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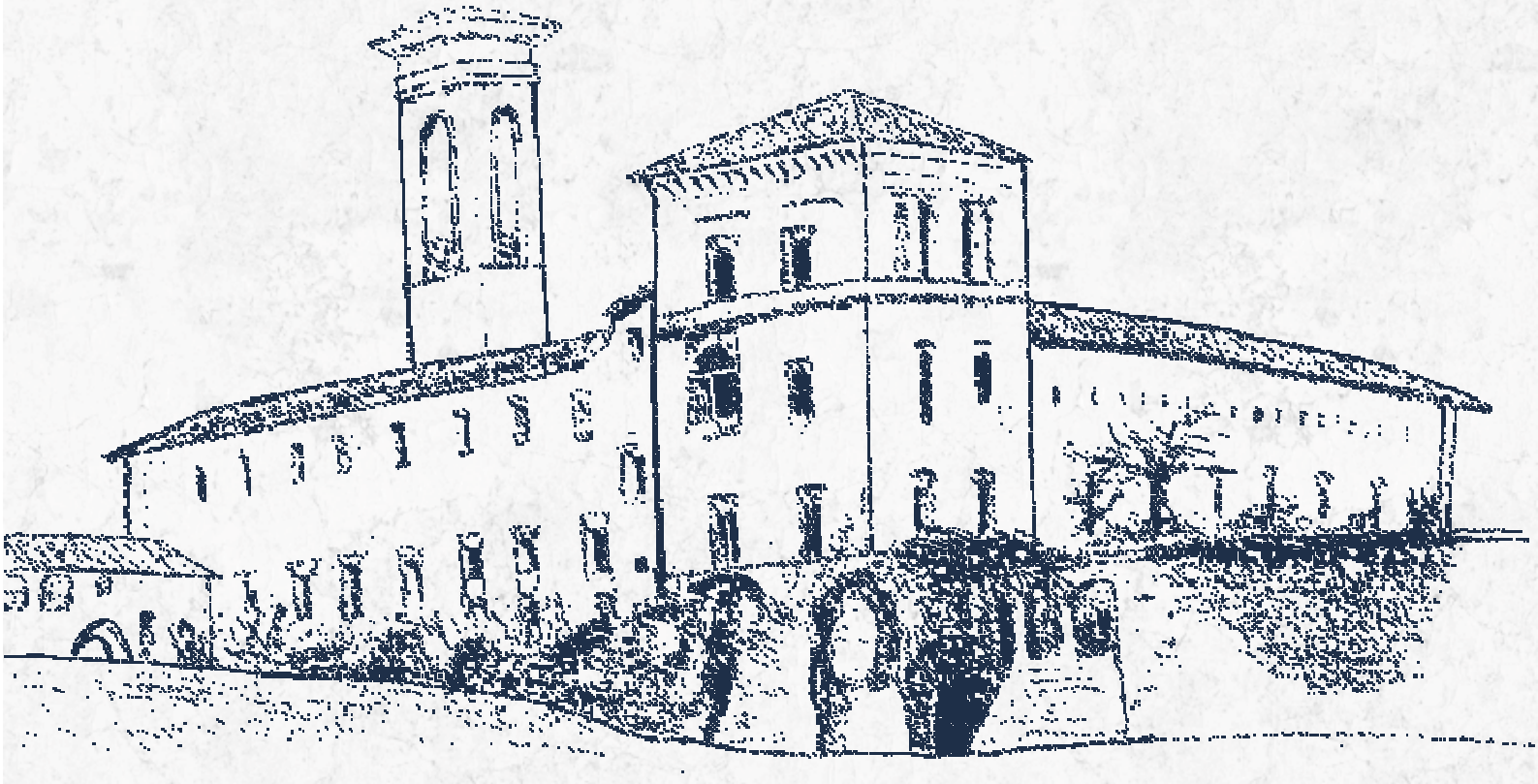

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Editorial

Valeria Filì, Michele Tiraboschi[1]

1. A Renewed Commitment to an Ongoing Project

Eight years have passed by since the E-Journal of International and Comparative Labour Studies (EJICLS) came into being. An ambitious project was envisaged at the time – both in cultural and scientific terms – that set in also thanks to the invaluable contribution of Prof Malcolm Sargeant.
In the inaugural editorial of the EJICLS, a commitment was made to "Building the Future of Work Together". Far from being a simple publishing venture aimed at research dissemination, the EJICLS was intended as an international platform for sharing social innovation projects.
There is no need to discuss the credibility of the journal or to evaluate the whole project around which it was built. Yet, thanks to your support and that of ADAPT's fellows, significant effort has been put in to establish the EJICLS' presence among the journals covering labour law and industrial relations issues. The journal's figures are there for all to see: from 2012 to 2019, 23 issues and 208 articles were published, covering topics from more than 50 countries. The papers were collected in eight volumes, which were made available open access to ensure widespread availability.
The many partnerships and research projects set up around the EJICLS attest to its success as a cooperative platform, especially when developing ideas and when engaging in comparison on a number of work-related issues, by adopting a consolidated and interdisciplinary approach.
The EJICLS should be conceived as a discussion forum, while always remaining committed to high-quality research. However, this might not be enough when facing the major challenges taking place in our fields in the

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attempt to build the future of work together, which should be better than the one we have inherited.

The COVID-19 pandemic is illustrative of this state of affairs, as it highlights the current limitations of the academic debate and of our contribution as individual researchers to a more modern and inclusive labour market.

As early as eight years ago, scholars from different disciplines had to deal with important challenges concerning the future of work, businesses, workers and industrial relations, in order to respond to geopolitical, economic, demographic, social and labour market changes. Today, these challenges are even more serious and are further magnified by the consequences of the pandemic, which will have a knock-on effect in different countries as far as work, politics and society are concerned.

Against this ever-changing background, there exist few certainties and these are the 'values' and the 'norms' expressing these values.

The natural development of the journal and its cultural manifesto has thus led to the setting-up of a new and promising group of early-career researchers gravitating towards the EJICLS, as a way to support its new editorship and editorial line. This was done mainly to strengthen the EJICLS' legal dimension.

Enhancing the legal perspective does not mean abandoning the interdisciplinary approach that has characterised the EJCILS since its creation. Yet it seems necessary to refocus the contribution provided by human, social and economic sciences to legal issues, emphasising the labour law and industrial relations dimension to avoid promoting theoretical assumptions that are detached from reality.

In the attempt to keep up with the trust of the academic community in relation to the quality of the contributions published in the previous issues, continuity will be ensured by focusing on certain aspects, which have been grouped under a number of sections. Some of them are more concerned with the legal perspective (Labour Law, Labour Market Law, Social Security Law, Anti-discrimination Law and Human Rights) while others have a more comparative dimension (Industrial Relations, Labour Issues). We decided to keep the 'Book Reviews' section, as it has always been appreciated.

The former joint managing editors have also ensured their presence in the new edition of the EJICLS, handing over its editorship to Prof Valeria Filì.

A proper balance between change and continuity has therefore been achieved, thanks to the acknowledgment and alternation of prestigious academics, with the declared intention of providing the new EJICLS with a more marked legal connotation.

Readers will have the last word on the reputation and credibility of a project which continues with a renewed commitment and energy.

The EU Directive on the Protection of Whistleblowers: A Missed Opportunity to Establish International Best Practices?

Dave Lewis[1]

Abstract

This paper is concerned with the EU Directive on the Protection of Whistleblowers (Directive (EU) 2019/1937). Contrasting the contents of the Directive with whistleblowing regulation worldwide, the positive and negative aspects of this provision are highlighted. The paper concludes by putting forward suggestions for the transposition of the Directive into Member States' legislation, in order to harmonise national rules with international best practices.

1. Introduction

The EU Directive (EUD) "on the protection of persons who report breaches of Union law" came into effect in December 2019 and allows two years for transposition in the Member States (MS)[2]. The Directive has been welcomed in many quarters as a significant step forward, particularly when for many years campaigners had been told that there was no legal basis for such a measure and that the requisite political will was lacking! This article will not recount the general rationale for protecting those who report concerns[3] or the particular

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[2] EUD Art. 26(1)2019/1937. However, Art 26 (2) provides that private sector entities with 50-249 workers will not need to have to internal reporting channels in place until December 2023.

[3] The rationale is discussed extensively in a range of publications on research and practice. See, for example, A.J. Brown, D. Lewis, R. Moberly, W. Vandekerckhove (eds.), *The International Whistleblowing Research Handbook*. Cheltenham, UK. 2014; K. Kenny, W. Vanderkerckhove, M.

background which led to the emergence of the EU provisions[4] but will discuss whether the EUD reflects international best practice principles.

2. Material Scope

Consistent with the objective of enhancing "the enforcement of Union law and policies in specific areas",[5] EUD Article 2 (1) identifies the breaches that will be covered.[6] Inevitably, Art.2(2) acknowledges that many countries both inside and outside of the EU afford protection to those who report on a much wider range of matters.[7] Thus the Council of Europe Recommendation [8] covers reports or disclosures that "represent a threat or harm to the public interest" and advocates that Member States "should, at least, include violations of law and human rights, as well as risks to public health and safety and to the environment".[9] Subsequently, in calling for an EU-wide horizontal legislative measure on whistleblower protection, the European Parliament adopted a notion of "breach of the public interest" which includes, but is not limited to,

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Fotaki, *The Whistleblowing Guide: Speak –up arrangements, challenges and best practices*. Chichester, UK. 2019.

4 The Recital to the EUD mentions fragmented protection across the MS and the need to address breaches of EU law with a cross –border dimension as well as specific problems with: (inter alia) tax and financial services; product, transport and nuclear safety; the protection of the internal market, the environment and the food chain.

5 EUD Art. 1.

6 "(a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas: (i) public procurement; (ii) financial services, products and markets, and prevention of money laundering and terrorist financing; (iii) product safety and compliance; (iv) transport safety; (v) protection of the environment; (vi) radiation protection and nuclear safety; (vii) food and feed safety, animal health and welfare; (viii) public health; (ix) consumer protection; (x) protection of privacy and personal data, and security of network and information systems;

(b) breaches affecting the financial interests of the Union as referred to in Article 325 TFEU and as further specified in relevant Union measures; (c) breaches relating to the internal market, as referred to in Article 26(2) TFEU, including breaches of Union competition and State aid rules, as well as breaches relating to the internal market in relation to acts which breach the rules of corporate tax or to arrangements the purpose of which is to obtain a tax advantage that defeats the object or purpose of the applicable corporate tax law".

7 "The Directive is without prejudice to the power of Member States to extend protection under national law as regards areas or acts not covered by paragraph 1". See also Art.25 on more favourable treatment and non-regression in MS. However, paragraph 104 of the Recital requires that any provisions that are more favourable to reporters should not "interfere with the measures for the protection of persons concerned". (see section 9 below on the protection of wrongdoers).

8 Council of Europe, *Protection of Whistleblowers*, Paris, 2014.

9 Council of Europe *Recommendation*, op.cit, paragraph 2.

"acts of corruption, criminal offences, breaches of legal obligations, miscarriages of justice, abuse of authority, conflicts of interest, unlawful use of public funds, misuse of powers, illicit financial flows, threats to the environment, health, public safety, national and global security, privacy and personal data protection, tax avoidance, consumers' rights, attacks on workers' rights and other social rights and attacks on human rights and fundamental freedoms as well as on the rule of law, and acts to cover up any of these breaches"[10].

Indeed, some whistleblowing statutes already identify a broad range of matters as potentially reportable. For example, Section 2A (1) of Norway's Work Environment Act 2005 gives employees the right to notify "matters that are contrary to legal rules, written ethical guidelines in the business or ethical norms that are widely accepted in society……"[11].

Australia's Public Interest Disclosure Act 2013 defines 'disclosable conduct' to include maladministration, abuses of public of trust, wastage of public funds and damage to the environment as well as breaches of legal obligations.[12] According to Section 3 of New Zealand's Protected Disclosures Act 2000, "serious wrongdoing" includes "an act, omission, or course of conduct by a public official that is oppressive, improperly discriminatory, or grossly negligent, or that constitutes gross mismanagement"[13]. Article 2 of Korea's Act on the Protection of Public Interest Whistleblowers defines the term "violation of the public interest" to mean an act that infringes on the health and safety of the public, the environment, consumer interests and fair competition.."

