to the UK, the ODW visas were cancelled with effect from 5 April 2012.

Starting from 6 April 2012, migrant domestic workers coming to the UK would only be allowed a maximum stay of six months, and will not be allowed to change their employer whilst in the country. However, considering that in 2011, migrants on ODW visas accounted for less than 3% of migration flows to the UK, it is difficult to see how the curtailment of ODW visas would help the UK government reduce migration flows in any meaningful way. Belin *et al.*<sup>90</sup> Argue that language and cultural barriers

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<sup>87</sup> See the Minister of State for Immigration, Damian Green Immigration (Work & Settlement), Consultation Paper, Thursday, 9th June HOME OFFICE, London, 2011.

<sup>88</sup> See HC 395 of 1993-4 as amended by CM 5597 of 22 August 2002.

<sup>89</sup> See ILO, *Report of the Special Rapporteur on the Human Rights of Migrants*, Mission to the United Kingdom of Great Britain and Northern Ireland, 16 March 2010, 15-16, 19-20.

<sup>90</sup> A. Belin, T. Zamparutti, K. Tull, G. Hernandez, *Occupational Health and Safety Risks for the Most Vulnerable Workers*, Study, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, Committee on Employment and Social Affairs, IP/A/EMPL/ST/2010-03, European Parliament, Brussels, 2011.

are a major risk for migrants. Difficulties in understanding occupational health and safety rules as well as cultural barriers which include poor knowledge of the labour market can put migrant workers in a dangerous situation. Migrants who have none or a basic command of English, lack qualification and those who are illegal are among the most vulnerable groups (Anderson, 2010). The Trade Union Congress suggests migrant workers' vulnerability in the labour market is unique because they experience problems such as language barriers and immigration constraints, which national workers may not experience<sup>91</sup>. The inequalities between national workers and migrant workers are the result of differences in "migration status, condition of recruitment, sector of employment or occupation, employment in the informal sector, lack of freedom of association and collective bargaining rights, discrimination and xenophobia in the workplace"<sup>92</sup>.

Sargeant and Tucker identify communication and language constraints as a major barrier to migrant workers' settlement in the host country and as one of the major risks in terms of occupational health and safety. Migrant domestic workers in the UK need some command of English in order to understand their rights and entitlement. Thus, migrant workers' disadvantages in the UK labour market are exacerbated by their lack of English language skills<sup>93</sup>. Poor language knowledge could raise the risk of adverse treatment, limit the workers' outside job options and increase their reliance on their employers. It appears that the "migrant worker factor" contributes to frequent labour market policy reforms and increases the role of the state in the economy"<sup>94</sup>.

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<sup>91</sup> TUC, *op. cit.*

<sup>92</sup> M. Sargeant, E. Tucker, *op. cit.*, 52.

<sup>93</sup> See for instance E. Kofman, S. Lukes, A. D'Angelo, N. Montagna, *The Equality Implications of Being a Migrant in Britain*. Equality and Human Rights Commission 2009, Research Report, 19.

<sup>94</sup> C. Devitt, *The Migrant Worker Factor in Labour Market Policy Reform*, in *European Journal of Industrial Relations*, vol. 16, n. 3, 2010, 259.

## 6. Raw Deal for Domestic Workers

### 6.1. Legal Protection

In the views of Leighton and Painter, vulnerability represents a disadvantage in terms of legal protection<sup>95</sup>. In addition to the “migrant factor”, the vulnerability of migrant domestic workers is precipitated by the lack of legal protection and respect for domestic workers. As highlighted above, domestic workers in the UK are excluded from the majority of labour law and health and safety regimes. Consequently, domestic workers are often denied the status of “real worker”<sup>96</sup>. The recognition by the ILO that domestic workers are often faced with legal dilemmas<sup>97</sup> led to the adoption of Convention No. 189 aimed at setting an international framework for the protection of these workers. Meanwhile, the continued policy of the UK government to keep migrant domestic workers outside the Health and Safety regime is a key reason for UK abstention from voting the International Labour Convention 189, which is tailored at providing maximum protection for domestic workers around the world.

### 6.2. Access to Justice

A key dilemma faced by migrant domestic workers who have not been employed in accordance with their visas or those who have been trafficked for the purposes of domestic servitude is the issue of illegality. In the UK – England and Wales in particular – the doctrine of illegality is a *trahit law*<sup>98</sup> under which the Courts would normally refuse to entertain grievances; especially contracts that are tainted with illegality. The essence of this is to avoid legitimising illegal acts.

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<sup>95</sup> P. Leighton, R.W. Painter, *Who are Vulnerable Workers?* in P. Leighton, R.W. Painter (eds.) *Vulnerable Workers in the UK Labour Market: Some Challenges for Labour Law*, Employee Relations, vol. 9, n. 5, 1987, 3-8.

<sup>96</sup> See A. Blackett, 1998, *op. cit.*

<sup>97</sup> J.M. Ramirez Machado, *Domestic Work, Conditions of Work and Employment: A Legal Perspective*, Conditions of Work and Employment Programme, Conditions of Work and Employment Series N. 7, ILO Publications, Geneva, 2003.

<sup>98</sup> See *Hall v Woolston Hall Leisure* [2000] IRLR 578 CA (CivDiv) applied in *Vakante v. Governing Body of Addey and Stanhope School* (No 2) [2005] ICR 231.

In the case of *Hounga vs. Allen*<sup>99</sup>, the Court of Appeal refuses the application of a domestic worker who has been trafficked into the UK for domestic servitude because it could not be shown that she did not collide with her traffickers *ab initio*. Although “common law” suggests a claim of discrimination is an exception to the illegality rule<sup>100</sup>, the Court of Appeal in *Hounga* re-affirms that if the discrimination and the illegal act are intrinsically linked, the discrimination claim would also fail. The implication for new domestic workers coming to the UK since April 2012 is that they would not be able to bring any claim against employers who mistreat them after their visas have expired but they continue to work illegally.

Since 2008, the economic downturn in the UK has led the government to introduce measures, which have far-reaching effects for domestic workers. The introduction of Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into effect on 1 April 2013 has led to the abolition of the Legal Aid Commission and the withdrawal of Legal Aid in most civil cases (such as unfair dismissal and non-payment of wages)<sup>101</sup>. Shortage of funding has also led to the closure of many law centres and citizens advice bureaus. The majority of migrant domestic workers earn nothing or too little to be able to instruct paid solicitors. Many domestic workers are thus likely to face hurdles in order to access justice. In a recent amendment to UK labour law, a period of 2 years of continuous employment is required for an employee to file claims concerning “unfair dismissal”<sup>102</sup>. Given that the newly-introduced domestic worker visas would only allow domestic workers to work in the UK for a maximum period of six months, it follows that new domestic workers would not qualify to bring unfair dismissal claims. In addition, instead of a panel, a new amendment to the tribunals composition mean that only one judge would sit in an unfair dismissal claim<sup>103</sup>. The likely problem with this rule is that cases brought by migrant domestic workers are usually more complex with issues such as the threat of deportation, other forms of

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<sup>99</sup> *Mary Hounga v Adenike Allen & Anor* [2012] EWCA Civ 609.

<sup>100</sup> See *Leighton v Michael* [1996] IRLR 67 approved in *Hall v Woolston Hall Leisure* [2000] IRLR 578.

<sup>101</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012 c.10, Part 1, Section 38, London: OPSI.

<sup>102</sup> See section 108 of the Employment Rights Act 1996 as amended by article 3 of the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (SI 2012/989), OPSI, London.

<sup>103</sup> See the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012, Statutory Instrument, N. 988, OPSI, London.

intimidation and discrimination. Besides, it is not uncommon that the evidence before the Tribunal would rest essentially on the “word of mouth” from both parties.

In this instance, it would be more appropriate for a panel to hear the claim. Migrant domestic workers in diplomatic households are at the mercy of their employers’ immunity. If employed directly by the foreign mission, the State Immunity Act<sup>104</sup> would apply such that the domestic worker may find it difficult to bring any claim against the state. In the same vein, if directly employed by a diplomat<sup>105</sup> or consular personnel<sup>106</sup>, the Vienna Convention would operate to prevent the employer from being sued. Although UK Courts have signalled that diplomatic or State immunity may not apply in all circumstances<sup>107</sup>, enforcing a Court judgement on the State or the individual who is claiming diplomatic immunity is another big challenge faced by domestic workers in the diplomatic households.

### *6.3. Trafficking for Domestic Servitude*

The National Referral Mechanism (NRM) is a measure introduced by the UK government on 1 April 2009 in response to the Council of Europe Convention on Action against Trafficking<sup>108</sup>, with the aim of identifying and assisting victims of trafficking. However, this measure could only allow Government to recognise the status of the trafficked person for a period of 45 days after which the victim would have to return to his/her own country except where there is a genuine case why he/she should not return. As of 3 April 2013, out of a total of 332 referrals of potential victims of trafficking (PVoT) made into the NRM between October and December 2012, only 131 have received a positive conclusive decision (CD) and were therefore found to have been trafficked<sup>109</sup>. The granting of CD status means that the victim would not be deported from the UK.

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<sup>104</sup> 1978 c.33, London, OPSI London.

<sup>105</sup> The Vienna Convention on Diplomatic Relations, Vienna on 18 April 1961, United Nations, *Treaty Series*, vol. 500, 95.

<sup>106</sup> The Vienna Convention on Consular Relations, Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, 261.

<sup>107</sup> See for instance, *The Federal Republic of Nigeria v Ogbonna* UKEAT/0585/10/ZT.

<sup>108</sup> The Council of Europe Convention on Action against Trafficking in Human Beings CETS N.: 197, Warsaw, 16.V.2005.

<sup>109</sup> See Serious Organised Crime Agency, *National Referral Mechanism Statistics – October to December 2012, Intelligence Report*, April 2013 (Accessed April 29, 2013).

However, a closer look at the country of origin of those most likely to be granted CD status shows with the exception of the Philippines, PVoT from countries outside the European Economic Area are less likely to be granted CD status (see Figure No. 4).

Figure No. 4 – Breakdown of the 10 Most Referred Countries of Origin.

**Breakdown of the 10 Most Referred Countries of Origin for Adults and Minors by Reasonable Grounds (RG) and Conclusive Decision (CD)**

Country of Origin	Referrals as at Q4				Reasonable Grounds Decision				Conclusive Decision			
	Suspension of Consideration	Withdrawn	RG Decision Not Yet Made	Negative RG Decision	Positive RG Decision	Suspension of Consideration	Withdrawn	Conclusive Decision Not Yet Made	Negative Conclusive Decision	Positive Conclusive Decision		
Albania	0	1	12	10	21	0	0	11	7	3		
Nigeria	0	0	6	13	21	0	0	12	5	4		
Vietnam	0	0	5	4	25	3	0	16	4	2		
Lithuania	0	0	0	0	30	0	0	0	1	29		
Slovakia	0	0	0	2	23	0	0	0	5	18		
Romania	0	1	0	0	21	0	0	0	0	21		
Philippines	0	0	0	0	15	0	0	2	0	13		
China	0	0	2	5	7	0	0	3	3	1		
Pakistan	0	0	1	3	4	0	0	2	1	1		
Afghanistan	0	0	0	3	4	0	0	1	0	3		
<b>Total</b>	<b>0</b>	<b>2</b>	<b>26</b>	<b>40</b>	<b>171</b>	<b>3</b>	<b>0</b>	<b>47</b>	<b>26</b>	<b>95</b>		

Source: UK Serious Organised Crime.

## 7. Conclusion and Recommendation

Migrant domestic workers are directly targeted by national law which often excludes them from legal protection. Given that the vast majority of migrant domestic workers are women, the lack of protection for migrant domestic workers is tantamount to sexual discrimination. Further, the lack of respect and the failure to recognise the importance of migrant domestic workers in the labour market is illustrative of the continued prejudice against women. This prejudice has no place in our modern world and must be tackled with all seriousness at all levels. Vulnerability does not exist in isolation<sup>110</sup>. It is argued that while the risk of vulnerability may exist in all forms of employment, the degree of domestic worker's vulnerability could be lowered if the condition(s) that predispose the worker to vulnerability are well taken care of. Migrant domestic workers might be at risk of vulnerability but if their job is none or less precarious, the detriment they may suffer in the labour market could be reduced or become non-existent. The power to prevent and or protect migrant workers' vulnerability in the labour market rests almost entirely on the government who has the power to formulate law and administer social and political policies<sup>111</sup>. Workers' vulnerability could be contained if the factors such as social injustices that predispose workers to it are reduced. This could be achieved through "social integration on the basis of human rights or an inclusion framework"<sup>112</sup>. The fact that the Home Secretary has chosen to amend rather than erase ODWs visas is evident that domestic workers are still relevant in the UK. However, the removal of immigration and employment protections from this group of workers simply means that the only offer being made available to them in the UK is a raw deal. Perhaps the correct starting point is to respect these workers and accept that they deserve similar rights as those of other workers. In line with the ILO legal framework set out in the 189<sup>th</sup> Convention and its corresponding Recommendation 201, the UK government needs to review the current policy on ODWs.

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<sup>110</sup> TUC, 2008, *op. cit.*, 11.

<sup>111</sup> TUC, 2008, *op. cit.*, 11-12.

<sup>112</sup> United Nations, 2001, *op. cit.*, 211.

# Health and Safety Issues in Precarious Cultural Work

Katherine Bischooping and Elizabeth Quinlan \*

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## 1. Introductory Remarks

Of late, cultural workers have been regarded as the quintessential ‘new’ economy workers: the entrepreneurial freelancers, independent of social welfare support, able to create their own jobs<sup>1</sup> and contribute to the Canada’s economic productivity. In 2010, the more than half a million Canadians who worked in the cultural sector, in film and television, the visual and performing arts, writing and publishing, and elsewhere, contributed an annual value of \$39B (or 3.4%) to the GDP<sup>2</sup>.

Although this figure and the whirlwind of recent developments in digital media lend credence to the productivity claim, “‘Starving’ artists getting poorer”<sup>3</sup> – the *Toronto Star*’s headline for a report on the 14% drop in artists’ inflation-adjusted earnings between 2001 and 2006 – reveals another facet of cultural industries. Cultural workers are conveniently demonized by neoliberal governments as members of a separate “creative class”<sup>4</sup> working in industries that receive “hand-outs” while other, non-cultural industries receive investments. During his 2008 election

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<sup>1</sup> A. McRobbie, *Everyone Is Creative: Artists as Pioneers of the New Century*, in T. Bennett and E. Silva (eds.) *Contemporary Culture and Everyday Life*, Sociology Press, Durham, 2004, 184-210.

<sup>2</sup> Cultural Human Resources Council, *Cultural HR Study 2010*, Conference Board of Canada, Ottawa, 2010.

<sup>3</sup> B. DeMara, ‘Starving’ Artists Getting Poorer, in *Toronto Star*, February 9, 2009, L7.

<sup>4</sup> R. Florida, *The Rise of the Creative Class: And How It’s Transforming Work, Leisure, Community and Everyday Life*, Basic Books, New York, 2002.

campaign, Prime Minister Stephen Harper defended a \$45 million cut to arts and culture funding, arguing that “when ordinary working people come home, turn on the TV and see [...] a bunch of people at, you know, a rich gala all subsidized by taxpayers claiming their subsidies aren’t high enough [...] – I’m not sure that’s something that resonates with ordinary people”<sup>5</sup>. These cuts were coincident with the beginning of the economic recession, during which employment rates fell in cultural occupations – with the exception of heritage collection and preservation – after having increased for several years<sup>6</sup>.