[10] European Parliament Resolution 2016/2224 para 17. The UN Special Rapporteur provided the following examples of issues that might be disclosed in the public interest: "a violation of national or international law, abuse of authority, waste, fraud or harm to the environment, public health or public safety". See: Promotion and protection of the right to freedom of opinion and expression, Note by the Secretary-General, seventieth session of the UN General Assembly, New York City,2015. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf

[11] "for example, matters that may involve(a) danger to life or health;(b) climate or environmental hazard;(c) corruption or other financial crime d) abuse of authority; (e) unhealthy working environment;(f) breach of personal data security.
(3) matters that apply only to the employee's own working conditions are not considered as notification under the chapter here, unless the relationship is covered by other paragraphs."

[12] Section 29 Public Interest Disclosure Act 2013.

[13] Similarly, the list of relevant wrongdoings in Section 5 Irish Protected Disclosures Act 2014 includes "an act or omission by or on behalf of a public body (which) is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement". The French whistleblowing law, Law No. 2016-1691 of 2016, known as "Sapin II", includes both a list of categories of wrongdoing and a public interest category. This has the potential to extend protection to information outside of the specific categories listed.

Turning to empirical research about what concerns are actually raised, again we find a range of matters are covered. For example, Section 301 of the Sarbanes-Oxley Act 2002 (SOX) requires public companies in the US to have internal reporting procedures only for reporting accounting and financial concerns. However, a recent large -scale study in the US indicated that 54.9% of concerns raised related to human resource issues[14]. Thus, it would appear that firms acquire information about a broad range of issues via whistleblowing procedures. Similarly, a survey of NHS Trust staff in 2014 revealed that the most frequently reported concerns were safety, harassment/bullying, clinical competence and mismanagement[15]. Respondents to an OECD survey selected from a range of serious corporate misconduct categories that were reported via internal mechanisms. The most commonly reported were fraud (42%), workplace safety and health issues (27%), and industrial relations and labour issues (24%)[16].

As regards the thorny issues of defence, national security and classified information, Art.3 makes it clear that the EUD does not affect the responsibility or powers of MS. By way of contrast, the Council of Europe Recommendation suggests that "a special scheme or rules…may apply to information relating to national security, defence, intelligence, public order or international relations of the State"[17]. Similarly, paragraph 18 of the European Parliament Resolution in 2017 suggested that "special procedures should apply for information involving …… classified information related to national security and defence".[18] Indeed, the Tshwane Principles[19] provide that laws should protect public servants, including members of the military and contractors working for intelligence agencies, who disclose information to the public if four conditions are met.[20] Even if a disclosure does not meet these

[14] S. Stubben, K. Welch, *Evidence on the use and efficacy of internal whistleblowing systems.* Utah, USA, 2019. SSRN_ID3379975_code342237

[15] 15,120 people responded to this survey. See: *The Freedom to Speak Up Review Report*, London, 2015. http://freedomtospeakup.org.uk/wp-content/uploads/2014/07/F2SU_web.pdf

[16] OECD, *Business Integrity and Corporate Governance*, Paris. 2015. http://www.oecd.org/daf/ca/Corporate-Governance-Business-Integrity-2015.pdf

[17] Council of Europe Recommendation, op. cit., paragraph 5.

[18] See, for example, Section 18 Irish Protected disclosures Act 2014 which deals with security, defence, international relations and intelligence.

[19] Open Society Justice Initiative, *The Global Principles on National Security and the Right to Information (The Tshwane Principles)*,New York. 2013 (https://www.justiceinitiative.org/publications/tshwane-principles-national-security-and-right-information-overview-15-points).

[20] (1) the information concerns wrongdoing by government or government contractors; (2) the person attempted to report the wrongdoing, unless there was no functioning body that was likely to undertake an effective investigation or if reporting would have posed a significant risk of destruction of evidence or retaliation against the whistleblower or a third party; (3) the

criteria, the Tshwane principles recommend that the whistleblower should not be punished so long as the public interest in disclosure outweighs the public interest in keeping the information secret.[21] Where a country has laws that criminalise disclosure to the public of classified information, any punishment should be proportionate to the harm caused.

Art.3(4) mentions "the autonomy of the social partners and their right to enter into collective agreements… without prejudice to the level of protection granted by this Directive". This is an important principle since it is the role of trade unions to negotiate more favourable provisions than the minimum levels set out in legislation. Indeed, workers' rights in relation to whistleblowing can be enhanced in many ways by collective bargaining. For example, a collective agreement could contain arrangements that are more generous than the statutory provisions in relation to: what can disclosed, by and to whom and how; feedback after investigations; advice and representation; remedies etc. [22]

3. Personal Scope and Condition for Protection

Article 4 makes it clear that both the public and private sectors are covered but the information about breaches must have been acquired "in a work- related context"[23]. Importantly, the word "breaches" covers not only acts or omissions which are unlawful but also abusive practices i.e. those which "defeat the object or the purpose of the rules" in the areas covered by the EUD[24]. "Information on breaches" includes "reasonable suspicions, about actual or potential breaches, which occurred or are very likely to occur….and about attempts to conceal such breaches"[25]. Although both the UK and Irish legislation use the word "likely", the practical difference between "very likely"

disclosure was limited to the amount of information reasonably necessary to bring to light the wrongdoing; and (4) the whistleblower reasonably believed that the public interest in having the information revealed outweighed any harm to the public interest that would result from disclosure.

[21] A United Nations report recommends that: "if a disclosure genuinely harms a specified legitimate State interest, it should be the State's burden to prove the harm and the intention to cause harm". See: *Promotion and protection of the right to freedom of opinion and expression'*, Note by the Secretary-General, seventieth session of the UN General Assembly, 2015. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_718048.pdf

[22] See: D. Lewis, W. Vandekerckhove, *Trade unions and whistleblowing process: an opportunity for strategic expansion*, in Journal of Business Ethics. 2018, Issue 4. ISSN 0167-4544.

[23] EUD Art.4(2) & (3) make it clear that it covers information obtained in a work –based relationship which has ended or "acquired during the recruitment process or other pre – contractual negotiations".

[24] EUD Art.5(1)

[25] EUD Art.5(2).

and "likely" will ultimately depend on case law. Paragraph 43 of the Recital indicates that protection should not apply to those who report information which is "already fully available in the public domain or of unsubstantiated rumours and hearsay". One problem here is that the reporter's concern may be that the information that is in the public domain has not been acted upon. Thus, both the UK and Irish whistleblowing legislation provide that "where the person receiving the information is already aware of it", disclosure means bringing it to that person's attention. [26]

Art.6(1) makes it clear that in order to qualify for protection the reporter must have "had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive." Given that this belief must relate to both the truth and the scope of the EUD, it is vital that MS make it clear that the reasonableness of a reporter's belief should be judged by what a person in a comparable position with similar knowledge might have believed rather than how others (for example, adjudicators) might have reacted. Given that some whistleblowing statutes[27] and ECHR decisions[28] still refer to the issue of good faith[29], it important to note that paragraph 32 of the Recital states that: "The motives of the reporting persons in reporting should be irrelevant in deciding whether they should receive protection".

The expression "work- related context"[30] constitutes a constraint because much valuable information about possible wrongdoing may not emerge from such a context. Paragraph 36 of the Recital justifies the restriction on the basis that there is an "economic vulnerability vis-à-vis the person on whom *de facto* they depend for work. Where there is no such work-related power imbalance, ….there is no need for protection against retaliation". This proposition would seem contentious given that ordinary citizens who report alleged wrongdoing may well suffer non-work related reprisals, for example, denial of or unfavourable access to the services offered by an employer. Indeed, paragraph 14 of a European Parliament resolution in October 2017 "takes 'whistle-blower' to mean anybody who reports on or reveals information in the public interest, including the European public interest, such as an unlawful or wrongful act, or an act which represents a threat or involves harm, which undermines or endangers the public interest, usually but not only in the

[26] Section 43L ERA 1996 and Section 3(1) Protected Disclosures Act 2014 (Ireland)

[27] For example, in India and the US.

[28] See, for example, Guja v Moldova (No.2) European Court of Human Rights (Application no. 1085/10) [2018]

[29] 'Good faith' as a necessary ingredient of a qualifying disclosure was removed from Part IVA ERA 1996 when a public interest test was inserted. See now Section 43B ERA 1996.

[30] Defined in EUD Art. 5(9).

context of his or her working relationship, be it in the public or private sector, of a contractual relationship, or of his or her trade union or association activities"[31].

It should be observed that many countries extend the definition of whistleblowing beyond work-based relationships. For example, the UK legislation protects workers who raise concerns based on information obtained outside the work context so long as the subject matter is within the list of qualifying disclosures contained in Section 43B Employment Rights Act 1996 (ERA 1996) and the report is made to an appropriate recipient[32]. Section 2 of the Ghanaian Whistleblower Act 2006 covers persons making a disclosure in respect of another person or an institution and Section 4(1) of India's Whistleblowers Protection Act 2014 states that: "any public servant or any other person including any non-governmental organisation, may make a public interest disclosure before the Competent Authority".

As regards who can report, the EUD takes a broad view covering "at least": workers within the meaning of Article 45(1) TFEU[33], former workers, job applicants, the self-employed, shareholders, volunteers and trainees.[34] Importantly, the EUD acknowledges the notion of indirect retaliation by affording protection to facilitators, defined as a person who assists a reporter,[35] as well as third parties who are connected with the reporter (known as associated persons) and "who could suffer retaliation in a work-related context". [36] Indeed, paragraph 41 of the Recital points out that trade union or employee representatives should be protected under the EUD "both when they report in their capacity as workers and where they have provided advice

[31] European Parliament, Legitimate measures to protect whistle-blowers acting in the public interest, (2016/2224 INI),2017. http://www.europarl.europa.eu/doceo/document/TA-8-2017-0402_EN.html. According to Principle 3 of the G20's High-Level Principles for the effective protection of whistleblowers,"G20 countries should seek to provide appropriate protection to persons reporting corruption to competent authorities outside of an employment situation including confidentiality".G20, Osaka, 2019.

[32] Section 43C –H ERA 1996.

[33] In Genc v Land Berlin [2010]ICR 1108 the Court of Justice of the European Union ruled that:"any person who is in an employment relationship, the essential features of which were that for a certain period of time he performed services for and under the direction of another person in return for remuneration, was a 'worker' if he pursued activities which were real and genuine and not on such a small scale as to be marginal and ancillary".

[34] Norway's Work Environment Act 2005 (as amended) covers: Employees, temporary agency workers, pupils, those liable for military service and service providers, patients, persons undergoing training and participants in labour market measures.

[35] EUD Arts 4(4)(a)and 5(8).

[36] EUD Art 4(4)(b). Many whistleblowing statutes protect associated persons. For example, Article 6 of Serbia's Law on the Protection of Whistleblowers Act.

and support to the reporting person".[37] For the sake of completeness, it should be noted that Paragraph 37 of the Recital suggests that third –country nationals as well as EU citizens should be protected and paragraph 62 makes it clear that the EUD applies even though a person has a contractual or statutory duty to report.

4. Internal Reporting Channels

Although the EUD contemplates people raising concerns internally, externally or publicly, Art.7(2) obliges MS to "encourage" internal reporting and Art 8 requires MS to ensure that public sector employers and private sector entities with 50 or more workers[38] establish internal procedures for reporting and follow-up[39]. However, Art 8(7) provides that, following an appropriate risk assessment, MS may require smaller private sector entities to establish internal reporting arrangements[40]. Indeed, Paragraph 49 of the Recital recognises the value of whistleblowing procedures in all organisations by suggesting that small private sector entities might be subject to less prescriptive requirements than those contained in the EUD so long as they "guarantee confidentiality and diligent follow-up". Where there are no internal channels, paragraph 51 makes it clear that people should still be able to report externally to the competent authorities and "enjoy the protection against retaliation provided by the Directive".