As Vosko, Zukewich and Cranford<sup>7</sup> *et al.* have shown, the standard employment relationship (9 to 5, full-time, permanent work on the employer’s premises or under the employer’s supervision) has not been the standard for over one-third of Canadian workers. Rather, a growing number of labour market participants patch together multiple poorly-remunerated part-time temporary / contract positions, with unionization which can only provide little regulatory protection. The Cultural Human Resources Council has found that while cultural workers in Canada have proportions of part- and full-time employment resembling those of the Canadian labour force as a whole, their rate of self-employment is especially high; in particular, over 40% of creative and artistic production workers are in the precarious position of being self-employed<sup>8</sup>.

Our project on cultural work during a time of recession explores the career paths of eight individuals who had collaborated on a theatre production in the early months of 2008. The span of the study – from May 2008 to April 2011 – thus covers a three-year period during which workers witnessed the onset of recession and its following upsurge. In this paper, we focus on the health and safety-related aspects of their work. From the fact that live theatre requires “bums in seats”, audiences that are both material and local, as well as the coordination of material objects with material bodies, one might readily conceive of certain specific health and safety issues that might arise, for example, regarding the use of fire on a stage. However, our findings move well beyond stage safety practices. In the three-year period under study, these eight erstwhile collaborators had, among them, held a staggering 412 jobs, both inside and outside the

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<sup>5</sup> B. Champion Smith, *Arts Uproar? Ordinary Folks Just Don’t Care, Harper Says*, in *Toronto Star*, September 24, 2008, p. A1.

<sup>6</sup> Cultural Human Resources Council, *op. cit.*

<sup>7</sup> L. Vosko, N. Zukewich, C. Cranford, *Precarious Jobs: A New Typology of Employment*, in *Perspectives on Labour and Income*, 2003, vol. 4, n. 10, (Accessed September 5, 2012).

<sup>8</sup> Cultural Human Resources Council, *op. cit.*

cultural sector, from acting coach, baker, and census enumerator through to usher, video store clerk, and wedding photographer. This figure points to conditions of extraordinarily precarious labour and directs our attention to the organization of the production system and the relations of production in cultural work.

Accordingly, we take a labour process approach to examining the links between the structural conditions of creative work and the health and safety of cultural workers, a group whose challenges are more often glamorized than taken seriously. In so doing, we illuminate some of the distinctive ways in which work in the cultural sector is charged with uncertainty about work schedules and future work, “employment relationship effort” (i.e. efforts to stay in employment, to deal with multiple employers and / or worksites, and to face constant evaluation), and shapes the “employment relationship support” garnered from individuals, households and unions. Both these terms are drawn from Lewchuk, Clarke and de Wolff’s<sup>9</sup> model of factors impeding precarious workers’ physical and mental health, which we both apply and gently critique.

## 2. Methodology

In winter 2008, the first of the two co-authors had participated in a small, independent Toronto theatre production that involved 11 cultural workers, herself included. In 2011 and 2012, we interviewed eight of these 11, including the co-author, about their cultural – and other – work. The project had been approved by our universities’ research ethics committees; in particular, research participants were assured in written informed consent documents that their decision about whether to be involved in the study held no consequences for the possibility of future collaboration. All names used here are pseudonyms and job titles are lightly edited to increase anonymity. Five of the participants were women, three were men, none were members of visible minority groups, and all but one, the co-author in her late 40s, was in their early 20s to mid-30s. The interviews covered a wide variety of topics including biographical trajectories, education and training, jobs held in the three years following

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<sup>9</sup> W. Lewchuk, M. Clarke, A. de Wolff, *Working without Commitments: Precarious Employment and Health*, in *Work, Employment and Society*, vol. 22, n. 3, 2008, 387-406.

the end of the 2008 theatre production, and job-seeking strategies. The interviews were two to six hours long, and were followed in a few instances by email exchanges to fill gaps or seek clarifications. The result was rich, thick data. Further, the first author annotated the transcripts with contextual information about Toronto and its theatre scene, e.g. the size of various theatres that were mentioned, or about shows that the participants had been involved in that she herself had seen.

The second coauthor, who possesses expertise in occupational health and safety, conducted the initial analysis, grouping material into conceptual categories, comparing for congruency and determining similarities and overlaps of the themes<sup>10</sup>. The coauthors then took turns revising the analysis until saturation<sup>11</sup> was reached, iteratively rereading the transcripts, grouping material in conceptual categories, refining the emerging themes, assigning interpretative meanings, and comparing findings to those in the literature. This approach led us to focus on the organization of the respondents' cultural work and the resulting health and safety implications.

That a mid-career academic is among the research participants, while the remainder are young adult members of what Bourdieu dubbed the "precarious generation"<sup>12</sup>, might be considered to skew the sample's income and education statistics or even to alter the structure of the analysis. We note that in this coauthor's experiences in cultural work, she has frequently encountered others in well-established non-cultural careers – in counselling or banking, information technology or research consulting – creating cultural products as an avocation or an exploration of the possibility of a cultural career. This is but one of the several ways in which the definition of cultural work as "work" becomes blurred. We specify whenever examples are drawn from the interview with this coauthor, provide a footnote showing how the main statistics reported would alter in her absence, and indicate directly when the interview with her is drawn upon to make a point no other participant's interview corroborates.

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<sup>10</sup> Y. Lincoln, E. Guba, *Naturalistic Inquiry*, Sage, Beverly Hills, 1985.

<sup>11</sup> *Ibid.*

<sup>12</sup> P. Bourdieu, *Acts of Resistance: Against the Tyranny of the Market*, trans. R. Nice, New Books, New York, 1999.

### 3. Results

In the sections that follow, we first provide an overview of the participants' jobs, and, second, detail the labour market conditions in which their remuneration for creative cultural work was generally low, and frequently nil. Third, we take up the psychological impact of the participants' labours of love in the cultural sector, and fourth, the broader health and safety implications of the participants' incessant cultural work-seeking. The risks incurred by the combination of creative cultural work with other precarious work form our fifth topic. Sixth, we examine specific health and safety issues that participants confront in unregulated – or underregulated – creative cultural worksites.

#### 3.1. Overview of Participants' Jobs

As stated earlier, in the three years since they went their separate ways, the eight research participants had held a reported 412 jobs<sup>13</sup>. The participant who held the largest number of them (208) was one of the two with burgeoning photography businesses, while the coauthor was the participant who had held the fewest (9). The median number of jobs among all the participants was 25.5<sup>14</sup>.

We sorted the jobs into three categories: (1) 341 jobs that involved creative work in the cultural sector, e.g., as acting coach, choir director, comic book writer, digital publicist, film extra, headshot photographer, set painter, and sketch comedian; (2) 37 jobs that fell outside the cultural sector, e.g., bartender, fast food promoter, and secretary; and (3) 34 jobs falling in a middle ground of non-creative work within the cultural sector, e.g., box office sales, community centre administration, and music teaching<sup>15</sup>. According to this categorization, the participants had held

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<sup>13</sup> Absent the co-author, the seven remaining participants would have held 403 jobs, a participant who had held 15 jobs would have held the fewest, and participants would have held a median of 33.0 jobs.

<sup>14</sup> This figure is likely an underestimate, since the co-author's continued familiarity with other participants' careers enabled her to prompt them to report 35 jobs that they would otherwise have omitted. Further, had we to have attempted to disentangle the information about jobs in which multiple roles were entwined, e.g., Composer / Performer / Choir Director / Audio Engineer, the interviews would have become prohibitively long; thus, such combined jobs are typically counted as one.

<sup>15</sup> The sorting of non-creative vs. creative jobs in the cultural sector was based on participants' accounts rather than standard industrial classification systems. For example,

medians of 17.0 creative jobs in the cultural sector, 3.5 jobs in other sectors, and 1.0 non-creative job in the cultural sector<sup>16</sup>.

### *3.2. “Don’t Do the Math”: Remuneration in the Cultural Sector’s Secondary Labour Market*

The very quantity of the participants’ creative positions in the cultural sector speaks to how the risks and uncertainties inherent in the production processes and outcomes of cultural industries are downloaded onto those working in the industries. All cultural projects are end-dated: even the legendary 60-year run of Agatha Christie’s *The Mousetrap* replaces its cast annually<sup>17</sup>. The participant who had held the lone permanent position that had not been generated through self-employment had quit it after a traumatic three months. Thus, the greatest continuity in creative work was reported by an actor who looked forward to a third summer in which she would hold a seven-week contract with an outdoor theatre company, as well as again donating her time to its annual fundraiser.

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a music school teacher assigned to teach keyboard without headphones to 20 to 30 students felt “the choice was either to not give a damn or blow a gasket in class”; this position was accordingly categorized as non-creative. At times the sorting had an arbitrary element, as when a photographer waffled over whether her work was “art” or simply “artful” (i.e. what she deemed non-creative).

<sup>16</sup> Absent the co-author, the participants would have held a total of 333 creative jobs in the cultural sector, with 21.0 being their median number of such jobs. Medians of 5.0 and 2.0 jobs would have been in other sectors and in non-creative cultural work, respectively.

<sup>17</sup> St Martin’s Theatre, *The Mousetrap Performance Program*, St. Martin’s Theatre, London, 2011.

*Table No. 1 – Characteristics of Participants' 341 Creative Cultural Jobs.*

<b>Compensation</b>	
At a loss	5
Unpaid	91
Paid *	229
Missing data	16
<b>Producer</b>	
Self-produced	20
Produced by others *	321
<b>Duration</b>	
Less than a day	49
Over 1 day, up to 1 week	43
Over 1 week, up to 1 month *	208
Over 1 month, up to 3 months	19
Over 3 months, up to 6 months	9
Over 6 months, up to 1 year	6
Over 1 year	7
Missing data	1

*Note: \* marks how participant Althea's paid photography jobs were categorized.*

*Source: Authors' own elaboration.*

The typical creative cultural job that our participants held was one week to one month long and remunerated (Table No. 1), though that conclusion is swayed by participant Althea's 180 one-week long paid photography jobs; when these are omitted, the balance shifts decidedly toward unpaid work of up to one week's duration. Cultural industries are subject to the same structural forces as other industries, notably labour market segregation and gendered and racial segregation. These structural forces cannot readily be studied using a sample of three men and five women, all of them white. However, we can note that primary labour markets are characterized by a small number of jobs offering security, promotion, high wages and benefits in exchange for experience, education, and loyalty, while secondary markets are characterized by low wages, high turnover, and the impossibility of improving one's position by acquiring additional

education and training<sup>18</sup>. In the Canadian cultural work context, primary labour market jobs are largely unionized ones, e.g., in the Canadian Actors' Equity Association (the 6000-member theatre, opera, and dance union), and ACTRA (the 22,000-member Alliance of Canadian Cinema, Television, and Radio Artists, which also includes digital media artists). Like other primary labour market jobs, these are rationed, leaving most cultural workers ghettoized without protections, security, and sustaining incomes.

Our research participants were cognizant of how the economic downturns had led to the loss of primary labour market opportunities in the cultural sector. One actor who had gone to London (England) for Shakespearean training rhymed off the demises since 2005 of several Toronto-area outdoor Shakespeare companies. Another, who had auditioned for a training program that provided background work contracts at the Stratford Festival – Canada's largest theatre festival – received a rejection letter saying, “The recession had hit the Festival pretty hard and they were going to have fewer jobs this year, and in a year when Festival veterans were going to be losing their jobs, it didn't make sense to be training new ones.” The largest new employment source that the participants mentioned was Nuit Blanche, an annual, overnight contemporary art festival that had its inception in Toronto two years before the recession set in. Although Nuit Blanche now contributes \$37.2 million to the local economy<sup>19</sup>, during the period surveyed, it provided only four of the participants' 341 creative culture sector jobs.

By our participants' accounts, of these 341 jobs, only a pair of one-week contracts in acting and in production management, participant Althea's numerous photography jobs, and participant James's \$5000 day of performing in Costa Rica in an antacid commercial were remunerated at anything resembling primary labour market rates; the preponderance were for pay so low that Pupo and Duffy would deem it coercive<sup>20</sup>. Further, as is common in the secondary labour market, education had no bearing on pay. For example, James, who holds an MA in Drama, estimated that he had typically done film, TV and commercials acting for \$400/day, sideshow freak work for either \$0 or \$40 per show, stage acting for an

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<sup>18</sup> See P. Doeringer, M. Piore, *Internal Labor Markets and Manpower Analysis*, Heath, Lexington, 1971; D. Gordon, R. Edwards, M. Reich, *Segmented Work, Divided Workers: The Historical Transformation of Labor in the United States*, Cambridge University Press, NY, 1982.

<sup>19</sup> Scotiabank Nuit Blanche, *Event history*, n.d., (Accessed August 30, 2012).

<sup>20</sup> N. Pupo, A. Duffy, *Unpaid Work, Capital, and Coercion*, in *Work Organisation, Labour and Globalisation*, vol. 6, n. 1, 2012, 27-47.

average of \$1/day, and sketch comedy for “shits and giggles” (i.e. a good time). “Ha!” said an MA student, when probed about the pay and hours involved in one of her directing positions, “I made a dollar an hour.” “Don’t do the math”, warned a BFA graduate, who had spent an estimated 190 hours composing, audio engineering, performing and directing a choir in a musical theatre production. We did the math. His \$500 pay meant that he had earned \$2.63/hour for his work on this production; in another, 60 hours of work had led to “a 20 percent share of zero profit.”

The participants were stymied by their distance from the better-paid primary labour market, with one actor saying “that professional sphere, the like Equity Association professional sphere, is closed [gestures its remoteness].” Several participants felt membership in Equity and ACTRA would initially close doors to them. Molly was the participant who was nearest to attaining union membership, having accumulated half of the job credits required to become an apprentice member of Equity. However, she was concerned about this prospect, because it would place her “in a much bigger pool, and it’s a tenuous transition – a pool of Fiona Reid [a leading Canadian stage actor] and people who are 15-year veterans of Stratford.” Thus, participants perceived an arduous road before them, even if they did enter the primary labour market.

### *3.3. The Psychological Costs of a “Labour of Love”*

Meanwhile, each participant had been doing unpaid creative cultural work, with five of the eight reporting fewer paid jobs than jobs that were unpaid or held at a loss<sup>21</sup>. Frequently they worked for nothing in order to immerse themselves and gain experience in a field that brought them “enchantment” and “joy and wonder”; as Gill and Pratt put it, a romantic “vocabulary of love is repeatedly evinced”<sup>22</sup> in projects on cultural work. Indeed, participant Nicole spoke of “love” eight times in her interview, in one instance tellingly using the expression “love project” to characterize work done at a loss. In “I got the job because I gave myself the job” scenarios, the participants contributed both financial and human capital to

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<sup>21</sup> Absent the co-author, four of the seven remaining participants had held more unpaid creative cultural positions than paid/at-a-loss ones. The co-author had funded three of the five projects that were done at a loss.

<sup>22</sup> R. Gill, A. Pratt, *In the Social Factory? Immaterial Labour, Precariousness and Cultural Work*, in *Theory, Culture & Society*, 2008, vol. 25, n. 7-8, 1-30, 15.

their creative cultural work in 20 situations, mounting theatre productions of varying success and writing music, fiction, and scripts that might or might not lead to future pay.

However, the bulk of the 91 creative cultural sector jobs that they undertook for free were not self-produced. In other industries, “rate-busting” would be the label for working for pay rates and in conditions that would be unsustainable in the long-term. The group continually grappled with aspects of skill devaluation implicit in unpaid work. “It’s always a piss-off,” said Nicole, speaking of an unpaid photography job, “when you do something for free and then they turn around and pay someone else to do the same job.” Another participant turned to the unexpected figure of her tax accountant to validate her professionalism: “She helped me recognize that the things that I do are professional. I can claim my expenses; they’re not *indulgences*, personal flights of fancy, wastes of time because they ‘don’t make money.’”

Some participants generalized the sense of devaluation, speaking of the arts as societally undervalued or of the arts community as self-devaluing. One participant wondered why “things that are sometimes brief and require less of me as an artist pay more than the soul-searching gut-wrenching that pays nothing.” Another thought that artists were schooled to feel money matters were “lowbrow when you’re an artist talking about Human Truth. It’s pedestrian. And that’s exploited by people who hold the pocketbooks.” A third maintained, “If you’re not gonna pay your actors, you’re gonna get shitty actors and your play is gonna suck. Most plays suck.” Although Lewchuk, Clarke and de Wolff’s employment strain model<sup>23</sup> is one we will show to be valuable in understanding health and safety risks in the cultural sector, it falls short here. This model does not include predictors specific to the knot of unease, mistrust, doubt, and anger of seeing one’s cherished efforts so broadly discounted, and of seeing one’s passion harnessed by post-Fordist capitalism<sup>24</sup>.

Many participants were also working for low or no pay alongside, or as part of, developing their networks. In the theatre world, as elsewhere, both immediate connections and “the strength of weak ties”<sup>25</sup> mattered. At times, participants thrived on their networking successes, happily relating that they had received a reference letter from a prominent director, or speaking comfortably of “leveraging” friendships and

<sup>23</sup> Lewchuk, Clarke, de Wolff, *op. cit.*

<sup>24</sup> See Gill, Pratt, *op. cit.*

<sup>25</sup> M. Granovetter, *The Strength of Weak Ties*, in *American Journal of Sociology*, vol. 78, n. 3, 1973, 1360-1380.

relationships. In other instances, they found it trying that networking should be the key to finding work. One was embittered that “the way you get to work with somebody you want to work with is you lick their boots for five years until they trust you to hold their pencil.” “I over-think it into complete anxiety”, said another, contemplating the chore of working a crowd – one of the several ways that work and leisure time and spaces blurred together for cultural workers<sup>26</sup>. The cautionary story a third participant told, of being hired by a national award-winning artist who sent an email midway through their project announcing that her agreed-to pay would be halved, shows the sinister face of “leveraging” in a closely-networked community<sup>27</sup>.

Turning to Lewchuk, Clarke and de Wolff’s model<sup>28</sup>, then, we construe networking as paradoxically providing both employment relationship support (i.e., a sense of community support) at the same time as it added employment relationship effort (i.e., through constant evaluation). Our data do not permit us to assess which of these outweighed the other for our participants; indeed, Gill and Pratt contend that researchers studying cultural work should stop oscillating between talk of the positives and talk of the negatives of networking and the other affectively-associated elements of cultural work, and instead arrive at ways of “thinking these together”<sup>29</sup>. In discussing the job-seeking side of their employment relationship efforts, though, most of our participants were plainly quite stressed, in ways that Lewchuk, Clarke and de Wolff<sup>30</sup> have associated with physical pain, exhaustion, sleep problems, and headaches. We turn now to elucidating pertinent aspects of the creative cultural work search.

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<sup>26</sup> For a discussion, see A. Neff, E. Wissinger, S. Zukin, *Entrepreneurial Labour among Cultural Producers: “Cool” Jobs in “Hot” Industries*, in *Social Semiotics*, vol. 15, n. 3, 2005, 307-334.

<sup>27</sup> For related discussions of gatekeeping in the Australian music industry and of “flexploitation”, see, respectively: C. Gibson, *Cultures at Work: Why ‘Culture’ Matters in Research on the ‘Cultural’ Industries*, in *Social & Cultural Geography*, 2003, vol. 4, n. 2, 201-215; and G. de Peuter, *Creative Economy and Labour Precarity: A Contested Convergence*, in *Journal of Communication Inquiry*, vol. 35, n. 4, 2011, 417-425.

<sup>28</sup> Lewchuk, Clarke, de Wolff, *op. cit.*

<sup>29</sup> Gill, Pratt, *op. cit.*, 16.

<sup>30</sup> Lewchuk, Clarke, de Wolff, *op. cit.*

### 3.4. “Feverishly Applying”: Health & Safety in Seeking Creative Cultural Work

As Table 2 shows, most of the creative cultural work our participants found was of brief duration, requiring a median of “over one week, up to one month”. Some positions routinely required only one day’s work, such as singing in a pub or presenting a sideshow freak act in an evening of burlesque performances, though development of a theatre production from script-writing to staging more commonly took up to six months. Gaps in creative cultural work could demoralize. “What I find hardest about the profession”, an actor said, “is the psychology, the confidence, the believing the next audition will be worthwhile, the believing when you’re not acting, you’re still an actor.”

Given the brevity of most of their creative cultural jobs and their passion for them, most participants made continual efforts to seek or create new cultural work opportunities, in work-seeking that could consume hours, amounting to an unpaid job in itself. “Getting a foot in the door is very complex issue”, a director explained: “It’s basically trying to become CEO.” A playwright recounted spending 10 hours on each application for a grant that could partially support her writing. And, one actor had even decided to call himself “retired”, which did not so much mean that he had left off acting as that, “I didn’t have to feel guilty about not doing anything, so that if I spent an afternoon where I wasn’t feverishly applying for auditions, then that was fine.” Auditions themselves could take anywhere from “probably two minutes” to “hours of your life”. Preparing for them could consume yet more time, depending on whether the actors were given five minutes or three weeks to study a script. Up to 1.5 uncompensated hours might be spent in waiting rooms<sup>31</sup>.

Auditioning demanded not only time, but enormous psychological resources. Once in casting rooms, actors had to contend with the possibility of being rejected simply for not fitting the physical type that a casting director envisioned. Molly said she found herself thinking “I don’t want any part of this” when surrounded by “six-foot blonde bombshells flipping their hair back and reapplying their make-up for the fifth time.” Leonard remained embarrassed by the memory of going to an audition where he was told that, for both unfilled roles, “We’re looking for Morgan

<sup>31</sup> Note that ACTRA members are paid for call-backs (to a 2<sup>nd</sup> or subsequent audition) and for waits of over one hour, according to ACTRA, *National Commercial Agreement between the Joint Broadcast Committee of the Institute of Communication Agencies and The Association of Canadian Advertisers and ACTRA*, October 31, 2011 to June 30, 2014, 2011, (Accessed September 2, 2012).

Freeman types.” A white man in his 30s, he tried out all the same, adopting a gravely tone. The casting company altogether stopped inviting him to their auditions – a reflection, Leonard worried, that they thought his judgment poor. That industry practice is to contact only successful auditioners meant that he would never know for certain.

The mix of desire for work and the dwindling of job opportunities was a potent one, facilitating the possibility of sexual harassment and scams in auditions and elsewhere. Molly recounted a conversation in which she learned that an acquaintance of hers had taken a theatre workshop with a warm-up in which “everybody has to be naked.” Though Molly considered such a warm-up as “verging on abusive, it’s so manipulative”, her acquaintance replied, “If you’re not willing to go there, you’re not ready to call yourself an actor.” The co-author had a “creepy” experience when she was seeking to cast an adult actor to take part in a children’s fairytale play. Observing that one candidate flirted with her throughout the audition, she wondered, “Wow, where did he learn that? He must have thought it would work.” In the absence of shop steward or union representation, James recounted how a co-star had sought advice about whether to accept an unpaid role in a film in which the director – who would also be the producer, writer, and cameraman – planned a graphic lesbian sex scene set in his own apartment. “When all you do is spend all day hoping for yourself and getting rejected,” James said, “sometimes when somebody asks you to do something any sane person would say ‘no’ to, you’re: ‘Maybe this is my big break.’”

It should be noted that legitimate members of the secondary labour market fairly commonly conduct auditions, rehearsals, and film shoots in private homes or other non-professional setting, saving their shoestring budgets \$15 per hour in studio rental costs. (In fact, the co-author first met most of the participants in a private home where auditions were being held for their joint project). Working in homes incurs a number of risks, some to be addressed later. Its impact here is to magnify the ambiguities surrounding auditions. Molly told of being approached in Toronto by a stranger who called himself a film actor. He claimed that she looked familiar and handed her a card, saying to her: “Come tomorrow, come to this apartment.” Long afterward, Molly worried about what might have happened to anyone accepting this disquieting invitation. Meanwhile, James had gone for an audition at a private home, only to be met at the door by a man clad in boxer shorts, who ultimately attempted to enlist him in a pyramid scheme.

### 3.5. “Flexible and Disposable”: Health Risks of Work in Precarious Combinations

Although the greatest *quantity* of jobs that the participants held were creative ones in the cultural sector, given the low income from these jobs, each participant derived the greatest part of their income elsewhere – in box office management and sales, as a music teacher, as a bartender-server / business manager, as a census enumerator / bookstore salesperson, as a secretary, and as a professor. Their median income was \$29,992 (\$29,000 if the coauthor is omitted). Although among them the participants had three college diplomas, eight Bachelor’s degrees, two MA degrees, and one PhD (the co-author’s), this median was slightly more than what Statistics Canada had reported for 30-32 year old high school graduates’ income in the year 2000<sup>32</sup>. Only three participants mentioned having employer-paid health benefits in the three-year period covered by the study. Two participants who hoped to have children wondered whether it would be feasible, as “the difference between subsistence for two and subsistence for three is pretty great. When expressed as a ratio, it’s 33 point 3 repeating.” Further, as Rusch-Drutz discusses, the schedules required in theatre work often mesh poorly with those of parenting<sup>33</sup>. Participants’ options for lines of work outside the creative cultural sector were largely constrained by the distinctive schedules that most of their creative cultural work demanded; Gill and Pratt call the resultant work patterns “bulimic”<sup>34</sup>. Actors needed to be able fit unpredictable chunks of audition time into their schedules at unpredictable intervals with as little as a day’s notice. Actors, directors, music directors, and assistant directors had to be able to block out time for rehearsals, where an industry adage is that one minute on stage requires one hour of rehearsal. Composers and designers of sets, costumes, props, and lighting could often work more independently for most of a production, but the final technical and dress rehearsals usually involved entire production teams. Writers, on the other hand, described their work as least dependent on others’ schedules, yet time-consuming nonetheless. “My mind has to just always be there”, said one of the several writers in the sample.

<sup>32</sup> Statistics Canada, *What Difference Does Learning Make to Financial Security?*, January 2008, (Accessed September 2, 2012).

<sup>33</sup> C. Rusch-Drutz, *Stage Mothers: A Qualitative Analysis of Women’s Work Experiences as Mothers in Toronto Theatre*, in *Journal of the Association for Research on Mothering*, vol. 6, n. 2, 2004, 90-101.

<sup>34</sup> Gill, Pratt, *op. cit.*, 14.

For six of the eight participants, though, complementing their fitful creative cultural work schedules with shift work was the most feasible way to make a living. (The two others had found permanent part-time secretarial work or were the co-author.) A participant who was a bartender/server in several different establishments reported typically working five 5:00 p.m.-1:00 a.m. shifts per week at one of them, dropping to three shifts a week when she had cultural industry contracts. “[Bar jobs are] not satisfying for what my capabilities are”, she said, “but they are definitely satisfying in terms of financial freedoms, in terms of the ability to fluctuate your schedule, which every artist loves”. Another participant, Cynthia, tellingly characterized bookstore shift work as meeting her need for “something in a big company that’s flexible and disposable”.

The irony, of course, is that part-time workers themselves are regarded as flexible, disposable, and exploitable by their employers. As a participant put it, the expectation is to “give your life and soul to your crappy minimum wage part-time job”. In Lewchuk, Clarke and de Wolff’s model, efforts to keep employed, having multiple employers, working at multiple locations, and facing constant evaluation all figure into employment relationship effort, with attendant health consequences<sup>35</sup>. Participants’ stories of job quitting were of insult added to injury. Frustrated at being assigned coffee shop shifts that lasted only three hours, one participant quit upon being warned that taking shifts at a different coffee shops would constitute “a conflict of interest”. Another, teaching tearful and reluctant children in a music school, was paid with late and bouncing checks but noted, “When you’ve got nothing else you put up with it.” His tipping point came when he was told his pay would be cut by \$2 per hour. When a third told her employer that she was quitting a part-time contract job that made her “violently ill”, he made a pass at her. (“I puked a little in my mouth,” she said.) In drawing direct links between “toxic” workplaces and her wellbeing, this participant was similar to two others who spoke of chronic conditions that were aggravated by stress.

Non-creative work in the cultural sector, especially in Toronto’s large performing arts venues, seemed to offer a solution to several participants. “It just sounded like at least a joe job that had something to do with what I wanted to do”, said Cynthia, describing why she left off bookstore shift work to usher and tend bar in an arts venue. She, like the two other participants working in box offices, was assured that she would have the scheduling flexibility her creative work required. Our interviews cast

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<sup>35</sup> Lewchuk, Clarke, de Wolff, *op. cit.*

doubt on this. Another box office staffer who considered his workplace to be “understanding” nonetheless spent a gruelling 47-hour day combining a pair of sales shifts during a Christmas rush with a pair of nights filming on location, and only two hours of sleep. A third box office staffer had spent three weeks in 10:00 a.m.-5:00 p.m. rehearsals, followed by 6:00 p.m.-9:00 p.m. box office shifts, coming home to an empty fridge. Just as Cynthia had done when combining theatre and bookstore shifts, this staffer had worked over 80 hours a week for a sustained period. In the United States, such a schedule is now banned for medical interns because of its association with burnout, depression, and serious error<sup>36</sup>; in Japan, labour researchers examine the phenomenon of *karoshi* – “death by overwork”<sup>37</sup>.

Participants sometimes emphasized these extremes, with remarks such as “one of the things that I love about performance is that you can ask an actor to do that, but if you went to a banker and told them a 47-hour day, they would tell you to go to hell.” But, “everyone’s so tired”, said Cynthia, who would catch herself napping in her assistant director’s seat when stage lights were low. Another participant told a cautionary tale of an acquaintance who had given up a small theatre space that he owned and ran, “keeping it alive living in an apartment space at the back. He had no life. He said to me, “This is what I’ve done 24/7 for probably ten years. [...] I’m going crazy, I need to live.” Numerous studies have explored the impacts of working long hours, including fatigue, sleep disturbance, acute stress, workplace accidents, and declining cardiovascular health<sup>38</sup>, with Gill and Pratt summarizing research specific to cultural workers<sup>39</sup>.

<sup>36</sup> R.N. Wilkey, *Federal Whistleblower Protection A Means to Enforcing Maximum-Hour Legislation for Medical Residents*, in *William Mitchell Law Review*, vol. 30, n. 1, 2003, Art. 18, (Accessed September 2, 2012).