Mention is made of consultation and "agreement with the social partners where provided for by national law". Clearly lip service is being paid here to the principle of democracy at the workplace and the practical gains to be had from worker participation in and commitment to reporting arrangements that have been negotiated by their representatives. Indeed, Dutch law provides for

[37] Legislation in France and Malaysia allows anybody to make a disclosure without a requirement that they acquire the information in a work context. See: Law on Transparency, The Fight Against Corruption and The Modernisation of Economic Life (Sapin 11, op.cit.) Article 6 and Whistleblower Protection Act 2010 of Malaysia, Part I respectively.

[38] Paragraph 52 of the Recital mentions imposing an obligation on contracting authorities in the public sector to have internal reporting arrangements.

[39] According to EUD Art 5(12),"'follow-up' means any action taken by the recipient of a report or any competent authority, to assess the accuracy of the allegations made in the report and, where relevant, to address the breach reported, including through actions such as an internal enquiry, an investigation, prosecution, an action for recovery of funds, or the closure of the procedure".

[40] EUD Art.8(8)obliges MS to notify the Commission of such a decision and the Commission must communicate it to other MS.

the compulsory consent of the works council when adopting a whistleblowing policy[41].

The reporting channels provided must allow workers to raise concerns but "may enable" other persons mentioned in Art.4 to do so (see above). This raises the interesting question as to how many reporting procedures employers think it desirable to have in place. For example, is it realistic to have separate procedures for workers, non-workers who are in contact with the employer in the context of work-related activities and others with relevant information?

Art.8 (5)&(6) stipulate that reporting channels may be operated internally or provided externally by a third party and private sector entities with 50 -249 workers "may share resources as regards the receipt of reports and any investigation to be carried out". In terms of recipients of reports, paragraph 54 of the Recital notes that third parties could be "external reporting platform providers, external counsel, auditors, trade union representatives or employee representatives." The operation of whistleblowing arrangements by external parties raises issues of principle as well as some practical considerations. For example, does outsourcing to a specialist agency in some way undermine an organisation's commitment to encouraging people to raise concerns internally? Is third party involvement more likely to give rise to delays in investigating, rectifying any wrongdoing or providing feedback? The recognition that relatively small employers can pool resources is unsurprising, although not all countries currently make specific adjustments for employer size[42].

Art. 9 deals with the contents of reporting procedures. It provides for information to be supplied in writing, orally or both and, upon request by the reporter, a "physical meeting within a reasonable time frame" should be possible. This Article also refers to the need to: keep the identity of both the whistleblower and any third party mentioned in the report confidential; acknowledge the receipt of the information to the reporter within seven days; designate an impartial person or department that is competent to diligently follow- up on reports and communicate with the discloser of information; provide feedback within a reasonable period, not exceeding three months; and provide "clear and easily accessible information regarding procedures for reporting externally to competent authorities…" (discussed below). Paragraph 59 of the Recital mentions making such information available to persons other than workers and suggests that it could be posted "on the website of the entity and could also be included in courses and training seminars on ethics and integrity".

[41] House for Whistleblowers Act 2016.

[42] For example, the UK. However, at the time of writing, employers in this jurisdiction are not legally obliged to have whistleblowing procedures.

5. External Reporting

It is a feature of the EUD that external reporting can take place either directly or after an internal procedure has been invoked[43]. Art 11 requires MS to designate competent authorities for reporting purposes and to provide them with "adequate resources". These authorities must be required to: set up "independent and autonomous external reporting channels for receiving and handing information…"[44]; acknowledge receipt of reports within seven days and diligently follow them up; give feedback to the reporter within a reasonable timeframe (not exceeding three months or six months in "duly justified cases"[45]); communicate to the reporter the final outcome of any investigation "in accordance with procedures provided for under national law"[46]. Importantly, MS must ensure that authorities which receive a report outside their remit transmit it to a relevant competent authority within a reasonable time and notify the reporter accordingly[47].

Art 11 (3) stipulates that MS can provide for competent authorities not to follow –up reported breaches that are "clearly minor" but, in such a case, reporters must be notified about the reasons for the decision. It is be hoped that, consistent with the objective of encouraging reporting, MS will err on the side of caution and introduce tightly drawn lists of what is likely to be considered "clearly minor." In the same vein, Art.11 (4) facilitates the closure of procedures where competent authorities receive "repetitive reports which do not contain any meaningful new information". In the event of "high inflows of reports", MS may allow competent authorities to give priority to reports of "serious breaches or breaches of essential provisions[48].

The competent authorities will also be required to publish a minimum amount of information on their websites "in a separate, easily identifiable and

[43] EUD Art. 10. Art.6(7)protects people who report matters falling within the scope of the EUD to EU institutions etc.

[44] EUD Art.12(1)states: "External reporting channels shall be considered independent and autonomous, if they meet all of the following criteria: (a) they are designed, established and operated in a manner that ensures the completeness, integrity and confidentiality of the information and prevents access thereto by non-authorised staff members of the competent authority; (b) they enable the durable storage of information in accordance with Article 18 to allow further investigations to be carried out".

[45] It would be good practice for MS to spell out the circumstances that justify the longer timeframe.

[46] EUD Art.12(4) requires MS to designate the staff responsible for handling reports.

[47] EUD Art.11(6).

[48] EUD Art.11(5). The possibility of judicial review is mentioned in paragraph 103 of the Recital to the Directive.

accessible section".[49] The procedures of competent authorities must be reviewed regularly "and at least once every three years". In undertaking this exercise they must take into account their own experience and that of other such authorities and adapt their arrangements accordingly[50].

6. Public Disclosures

According to Article 15 (1), public disclosures qualify for protection if: (a) the person reported internally or externally but no appropriate action was taken within the timeframes specified in Articles 9 and 11; or (b) the reporter had reasonable grounds to believe that either the breach "may constitute an imminent or manifest danger to the public interest[51] or, in the case of external reporting, owing to the particular circumstances, there is a risk of retaliation or low prospect of the alleged breach being "effectively addressed". Paragraph 45 of the Recital provides examples of how information may come into the public domain: "directly to the public through online platforms or social media, or to the media, elected officials, civil society organisations, trade unions or professional and business organisations"[52].

[49] EUD Art.13 …. (a) the conditions for qualifying for protection under this Directive; (b) the contact details for the external reporting channels as provided for under Article 12, in particular the electronic and postal addresses, and the phone numbers for such channels, indicating whether the phone conversations are recorded; (c) the procedures applicable to the reporting of breaches, including the manner in which the competent authority may request the reporting person to clarify the information reported or to provide additional information, the timeframe for providing feedback and the type and content of such feedback; (d) the confidentiality regime applicable to reports, and in particular the information in relation to the processing of personal data in accordance with Article 17 of this Directive, Articles 5 and 13 of Regulation (EU) 2016/679, Article 13 of Directive (EU) 2016/680 and Article 11 of Regulation (EU) 2018/1725, as applicable; (e) the nature of the follow-up to be given to reports; (f) the remedies and procedures for protection against retaliation and the availability of confidential advice for persons contemplating reporting; (g) a statement clearly explaining the conditions under which persons reporting to the competent authority are protected from incurring liability for a breach of confidentiality pursuant to Article 21(2); and (h) contact details of the information centre or of the single independent administrative authority as provided for in Article 20(3) where applicable".

[50] EUD Art.14

[51] "such as where there is an emergency situation or a risk of irreversible damage".

[52] Employees in the Irish private and non-profit sectors who were questioned in the 2016 Integrity at Work survey were asked whether a person would be justified in disclosing information about serious wrongdoing to the media or online. Only 7% of employees agreed that such disclosure was justified as a first option, whilst almost half of the employees surveyed said that this disclosure channel should only be considered as a last resort. Transparency International Ireland, *'Speak Up Report 2017'*, Dublin, 2017.

7. Confidentiality and Anonymity

MS must ensure that a reporter's identity is not disclosed other than to staff authorised to receive or follow -up reports without the express consent of the person reporting (on penalties see section 11 below). However, this does not apply if there is a "necessary and proportionate obligation imposed" by EU or national law in the context of investigations. In these circumstances the reporter must be informed before their identity is revealed unless this would jeopardise investigations or legal proceedings. In addition, Art. 16(3) provides: "When informing the reporting persons, the competent authority shall send them an explanation in writing of the reasons for the disclosure of the confidential data concerned".
Article 6(2) of the EUD provides that the Directive "does not affect the power of Member States to decide whether legal entities in the private and public sector and competent authorities are required to accept and follow -up on anonymous reports of breaches". Art 6 (3) adds that anonymous reporters who meet the EUD's conditions should enjoy protection if they are "subsequently identified and suffer retaliation". Interestingly, EU law currently requires anonymous reporting channels in relation to money laundering[53] and in 2017, the European Commission launched a new whistleblower tool to make it easier for individuals to provide information anonymously about cartels and other anti-competitive practices[54].

8. Record-keeping and Data Protection

Public and private sector organisations as well as the competent authorities will be obliged to keep records of each report received and store them for no longer that is necessary and proportionate. Provision is made for documenting oral reports and producing minutes, or conversations being transcribed and reporters being given the opportunity to check etc their contents. Similarly, provision is made for records of meetings with recipients of concerns to be kept in a durable and retrievable form if the person reporting by this mechanism so consents[55]. Significantly, the EUD does not create an EU-wide report-collecting agency as suggested in the European Parliament Resolution[56].
Art 17 requires that the processing of personal data that is carried out as a result of the EUD must comply with Regulation (EU) 2016/679 and Directive

[53] See, for example, Article 61(3) of the Anti-Money Laundering Directive (EU) 2015/849.
[54] See *Anonymous Whistleblower Tool* https://ec.europa.eu/competition/cartels/whistleblower/index.html
[55] EUD Art.18
[56] Op.cit., 2016/2224.

(EU) 2016/680 on data protection. As observed in paragraph 44 of the Recital, this may oblige MS to invoke Art 23 of the 2016 Regulation and restrict the exercise of certain data protection rights in order to "prevent and address attempts to hinder reporting or to impede, frustrate or slow down follow-up,…or attempts to find out the identity of the reporting persons".

9. Retaliation

Article 19 requires MS to prohibit any form of retaliation (including threats and attempts to retaliate) against reporters, third parties connected with them and facilitators[57]. Paragraph 87 of the Recital provides the following detail: "Reporting persons should be protected against any form of retaliation, whether direct or indirect, taken, encouraged or tolerated by their employer or customer or recipient of services and by persons working for or acting on behalf of the latter, including colleagues and managers in the same organisation or in other organisations with which the reporting person is in contact in the context of his or her work-related activities".

Article 21 deals with measures to ensure protection against retaliation and provides illustrations of the steps that MS need to take. For example, provided that the reporter did not commit a criminal offence, no liability[58] should be incurred for a disclosure if the reporter had reasonable grounds to believe that the information was necessary for revealing a breach covered by the EUD. In this respect it is worth noting that paragraph 92 of the Recital suggests that accessing emails of a co-worker or files that they normally do not use, taking photos of work premises or visiting locations they usually do not have access to would not undermine a reporter's immunity since they give rise to civil or administrative rather than criminal liabilities. Paragraph 97 of the Recital states that the person initiating such proceedings should be obliged to prove that the reporter did not meet the conditions set out in the EUD. Paragraph 98 of the Recital adds that, where these conditions are met in relation to trade secrets, a disclosure will be considered allowed within Art.3(2) of Directive (EU) 2016/943. No mention is made of physical protection, although some countries feel it necessary to do so[59].

In terms of remedies, reference is made to full compensation being available and interim relief pending the conclusion of legal proceedings (Article 23, which deals with penalties, is outlined below). Paragraph 94 of the Recital

[57] Fifteen examples of possible types of retaliation are listed.

[58] EUD Art.21(7) specifically mentions legal proceedings for defamation, breach of copyright, breach of secrecy, breach of data protection rules and disclosure of trade secrets.

[59] See Ghana's Whistleblower Protection Act 2006 Section 17 and Article 13 of South Korea's Protection of Public Interest Reporters Act 2011.

mentions reinstatement and the need to compensate for actual and future losses, including both economic and intangible damage (for example, pain and suffering). According to paragraph 95, compensation or reparation must be dissuasive and should not discourage potential whistleblowers. Of particular note here is the observation that "providing for compensation as an alternative to reinstatement in the event of dismissal might give rise to systematic practice in particular by larger organisations..".