<sup>37</sup>A. Kanai, “*Karoshi – work to death*” in Japan, in *Journal of Business Ethics*, vol. 84, 2009, 209-216.

<sup>38</sup> For example, see: J.V. Johnson, J. Lipscomb, Long Working Hours, *Occupational Health and the Changing Nature of Work Organization*, in *American Journal of Industrial Medicine*, vol. 49, n. 11, 2006, 921-929; A. Spurgeon, M. Harrington, C.L. Cooper, *Health and Safety Problems Associated with Long Working Hours: A Review of the Current Position*, in *Occupational and Environmental Medicine*, vol. 54, 1997, 367-375; and M. van der Hulst, *Long Work Hours and Health*, in *Scandinavian Journal of Work, Environment & Health*, vol. 29, n. 3, 2003, 171-188.

<sup>39</sup> Gill, Pratt, *op. cit.*

### 3.6. “Never Say No”: Safety Issues in the Creative Cultural Workplace

As discussed earlier, participants’ education and training had little bearing on what they were paid for their creative cultural work. At the same time, we noted that they often took on challenges for which they had no education/training, in unregulated workplaces, and / or in preparing acts under the aegis of self-employment. These factors make for potentially serious safety issues. “Never say no” was the motto one participant took away from her first lighting design, though implementing such designs would, in a regulated workplace, require ladder training. The co-author told of turning one room of a private home into a design studio, where she painted with indifference to the fumes, and aged a costume by setting fire to it, which she described as “really fun: I began to understand pyromania.” That she would readily consider identical activities hazardous in her academic workplace is indicative of the ethos of bravado more generally infusing cultural worksites, represented most extremely by James, a sideshow freak who described standing in front of the mirror preparing to put a mousetrap out on his tongue. When asked who would be liable were he injured, James replied, “I could go after the producer of the show because they asked me to put myself in danger, but that’d be a douchey thing to do, so I’ve never signed an agreement of any sort. I think it’s just assumed that the performer is looking out for themselves.” Were James to be injured in his home, being without an employer would leave him even less legal recourse.

Moreover, the default position of theatre artists is to abide by directors’ direction. Thus, even a participant who had told a director that she didn’t know how to do sound design could be over-ridden with, “‘Okay, well, you’re going to do sound design.’ He just kind of threw me in the pool, and I did it.” Although this situation entailed no risks, others did. An actor summed up his assigned tasks for a film role as “*Same as usual*: Learn my lines, make choices for my character, *take direction*, but there was the additional thing of being underdressed, covered with stage blood, and standing in the snow for eight hours.” [Italics ours]. When James was cast to act as a marauding Chimp, he was expected to wear a headpiece “held together by fancy chemical glues. You’re wearing a mask, breathing through here [points to the eyeholes], and huffing and every time you take a breath, it’s mostly CO<sub>2</sub> filled with chemicals and not actually breathable air. You do two scenes, pull the head off and lie down.” In this instance, film regulations made a difference. When James could not see well enough to think he could safely break a sideview mirror off a moving car, a stuntman was cast as the Chimp and James was assigned another role.

However, one can imagine a situation in which a desperate actor would not speak up, especially after a production company had invested in creating a Chimp costume requiring a full-body cast.

Working in un-regulated workplaces without protection of collective agreements and occupational health and safety legislation, these workers can be subject to profound and unique risks arising from the work and the way it is organized. Few other types of workers face a completely unpredictable situation. Nicole was left to handle at an overnight arts festival where the event she was assigned to manage attracted “close to half a million people over the course of 12 hours”, including a hazardously-driven bus that was being followed by 750 partying ravers. “It’s very satisfying when none of your actors die,” was her summary of the night.

#### 4. Conclusion

The organization of creative production has some unique characteristics that engender health consequences for its workers. Cultural workers’ employment relationships for any of the multiple jobs they might hold at a given time are embedded in a complicated web of contracting, sub-contracting, employment and self-employment. From our interviews with eight cultural workers, we found that many changed their relations to the means of production and crossed over from employee to self-employed, from independent to dependent contractor, often several times in a single day, within a single work project. Even within the same production, participants perform routinized and non-routinized, craft, technical and professional jobs, each with different terms of employment. They are waged employees in some instances, while, in others, they own the means of producing and distributing their cultural outputs.

Their ambiguous status places these workers somewhere between the definitions of employee, dependent contractor, and self-employed. As a result they are denied basic forms of protection of minimum wage and occupational health and safety legislation<sup>40</sup>. These regulatory regimes were designed to deal with permanent employees in large workplaces and are configured for the small, distributed workplaces with high-turnover of staff and attenuated chains of sub-contracting that characterize the

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<sup>40</sup> J. Fudge, *Labour Protection for Self-Employed Workers*, in *Just Labour*, vol.3, 2003, 36-45.

cultural industries<sup>41</sup>. Labour regulations governing minimum wage, employment insurance, and occupational health and safety require updating if they are to reflect the reality of dissolving distinctions between types of employees and self-employed (Fudge, 2003). The cultural workers explored in this article would be among the beneficiaries of such social policy changes.

Arguments against such regulations abound. Labour standards for safe, decent work, such as the ILO's universal floor of rights, are often perceived as obstructing economic development. As the well-known economist, Paul Krugman, argues, "bad jobs at bad wages are better than no jobs at all"<sup>42</sup>. Other arguments against regulations come from within the cultural industries: Leger, along with participants who speak with pride of "being willing to put up with more crap because they *want* to", view regulation as too closely associated with the disciplining of radical expression and dissent<sup>43</sup>. Until the debate is settled, the under-regulated precarious work of cultural labourers will be done for "shits and giggles" with deleterious health and safety consequences.

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<sup>41</sup> C. Mayhew, M. Quinlan, *Fordism in the Fast Food Industry: Pervasive Management Control and Occupational Health and Safety Risks for Young Temporary Workers*, in *Sociology of Health & Illness*, vol. 24, n. 3, 2002, 261-284.

<sup>42</sup> P. Krugman, *In Praise of Cheap Labor: Bad Jobs at Bad Wages Are Better than No Jobs at All*, in *Slate*, March 21, 1997, (Accessed September 5, 2012).

<sup>43</sup> M. Leger, *The Non-Productive Role of the Artist: The Creative Industries in Canada*, in *Third Text*, vol. 24, n. 5, 2012, 557-570.



# The Impact of Wage Reform Policies on Industrial Relations in Nigeria's State Universities: A Case for Multi-Employer Bargaining

Emmanuel Unimke Ingwu and Joseph Idagu Ogah \*

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## 1. Introduction and Theoretical Background

The link between education and national development is universally acknowledged. The most straightforward example of this interconnection is that education provides people with knowledge, skills, competence and a positive attitude which are necessary for national economic growth.

Moreover, supplying a high-calibre workforce which can take the nation to greater heights is the main function of the universities<sup>1</sup>.

This point was further stressed by the President of Nigeria, Goodluck Jonathan, during a speech delivered on the occasion of the 50th anniversary of the Nsukka University: "Our Universities must play a central role in rebuilding Nigeria's economy and in meeting our society's most crucial needs; an educated citizenry and a competent workforce"<sup>2</sup>.

With the attainment of independence in 1960, the need to meet the demand for highly-qualified manpower was the major concern facing the national government. The realization of this gap led to the setting-up of

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<sup>1</sup> Federal Republic of Nigeria, *National Policy on Education*, NERDC, Lagos, 2004.

<sup>2</sup> E. J. Goodluck, *Making Nigeria's Education System Globally Competitive*, Paper delivered at the University of Nigeria, Nsukka's 50<sup>th</sup> Anniversary Celebration, 2010.

the Ashby Commission in April 1959<sup>3</sup>. The Commission recommended the establishment of an additional number of universities to fulfil the foregoing objectives. Consequently, universities have expanded in size and number, even more than what the commission envisaged.

This phenomenal increase has been accentuated by the removal of education from the exclusive to the concurrent legislative list<sup>4</sup>. Initially, the 1963 Republican constitution made provisions for higher education to be the joint responsibility of governmental bodies at both federal and regional level. However in the mid-1960s the military took over power and the provision of higher education – particularly that supplied by the universities – was assigned to the federal government on an exclusive basis. The centralized nature of the education system was based on the premise that “the arrangement will ensure adequate funding and orderly development [...] guarantee uniform high standards, and promote national unity and security [...]”<sup>5</sup>. The 1979 constitution amended this arrangement. To some commentators, the existing federal universities could not meet the aspirations and yearnings of the Nigerians for university education; others welcomed moving the issue of education to the concurrent legislative list.

By and large, this provision entrusted the federal government with the power to deregulate the educational system. It has therefore given the States considerable latitude to participate in the supply of higher education. As of 2009, there were 104 universities with a total enrolment of 775,385 students: 61% of them attended federal universities; 33.6% were enrolled in public universities, while the remaining 5.3% were in private universities<sup>6</sup>. The share of those attending public universities is significant, showing that they are contributing to filling the yawning gap in the admission of qualified candidates.

It should be noted that the establishment of universities is only a means to an end. The end is to churn out graduates who are proficient in their chosen vocations and thus can contribute maximally to nation building. Thus, at the centre of the students’ learning outcome are the lecturers. In

<sup>3</sup> A. Aderinto, *Ashby Revisited: A Review of the Growth of Nigeria Universities*, in *Review of Education*, Institute of Education, University of Nigeria, Nsukka, vol. 8, n. 1, 1981, 32-43.

<sup>4</sup> A. I. Goubadia, *The Political Environment of Higher Education Coordination in Nigeria*, in S. Adesina, K. Akinyemi, K. Ajayi, eds. *Nigerian Education: Trends and Issues*, University of Ife Press, Ile-Ife, Nigeria, 1983.

<sup>5</sup> K. Ajayi, *The 1979 Constitutions and the Nigerian Education System*, in S. Adesina, K. Akinyemi, K. Ajayi, K., eds., *Nigerian Education: Trends and Issues*, University of Ife Press, Ile-Ife, Nigeria, 1983, 56.

<sup>6</sup> E. J. Goodluck, *op. cit.*

this sense, their disposition to teach and their dedication to duty might depend on:

- The individual ability, as determined by education, training and experience.
- Their motivation, to wit, the drive and willingness to teach.
- The physical conditions of the situational factors, including monitoring and supervision<sup>7</sup>.

However, the most compelling factor is the motivation and commitment to teach. Lecturers may possess qualifications and expertise, but if they are not adequately motivated, meeting the goals of establishing the universities might be complicated. It is from this perspective that we need to pose the following question: What has been the character and content of the industrial relations system in Nigerian universities? Simply put, what has been the nature of wage policies and conditions of service of the university staff? According to a renowned Nigerian educationist, Pai Obanya, the national university system faces major shortcomings. He argues<sup>8</sup>:

It beats one's imagination to see what happens when academics in Nigeria become part of the "internal brain drain" and are "attracted to other sectors of the Nigerian economy, even government services. They are then usually more highly prized than they would have been in their "natural habitat", the tertiary institutions.

Thus, why are university staff – and particularly academics – disenchanted with the system? Otherwise stated, why are they conducting battles with their respective employers, as portrayed by the incessant strike action taking place at the universities? Are the current wage policy and conditions of service not favourable? What is the current mode of arriving at an acceptable pay policy between the parties involved in the negotiations? Given the current adverse industrial relations atmosphere in the universities, we need to provide answers to these and other questions.

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<sup>7</sup> E. U. Ingwu, E. N. Ekefre, M. E. Bassey, *Trends in Labour-Management Relations in Nigeria's Higher Educational Institutions*, in *SOPHIA* (An African Journal of Philosophy & Public Affairs), vol. 9, n. 2, 2007, 189-196.

<sup>8</sup> P. A. I. Obanya, *Higher Education for an Emergent Nigeria*, Heinemann, Ibadan 1999.

Accordingly, the aim of this paper is to examine the way in which wage reform policies have affected work relations over the years, especially in state universities. The intent is to show how such policies have negatively impacted the teaching and learning processes. The paper will conclude by putting forward an alternative model of wage resolution process that would engender a more favourable industrial relations climate in the national university system. The research approach consists in an historical – and to some extent philosophical – analysis of the development of wage reforms in Nigeria, highlighting the effect on university education.

## 2. Scope of the Study

As the title of the paper portends, this study is focused on public universities owned by federal and state governments. As previously stated, they have enrolled 94.7 percent of students admitted into Nigerian universities, leaving private ones with only a meagre 5.3 percent. In addition, public universities run a range of programmes in almost every field of human endeavour. Hence, their impact on the Nigerian economy is rather pervasive.

Yet private universities in Nigeria have just been recently been established. Extant legislation issuing them with licenses to operate has given them considerable latitude to bar both their staff and students from unionizing (National Scholar, 2007, 3). More than 50 percent of staff engaged in these institutions are either on part-time or on adjunct appointment, some academics are on sabbatical, while others are retirees from public universities. Moreover, the salary paid to lecturers by many of these universities is not as competitive as remuneration paid at public universities. This aspect explains why 60 to 80 percent of academic staff have endorsed the desire to leave at the slightest opportunity<sup>9</sup>. Most of the staff teaching in these universities are there because of unemployment conditions in the economy. They are therefore likely to unionize if given the opportunity. One should also not lose sight of the fact that private universities offer market-driven programs rather than commitment to diverse disciplines. Thus, apart from few missionary universities, proprietors of private universities run them based on profit motive and

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<sup>9</sup> O. A. Erinsho, *The Quality of Nigeria's Private Universities*, *The National Scholar*, vol. 5, n. 7, 4-10.

not necessarily on commitment to quality<sup>10</sup>. Due to these shortcomings in the private universities, we decided to focus our study on public ones.

### 3. Theoretical Framework

This study is hinged on the equity theory of social comparison. The equity proposition is useful in explaining how employees in the employment exchange relationship evaluate their work efforts and judge whether the reward they receive is “comparable” to the treatment given to similar colleagues working elsewhere. As the theory further suggests, if employees believe that they are being paid less than the other comparison persons, then they would reduce their work efforts<sup>11</sup>. Technically stated, the perceived inequity will motivate an individual to achieve equity or to reduce inequity, with the degree of motivation which varies in accordance with the magnitude of the imbalance between the employees inputs – that is, education, competence, experience, efforts, hours of work – and outcomes - to wit salary levels, raises, promotions, recognition<sup>12</sup>.

In attempting to support the validity of the equity theory, most studies have focused on money as the most relevant variable in explaining the workers' behaviour in the workplace<sup>13</sup>. As it applies to wage bargaining, such studies have been quite fortuitous in explaining that a worker may be happier and satisfied only if he perceives that what he is getting is “fair” and “just” in comparison with what someone else with a similar background is receiving. As explained by a number of scholars<sup>14</sup>, the consequences of dissatisfaction with remuneration explained may lead to

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<sup>10</sup> O. A. Erinsho, *op. cit.*

<sup>11</sup> J. S. Adams, *Inequity in Social Exchange*, in L. Berkowitz, ed., *Advances in Experimental Social Psychology*, Academic Press, New York, vol. 2, 1965.

<sup>12</sup> B. E. Kaufman, *Models of Man in Industrial Relations Research*. *Industrial and Labour Relations Review*, vol. 43, n. 1, 1989, 80-93.

<sup>13</sup> P. N. O. Ejiofor, *Equity Theory and Perceptual Differences in Reward Distribution amongst Middle and Lower Managers*, in P. N. O. Ejiofor, A. Aniagoh, eds., *Managing the Nigerian Worker*, Ibadan, Longman, Nigeria, 1984; G. John, *Organizational Behaviour: Understanding and Managing Life at Work* (4th ed.), Harper Collins Publishers, New York, 1996; J. F., Stoner, Freeman, R. E. & Gilbert, D. R. *Management*, (2<sup>nd</sup> ed.), Pitman Publishing, London, 2000. E. U. Ingwu, *The Import of Equity Theory of Labour Relations in Improving Qualitative Teacher Education*, in A. M. Wokocha, ed. *Quality in Nigerian Education: Agenda for Action*, Osai International Publishers, Port Harcourt, 2000.

<sup>14</sup> J. B. Miner, *Industrial-Organizational Psychology*, McGraw-Hill Incorporated, New York, 1992; S. P. Robbins, N. Langton, *Fundamentals of Organizational Behaviour. Canadian Edition*, Prentice Hall, Toronto, 2002.

low productivity, low quality product, absenteeism or turnover. At the other extreme, workers might be possibly forced to redress the inequity by going on strike(s)<sup>15</sup>.

Stoner, Freeman and Gilbert<sup>16</sup> suggest that management in any organization should understand that the feelings of equity stem from a perceptual social comparison process in which the worker controls the equation that is employees decide what is considered to be relevant inputs, outcomes and comparison persons. Employers and management must therefore be sensitive to these decisions at the time of designing equitable wage policies for their employees.

#### 4. Public Sector Wage Determination: A Conceptual Clarification

In the context of the present study, it has long been established that the role played by the forces of demand and supply in wage fixation in the private sector is irrelevant in most parts of the public sector<sup>17</sup>. As suggested by Summers<sup>18</sup>, collective bargaining in public employment is different from that of private employment because government is not just another industry. In the view of Summers<sup>19</sup>:

In private employment, collective bargaining is a process of private decision-making shaped primarily by market forces while in public employment, it is a process of governmental decision-making shaped ultimately by political forces [...]. The introduction of collective bargaining in the private sector restructures the labour market, in the public sector, it restructures the political process.

What Summers is contending here is that public wage determination must be examined as a part of the governmental process.

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<sup>15</sup> E. E. Lawler, *Pay and Organizational Effectiveness: A Psychological View*, McGraw-Hill, New York, 1971; B. E. Kaufman, *op. cit.*

<sup>16</sup> *Op. cit.*

<sup>17</sup> T. Mallier, T. Shafto, *Economics of Labour Markets and Management*, Hutchinson, London 1989.

<sup>18</sup> C. W. Summers, *Public Employee: A Political Perspective*, D. Lewin, (ed.), *Public Sector Labour Relations: Analysis and Readings*, Thomas Horton & Daughters, Sun Lakes, Arizona, 1981.

<sup>19</sup> C. W. Summers, *op. cit.*, 45.

Fogel and Lewin<sup>20</sup> took the debate further by explaining that public employers' demand curves are inferred indirectly through voter-expressed demands for government services and directly through political bargaining between government and employee groups, rather than through a marginal revenue product curve. In their view "the construction of a relevant public sector wage model apparently requires a more explicit consideration of the motivations of public managers and public workers, as well as the political processes through which these motivations are filtered"<sup>21</sup>. However, in suggesting a public sector wage determination model, Fogel and Lewin<sup>22</sup> assign little to no role to the other interest groups – that is, taxpayers – in the wage-setting processes. To the contrary, Summers<sup>23</sup> argues that the political process involved is not that simple. He warns that public employees have to contend strongly with other interest groups competing for a share of the limited budget money. The other interest groups want to keep taxes as low as possible, while wanting government to improve the services provided.

In supporting Summer's arguments, Omole<sup>24</sup> points out that there is a limit to the bargaining power of public servants, as their salaries and wages are paid from taxes, and increases in salaries may necessitate a rise in taxation, a move the government may be reluctant to make because of political implications. Quoting Taylor<sup>25</sup>, Omole substantiates his claim by asserting that "anticipating and allocating salaries income with a profit objective in the private sector is a function quite different from that in the public sector of levying taxes and formulating a legislative budget with its allocations for free or subsidized services designed to enhance the general welfare of the citizenry". This is because in the private sector, "firms can meet the rising cost of labour in a number of ways. These include raising taxes and increasing efficiency, thereby increasing production of goods. But the public sector employee must contend with budget restrictions and taxation limits".

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<sup>20</sup> W. Fogel, D. Lewin, *Wage Determination in the Public Sector*, in D. Lewin, ed., *Public Sector Labour Relations: Analysis and Readings*, Thomas Horton and Daughters, Sun Lakes, Arizona, 1981.

<sup>21</sup> W. Fogel, D. Lewin, *op. cit.*, 373.

<sup>22</sup> *Ibid.*

<sup>23</sup> Summers, *op. cit.*

<sup>24</sup> M. A. L. Omole, *Collective Bargaining in the Public Sector*, in D. Otopo, and M. Omole, eds. *Readings in Industrial Relations in Nigeria*, Malthouse Press Ltd, Lagos, Nigeria, 1987.

<sup>25</sup> G. W. Taylor, *Government Regulation of Industrial Relations*, Prentice-Hall, New York, 1969.

Mallier and Shafto admit that economic analysis alone cannot offer a solution to the problem of pay determination in the public sector. They contend that political forces and organizational structures largely influence pay conditions in public employment through negotiations between representatives of government and trade unions. That is, wage fixation is the result of political struggle and its outcome is largely a function of political power and influence. This implies the ability of one side to inflict expense and loss of public approval on the other. Citing Bowley<sup>26</sup>, Mallier and Shafto conclude that in the absence of market forces as understood in the private sector, adopting “comparability” and or wage indexation” are two major conceptual approaches of overcoming the problem of pay determination in the public sector.

The implication of the foregoing argument is quite clear. Wage determination in the public sector involves questions that are politically, socially, or ideologically sensitive. For instance, in a democratic dispensation, an elected government in power will be disciplined not by a desire to maximize profits but by a desire, in virtually all cases, either to be re-elected or to move to a better elective office<sup>27</sup>. As they further contend, what an elected official like the Governor of a State will give to the Union must be taken from some other interest group(s) or tax-payers. His job is that of coordinating these competing claims while remaining politically viable. Moreover, that coordination will be governed by the relative power of the competing interest groups.

As a result, where for example a demand for higher academic staff salaries in the universities is viewed as involving essentially political costs, the governor may be pressured to accede to the union demands, regardless of whether the former is in a position of “ability (or inability) to pay”. In some cases however, the governor may damn the consequences and call off the union bluff. This can be done depending on the union relative strength, and its ability to turn the public against the union.

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<sup>26</sup> A. Bowley, *Coming to terms with Compensation*. *Personnel Management*, 12, 2, 1980, 14-20.

<sup>27</sup> H. Wellington, R. K. Winter, *The Limits of Collective Bargaining in Public Employment*, in Lewin, D. ed., *Public Sector Labour Relations: Analysis and Readings*, Thomas Horton & Daughters, Sun Lakes, Arizona, 1981.

## 5. The Udoji Commission and the Unified Salary Structure

Admittedly, the major area of friction between the university staff and their employers revolves around wage policy issues and conditions of service, while other matters are relegated to the background. There seems to have been a relatively non-conflictual relationship between university workers and their employers or management at the time universities were established. Things have changed now. Why?

One should recall that between 1960 and 1974 there were only six universities in Nigeria; two federal (Lagos and Ibadan), three regional (UNN, Ife and Ahmadu Bello), and later came the University of Benin. The first five universities formed the basis for the national university system, with Benin joining subsequently. At the beginning, remuneration and conditions of service were unique to the university environment. As Anikpo<sup>28</sup> recalls, "University workers were not part of the civil service scale and they earned relatively more than the civil servants especially at the senior level". A professor then earned more than a permanent secretary. At this initial stage too, academic staff earned more than their non-academic colleagues. Accordingly, there was no salary parity between universities and other public servants, nor was there parity between academic and non-academic staff (Otobo, 1987a). Perhaps this might have been possible due to the centralization of the university on the part of the federal military government, which had made university education an exclusive legislative list.

It should be noted also that the pattern of salary determination in the public service was setting up by wage commissions which advised government on what to pay civil servants from time to time. This system was inherited from the colonial days and had overbearing influence in determining remuneration at the universities at least up to 1992.

The Udoji Salary Review Commission set up by the federal government in 1974 seems to have unsettled the peaceful relationships characterizing the institutions. This Commission introduced into the system an element of unification in the salary awards. In recommending its position to the government, the commission noted that "the unified salary structure will establish throughout the public service the principle of equal pay for

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<sup>28</sup> M. Anikpo, *FGN and ASUU: The Matrix of a Sour Relationship*, in M. Anikpo, ed., *The 2009 ASUU Strike: Issues, Intrigues and Challenges*, Freedom Press and Publishers, Port Harcourt, 2011. D. Otobo, *Bureaucratic Elites and Public Sector Wage Bargaining in Nigeria*. In D. Otobo, M. Omole, *Readings in Industrial Relations in Nigeria*. Malthouse Press Ltd., Lagos, 1987a.

substantially equal work, irrespective of the area of the public sector in which an employee may be engaged” (in Otobo, 1987:261a). As expected, the government accepted this recommendation. By recommending the merger of universities with the main civil service, the Udoji report ensured that academic and non-academic staff and civil servants were placed on the same remuneration scale (Otobo, 1987a)<sup>29</sup>. The report therefore wiped out the little gains made by academic staff resulting from the previous policy<sup>30</sup>.

## 6. The Coockey Commission and the Centralization of Wage Determination

The Udoji salary policy was not accepted by the university academic staff on one major ground: job responsibilities between the civil service and those employed in the tertiary institutions more generally were not similar. Those of the universities, they argued, were much more tedious<sup>31</sup>. What irked the academic staff further was that the Udoji Report awarded a higher pay package to permanent secretaries than to professors, which hitherto was not the case. It has been argued that due to the perceived anti-intellectual stance of the military regime of Gowon, Murtala and Obasanjo – between 1972 and 1979 – the university workers could not express their discontent openly (Otobo, 1987a). The military regimes were not disposed to any form of protest or demonstration from any group in the country. During this state of affairs, many lecturers left the system in what came to be known as the “brain drain” phenomenon.

The emergence of the democratic era in 1979 provided the tonic for trade unions to express their displeasure. The situation was not helped by the assumption of office of the members of the National Assembly. Otobo (1987b) contends that the new legislators proceeded to fix their own salaries awarding themselves exorbitant car loans and furniture allowances, to the consternation of the civil servants. While granting themselves these huge awards, the National Assembly found it not expedient enough to legislate on the workers’ demands. This infuriated

<sup>29</sup> D. Otobo, 1987a.

<sup>30</sup> O. A. Erinosh, *op. cit.*

<sup>31</sup> D. Otobo, *State and Industrial Relations in Nigeria*, Malthouse Press, Lagos, 1988.

D. Otobo, *The Nigeria General Strike of 1981*, in D. Otobo, M. Omole, eds. *Readings in Industrial Relations in Nigeria*. Malthouse Press, Lagos, 1987b.

the latter and what followed was a series of work stoppages in all the sectors of the economy.

In the universities, protests mounted over the demand for a separate salary structure and improved conditions of service. In 1981, President Shehu Shagari set up the Cookey Commission to determine remuneration for university workers, as well as funding and development strategies of the university system. Therefore, the Commission consulted widely, analyzed memos and technical reports. In its Reports, the Cookey Commission admitted that two of the principles which guided it in determining the pay structure it offered were:

- Providing salaries and fringe benefits that can attract and retain high-calibre personnel in the university within the economic constraints.
- Encouraging dedication and commitment to the overall objectives of tertiary institutions in Nigeria<sup>32</sup>.

The Cookey Report submitted in 1982 recommended an equitable salary structure (the University Salary Scale, USS) for all the university staff, irrespective of ownership and location. It also restored the pay differentials, by making remuneration higher than that granted to public servants. These recommendations somehow assuaged the feelings of workers at the university, especially academics. Normalcy then returned to the universities. Yet one needs to ask, did they benefit from the Cookey recommendations?

The first generation of State Universities – apart from Benin which was established earlier – was set up in the early eighties, just at the time the Cookey Report was presented to the federal government. In the old Anambra, Imo, Rivers and Ondo, the state universities appeared to have adopted the University Salary Structure. The governors of these old states – which were subsequently split into more States – were aware of the pivotal role played by lecturers within the University system. They had a vision of what a good university stands for. Aonyekakeyah<sup>33</sup> recounts that

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<sup>32</sup> F. Ojo, *Personnel Management: Theories and Issues*, Panaf Publishing Inc, Lagos, 1998; E. U. Ingwu, E. N. Ekefre, E. U. Ibli, *Wage Relativities as a Predictor of Absenteeism and Turnover in Higher Educational Institutions in Nigeria*, in *Journal of Research and Development in Education*, vol. 8, 2008, 63-72.

<sup>33</sup> L. Aonyekakeyah, *When State Universities Became a Burden*, in *The National Scholar*, vol. 7, n. 1, 2012, 46-47.

in the old Anambra State, where Governor Jim Nwobodo established the Anambra State University of Technology (ASUTECH):

The university, which aimed at being ranked among the best in the world, paid the experts drawn from abroad commensurate remuneration to keep them. There was no discriminatory salary and allowances package between the federal universities and ASUTECH. The conditions of service were the same. For example, the University Salary Scale (USS), which was negotiated in the early 80's, was unreservedly implemented by ASUTECH without hesitation from the State Government.

This was the stance taken by the other State Universities earlier mentioned. However, can the same be said of State Universities today? What has gone wrong? What is the reason for the escalating crises in these Universities?

## 7. Introduction of Wage Deregulation Policy

Both Udoji and Cookey Commissions actually introduced what in the industrial relations lexicon is termed centralized collective bargaining or relations. Determination of pay was done at the federal level and whatever was negotiated was then applied across the board. To wit, any salary structure negotiated between ASUU and the federal government was automatically implemented in both the federal and state universities. This may account for the relative peace enjoyed, and the reason that there were fewer strikes. Yet this policy was short-lived.

In the mid-eighties, centralized collective bargaining was deregulated by the Military Government. Then a downturn in the nation's economy followed. The revenue generating capacity of the country from crude oil production could no longer finance most of the developmental projects as well as meet other fiscal commitments. As suggested by Obasi<sup>34</sup>, the dwindling fortunes in the national economy resulted in capacity underutilization in many industrial and manufacturing firms, high rates of unemployment and inflation, significant domestic and foreign debts, as well as unpaid arrears of salaries. This negative trend required that drastic measures be instituted to revamp the economy. Accordingly, in 1986, President Ibrahim Babandiga introduced the Structural Adjustment

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<sup>34</sup> I. N. Obasi, *State Labour Relations Under SAP in Nigeria*, Sam Goodman Publishers, Ibadan, 1999.

Programme (SAP). In the view of Okongwu<sup>35</sup>, the SAP was aimed at promoting economic efficiency and long-term growth, with stabilization policies designed to restore balance of payment and price stability.