10. Protection of Alleged Wrongdoers and Associated Persons

The EUD uses the term "persons concerned" and requires the identity of such persons to be protected while investigations or the public disclosure are ongoing. For these purposes, protection is also afforded to people who are associated with the person to whom the breach is attributed[60]. In addition, MS must ensure that such persons get the benefit of the presumption of innocence, a fair trial and right of access to their file[61].

11. Measures for Support

Article 20 requires MS to offer support to reporters covered by the EUD and mentions the following measures: (a) "comprehensive and independent information and advice, which is easily accessible to the public and free of charge" ….; (b) effective assistance from competent authorities ….., including, where provided for under national law, certification of the fact that…[reporters] qualify for protection under this Directive"[62]; and (c) "legal aid in criminal and in cross-border civil proceedings ….and, in accordance with national law, legal aid in further proceedings and legal counselling or other legal assistance". Article 20(3) indicates that the support measures may be offered by "an information centre or a single and clearly identified independent administrative authority". Paragraph 89 of the Recital goes further by suggesting that MS could extend advice to legal counselling and: "Where such advice is given to reporting persons by civil society organisations ….. Member States should ensure that such organisations do not suffer retaliation, for instance in the form of economic prejudice ….."

[60] EUD Art.5(10).
[61] EUD Art.22.
[62] Article 7(1) of the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina 2013 provides for the Agency for Prevention of Corruption and Coordination of the Fight Against Corruption to determine whether an employee has whistleblower status.

12. Penalties

MS must provide for "effective, proportionate and dissuasive penalties" for:(a) hindering or attempt to hinder reporting;(b) retaliating against persons referred to in Article 4; (c) bringing vexatious proceedings against persons referred to in Article 4;(d) breaching the duty to maintain the confidentiality of the identity of reporting persons; (e) knowingly reporting or publicly disclosing false information. Significantly, no penalties are specified for other obligations imposed by the EUD, for example the establishment of internal reporting procedures and following up reports that are received.
In relation to hindering reporting, Paragraph 46 of the European Parliament Resolution suggests that 'gagging' orders should attract criminal penalties. As regards retaliation, it is worth observing that, according to Section 19 of Australia's Public Interest Disclosure Act 2013, a reprisal is a criminal offence with a maximum of 2 years' imprisonment. By way of contrast, Section 13 of Ireland's Protected Disclosures Act allows a whistleblower to bring a civil action against a person taking reprisals. As regards confidentiality, Paragraph 47 of the European Parliament Resolution suggests that breaches of confidentiality should attract criminal penalties[63]. With respect to knowingly false reporting, Paragraph 102 of the Recital notes that the "proportionality of such penalties should ensure that they do not have a dissuasive effect on potential whistleblowers". Good practice requires that the burden should be on a complainant to prove that the reporter knew the information was false at the time of disclosure.

13. Contracting Out

Article 24 requires MS to ensure that the rights and remedies provided by the EUD cannot be "waived or limited by any agreement, policy, form or condition of employment, including a pre-dispute arbitration agreement."

[63] Under the French whistleblowing law, Sapin II,(op.cit.) a breach of confidentiality attracts two years' imprisonment and a €30,000 fine. The Commonwealth of Australia's Public Interest Disclosure Act 2013 Section 20 provides that, subject to exceptions, it is a criminal offence to disclose information obtained by a person in their capacity as a public official and that information is likely to enable the identification of the discloser as a person who has made a public interest disclosure. The offence carries a penalty of imprisonment for six months and/or thirty penalty units.

14. Evaluation and Review

Article 27 obliges MS to furnish the EU Commission with information about the implementation of the EUD and, on the basis of the information supplied, the Commission must submit a report to the European Parliament and the Council by December 2023. The annual statistics required from MS must detail: "(a)the number of reports received by the competent authorities; (b) the number of investigations and proceedings initiated as a result of such reports and their outcome; and (c) if ascertained, the estimated financial damage, and the amounts recovered following investigations and proceedings, related to the breaches reported." It is worth observing here that Paragraph 28 of the European Parliament Resolution 2017 called on the Commission "to consider creating a platform for exchanging best practices … (on whistleblowing legislation) between Member States and also with third countries".
Within six years of the EUD coming into force, the EU Commission must submit a report to the European Parliament and the Council assessing the impact of national laws transposing the EUD[64]. In addition to an evaluation of the way in which the EUD has functioned, this report must assess the need for additional measures, "including, where appropriate, amendments with a view to extending the scope of this Directive to further Union acts or areas, in particular the improvement of the working environment to protect workers' health and safety and working conditions" [65].

15. Conclusions and Recommendations

Much of this section will be devoted to how, in transposing the EUD, MS might build on its provisions in order to ensure that they adhere to international best practices. Indeed, in accordance with the principle of subsidiarity, the EUD establishes basic principles and it is the intention that MS will introduce measures that meet their particular needs and circumstances. It is also important to acknowledge that the EUD is the result of extensive consultation and debate and that the final text avoids some of the pitfalls that beset some current whistleblowing statutes. For example, it is now clear that good faith cannot be used as a condition for protecting whistleblowers because it diverts attention from the message to the motives of the messenger. A related matter is the EUD stipulation that innocent misinformation should not result in loss of protection but knowingly supplying false information can lead

[64] EUD Art.27(4) stipulates that the reports required by this Article must be "public and easily accessible".
[65] EUD Art.27(3).

to legal liability[66]. Another test that features prominently in current whistleblowing legislation is that of acting in the public interest. Again, the EUD approach is useful here in that it contains no separate test - the public interest is assumed if a breach of Union law is reported to a designated recipient in the manner specified in the relevant Articles. The issue of rewarding whistleblowers also seems to have been put to bed at the moment because it does not feature in the EUD. MS may choose to operate reward schemes but should bear in mind that these may indirectly raise questions about a whistleblower's motive. Far more positive would be the encouragement of awards for disclosing particularly valuable information and public recognition via a state honours system.

As regards the matters that can be reported, it seems highly unlikely that MS will confine themselves to breaches of Union law. Indeed, Transparency International (TI) argues that restricting the range of information for which disclosers will be protected hinders whistleblowing: "if people are not fully certain that the behaviour they want to report fits the criteria, they will remain silent, meaning that organisations, authorities and the public will remain ignorant of wrongdoing that can harm their interests".[67] In "A best practice guide for whistleblowing legislation",[68] TI offers a broad definition of whistleblowing[69] and recommends that indicative rather that exhaustive lists of reportable conduct should be provided. In relation to national security, defence, intelligence and international relations, it would have been helpful if the EUD had required special rules to apply as advocated by (inter alia) the European Parliament and the Council of Europe[70].

In terms of personal scope, MS may choose to follow the approach of the European Parliament and several countries by not confining their legislation to breaches and abusive practices "in a work related context". The EUD is very

[66] Arguably it would be appropriate simply to deny protection to the individual. See Art.9(1) of the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina 2013.

[67] Transparency International, *A Best Practice Guide for Whistleblowing Legislation*, Berlin, 2018.Page 7.
ttps://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation.

[68] Transparency International, *op.cit.*, 2018. Principle 3. https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation

[69] "the disclosure or reporting of wrongdoing, including but not limited to corruption; criminal offences; breaches of legal obligation (including perceived or potential wrongdoing); miscarriages of justice; specific dangers to public health, safety or the environment; abuse of authority; unauthorised use of public funds or property; gross waste or mismanagement; conflict of interest; and acts to cover up of any of these".

[70] For an example, see Irish Protected Disclosures Act 2014 Section 18.

inclusive about who can report, although MS might choose to protect disclosures made on the basis of reasonable suspicions rather than reasonable grounds to believe that the information was true. The need to safeguard those who assist whistleblowers and third parties who are connected with them is recognised in the EUD. However, it would be good practice for MS also to protect those who incur reprisals because they are wrongly perceived to be a whistleblower or because of their attempt to raise a concern about wrongdoing. In this respect it is worth noting that Article 7 of Serbia's Law on the Protection of Whistleblowers Act provides protection to those who are wrongly identified as a whistleblower.

The EUD contains a 50 worker threshold for internal reporting procedures but MS may consider a lower figure on the grounds that whistleblowing arrangements should exist in all organistions because they promote transparency, integrity and business efficiency[71]. Significantly, paragraph 15 of the Council of Europe Recommendation does not have a small employer threshold for putting reporting procedures in place. Article 5(1) of the EUD defines "follow - up" to include "an internal inquiry, an investigation, prosecution, an action for recovery of funds, or the closure of the procedure". By way of contrast, the Council of Europe Recommendation expressly mentions acting on the results of investigations where appropriate[72]. It might be argued that the need to act on results is implicit but it would be good practice for MS to make this obligation explicit[73]. Indeed, MS may well be advised to produce official guidance or a Code of Practice for both employers and competent authorities about how to establish and maintain suitable whistleblowing procedures[74]. Arguably, such guidance would include a recommendation that whistleblowers should also have the opportunity to comment on the feedback they receive[75]. Some countries already provide an indirect incentive for employers to have procedures by allowing them to argue that a wider disclosure was unreasonable because internal arrangements were not followed[76]. MS might also consider introducing penalties and other

[71] See: Transparency International, T*he business case for 'speaking up': how internal reporting mechanisms strengthen private-sector organisations*, Berlin, 2017.

[72] Council of Europe Recommendation, op.cit., paragraphs 15 & 19.

[73] See, for example, Art 14 of Serbia's Law on the Protection of Whistleblowers 2014 which requires employers to correct irregularities.

[74] In Ireland, Section 23 (3) of the Protected Disclosures Act 2014 allows the Minister to issue guidance.

[75] See The Netherlands Whistleblowers Authority Act 2016 Section 17

[76] See, for example, S43G ERA 1996.

sanctions for employers who fail to introduce an internal whistleblowing procedure within a stipulated time period[77].

Although Art 12 of the EUD obliges MS to ensure that competent authorities have designated staff responsible for handling reports and that they receive "specific training for the purposes of handling reports", training is not mentioned in relation to internal reporting arrangements. MS should bear in mind that it is good practice to provide specialist training for managers and those responsible for operating whistleblowing arrangements and general training to all staff (as potential whistlebowers or retaliators). Since training obligations rarely feature in existing whistleblowing legislation it would also have been helpful if the EUD had set out some minimum standards. Indeed, it would be valuable if judges and those involved in alternative dispute resolution were also trained in national whistleblowing provisions.

Disclosures to the public are covered in many whistleblowing statutes but specific mention of the press is not common. Paragraph 46 of the Recital observes that "protection of whistleblowers as journalistic sources is crucial for safeguarding the 'watchdog' role of investigative journalism in democratic societies". The European Parliament is more specific when it "calls on the MS to ensure that the right of journalists not to reveal a source's identity is effectively protected; takes the view that journalists are also vulnerable and should therefore benefit from legal protection"[78].

The issue of whether or not to accept anonymous reports is left open by the EUD. However, the European Parliament Resolution is more positive about their value and "believes that the option to report anonymously could encourage whistle-blowers to share information which they would not share otherwise; stresses, in that regard, that clearly regulated means of reporting anonymously, to the national or European independent body responsible for collecting reports, verifying their credibility, following up on the response given and providing guidance to whistle-blowers, including in the digital environment, should be introduced, setting out exactly the cases in which the means of reporting anonymously apply; stresses that the identity of the whistle-blower and any information allowing his or her identification should not be revealed without his or her consent; considers that any breach of anonymity should be subject to sanctions"[79]. Both the OECD and Transparency International assert that there should be protection of identity through the

[77] See Art 37. of Serbia's Law on the Protection of Whistleblowers 2014.

[78] Para 21.

[79] Op.cit., paragraph 49. According to the G20, "where appropriate, G20 countries could also consider ways to allow and support whistleblowers to make a report without revealing their own identity while being able to communicate with the recipient of the report". op.cit, Principle 5.

availability of anonymous reporting[80] and the UK Department for Business, Energy and Industrial Strategy provides that it is good practice for managers to have a facility for anonymous disclosures[81]. Indeed, anonymous disclosures are already explicitly dealt with by statute in some jurisdictions[82].

The importance of facilitating anonymous disclosures of wrongdoing is underlined by empirical research. According to the OECD, approximately half of the member countries surveyed allow anonymous reporting in the public sector[83]. In the private sector, 53% of respondents to the 2015 OECD Survey on Business Integrity and Corporate Governance indicated that their company's internal reporting mechanism provided for anonymous reporting[84]. In the US, Section 301 of the Sarbanes-Oxley Act 2002 requires public companies to set up procedures so that people can report financial misconduct anonymously[85] and in their large –scale study Stubben and Welch found that 28.5% of those reporting chose to remain anonymous. In the NHS 2014 survey, staff were asked if a range of measures would make it likely or unlikely that they would raise concerns about suspected wrongdoing in the future. The ability to report anonymously was the second most supported option by NHS trust staff and the most supported option by primary care staff.[86]

The EUD provides for immunity from legal liability if a disclosure is made in accordance with its Articles. However, MS might wish to consider offering exemptions from disciplinary proceedings as well[87]. The Recital contemplates retaliation coming from a number of sources but the issue of vicarious liability

[80] Organisation for Economic Co-operation and Development, *G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers*, Paris, 2019; Transparency International, *International Principles for Whistleblower Legislation, Best Practices for Laws to Support Whistleblowers and Support Whistleblowing in the Public Interest*, Berlin, 2013.

[81] Department for Business, Energy and Industrial Strategy, Whistleblowing Guidance for Employers and Code of Practice, London, 2015.

[82] For example, Commonwealth of Australia (Public Interest Disclosures Act 2013, s 28(2)); New Zealand (Protected Disclosures Act 2000, s 19(3)(a)); Serbia (Law on the Protection of Whistleblowers Act, no 2014/128, art 13).

[83] See, for example, Section 28 (2) of Commonwealth of Australia's Public Interest Disclosure Act 2013.

[84] OECD, *Committing to Effective Whistleblower Protection*, Paris, 2016. https://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf

[85] Section 301(4) requires audit committees to "establish procedures for (a) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters".

[86] Annex Di of the *Freedom to Speak Up Review Report*, op.cit.

[87] See, for example, Section 18 of New Zealand's Protected Disclosure Act 2000 and Art.7 of the Law on Whistleblower Protection in the Institutions of Bosnia and Herzegovina 2013

is not discussed at all[88]. Perhaps of more general concern is the lack of emphasis in the EUD on *preventing* retaliation. In this context it is worth noting that Section 59(1) of Australia's Public Interest Disclosure Act 2013 requires the assessment of risks that reprisals may be taken, and in all Australian companies, damage arising from a failure to fulfil a duty to prevent detrimental acts or omissions can itself result in a civil remedy[89]. Indeed, an obligation to conduct risk assessments would be consistent with the EU's approach to health and safety and other matters. Another positive method of inhibiting reprisals has been adopted in Slovakia where the legislation aims to stop employers taking detrimental action against whistleblowers without prior approval of the Labour Inspectorate[90].

Where a person demonstrates that he or she has suffered a detriment following a report, the EUD states that it must be presumed that that this was made in retaliation. Thus the person who inflicted the detriment must prove that what happened was "based on duly justified grounds". It would have been more in keeping with international best practice if the EUD had adopted the formula contained in paragraph 93 of the Recital i.e. it must be demonstrated that the detrimental action was not "linked in any way" to the disclosure. Indeed, such an approach accords with the widely accepted test in anti-discrimination legislation of whether any acts or omissions suffered were "in no sense connected with" a protected characteristic. In relation to penalties, the EUD requires that these must be "effective, proportionate and dissuasive". It is clear that MS could adopt civil, criminal or administrative sanctions and that exemplary damages might be made available where flagrant breaches of obligations have occurred[91]. Nevertheless, whistleblowers will continue to face problems securing redress if they find themselves included on a list of persons to be boycotted[92].

Turning to measures for support, the EUD does not go as far as the Council of Europe Recommendation in relation to the raising of awareness. Paragraph

[88] In the UK, Section 47B ERA 1996 deals with both personal and vicarious liability for detriments.

[89] Section 1317AD(2A) of the Commonwealth of Australia's Corporations Act 2001 (as amended in 2019).

[90] Section 7 of the "Act on certain measures related to reporting of anti-social activities and on amendment and supplements to certain Acts" (2014)

[91] See, for example, Section 337BB of the Commonwealth of Australia's Fair Work (Registered Organisations) Act 2009 (as amended). Best practice would be to declare detrimental treatment null and void: see Transparency International Position Paper 1/2019.

[92] On the experiences of those who leave their jobs after whistleblowing see: K. Kenny, M. Fotaki, *Post disclosure survival strategies: Transforming Whistleblower Experiences*, Galway, 2019. /www.whistleblowingimpact.org/wp-content/uploads/2019/06/19-Costs-of-Whistleblowing-ESRC-report.pdf.

27 of the Recommendation advocates that national frameworks should be "promoted widely in order to develop positive attitudes amongst the public …and to facilitate the disclosure of information…". Similarly, EU Parliament's Resolution 2016[93] emphases the role of public authorities, trade unions and civil society organizations in assisting whistleblowers and in raising awareness about existing legal frameworks[94]. In particular, paragraph 24 calls for "a website to be launched where useful information on the protection of whistle-blowers should be provided, and through which complaints can be submitted; stresses that this website should be easily accessible to the public and should keep their data anonymous"[95]. When it comes to the provision of support in response to internal whistleblowing, the EUD requirements for employer procedures do not go as far as those applying to Australian companies. Here whistleblowing policies must include explicit guidance on 'how the company will support whistleblowers and protect them from detriment'[96] – or in the words of the regulator, provide 'practical protection'[97] rather than simply stating that legal protection is available.

MS are obliged to furnish the EU Commission with information about the implementation of the EUD. In order to supply the statistics required MS will need to ensure that the competent authorities collect relevant data. In the same way as the European Commission must submit a report assessing the effect of transposing the EUD, MS should ensure that they receive sufficient information from the competent authorities to enable them to evaluate the impact of their laws on the whistleblowing process. This may well reinforce the case for establishing national whistleblowing agencies. Existing national whistleblowing authorities/commissions perform a variety of functions including: receiving and investigating reports of wrongdoing and retaliation, giving advice and providing representation. MS may choose to extend their remit by including: the dissemination of good employer practices in whistleblowing arrangements; overseeing the work of competent

[93] 2016/2224. Paragraph 53.

[94] According to the OECD, awareness campaigns are only conducted in the public sector by slightly more than half of the member countries surveyed: OECD, *Committing to Effective Whistleblower Protection*, Paris. 2016. Page 3. https://www.oecd.org/corruption/anti-bribery/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf

[95] Paragraph 55 of this Resolution (op.cit.)contemplates a role for the European Ombudsman in relation to whistleblowing.

[96] Section 1317AI(5)(c) of the Commonwealth of Australia's Corporations Act 2001 (as amended in 2019).

[97] Australian Securities & Investments Commission, R*egulatory Guide 270: Whistleblower Policies*, Canberra, 2019, p.31 < https://download.asic.gov.au/media/5340534/rg270-published-13-november-2019.pdf>.

authorities/regulators and educating the public about the role of whistleblowing in a democratic society.

Finally, the objectives of national legislation should be not only to promote the EUD's purpose of providing "a high level of protection of persons reporting"[98] but also to encourage and facilitate the raising of concerns and to ensure that wrongdoing is dealt with. Whatever measures they choose to adopt, it is to be hoped that MS will ensure that they are framed as promoting both human rights and public accountability. Indeed, these principles may need to be invoked if the Commission is to be persuaded to extend the scope of the Directive following a review of its operation[99].

[98] EUD Art.1
[99] EUD Art.27(3).

Protecting Workers' Psychological Wellbeing: Some Legal Aspects

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Abstract

The paper aims to study and compare the experience of the European Union and Ukraine in relation to the protection of employees' psychological health, applying both a quantitative and qualitative approach. The analysis focuses on the problems of protection of the psychological health of employees and the need to implement effective legal mechanisms for stress prevention in the workplace. The drawbacks of the protection strategy are highlighted, as is the need to implement more effective measures. It thus demonstrates the advisability of a comprehensive approach to solving the problem of professional burnout, through the introduction of measures both within labour law and social security law.

1. Introduction

Work organization has undergone major changes over the last decades, the result of the widespread use of technology in production processes and new ways of exercising the right to work. Atypical forms of employment and new working conditions have increased workers' pressure, posing a threat to their mental health. In this regard, many cases of occupational burnout have been reported.

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A recent survey conducted by Gallup – a U.S. research and advisory company –on 7,500 employees, has found that 23% of them report feeling burnout at work often or always, and 44% of them suffer from work-related stress[2].This is such a serious issue that on 28 May 2019, the World Health Organisation (WHO) included burnout in the 11th Revision of the International Classification of Diseases (ICD-11), regarding it as an occupational illness[3]. While not considered to be a medical condition, burnout is defined as syndrome resulting from chronic workplace stress which has not been successfully dealt with. Burnout is characterised by a feeling of exhaustion, increased mental distancing from work and lower professional efficacy.

The opportunity provided by new technologies to work around the clock contributes to occupational burnout, increasing both physical and mental overloads. Furthermore, the blurring of boundaries between work and family life limits one's chances of resting and the ability to cope with stress, all the more so in a time when workers are overexposed to psychological pressure.

The necessary condition to deal with work-related stress is to remove the psychosocial causes originating it. This could be done in the context of Occupational Health and Safety (OHS), but a review is needed of the mechanisms safeguarding employee wellbeing in order to adapt to current times.

Consequently, mental health preservation makes it topical to implement effective legal provisions preventing occupational burnout and the consequences of work-related stress. In this respect, this paper aims to examine how problems related to employees' psychological wellbeing have been managed, concurrently putting forward some OHS measures.

2. Research Discussion

The fact that the burnout syndrome can be caused or worsened by work is well-established. Medical staff, social operators, police officers, teachers as well as service sector workers are more likely to suffer from burnout. Some research has also argued that lawyers and managers are stress-sensitive[4].

[2] Wigert, B, Agrawal, S: Employee Burnout, Part 1: The 5 Main Causes. July 12, 2018 URL: https://www.gallup.com/workplace/237059/employee-burnout-part-main-causes.aspx. Accessed 26 January 2020.

[3] World Health Organisation Burn-out an «occupational phenomenon»: International Classification of Diseases(2019) URL: https://www.who.int/mental_health/evidence/burn-out/en/. Accessed 26 January 2020.

[4] Lastovkova A, Carder M, Rasmussen HM, Sjoberg L, Groene GJ, Sauni R, Vevoda J, Vevodova S, Lasfargues G, Svartengren M, Varga M, Colosio C, Pelclova D.: Burnout syndrome as an occupational disease in the European Union: an exploratory study. Ind Health.

Occupational burnout prevention should start with stress assessment in the workplace. This is considered one of the most complicated tasks in the OHS context, since one's stress level depends not only on the type of work, but also on personal perception. Still, the conditions of work that most frequently lead to stress, burnout or depression can be identified. Among them are excessive workload, unclear distribution of responsibilities, controversial managerial instructions, absence of ways for employees to contribute to business growth, inefficient organizational and managerial activities, downtime in production, temporary unemployment, low levels of communication between employees and managers, harassment in the workplace[5].

Thus, creating and implementing a system for assessing occupational burnout should be a priority for politicians, lawmakers and the social partners. However, Ukraine's Mental Health Care Development Concept Note, which will remain in effect until 2030, makes no reference to occupational burnout or work-related stress, though an increasing number of people in the country is reported to suffer from these diseases[6]. Furthermore, employees were not included among those for whom psychological support services will be made available.

Leaving the problem unattended at the level of state administration causes considerable damage to the interests of employees, employers and the national economy. Moreover, it runs counter to Ukraine's commitments made to the European Union (the EU) pursuant to the Association Agreement concluded on 27 June 2014. Here reference is made to the duty to implement Directive89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work, obliging employers to protect their employees against all types of health risks, in particular, psychosocial ones[7]. Therefore, it might be useful to go through the OHS measures put in place at the EU level, which might also be implemented in national contexts.