The outcome of the SAP policy was massive privatization and commercialization of government's institutions and parastatals. The public service was also not spared with the promulgation of the Civil Service (Reorganization) Decree No. 43 of 1988<sup>36</sup>. The Decree affected the character and content of industrial relations in the public sector. That is tantamount to saying that uniform wages and salaries were deregulated. Therefore, staff of federal and state universities would no longer enjoy the same pay policy, except where a given state university has the financial muscle to pay its workers what the federal government has approved for federal workers. The deregulation of wages was first enacted in 1991. Its implementation was ineffective, as state and local government workers – including universities – protested unceasingly for the same salary scale each time there was a pay increase by the federal government. The policy was again re-enacted in 1997<sup>37</sup>, in order to make it effective as state military governors were complaining bitterly of their inability to pay federal government's salary scale to their own workers. It was President Obasanjo who in 2000 ensured that the deregulation of salaries became effective. Wage differentials or relativities that may likely exist now between federal universities and any state university can be traced to this policy. We shall now examine the impact of this policy in the State Universities.

## 8. Wage Deregulation and the Problem of Pay Relativities

As is often the case in the contemporary world, an innovation which does not bring positive and immediate benefits is likely to be resisted. The same occurs with the deregulation policy, for it affects workers' pay. A university employee who has been receiving the same pay as a colleague of

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<sup>35</sup> C. Okongwu, *A Review and Appraisal of Structural Adjustment Programme*, July 1986 / July 1987. Special Press Briefing, Federal Government Printer, Lagos, 1987.

<sup>36</sup> E. U. Ingwu, F. U. Udey, *Current Economic Reforms and Wage Administration in Colleges of Education in Nigeria*, in *African Journal of Contemporary Issues*, 2008, vol. 8, n. 3, 70 – 83.

<sup>37</sup> E. U. Ingwu, *Evaluation of Wage Administration and Job Satisfaction in State Colleges of Education in the South-South Geopolitical Zone of Nigeria*, a Ph.D. thesis submitted to the Department of Adult Education, University of Ibadan, Ibadan, 2004.

comparable status working in a similar but different institution would not take it lightly when he is offered lower pay, which was actually the result of the newly-issued policy. Crises facing state universities after a new wage structure has been negotiated at the federal level emanates from the issue of pay comparability. For instance, an examination of the difference in salary and tax between the academic staff of the federal University of Calabar (UNICAL) and Cross River (State) University of Technology (CRUTECH), Calabar, is presented in Table No. 1

*Table No. 1 - Differentials in Pay and Tax Policies between a Federal and State University as at 2007.*

<b>1</b> <b>Salary</b> <b>Level</b> <b>and</b> <b>Step</b>	<b>2</b> <b>Institution</b>	<b>3</b> <b>Total</b> <b>Enrolments</b> <b>(Gross Pay</b> <b>in ₦)</b>	<b>4</b> <b>Tax</b>	<b>5</b> <b>%</b> <b>Differentials</b> <b>in Salary/</b> <b>Tax</b>
UASS 1 (6)	UNICAL	60,538.59	415.89	18,462.7
	CRUTECH	42,075.89	3,545.30	(30.5%)
UASS 2 (8)	UNICAL	73,971.57	564.08	20,613.81
	CRUTECH	53,357.76	4,835.17	(27.9%)
UASS 3 (8)	UNICAL	85,040.08	575.03	24,191.35
	CRUTECH	60,848.73	6,374.02	(28.4%)
UASS 4 (9)	UNICAL	116,076.72	793.23	34,544.79
	CRUTECH	81,531.73	9,385.18	(29.8%)
UASS 5 (13)	UNICAL	193,762.64	1,075.87	60,300.93
	CRUTECH	133,461.71	14,321.03	(31.1%)
UASS 6 (10)	UNICAL	218,770.64	1,189.23	64,523.91
	CRUTECH	154,246.73	15,522.23	(29.5%)
UASS 7 (10)	UNICAL	259,563.71	1,318.71	91,789.65
	CRUTECH	167,774.06	18,020.34	(35.4%)

*Source: Pay Policies taken from Bursary Departments, University of Calabar/ Cross River University of Technology, Calabar, May, 2007.*

A cursory look at the table shows that there is a significant gap between remuneration granted to the academic staff of UNICAL and CRUTECH, with the latter that are in a position of disadvantage. The gap originates for tax varies between 27.9 to 35.4% (See column 5). As one can see in column 4, the tax difference – pay-as-you-earn – appears incomprehensible. As indicated, the more a federal university staff earn, the less they pay in terms of tax. Concurrently, those in the state university who receive a lower salary pay higher taxes. The explanation for this anomaly is not far-fetched. A federal tax provision – Personal Income Tax Act Cap No. 104 of 1993, as amended in 2004 – applies throughout the federation. Many state governments have found it expedient to implement this Tax Law but when it comes to federal pay policies, they complain they have no financial means to implement the policy. This is one of the issues that state branches of Academic Staff Union of Universities (ASUU) disagree with.

Staff unions in the state universities – the Academic Staff Union of Universities (ASUU), the Senior Staff Association of Nigeria Universities (SSANU), and the Non-Academic Staff Union (NASU) – insist on wage parity with their colleagues in the federal universities for the reasons that:

- State and federal universities have similar administrative structures, operate similar curricular and employment conditions, and possess the same job titles.

- They also have similar academic qualifications and face the same promotion criteria.

- As an overarching body, the National Universities Commission (NUC) monitors, evaluates and subjects all universities in the country, irrespective of ownership to similar academic standard(s)<sup>38</sup>.

On the other hand, the proprietors of the state universities argue that they cannot adopt federal pay because of their limited resources. The consequences of the muscle flexing between the two parties have been quite devastating for staff and the universities.

First, there is the problem of strike or work cessation. Between 2001 and 2009, three salary policies have been negotiated with the federal government by the academic staff. In the case of ASUU, the salary structures include UASS, CONUASS, and CONPUASS. Before each of these salary structures were negotiated, ASUU had to go on strike to force government to the negotiating table.

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<sup>38</sup> E. U. Ingwu, *op. cit.*

It is unfortunate that strike statistics in the universities are not given separate treatment by the Federal Ministry of Employment and Labour Productivity. However, according to newspaper reports and documents from ASUU branches, the frequency and duration of strikes in state universities is rather high. More worrisome is the fact that state universities had to embark on a subsequent strike after the national one had been suspended. The delay by the proprietors of state universities to implement the recent wage agreement (2009), led to strikes that at the South-East universities lasted between six to twelve months<sup>39</sup>. At the Cross River University of Technology, the strike lasted for more than six months. The Lagos State University, whose proprietor has the highest revenue generating capacity among the 36 states in Nigeria, was also not spared the agony<sup>40</sup>.

Consideration of conventional measures such as frequency, share of workers involved and duration of the strikes<sup>41</sup> that occur in the state universities as a result of the deregulation policy would be alarming, particularly if the number of man-days lost due to these strikes is also taken into account. The protracted industrial acrimony in the South-South, South-West and South-East State universities left academic activities in shambles. To cite an example: at the Evans Enwerem University, Ibekwe<sup>42</sup> observed that the institution remained closed for some six months, whereas a semester that was supposed to last for 16 weeks was cut to seven. Students had barely attended lectures for a month when the time-table for examinations came out. According to Ibekwe<sup>43</sup>, a student was forced to lament that:

Rushing students for examinations would encourage cheating and the churning out of half-baked candidates.

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<sup>39</sup> O. Obinna, E. Mgbeahurike, *EBSU Takes ASUU to Industrial Court*, in *The Nation*, Thursday, December 16, 2010, O. Oyebanji, *Between ASUU and the South-East Governors*, *The Nation*, Thursday, October 21, 2010, 39. D. Ibekwe, *Varsity Rushes Exam*, in *The Nation*, Thursday, March 17, 2011; A. Olugbamilua, *Anambra Varsity Increases Fees by 150%*, *The Nation*, Thursday, February 17, 2011.

<sup>40</sup> A. Olugbamilua, N. Ashogbon, *Strike Paralyzes Lagos Tertiary Institutions*, in *The Nation*, Thursday, October 7, 2010.

<sup>41</sup> T. Fashoyin, *Industrial Relations in Nigeria*, Longman Nigeria Limited, Ikeja, Ibadan, 1992.

<sup>42</sup> D. Ibekwe, *Varsity Rushes Exam*, in *The Nation*, Thursday, March 17, 2011.

<sup>43</sup> D. Ibekwe, *op. cit.*

The foregoing comment brings us to the second issue to be discussed. What do students learn? Strikes have resulted in the state universities trimming many academic programmes, with lecturers feeling demoralized to teach. Evidently, when the strikes are over, lectures are rushed in order to catch up, and in most cases, the course contents are not fully covered. Moreover, with the overcrowding of lectures, students do not learn effectively. As a result, doubts can be cast about the effective quality of the graduates. Lamentably, Aonyekakeyah<sup>44</sup> admits that, “state universities rather than leveraging university education have turned out to become a burden on the states with unpleasant consequences on the country’s youths”.

The quality of Nigerian universities and their graduates has continued to be a major concern among stakeholders. The international community, consumers and funders have lost confidence in the degrees awarded in our universities<sup>45</sup>. The widely held view is that graduates of the Nigerian university system are half-baked and ill-equipped for the world of work<sup>46</sup>. It is not surprising that many of them cannot express themselves, or convincingly defend the class of degrees they obtained from the university. Therefore, what competence, skills and knowledge do they possess to contribute to nation building when their examination and projects are written for them by mercenaries?

## 9. Multi-Employer Bargaining and the Resolution of Wage Crises

Along this paper, two major consistent complaints of the states against the federal government can be discerned. The first is that the federal government unilaterally sets “new” wages without involving the State Governors in the negotiations to determine remuneration. Such involvement would have helped to avoid the spill over effect. Secondly, not all the states are equally financially endowed like the federal government; hence payment of “jumbo” wages – as the states claim – is not practicable. Ironically, when the university workers embark on industrial action for a long time, the states often capitulate at the end

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<sup>44</sup> L. Aonyekakeyah, *op. cit.* E. Gbenenye, *ASUU UNIPORT and the 2009 University Teachers Strike: A Documentary*, in M. Anikpo, ed., *The 2009 ASUU Strike: Issues, Intrigues and Challenges*, Freedom Press and Publishers, Port Harcourt, 2011.

<sup>45</sup> *Ibid.*

without rationalizing the workforce<sup>47</sup>, as it happened recently. The federal government has also maintained that the states have all along been represented by the state vice-chancellors in the federal government's negotiating team<sup>48</sup>. The snag here is that state vice-chancellors do not generate funds of their own. They merely inform governors of what happened, and cannot compel the chief executive of the state to pay.

It is for these reasons that this paper recommends the multi-employer bargaining model as an alternative approach to wage determination in the federal and state universities in Nigeria. We encourage the recourse to this model because the multi-employer bargaining structure is likely to operate in the Nigerian environment where:

- Employers of State Universities are in close geographical proximity to one another, and compete for the bulk of their labour in the same labour markets

- Competition in the labour market has made it possible for individual employers to look to other employers for comparative data to use at the bargaining table and is affected by the same terms of bargaining settlements in nearby universities.

- Moreover, employers of state universities deal with the same unions, and each employer tends to be small relative to the union.

- Finally, the products of these universities are relatively undifferentiated<sup>49</sup>. That is, the graduates of these universities are the same, having gone through the same course contents.

It is these and other prevailing conditions that make university unions argue that the decentralization of pay bargaining and other conditions of service being advocated by the federal government is untenable. And as Korczynski<sup>50</sup> has suggested, whichever party's preference prevails or is

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<sup>47</sup> M. Anikpo, *op. cit.*

<sup>48</sup> ASUU – University of Calabar Branch, *Agreement between the FGN and ASUU*, 1, ASUU University of Calabar Branch, Calabar, 2001.

<sup>49</sup> P. Feuille, H. Juris, R. Jones, M. J. Jedel, *Multi-employer Negotiations among Local Governments*, in D. Lewin, P. Feuille, T. Kochan, eds., *Public Sector Labour Relations: Analysis and Readings*, Thomas Horton and Daughters, Sun Lakes, Arizona, 1981.

<sup>50</sup> M. Korczynski, *Centralization of Collective Bargaining in a Decade of Decentralization: The Case of the Engineering Construction Industry*, in *Industrial Relations Journal*, vol. 28, n. 1, 1997, 14-26.

stronger, would eventually determine changes in the level of bargaining structure. The incessant disruption of academic activities in Nigerian universities has led to a loss of public confidence in academic standards and points to the direction that the ASUU stance on the same pay policy should be taken seriously.

Multi-employer bargaining is a centralized bargaining structure in which a number of employers develop formal consortia or coalitions to reach master agreements with employee unions<sup>51</sup>. What this simply means is that in fixing wages or conditions of service for universities, the federal government – the employer of staff of federal universities – and the state governments – as state university employers – can band together or form a coalition of employers on one side and bargain with ASUU – which represents academic staff of all universities – on the other, in order to arrive at a single wage structure and common conditions of service

In the Nigerian context, for the model to be effective and efficient, governors of the six geo-political zones can each send a single representative to band with the federal governments. This is necessary because each zone has its own peculiarities. Some zones are richer than others, like South-South and North East for example. Each of these zones will present its own position in terms of remuneration. From here, a common position about what they can pay would be agreed upon, before bargaining with the union in question.

One major advantage with this model is that by banding together, both the federal and state governments can present a common front and also bargain from a stronger position with a powerful union like ASUU. Secondly, once a common wage agreement has been successfully negotiated with ASUU, the problem of leap-frogging or whip-sawing will be nipped in the bud. Leap-frogging or whip-sawing are tactics often employed by ASUU to force state universities to pay what federal government has negotiated with its own academic staff in federal universities. It is these tactics that are the cause of incessant strikes at the universities.

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<sup>51</sup> K. Wetzel, C. Maxey, D. G. Gallagher, *Management and Union Assessments of Multi-Employer Bargaining in Health-Care: A Canadian Example*, in *Journal of Health and Human Resources Administration*, 7, 4, Spring, 1985, 445-459.

## 10. The Implementation of Multi-Employer Bargaining Agreements

Will the agreements concluded between the consortium of governors and the presidency on the one side and the academic staff union of universities on the other side be faithfully implemented by all the state governments at their universities if the multi-employer bargaining model is adopted? The succeeding sections below might answer the question.

Indeed, there is a perceived fear by some critics that not all governors may effect implementation in the light of their experiences with periodic wage increases in Nigeria. For instance, in 2011 the Tripartite Committee of Labour was established by Justice Alfa Belgore, some government officials and the representatives of the private sector to review the minimum wage in Nigeria. After exhaustive negotiations, a minimum wage (N18,000.00) was agreed as a benchmark. This was signed into law by the President in April. The same month was approved as the effective date for implementation in all the States of the federation. Two years after the approval, 9 out of 36 states are yet to implement the minimum wage<sup>52</sup>. Governors of these states refer to “unequal endowments among states” and “the inability to pay” as major reasons for incompletion. The issue is: were they not party to the collective agreements during the negotiations?