(2018) Apr 7;56(2): P. 161 doi: 10.2486/indhealth.2017-0132. Epub 2017 Nov 3. PMID: 29109358; PMCID: PMC5889935.

[5] EU-OSHA: Psychosocial risks and stress at work URL: https://osha.europa.eu/en/themes/psychosocial-risks-and-stress. Accessed 26 January 2020.

[6] Кабінет Міністрів України: Концепціярозвиткуохоронипсихічногоздоров'я в Українінаперіоддо 2030 року, щосхваленарозпорядженнямвід 27 грудня 2017 р. № 1018-р. (2017) [Ukraine's Cabinet of Ministers: The concept of mental health development in Ukraine for the period up to 2030, approved by the decree of December 27(2017) URL: https://zakon.rada.gov.ua/laws/show/1018-2017-%D1%80#top [in Ukrainian]. Accessed 26 January 2020.

[7] The Council of the European Communities: Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L 183, 29.6.1989, p. 1–8. (1989).

2.1. EU Measures to Ensure Employees' Psychological Wellbeing

As pointed out in recent research, more than 50% of employees in the EU believe that stress is a customary and typical characteristic of their work[8]. Therefore, in the EU context, psychosocial risks and occupational burnout are regarded as some of the most complicated problems to deal with as far as OHS is concerned. Many absences from work are caused by work-related stress. Besides, occupational burnout increases the risk of accidents by five times, and a fifth of staff turnover is related to stress at work[9]. Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work[10] lays down the minimum OHS requirements at the EU level. This Directive places employers under the obligation to assess OHS risks, to take preventive measures and to provide special OHS training. The same obligations are in place for work-related stress[11]. This aspect is also outlined in the Framework Agreement on work-related stress concluded by the social partners in 2004[12]. This agreement highlights the need to prevent or reduce stress in the workplace, through the implementation of individual or collective measures. These measures may concern management (e.g. improvement of the system of duty distribution among employees; enhancement of the authority and the role of management in supporting both individual employees and staff in general; agreement on the degree of responsibility and control over work activity; improvement of work organization and working conditions) or information (e.g. special training to raise awareness and to understand the reasons for work-related stress and ways to tackle it). Additionally, in 2014 the European Agency for Safety and Health

[8] EU-OSHA: Psychosocial risks and stress at work URL: https://osha.europa.eu/en/themes/psychosocial-risks-and-stress. Accessed 26 January 2020.

[9] European Commission: Communication «Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy». COM/2017/012 final (2017) URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:0012:FIN. Accessed 26 January 2020.

[10] The Council of the European Communities: Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L 183, 29.6.1989, p. 1–8. (1989).

[11] European Commission: Communication «Safer and Healthier Work for All - Modernisation of the EU Occupational Safety and Health Legislation and Policy». COM/2017/012 final (2017) URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:0012:FIN. Accessed 26 January 2020.

[12] The European Trade Union Confederation, the Union of Industrial and Employers' Confederations of Europe, the European Association of Craft Small and Medium-sized Enterprises, the European Centre of Enterprises: Framework agreement on work-related stress (2004) URL: https://travail-emploi.gouv.fr/IMG/pdf/StressAccordCadresEuropeen.pdf. Accessed 26 January 2020.

at Work (EU-OSHA)developed some e-guidelines to manages tress and psychosocial risks[13]. A description is provided of stress at work and psychosocial risks, their consequences for employees and employers, and some measures are put forward aimed to prevent them.
The importance of implementing OHS regulation to tackle occupational risks, especially psychosocial ones, is constantly underlined by EU policymakers[14]. In this sense, provisions have been enforced at the EU level in the framework of employment and social security strategies. Examples include 'Europe 2020'[15], the Agenda for New Skills and Jobs[16], and the Green Paper: "Improving the Mental Health of the Population - Towards a Strategy on Mental Health for the European Union"[17].These documents underline that psychosocial wellbeing is an important component when considering employee working conditions. Furthermore, it would be important that the national governments of EU Member States recognise that workers' mental and physical issues mostly develop in the workplace, so necessary measures should be implemented[18].

2.2. Legal Instruments Preventing Occupational Burnout in Ukraine

Ukraine can rely on wide-ranging employment protection legislation. The Labour Code of Ukraine[19], the Law of Ukraine "On Labour Protection"[20] and

[13] EU-OSHA: Managing stress and psychosocial risks. E-guide (2014) URL: https://osha.europa.eu/sites/default/files/Eguide_stress_ENGLISH.pdf. Accessed 26 January 2020.
[14] European Parliament: Resolution of 25 November 2015 on the EU Strategic Framework on Health and Safety at Work 2014-2020 (2015/2107(INI)) OJ C 366, 27.10.2017, p. 117–128.
[15] European Commission: Europe 2020. Strategy for smart, sustainable and inclusive growth. COM(2010) 2020 final, Brussels(2010). Accessed 26 January 2020.
[16] European Parliament: Resolution of 26 October 2011 on the Agenda for New Skills and Jobs (2011/2067(INI)) OJ C 131E , 8.5.2013, p. 87–102.https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1577043185006&uri=CELEX:52011IP0466. Accessed 26 January 2020.
[17] Commission of the European Communities: Green Paper - Improving the mental health of the population - Towards a strategy on mental health for the European Union /COM/2005/0484 final/(2005) URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1488204560202&uri=CELEX:52005DC0484. Accessed 26 January 2020.
[18] Stavroula, L., Aditya, J.: Mental health in the workplace in Europe - Consensus Paper - EU Compass for action on mental health and well-being. Centre for Organizational Health & Development, School of Medicine, University of Nottingham. – p.26-27 (2017) URL: https://ec.europa.eu/health/sites/health/files/mental_health/docs/compass_2017workplace_en.pdf. Accessed 26 January 2020.
[19] ВерховнаРадаУкраїни: КодексзаконівпропрацюУкраїнивід 10.12.1971 № 322-VIII (1971) [The Verkhovna Rada of Ukraine: Labour Code of Ukraine of December 10, 1971,

the Code of Civil Protection of Ukraine[21] are the main sources of regulation in this field. Mention should also be made of the National Social Programme for Safety Improvement, Workplace Hygiene and Production Environment for 2014 - 2018[22],which was approved in 2013. The programme ended in 2018 but was extended through another provision.

This list is not meant to be comprehensive. It only refers to some OHS measures enforced through normative acts forming part of a system which is unrelated to national labour legislation. While there exist many provisions of this kind, they are poorly implemented and their content needs updating, as most of them were issued during the Soviet period. The widespread normative approach to legal thinking hampers the application of general principles regarding the protection of workers' psychological health. In addition, no relevant case law is available; employees do not turn to the courts to exercise their rights as they believe they will not succeed. Unclear legal rules hinder workers' action when it comes to safeguarding their psychological wellbeing. This state of affairs explains why in Ukraine no preventive measures exist in relation to psychological wellbeing and work-related stress. This issue should not be neglected; a survey has found that 41.9% of employees in non-governmental organizations in Ukraine report high or very high levels of occupational burnout, while 35.9% of them have been certified moderate-degree burnout[23].

№ 322-VIII (1971)] URL: https://zakon.rada.gov.ua/laws/show/322-08 [in Ukrainian]. Accessed 26 January 2020.

[20] ВерховнаРадаУкраїни: Законпроохоронупрацівід 14.10.1992 р. № 2694-XII (1992) [The Verkhovna Rada of Ukraine: Law on Labour Protection of October 14, 1992, № 2694-XII (1992)] URL: https://zakon.rada.gov.ua/laws/show/2694-12 [in Ukrainian]. Accessed 26 January 2020.

[21] ВерховнаРадаУкраїни: КодексцивільногозахистуУкраїнивід 02.10.2012 р. № 5403-VI (2012) [The Verkhovna Rada of Ukraine: Code of Civil Protection of Ukraine of November 21, 2012, № 5403-VI (2012)] URL https://zakon.rada.gov.ua/laws/show/5403-17 [in Ukrainian]. Accessed 26 January 2020.

[22] ВерховнаРадаУкраїни: ЗаконПро затвердження Загальнодержавної соціальної програми поліпшення стану безпеки, гігієни праці та виробничого середовища на 2014-2018 рокивід 04.04.2013 р. № 178-VII (2013) [The Verkhovna Rada of Ukraine: Law on approval of the National Social Program for the Improvement of Safety, Occupational Health and Industrial Environment for 2014-2018 of April 4, 2013, № 178-VII (2013)] URL: https://zakon.rada.gov.ua/laws/show/178-18 [in Ukrainian]. Accessed 26 January 2020.

[23] tsn.ua: Половина українських працівників страждає через професійне вигорання. ІЩо робити та як не потрапити до зони ризику [HalfofUkrainianworkerssufferfromburnout. What to do and how not to reach the risk zone] (2019) URL:https://tsn.ua/zdorovya/polovina-ukrayinskh-pracivnikiv-strazhdayut-cherez-profesiyne-vigorannya-scho-robiti-ta-yak-ne-potrapiti-v-zoni-riziku-1373280.html [in Ukrainian]. Accessed 26 January 2020.

The absence of a system to manage stress in the workplace can be explained with the fact that in the Soviet period, this aspect was dealt with through a set of more general measures intended to preserve employees' wellbeing. Yet labour law research contains much evidence of the need to promote a healthy work environment, by also taking account of psychological factors[24].Simply put: the 'occupational health and safety' concept should be taken to refer to both physical and psychological aspects.

In this regard, while much has been done through the implementation of the Mental Health Care Development Concept Note[25], further work is needed. For example, measures should be put forward ensuring employer engagement in programmes preventing work-related stress. This should be accompanied by investments allocated to tackle this issue, in order to reduce the economic loss caused by workers' reduced ability to work due to psychological factors.

The absence of burnout prevention initiatives in Ukraine does not mean that some issues cannot be dealt with at all. Collective agreements could play an important role in tackling occupational burnout and limit its consequences. Examples include: the involvement of professional experts, the provision of facilities where 'emotional release' practices can take place, the monitoring of leave taken to enjoy time off from work; and the provision of training helping employees to detect burnout symptoms or to deal with emotional breakdowns. Collective agreements could also lay down some form of compensation, should workers suffer from work-related mental disorders. A further step is the establishment of minimum annual leave and health improvement benefits, which are not paid if leave is not taken. Collective bargaining in Ukraine should also determine that it is for the employer to ensure a favourable working environment, so as to reduce as much as possible the risk of occupational burnout.

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[24] Бек, У.П.: Правове регулювання охорони праці в Україні: теоретичний аспект [Текст] :дис. ... канд. юрид. наук : 12.00.05 / Бек Уляна Павлівна ; Нац. акад. наук України, Ін-т держави і права ім. В. М. Корецького. - К., 2013. – С. 85. [Bek, U.P.: Legal regulation of labour protection in Ukraine: theoretical aspect [Text]: diss. ... cand. jurid. sciences: 12.00.05 / Bek Ulyana Pavlivna; Nat. Acad. of Sciences of Ukraine, Institute of State and Law. V.M. Koretsky. - K. (2013). - p. 85[in Ukrainian]; Rym, O: Current issues of legal regulation of occupational safety in Ukraine // 3 rd International Conference of PhD Students and Young Researchers: Security as a purpose of law. Conference papers. 9 – 10 April 2015, Vilnius University Faculty of Law. Vilnius, Lithuania. P. 219.

[25] Кабінет Міністрів України: Концепціярозвиткуохоронипсихічногоздоров'я в Україні наперіоддо 2030 року, щосхваленарозпорядженнямвід 27 грудня 2017 р. № 1018-р. (2017) [Ukraine's Cabinet of Ministers: The concept of mental health development in Ukraine for the period up to 2030, approved by the decree of December 27(2017) URL: https://zakon.rada.gov.ua/laws/show/1018-2017-%D1%80#top [in Ukrainian]. Accessed 26 January 2020.

2.3. Ensuring the Social Security of People Suffering from Work-related Stress

Occupational burnout resulting from chronic, work-related stress affects workers' performance, increasing the likelihood of occupational injuries and work inability.

Social security in Ukraine safeguards people in employment through compulsory insurances against work-related accidents and occupational diseases. Ukraine's Law on Compulsory State Social Security constitutes the legal basis for exercising the rights and duties related to insurance provision, social services and benefit payment[26]. According to the WHO, occupational burnout in domestic legislation should be regarded as a workplace disease covered by insurance. To this end, amendments should be made to current legislation, in that par. 1, Article 1 of the provision mentioned above defines 'occupational disease' as the result of work carried out by the insured person (i.e. the employee) which is caused, exceptionally or mainly, by harmful substances, certain types of tasks and other work-related factors[27].

Like many other EU Member States – 35 out of the 38 countries which participated in the survey[28] - Ukraine has drawn up a List of Occupational Diseases[29]. If this list is examined, along with the instructions for its application[30], it can be noted that there are eight groups of occupational

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[26] Верховна Рада України: Закон про загальнообов'язкове державне соціальне страхування від 23.09.1999 р №1105-XIV 23.09.1999 r №1105-XIV (1999) [The Verkhovna Rada of Ukraine: Law on Compulsory State Social Insurance of September 23, 1999, №1105-XIV September 23, 1999, №1105-XIV (1999)] URL:https://zakon.rada.gov.ua/laws/show/1105-14 [in Ukrainian]. Accessed 26 January 2020.

[27] Верховна Рада України: Закон про загальнообов'язкове державне соціальне страхування від 23.09.1999 р №1105-XIV 23.09.1999 r №1105-XIV (1999) [The Verkhovna Rada of Ukraine: Law on Compulsory State Social Insurance of September 23, 1999, №1105-XIV September 23, 1999, №1105-XIV (1999)] URL:https://zakon.rada.gov.ua/laws/show/1105-14 [in Ukrainian]. Accessed 26 January 2020.

[28] Guseva Canu, Irina et al.: "Burnout syndrome in Europe: towards a harmonized approach in occupational health practice and research." Industrial health vol. 57,6 (2019): p.747, 748-749. doi:10.2486/indhealth.2018-0159.

[29] Кабінет Міністрів України: Перелік професійних захворювань від 08.11.2000 р. №1662 [Ukraine's Cabinet of Ministers: List of occupational diseases of November 8, 2000, No. 16662] URL: https://zakon.rada.gov.ua/laws/show/1662-2000-%D0%BF [in Ukrainian]. Accessed 26 January 2020.

[30] Міністерствоохорониздоров'яУкраїни: Інструкціяпрозастосуванняперелікупрофесійнихзахворюваньвід 29.12.2000 № 374/68/338 [Ministry of Health of Ukraine: Instruction on application of the list of occupational diseases of 29.12.2000 № 374/68/338] URL: https://zakon.rada.gov.ua/laws/show/z0068-01 [in Ukrainian].

diseases originated from harmful chemicals, physical factors, industrial aerosols which are covered by national insurance. On the contrary, psychological factors – e.g. stressful working conditions – resulting in occupational burnout are not even mentioned in the list.

Some countries already consider burnout to be an occupational disease for which a social insurance is paid. For example, Italy's National Institute for Insurance against Accidents at Work (INAIL) includes burnout among occupational diseases[31]. Latvia's legislation on Compulsory Social Insurance related to Accidents at Production Sites and Occupational Diseases, specifies that an occupational disease is caused by physical, chemical, hygienic, biological and psychological factors at work (par. 5, Article 1)[32]. Specifically, burnout is defined as an occupational disease caused by the overload and overstressing of some groups and systems of individuals[33]. While Section 4 of Ukraine's List of Occupational Disease refers to factors related to occupational diseases, no mention is made of psychological and psychosomatic reasons leading to burnout.

Still by way of comparison , in 2015 in the Netherlands occupational burnout caused disability in 4-5% of respondents, who also received benefits for their inability to work. The Dutch Agency of Employee Insurance has reported an increase in burnout arising from stress and disability. They stress that the lack of recognition of burnout as an occupational disease means that only 0.5% of applicants are granted disability benefits[34].

In Ukraine, occupational burnout is not a recognized disease, so there is no statistics concerning individuals suffering from it. However, the problem exists and needs to be solved urgently. In the authors' opinion, the most efficient way to deal with it is changing how current legal provisions are interpreted. In Ukraine, there is an open list of occupational diseases that can be amended by the national Social Insurance Fund, if supported by medical evidence.

This approach is effective and has been successfully implemented in Bosnia and Herzegovina, Denmark, Estonia, Hungary, Malta, Portugal, Slovakia, and

[31] Eurofound: Burnout in the workplace: A review of data and policy responses in the EU, Publications Office of the European Union, Luxembourg. P. 9 (2018).

[32] Parliament of the Republic of Latvia: Law of 17 November 1995 on Compulsory Social Insurance in Respect of Accidents at Work and Occupational Diseases (valid from 1 January 1997) URL: https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=57255&p_country=LVA&p_count=472. Accessed 26 January 2020.

[33] Eurofound: Burnout in the workplace: A review of data and policy responses in the EU, Publications Office of the European Union, Luxembourg. P. 9 (2018).

[34] Eurofound: Burnout in the workplace: A review of data and policy responses in the EU, Publications Office of the European Union, Luxembourg. P. 20 (2018).

Turkey[35]. Furthermore, in Iceland, the Netherlands, and Sweden, occupational diseases are defined based on one's working conditions[36]. Providing evidence for the establishment of occupational diseases in Ukraine lies with the Ministry of Health of Ukraine and the Academy of Medical Sciences[37]. Therefore, it is them who must determine some clinical criteria so that burnout can be regarded as an occupational disease.

3. Conclusion

The workplace should ensure safe conditions as people spend most of their lives there. The work environment should also contribute to personal development, complying with health and safety requirements. Therefore, the development and introduction of effective legal mechanisms safeguarding employees' health call for the involvement of all those concerned. Employers, employees, the social partners and state authorities must all cooperate, setting the standards protecting employee psychological health care. These measures should be laid down both in the field of labour law and social security law, since a comprehensive and systemic approach is more effective to solving the issue at hand. Thanks to a wide-ranging set of measures preventing work-related stress, its early identification, and further support provided to the affected person, positive effects can be generated, without frustrating attempts to overcome these new challenges at work.

[35] GusevaCanu, Irina et al.: "Burnout syndrome in Europe: towards a harmonized approach in occupational health practice and research." Industrial health vol. 57,6 (2019): p.747. doi:10.2486/indhealth.2018-0159

[36] Lastovkova A, Carder M, Rasmussen HM, Sjoberg L, Groene GJ, Sauni R, Vevoda J, Vevodova S, Lasfargues G, Svartengren M, Varga M, Colosio C, Pelclova D.: Burnout syndrome as an occupational disease in the European Union: an exploratory study. Ind Health. (2018) Apr 7;56(2): P. 161 doi: 10.2486/indhealth.2017-0132. Epub 2017 Nov 3. PMID: 29109358; PMCID: PMC5889935.

[37] Міністерство охорони здоров'я України: Інструкція про застосування переліку професійних захворювань від 29.12.2000 № 374/68/338 [Ministry of Health of Ukraine: Instruction on the application of the list of occupational diseases of 29.12.2000 № 374/68/338] URL: https://zakon.rada.gov.ua/laws/show/z0068-01 [in Ukrainian].

Definition of Workers and Application of the Bangladesh Labour Act 2006: An Appraisal

Hassan Al Imran[1]

Abstract

There are approximately 63 million labourers in Bangladesh. The Bangladesh Labour Act 2006 ("Labour Act" or "Act") provides the statutory framework ensuring workers rights and responsibilities. Definition and application of the Act is the central issue of its enforcement. Unfortunately, the Act fails to include a large number of workers, including domestic workers; agriculture workers; and staff working at schools. This research reveals that there are numerous ambiguities and complexities in existing labour law, and in this regard there are many gaps in the existing law that require substantial amendment to increase its effectiveness. This paper suggests that the definition of a 'worker' for the purposes of the Act creates complexities which needed to be addressed. This paper critically examines the definitions of a worker and the application of the act under the existing Labour Act before drawing a conclusion on how the law ought to be reformed.

1. Introduction

The Bangladesh Labour Act 2006 is the main law regulating the rights and responsibilities of workers and employees in Bangladesh. This relatively recent legislation was preceded by the Trade Union Act 1926, which was the first industrial related law adopted by the British Raj in the undivided India-Pakistan and Bangladesh. The law reform led to the introduction of other legislation including the Trade Disputes Act 1929 and the Industrial Disputes Act 1947. During the Pakistan government, the major industrial law was Industrial Relations Ordinance, which was adopted in 1969. Between 1947 to 1971 Bangladesh was part of Pakistan, thereafter in December 1971 Bangladesh

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became independent State. Despite Bangladesh gaining independence from Pakistan, no major labour law reform had taken place until 2006.[2] Until that time, there were around 46 separate pieces of laws (legislations, regulations and ordinances) in force in Bangladesh encompassing labour and industrial sectors,[3] making labour law disputes costly and time consuming to resolve.[4] The effect of enacting the Bangladesh Labour Act in 2006 was that it repealed twenty-five of the preceding enactments that were then amalgamated with the new Act.[5] The law has made many improvements in legal framework on industrial relations but it still has some weaknesses.[6] These weaknesses have not gone unnoticed with the Bangladesh Government who have formed a committee to investigate and address these weaknesses. In 2013, the National Parliament passed an amending legislation to the Labor Act as a response to the committee's investigations, however these amendments were inadequate.[7] A subsequently decision by the Government in 2015 caused the Bangladesh Labour Rules to be published as a national policy.[8]

The Labour Force Survey of Bangladesh (2015-16) from the Bangladesh Bureau of Statistics provides that the number of laborers in the country is 62.5 million.[9] The Labour Act ensures the rights of these workers. The main issue involve not the rights themselves, but the definitions within the Act which limits its scope. As a consequence, the Act fails to include a large number of workers including domestic workers; agriculture workers; and workers working at schools. This gap renders the act highly ineffective, especially since those who (unfairly) fall outside of its scope cover a large number of registered workers.[10] Furthermore, this research reveals that there are numerous ambiguities and complexities in existing Labour Laws, especially the definition of a 'worker' under section 2(65), which is substantially limited. In addition, the Act provides two types of the definition of workers (sections 175 and 150 (8) read with Schedule Four of the Act)). Further, The EPZ law provides a different definition. In addition, decisions of courts on definition of a worker also to be considered as precedent. In addition, the provisions of its

[2] Abdullah Al Faruque, Current Status and Evolution of Industrial Relations System in Bangladesh, International Labour Organization (2009), 1.
[3] Ibid. 9.
[4] Ibid.
[5] Ibid 9 -10. Also, in Section 353 of the Bangladesh Labour Act, 2006.
[6] Ibid 12.
[7] Hasan Tarique Chowdhury, Amendment to labour law inadequate, *The Daily Star* (July 25, 2013) <http://www.thedailystar.net/news/amendment-to-labour-law-inadequate>.
[8] Bangladesh Labour Rules 2015, S.R.O.- 291/2015, published 15 September 2015.
[9] Report on Quarterly Labour Force Survey (QLFS) 2015-16, Published by Bangladesh Bureau of Statistics with technical support from the World Bank in March 2017.
[10] Jakir Hossain, Mostafiz Ahmed, Afroza Akter, *Bangladesh Labour Law: Reform Directions*, p 14.

application create complexities and ambiguities. There is limited academic commentary that evaluates the definition of 'worker' under the Labor Act. This paper seeks to do this by critically examining these definitions and the way they apply under the existing legal framework.

2. The Objective of the 2006 Bangladesh Labour Act

The Labour Act originally passed as 'Bangladesh Sram Ain, 2006.'[11] Gazette Notification was published on 11th October 2006. The Bangladesh Labour Act 2006 repealed most of the existing Labour Laws of Bangladesh to ensure a more efficient and up to date labour law for the regime. The Bangladesh Labour Act 2006 was amended in 2008, 2010 and 2013 to make the law as efficient as possible and more friendly for the workers. On 21 September 2015, the English version of the Act was published as 'The Bangladesh Labour Act, 2006.'