It is highly probable that the committee set up to review the minimum wage was not properly constituted. For instance, were those who served as government officials in the committee selected by the Federal government or the States? If the latter were not consulted in appointing members of the committee, the N18,000,00 benchmark agreed upon may not reflect the actual wish of all the state governors. Hence, the refusal by some state governors to implement the minimum wage, claiming that it is on the high side. One should recall that the 2011 minimum wage negotiating committee is akin to the tripartite committee often set up by the federal government to review ASUU’s demands, including salary increases. On the federal/state governments’ side, three vice-chancellors from state universities are often selected into the negotiating team without the consent of state governors. This is done in the hope that the benchmark arrived at may filter back to the proprietors of state universities, who are then expected to comply. The problem here is that these vice chancellors do not actually know the actual financial situation

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<sup>52</sup> D. Olaye-Osinkolu, *Minimum Wage Will Remain Topical*, in *The Nation*, February, 4, 2013, 38.

of their state governments, which almost always refuse to implement the agreements on the ground that they were not part of the negotiations.

One should also note that at the time the minimum wage was negotiated many state governors were preparing for governorship elections which were just one month away. No governor was ready to lose being re-elected, so they all conceded to labour demands. It is unfortunate that after re-election into office, some of them turned back to tell the workers that the state budget cannot carry the minimum wage<sup>53</sup>.

It is true that not all the states in Nigeria are equally endowed. Some states are being alluded to as super-rich, some moderately rich and others are poor. Nigeria operates a federal constitution, though a weak one. Power is concentrated at the centre. Much of the revenue generated in Nigeria is collected by the federal government. This is then redistributed to the states and local governments every month as their share from the federation account as determined by the revenue sharing formula. It is shared on the basis of such aspects as equality of states, population, internally generated revenue, and so forth. States whose natural resources generate much revenue to the federal coffers receive an additional share, like those in the Niger Delta region where crude oil is manufactured. It is for this reason that States like Akwa Ibom, Delta and Rivers which net additional N10billion and above from the 13% derivation fund, along with Lagos State are said to be rich. Therefore, other states like Jigawa, Taraba, Yobe, Zamfara, which depend solely on what is shared from the federation account without any other source of income are said to be poor. This is where many critics tend to believe that the introduction of multi-employer bargaining in setting wages in the state universities or the public sector may not work.

However, we are convinced that given this type of background, multi-employer bargaining is likely to thrive because it operates on the principle that employers in the same industry may not be equally endowed. Nigeria as a nation has six zones, with each having its own peculiarities. When the States in each of these zones band together, the interest of each zone is taken into consideration before the “benchmark” as well as the “ceiling” is set, so that presumed “poor” states cannot pay below (benchmark) and the “rich” ones do not pay above the ceiling-rates.

It is instructive to note that there is a Nigerian Governors Forum that is established to protect its members' interests. The Forum is so powerful that it thwarted the efforts of the National Assembly to amend an aspect

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<sup>53</sup> *Ibid.*

of the constitution requiring fiscal allocation from the federation account to be sent direct to the local governments and not through the state governments, as is presently the case.

Moreover, the Governors Forum seems to have diminished any ideological differences between the different political parties that they belong to. As far as these writers are concerned, there is no qualitative difference between the political parties in Nigeria. Their approach to governance is the same whether in the People's Democratic Party (PDP), Action Congress of Nigeria (ACN), All Progressive Grand Alliance (APGA), Congress for Progressive Change (CPC) or All Nigeria's Peoples' Party (ANPP) controlled states. PDP, the dominant party controls two-thirds of the states. The issue of whether all states can or cannot pay any minimum benchmark that may be agreed upon is therefore relative. In the history of periodic wage increases in Nigeria, no state government – military and civilian alike, rich or poor – has ever accepted it is capable of implementing any “new wage structure”<sup>54</sup>. Even among the states that are perceived to be rich, they do initially complain that their state budgets cannot carry the wage increases. Ironically, it is when workers embark on serious and prolonged strikes that these governments, one by one, capitulate and consent to workers demands<sup>55</sup>. This shows that there is no benevolent capitalism anywhere.

A major problem envisaged by the present paper which may affect the implementation of an agreed benchmark in any state university is the high level of corruption and profligacy among politicians in Nigeria – the presidency, governors and the legislators. Several commentators in the Nigerian tabloids and journals<sup>56</sup>, have noted that Nigerian politicians along with their senior administrative elites in the civil and public services “do not conceive of public office as an opportunity to serve but to appropriate public funds for their private use”. Why would the legislators jettison salaries fixed for them by the National Salaries, Incomes and

<sup>54</sup> E. U. Ingwu, *Evaluation of Wage Administration and Job Satisfaction in State Colleges of Education in the South-South Geopolitical Zone of Nigeria*, cit.

<sup>55</sup> M. A. L. Omole, *op. cit.*

<sup>56</sup> D. Otobo, *Bureaucratic elites and public sector wage bargaining in Otobo*, in D. Otobo, M. Omole, eds. *Readings in Industrial Relations in Nigeria*, Matthouse Press Ltd., Lagos Nigeria, 1987a; U. Awuzie, *Text of ASUU Press Conference Delivered at the End of National Executive Council (NEC) Meeting, Held at Ahmadu University, Zaria, 15 – 16 May*, in *The National Scholar*, vol. 8, n. 1, 2011, 12-16. S. Sawyer, *Controversies over Payment of Minimum Wage Set Labour and State Governments on a Collision Course and Raise Fundamental Questions about the Nature of Federalism in Nigeria*, *Tell Magazine*, 25, June, 2011, 27. D. Olaoye-Osinkolu, *Minimum Wage: Labour Threatens Governors*, in *The Nation*, October, 15, 2012, 39.

Wages Commission and proceed to fix salaries for themselves? On their part, the state governments complain that if they are to pay any periodic wage increases, there will be no money left for capital and infrastructural developments. Yet it is the exorbitant sums of money appropriated for the execution of capital projects that enhance profligacy among governors and civil servants (Otobo, 1987b). Over invoicing and inflation of contracts is the business of politicians in governance. Many former state governors have either been convicted in European courts for laundering their state monies; or arraigned by the Economic and Financial Crimes Commission for embezzlement of funds running to billions of Naira (See Tell Magazines, April 30, 2012, pp. 52 – 56). At the federal level, ministries do not release up to 50 percent of the budget meant for infrastructural development. At the end of the year, what is deliberately left or kept aside is shared between the ministers, permanent secretaries and senior public servants rather than being returned to the state treasury. This behaviour of politicians runs counter to the claims of Fogel and Lewin<sup>57</sup>, that politicians do not seek public offices for profit motives. It is our belief that if profligacy and corruption is minimized and the state governments trim down the size of their officials, there is no state government that cannot pay the benchmark.

We need not labour the issues here any longer but suffice it to say that the implementation of benchmark agreements arising from the application of multi-employer bargaining model in determining salary outcomes depends in part on the integrity, sincerity and the political will of the state governments to accomplish it. And more so on the relative power of ASUU in forcing the states governments to implement the benchmark agreement should the later renege. Fashoyin (1977) admitted a long time ago that multi-employer bargaining arrangements – as the experience in the banking industry in Nigeria reveals – will put an end to comparison as a basis for increasing wages.

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<sup>57</sup> W. Fogel, D. Lewin, *op. cit.*, T. Fashoyin, *Multiemployer Bargaining in Nigeria: The Banking Model, Management in Nigeria*, vol. 13, n. 7, 1977, 30-45.

## 11. Conclusion

In this paper an examination has been presented of major trends in wage reforms in Nigerian universities. Initially, the centralization of wage bargaining presented a common pay structure that was welcomed by all staff of the universities in Nigeria, especially the academic staff. This augurs well for the system as there were fewer strikes. Pay disparity between academics and non-academic staff was not much of a problem, as it did not ground academic activities.

The reforms that ushered in pay differentials among staff of the universities have not helped the system to thrive and prepare students for a better world of work. The backlash of these reforms is that students spend more time at home than in school. In the end, they are awarded degrees without possessing competence in their chosen fields.

The 2009 ASUU – FGN agreement shall soon expire. Another round of negotiations will begin. The problem may resurface as before. To forestall the whip-sawing tactics, this paper recommends the adoption of a multi-employer bargaining model by the federal and state governments to resolve the problem of pay differentials in Nigerian universities.

# Workplace Dress Code and Fundamental Rights

Éric L'Italien \*

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## 1. Introduction

A Quebec grievance arbitration tribunal recently affirmed that an employee, just by being in a relationship of subordination to the employer, does not waive the right to his or her image and personal appearance<sup>1</sup>. *A priori*, aspects of an employee's physical appearance benefit from the right to privacy and in certain cases the right to freedom of expression and can be regulated by the employer only for considerations that are substantial and valid and only if the means used to do so are proportional to the underlying objective.

## 2. Facts

The union was challenging the legality of certain directives issued by the employer, a vocational training centre, in relation to the dress code imposed on teaching staff in its healthcare programs. The union contended that the directives were unreasonable and abusive and infringed these employees' fundamental rights and freedoms, and in particular the right to privacy and freedom of expression.

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\* Éric L'Italien, Norton Rose Canada LLP - Montreal Office. This commentary has been previously published in Norton Rose Fulbright, <http://www.nortonrosefulbright.com/knowledge/publications/74224/workplace-dress-code-and-fundamental-rights> (Accessed June 10, 2013).

<sup>1</sup> *Le Syndicat de l'Enseignement de Lanaudière et La Commission scolaire des Samares* (October 9, 2012), Grievance Nos. 2010 0003591-5110, AZ-50914116 (T.A.), Maureen Flynn, Arbitrator.

The employer's rules on physical appearance included requirements for the employees to maintain good personal hygiene. Hair had to be a natural colour, long hair had to be tied back and beards had to be covered during practical classes. Nails had to be clean and cut short, without coloured nail polish or artificial nails (clear polish was permitted). Jewellery other than simple jewellery was prohibited at all times and rings and arm jewellery were prohibited during practical classes. Dress code standards provided that instructors were to wear clean uniforms in practical classes and street clothes covered with white lab coats in theoretical classes and in the presence of students. Jeans, miniskirts, shorts and camisoles were not permitted.

While it acknowledged the references made in the rules to concerns about professional image, the need for staff to set an example and perceptions about the teacher's pedagogical role, the union submitted that these considerations cited by the employer were questionable, no directives of this sort having been issued between 1998 and 2009. It went on to note that many private schools where students were asked to wear uniforms did not make such demands of their teaching staff. In short, in the union's view, the rules were based on subjective considerations which could not serve to justify such broad measures.

The evidence before the arbitrator showed that from 1998 to 2009, the employer did not impose any dress code, except in the laboratory and for certain internships. The employer maintained that a dress code had resulted from the recommendations and positions which were adopted in this connection in 2006 by Quebec's nurses' professional corporations, the *Ordre des infirmières et infirmiers du Québec* (OIIQ) and the *Ordre des infirmières et infirmiersauxiliaires du Québec* (OIIAQ). Those recommendations insisted on the importance of dress codes for reasons related to hygiene and professional image.

### 3. Decision

After analysing the applicable principles and reviewing the evidence before her, the arbitrator declared the rules to be invalid. She noted that labour law principles allowed the employer to regulate employees' physical appearance as necessary for the sound administration of its enterprise, to the degree that such regulation was consistent with the collective agreement and the law, and in particular the Quebec Charter of human rights and freedoms (Charter). Where a measure infringed a right protected by the Charter, not only must the underlying objective be

serious and valid, but the means used to achieve the objective also had to be in proportion to it.

In this case, the rules' stated goal was to allow students to acquire skills in an environment designed to mirror the real-life situations they would encounter at work and to sensitize them to the importance of dress in the exercise of their professional duties. The arbitrator pointed out that the measures had to be assessed in relation to the standards generally acknowledged as appropriate in the teaching environment, not in the work environment, and that the standards applicable in the work environment could not be simply imported in order to justify the impairment of a fundamental right in the teaching environment, as adherence to certain standards did not have the same degree of importance in the two environments (for example, the risk of infection was not present in the teaching environment).

The arbitrator found that the requirement of maintaining good personal hygiene made sense and did not contravene any fundamental Charter rights. As for the natural hair colour rule, it infringed the right to privacy, especially seeing that the restriction extended beyond the employees' working hours. Moreover, the rationale for such a measure had not been demonstrated, as neither the OIIQ nor the OIIAQ had adopted such a requirement. The rule requiring beards to be covered did not infringe any Charter right, corresponding in essence to the OIIQ's and OIIAQ's recommendations on the matter. Indeed, since it flowed from a pedagogical objective that was focused on meeting hygiene standards applicable in the work environment, it could not be considered unreasonable or excessive as long as the employer was prepared to provide the gear necessary for the purpose. The obligation to tie long hair back in practical classes, while it could be considered to impair the right to freedom of expression to some degree, was still legitimate considering that the effects were limited, being confined to a specific period of time. As for the restrictions on nails, the rules were in fact more permissive than the OIIQ and OIIAQ recommendations, which did not allow clear nail polish, the parties having acknowledged that the rules should be consistent with the OIIQ and OIIAQ positions. The restrictions on jewellery constituted an impairment of the right to one's image, privacy and freedom of expression which the arbitrator, referring in particular to the requirement that jewellery be "simple" (in French, "*sobre*"), did not consider justified, finding that choice of jewellery was a matter of taste, not a pedagogical consideration.

As far as dress code was concerned, the requirement that uniforms be worn in practical classes was not illegitimate or disproportionate, in the

arbitrator's view, considering that the impairment of the Charter right that it caused was minimal, the scope of its application was well defined and its pedagogical goal was to mirror the work environment. Regarding the requirement of wearing lab coats in theoretical classes, the evidence submitted by the employer had not been sufficient to establish a relationship between wearing a lab coat and the ability to provide quality instruction. As the primary aim of this measure was to protect its public image, the arbitrator noted that the standard of evidence required of the employer in attempting to justify it was especially high, which burden it had failed to discharge. As for the prohibition on wearing jeans, miniskirts, shorts and camisoles, while it impinged on the employees' privacy and freedom of expression, the ban on miniskirts and camisoles could be justified, on the basis of standards of decency in an educational environment and the proportionality of the resulting impairment and the beneficial effects, whereas the prohibition on jeans could not, as jeans were usually considered suitable attire in public academic institutions. In short, while some of the requirements were considered legal by the arbitrator, the rules as a whole were found to be invalid.

#### **4. Conclusion**

This decision serves as a reminder that when adopting rules relating to its employees' physical appearance, an employer must be careful to respect the employees' fundamental rights, including in particular their right to privacy and freedom of expression. In addition to being based on considerations that are substantial and valid, such rules must be designed in a way that ensures that measures which impair one or more fundamental rights are rationally connected to the objective sought and that the impairment of the rights is minimal and in proportion to the measures' anticipated beneficial effects. The decision also emphasizes that standards which apply in the work environment cannot be blindly applied to a teaching environment as the justification for impairing a fundamental right, given the differences in the standards appropriate to the two environments.

***Ethnic Diversity in European Labor Markets:  
Challenges and Solutions, by Martin Kahanec  
and Klaus F. Zimmermann.  
A Review.***

Donella Caspersz \*

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Managing ethnic diversity in labour forces is a common challenge throughout the world. This poses a special challenge in the European Union (EU) given the free flow of people between nation-states in the Union post integration of Member States under the EU umbrella. Hence the collection of country specific articles in the edited collection *Ethnic Diversity in European Labor Markets Challenges and Solutions* edited by Martin Kahanec and Klaus F. Zimmermann is a useful summary of information that can be drawn upon by those interested in this field in both informing and developing responses to the issue.

A major theme preoccupying most of the essays in this collection is however the continued exclusion of labour migrants from effective participation in the societies in the host countries to which they migrate for work. Whilst this is more dramatic in some as opposed to other countries (see for instance Tables 1.5 and 1.6 in the introductory essay by Kahanec and Zimmermann), the issue is as Kahanec and Zimmermann conclude, “[...] the data and definition issues cannot hide the worrisome reality of ethnic minorities in Europe” which they define as “the issue of integration of ethnic minorities into the whole social fabric” (25).

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The present review refers to Martin Kahanec and Klaus F. Zimmermann eds. *Ethnic Diversity in European Labor Markets: Challenges and Solutions*. Edward Elgar, Cheltenham, UK, 2011, 328 pp., ISBN 978 184844 559 8.

Whilst amply illustrated in the essays in this collection, signals of this uneasy accommodation between host nation societies and labour migrants are also evidenced by the absence of signatories to the European Convention on the Legal Status of Migrant Workers. Denmark, Hungary, Latvia, Romania and Slovakia are nation-states featured in this collection that have either not signed or ratified the treaty. This sends out a signal of dis-unification on a central issue and challenges the principle of unification symbolised by the formation of the Union.

The issue of social integration of labour migrants into host countries is indeed a matter that should preoccupy those engaged in migrant labour market considerations. International flows of labour migrants are ever increasing. Interestingly, whilst in the past this followed a South-North trajectory, the ILO notes the increasing phenomenon of labour migrants South-South and the propensity for nation-states such as Canada and other more developed economies, to be both sending and receiving labour migrants (2010). However the institutional structures and societal attitudes that characterise labour migrants as only another component of the production process rather than an integral aspect of nation-state societies, raise serious questions about the efficacy of these migrations in the long term. For instance, as the essays in this collection note, the precarious nature of their status makes labour migrants vulnerable to forced dislocations from host countries when local conditions change, and their continued employment status cannot be supported. Thus, as the ILO concludes in the face of this now permanent trend in labour force dynamics in nation-states in both Europe and elsewhere,

The challenge now confronting the global community is to govern and regulate migration in such a way that it can serve as a force for growth and development in both origin and destination countries, while protecting the rights of migrant workers<sup>1</sup>.

Thus, the detail provided to readers in the essays in this collection will undoubtedly be of assistance for those interested in exploring this matter further. In addition to statistical substantiation, the authors of the essays also provide insightful observations about the matters in their own local contexts that influence the status of labour migrants. The essays follow a format which reviews the status of ethnic minorities in local labour forces, with the chapters that subsequently consider the barriers and policy

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<sup>1</sup> International Labour Organisation, *International Labour Migration. A rights-based Approach*, ILO, Geneva, 2010.

responses by stakeholders including government and business. The chapters in the main conclude with reflective notes on ‘what else can be done?’

This attention to context is appreciated, as it is undoubtedly a deeper understanding of the local contexts that labour migrants enter that is needed in developing appropriate responses. That is, policy and regulation emerge in response to local situations. This is the dilemma facing management of ethnic diversity in labour forces: that is, whilst labour migration is a global phenomenon, resolution of the issues that prevent the ability of labour migrants to engage efficaciously in the societies they enter remains a locally driven challenge. The authors of the essays in this collection refer to this dilemma, noting the barriers preventing social integration that emerge from the attitudes of local societies. Without doubt the detail provided by the authors in this collection will be of assistance to those responding to this challenge.

The imperative to do so is nigh as labour migration and hence ethnic diversity in labour forces worldwide continues to deepen, given the increasing ‘push’ factors such as social unrest and unemployment in local environments that motivate labour migrants to move in search of new opportunities for them and their families. Coupled with push factors such as ageing populations and low birth rates in many societies around the world that underpins much of the need for labour migrants in host country environments; it is clear that managing the challenges and developing solutions to ethnic diversity not just in European labour markets but those in other regions of the world, will attain greater significance in the future.



*Labour Markets at a Crossroads: Causes of Change, Challenges and Need to Reform,*  
by Henrik Lindberg and Nils Karlson.  
**A Review.**

John Martin \*

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*Labour Markets at a Crossroads* follows four themes and focuses on European nations contextualised as four models of European labour markets: Southern European, Central European, Northern European and Anglo. The different policy prescriptions that may be adopted have four potential outcomes: disruption; re-regulation; de-regulation; modernization. The Anglo model favours deregulation and the adoption of an aggressive approach to policy formation and reform. The editors argue against a convergence towards the Anglo model and for existing structures adapting to the liberalisation resulting from globalisation without the conflict associated with a deregulatory approach.

Their first theme is Flexicurity. Whilst originating in the Netherlands, flexicurity has been used to describe the Danish policy solution of liberal employment protections combined with high social security – flexible dismissal rules, generous and long-lasting unemployment benefits and active labour market policies (ALMPs). It is suggested that ALMPs are not feasible in countries with budgetary issues. Denmark’s comparative success has been for problem groups such as the young and long-term unemployed. Chapter 1, “Flexicurity Pathways for Italy: Learning from

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The present review refers to Henrik Lindberg and Nils Karlsoneds. *Labour Markets at a Crossroads: Causes of Change, Challenges and Need to Reform*, Cambridge Scholars Publishing, Newcastle upon Tyne, UK, 2012, 282 pp., ISBN 978 144383610 4.

Denmark?’ by Gianetti and Madia assesses the possibility of a Southern European country adopting the Danish, Northern European model of flexicurity. Budgetary constraints and dual labour market issues mean that ALMPs may not be achievable in Italy. However, the gradual introduction of protections for insecure workers, accumulation of rights and access to training are cost-effective measures.

Chapter 2, Borghort’s ‘Employment Security for the Young Disabled – Policies and Practices’ discusses the definition of employment security and how that has changed. It is a study of several European nations and the approaches adopted in each concerns the employment of young people with disabilities. It identifies three approaches: rights based (e.g. anti-discrimination legislation); obligations based (quotas, etc.); and incentive based (a range of incentives to business, to employ assistants alongside disabled workers). The chapter also attempts to assess the effectiveness of various programs, but identifies a significant gap in their monitoring at a national or EU level.

Chapter 3, ‘Trade Unions and the Development of Employment Security: Can They Deliver?’ by Nuna Zekic discusses the role for unions and associated attitudes adopted by them in light of the recent emphasis on employment security and flexicurity in Europe. It asks, and to some extent answers, the question as to whether employment security as opposed to job security can be achieved by social partners in the context of collective bargaining. The European context is a familiar one, with a decline in union membership and therefore power and influence being juxtaposed with rising unemployment and ever increasing fiscal restraint and austerity.

Serious limitations exist for union support for the concept of flexicurity. It is criticised for its emphasis on the supply side of the labour market and its failure to address the fundamentals of the creation of employment through demand at a macro-level. In addition, unions have demonstrated a healthy scepticism of flexicurity, it being a vehicle for the removal of existing rights for workers in return for the less tangible and enforceable employment security.

Flexicurity envisages the development of transportable skills and training that may not necessarily advantage the employer. The cost of training and who bears that cost is problematic at both industry and enterprise level. None the less, the author is confident in the capacity of the industrial parties to address the outstanding issues surrounding employment security.

The second theme is Unions and Industrial Action. Chapter 4, Olafsdottir’s ‘Efficiency of Collective Bargaining: Analysis Changes in

Wage Structure in the Public Sector in Iceland” examines the decentralisation of public sector bargaining. Its underlying principle is that centralised bargaining will lead to a lower dispersion of earnings amongst employees, and its conclusion is that the effect of budget on bargaining outcomes is greater the more decentralised the system of wage determination.

Chapter 5, Dittrich and Schwirwitz’s “Union Membership, Employment Dynamics and Bargaining Structure” concentrates on the welfare effects of union bargaining, assuming that there is a dual labour market: unionised and competitive. Unionised workers displaced by wage demands will be able to obtain employment in the competitive sector. The study of OECD nations establishes that to some extent there was decentralisation, albeit a flirtation in some cases, in most of them towards the end of the twentieth century. The authors conclude that where wages alone are bargained in a centralised model it will yield greater welfare measures if wages and employment are bargained at the firm level.

Chapter 6, Lindberg’s “Industrial Action in Sweden: A New Pattern?” hypothesises that if it is accepted that the ability of employers to outsource production and reduce labour costs has seriously limited the union’s general ability to use strike action as means of exerting economic power, it follows that globalisation potentially accounts for an ongoing reduction in industrial conflict. In this regard, Sweden is not unlike many other industrialised nations.

The editors’ third theme is Wages and Bargaining. Chapter 7, Duma’s “Union Wage Premium and the Impact of Unions on Wage Inequality in Turkey” is a study of the effects of unions on wage dispersion in Turkey. It assumes that unions will increase the wages of their members and decrease the level of inequality. Despite falling memberships, unions still provides for a premium of around nine per cent when control factors are taken into consideration, but for males, not females. The wage dispersion is also greater for males than for female union members in Turkey.

Chapter 8, Battisti’s “Mobility and Wages in Italy: The Effects of Job Seniority” based on data collected for young workers in the period 1985-1999 analyses the effects of job seniority on both mobility and wages. The Italian labour market is one of growing employment insecurity and a decline of the impact of unions and collective bargaining on wage outcomes. The author assumes that job seniority will have an unconditional impact on wages.

Chapter 9, “The Wage Costs of Motherhood: Which Mothers are Better Off and Why?” by Nivorozhkina *et al.* deals with a fertility crisis in Russia that has led to a policy of promoting reproduction. This policy has had to

be balanced with the needs of working mothers to ensure that there is sufficient incentive for mothers to remain connected to the workforce. The gap between male and female wages in Russia has been declining, as has the gap between the wages of mothers and non-mothers. The conclusion is that if social policy is to be geared to increasing fertility, then the protection of the rights of working mothers is axiomatic.

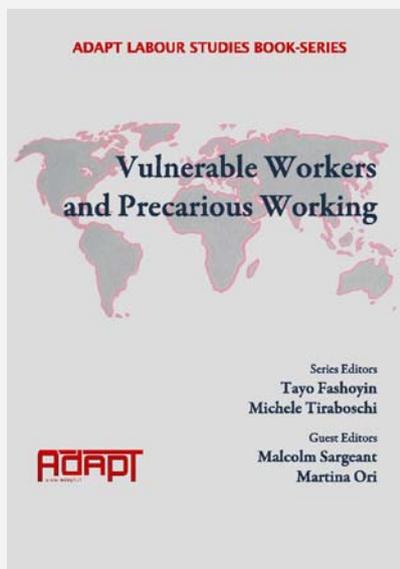
Chapter 10, Karlson and Lindberg's "The Decentralisation of Wage Bargaining: Four Cases" is also concerned with an analysis of the decentralisation of wage determination, among 16 OECD nations. In particular, patterns within Sweden, Denmark the UK and the Netherlands have demonstrated the most pronounced trends with respect to decentralisation. As was noted earlier, decentralisation is by no means universal and some OECD nations have either re-centralised or actually become more centralised. The chapter focuses on three aspects of centralisation; the level of bargaining, the involvement of federations and government intervention.

*Labour Markets at a Crossroads* offers the reader a clear and reasonably contemporary understanding of the labour market challenges facing European nations. In a globalising world it is instructive to consider the similarity of those challenges by way of comparative analysis. Despite the divergent histories and contexts of the nations considered in this book, the similarity of labour market outcomes is remarkable. For the reader – in this case the reviewer – who is not from Europe and prone to think that many of the problems associated with modern labour market analysis and policies are of Anglo-American origin, this book demonstrates the universal nature of problems facing employees and their representatives in trying to ensure adequate levels of employment security, wages and employment conditions on a cross-national basis.

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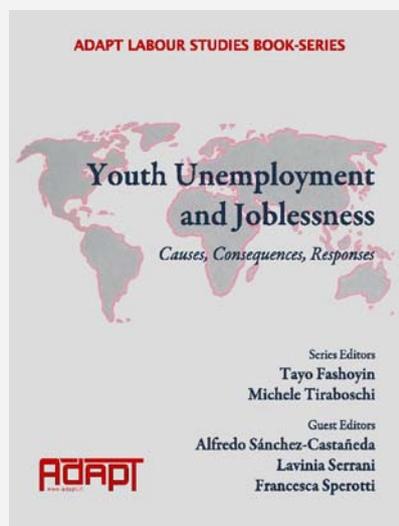
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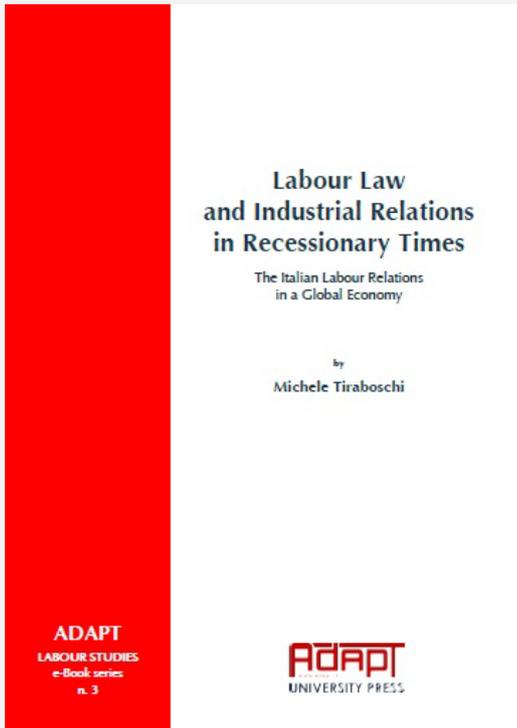


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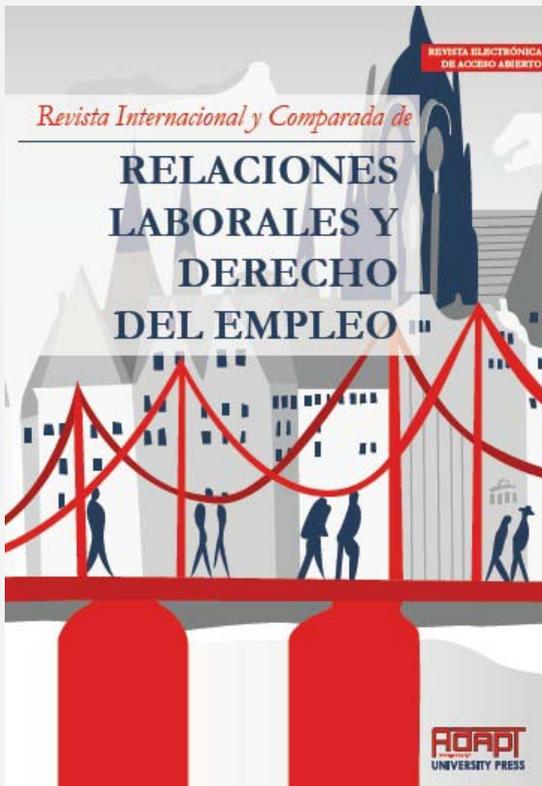
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