According to the Preamble of the Labour Act, its aim is to consolidate and amend the laws relating to employment of workers, relations between workers and employers, determination of minimum wages, payment of wages and compensation for injuries to workers, formation of trade unions, raising and settlement of industrial disputes, health, safety, welfare and working conditions of workers, apprenticeship and all other matters that are connected with labour and industrial relations.

3. Salient Features of Labour Law of Bangladesh

The Bangladesh Labour Act repealed the scattered 25 acts and ordinances and inserted a modern, single and updated code.[12] The salient features of the act are as follows:

[11] The Bangladesh Labour Act, 2006, Act No. XLII OF 2006, [11 October, 2006].

[12] According to the section 353 of the Bangladesh Labour Act, 2006 the act repealed the following 25 labour and industrial laws: (a) The Workmen's Compensation Act, 1923 (III of 1923); (b) The Children (Pledging of Labour) Act 1833 (II of 1933); (c) The Dock Labourers Act, 1934 (XIX of 194); (d) The Workmen's Protection Act, 1934 (IV of 1934); (e) The Payment of Wages Act, 1936 (IV of 1936); (f) The Employer's Liability Act, 1938 (XXIV of 1938); (g) The Employment of Children Act, 1938 (XXVI of 1938); (h) The Maternity Benefit Act, 1939 (IV of 1939); (i) The Mines Maternity Benefit act, 1941 (XIX of 1941); (j) The Motor Vehicles (Drivers) Ordinance, 1942 (V of 1942); (k) The Maternity Benefit (Tea Estate) Act, 1950 (XX of 1950); (l) The Employment (Records of Service) Act, 1951 (XIX of 1951); (m)The Bangladesh (Plantation Employees) Provident Fund Ordinance, 1959 (XXXI of 1959); (n) The Coal Mines (Fixation of Rates of wage) Ordinance, 1960 (XXXIX of 1960); (o) The Road Transport Workers Ordinance, 1961 (XXVIII of 1961); (p) The Minimum Wages Ordinance, 1961 (XXXIV of 1961); (q) The Plantation Labour Ordinance, 1962 (XXXIX of

• There are 354 sections in 21 different chapters and the Schedules (one to five) in the Act.
• The scope and applicability of the law have been extended (s.1 (3)) and definitions of different terms have been clarified (s. 2).
• According to Labour Act, any person below the age of 14 shall be treated as a child (s.2 (63)).[13]
• There 6 types of workers under the Labour Act (s.4).
• Registration of Contracting Organization is mandatory (s. 3A).
• Mandatory provision of the issue of Letter of Appointment and Identity Card (s.5).
• Death benefits have been provided for normal deaths or in cases of any deaths due to causes other than accidents during the continuance of the service (s.19).
• The usual retirement age has been scheduled at 60 years of his age (s.28).
• Restrictions on child employment (s.34).
• Maternity benefits have been ensured (Chapter IV).
• Special importance is given to occupational health and safety (Chapter V, VI and VII).
• Introduction of Group Insurances (s.99).
• Time limits for payment of wages have been determined (s.123).
• Provisions to realize the unpaid wages through the Court (s.132).
• The Right of Trade Union (Chapter XIII).
• The purview of unfair labor practices on the part of the workers, employers or the trade unions has been extended (s.195 & s. 196).
• Provision of Collective Bargaining Agent (s. 202).
• Labor courts shall be the only courts to adjudicate all issues under labor law and all appeals shall lie to the Labor Appellate Tribunal (s.213 – s.218).
• Provisions for worker's participation in company's profit was introduced (Chapter XV).
• The punishments for the breach of the provisions of the labor law have been revised appropriately. Imprisonment has also been provided for along with fines (Chapter XIX).

1962); (r) The Employees Social Insurance Ordinance, 1962 (XXII of 1962); (s) The Apprenticeship Ordinance, 1962 (LVI of 1962); (t) The Factories Act, 1965 (IV of 1965); (u) The Shops and Establishments Act, 1965 (VII of 1965); (v) The Employment of Labour (Standing orders) Act, 1965 (VIII of 1965); (w)The Companies Profits (Worker's Participation) Act, 1968 (XII of 1968); (x) The Industrial Relations Ordinance, 1969 (XXIII of 1969); (y) The Dock workers (Regulation of Employment) Act, 1980 (XVII of 1980).

[13] Section 2(63) of the Bangladesh Labour Act, 2006 provides that "child" means a person who has not completed the 14th (fourteenth) years of age.

• Provision has been made for the strict implementation of the "Equal Pay for Equal Amount of Work" policy of ILO convention (s.345).
• Restriction of employment of women in certain work (s. 87).
• Sick Leave: 14 days sick leave with full average wages have been provided, in the new Labor Law. In previous laws, sick leaves were paid for half average wages (s.116).
• Annual leave with wages: For adults one day for every 18 (eighteen) days of work performed by him/her during the previous period of twelve months (s.117).
And for adolescents one day for every 15 days of work performed by him/her during the previous period of 12 months (s.117(2)).
• Festival Leave: Every worker shall be entitled to eleven days festival leaves in a calendar year. The Employer shall fix the days and dates of such leaves (s.118).
• Children Room: A children room for every 40 female workers having their children below the age of 6 years have been provided by the law (s.94).
• Termination of employment by the worker: A permanent worker may terminate the employment serving a 30 days' notice to the employer and a temporary worker may terminate it serving a notice of 30 and 14 days case wise. In lieu of the notice, the worker can even terminate the employment returning the wages for that period (s.27).
• Grievance Procedure: Limitation for the application of grievance has been extended to a period of 30 days, though previously it was 15 days only (s.33).
• Provision of allowance during the period of training (s.4(2)).
• Wider Liability: Section 307 provides 'Penalty for other offences.' It states - whoever contravenes, or fails to comply with, any of the provisions of this act or the rules, regulations or schemes shall, if no other penalty is provided by this act or by such rules, regulation or schemes for such contravention or failure, be punishable with imprisoned for a term which may extend to three months, or with fine which may extend to twenty-five thousand taka, or with both.
• Power to make rules by the Government (s.351).
It is also noted that the Labour Act is applicable with equal force to all the industrial and commercial establishment as previous Shops and Establishment Act-1965 and other labour laws have been abrogated by the promulgation of this new labour code (s. 2(4) and 2(21)).[14]

[14] Salient Features of The Bangladesh Labour Law 2006 Related To The RMG Sector, Working Paper No – 2, March 2007, by SEBA Limited, in cooperation with Ministry of Labour and Employment,
Bangladesh , under German Development Cooperation. <http://www.psesbd.org/index.php/publications/working-papers/item/download/8_4d82a602ac515e2eca5e7a3b3918498c>.

4. Application of the Bangladesh Labour Act, 2006

Section l (3) of the Labour Act provides the details of the application of the Act, for instance, that it shall apply to the whole of Bangladesh. It covers all industrial, labour and retail establishments including factories, shops, docks and tea plantations to just name a few. Bangladesh Labour Act also applicable to other areas as well. The Act has been constructed by the courts to apply either directly or indirectly to the following areas:

i) all establishments which come under the definition of an establishment as defined in section 2 (31) of the Act.[15] That included - shop, a commercial establishment or an industrial establishment or premises or yard where workers are employed for industrial work.

ii) The Act usually applies to all establishments which come under the definition of a factory as defined in section 2 (7) of the Act.[16]

iii) tea plantation which comes under the definition of tea plantation as defined in section 2 (10A) of the Act.[17]

iv) all establishments which come under the definition of a garden as defined in section 2 (40) of the Act.[18]

v) all establishments which come under the definition of a commercial establishment as defined in section 2 (41) of the Act that included- a clerical department of a factory or any industrial or commercial undertaking; a unit of a joint-stock company, an insurance company, a banking company or a bank,

- a broker's office,
- stock exchange,
- a club, a hotel or a restaurant or an eating house,
- a cinema theatre, or
- Such other establishments or classes thereof as the official Gazette, declare to be a commercial establishment for the purpose of this Act.

[15] Section 2(31) of the Bangladesh Labour Law 2006 provides, "establishment" means any shop, commercial establishment, [transport,] industrial establishment or premises or precincts where workers are employed for the purpose of carrying on any industry.

[16] Section 2(7) of the Bangladesh Labour Law 2006 provides "factory" means any precincts or premises where five or more workers ordinarily work on any day of the year and in any part of which a manufacturing process is carried on, but does not include a mine.

[17] Section 2(10A) of the Bangladesh Labour Law 2006 provides "tea plantation" means any land used or intended to be used for growing tea, and also includes a tea factory.

[18] Section 2(40) of the Bangladesh Labour Law 2006 provides "plantation" means any area where the rubber, coffee or tea is grown and/or preserved, and includes every agriculture farm, other than experimental or research farm, employing 3[5 (five)] or more workers.

vi) The Act applies to all establishments which come under the definition of a vehicle as defined in section 2 (51) of the Act i.e. any mechanically propelled vehicle used or capable of being used for the purpose of transport in road, air and water and includes a trolley vehicle and a trailer.
vii) The Act applies to all establishments which come under the definition of an industrial establishment as defined in section 2 (61) of the Act.[19]
viii) The Act usually applies to all establishments which come under the definition of newspaper establishment as defined in section 2 (71) of the Act i.e.. an establishment for the printing, production or publication of any newspaper or for conducting any news agency or news or feature syndicate;
In addition, Chapter 15 of the Labour Act states that Participation of Workers in the Profit of the Companies shall apply to all companies engaged in industrial undertakings which satisfy any one of the following conditions:

- The number of workers employed by the company in any shift at any time during a year is 100 or more.
- The paid-up capital of the company as on the last day of its accounting year is at least TK. Ten million.
- The value of the fixed assets of the company as on the last day of the accounting year is at least TK. Twenty million.

Further, according to Chapter 18, the Act (Apprenticeship) is applicable to such establishments which are in operation for more than two years and where

[19] Section 2(61) of the Bangladesh Labour Law 2006 provides "industrial establishment" means any workshop, manufacturing process or any other establishment where any article is produced, adapted, processed or manufactured, or where the work of making, altering, repairing, ornamenting, finishing or fining or packing or otherwise treating any article or substance for the purpose of its use, transport, sale, delivery or disposal, is carried on or such other establishments as the Government may, by notification in the official Gazette, declare to be an industrial establishment for the purpose of this Act, and includes the following establishments, namely:
(a) road transport, or railway transport service; (b) river transport service; (c) air transport; (d) dock, quay or jetty;
(e) mine, quarry, gas field or oil field; (f) plantation, (g) factory; (h) newspaper establishment; (i) establishment of a contractor or sub-contractor established for the purpose of construction, reconstruction, repair, alteration or demolition of any building, road, tunnel, drain, canal or bridge, ship-building, ship-breaking or loading or unloading of cargo into vessel or carrying thereof; (j) ship building; (k) Ship recycling; (l) welding; (m) any outsourcing company or any establishment of contractor or sub-contractor for supplying security personnel,; (n) port; port shall mean all sea ports, river ports and land ports; (o) mobile separator company, mobile network service provider company and land phone operator company; (p) private radio, tv channel and cable operator; (q) real estate company, courier service and insurance company; (r) fertilizer and cement manufacturing company; (s) clinic or hospital run for profit or gain; (t) rice mill or *Chatal;* (u) saw mill; (v) fishing trawler; (w) fish processing industry;
(x) seagoing vessel.

at least fifty workers work generally and at least fifty workers work as apprentices.

5. Non-Applicability of the Labour Act, 2006

Section 1 (3) of the Bangladesh Labour Act 2006 states that its application extends to the whole of Bangladesh subject to specified expectation in this Act. A detailed list of non-application of the Act is mentioned in section 1 (4) of the Act. In a summary, the Act is not applicable to: Government offices; Security Printing Press; Arms Factory; not-for-profit organisations which are run for the treatment or care of the sick, infirm, destitute or mentally unfit, old, disabled, disserted women or children; shops or stalls in any public exhibition or in retail trade; shops or stalls in any public fair or bazaar held for religious or charitable purpose; educational, training or research institution; hostels and messes not maintained for profit or gain; any worker whose recruitment and terms and conditions of service are governed by the Acts or rules made under Article 62, 79, 113 or 133 of the Constitution; university teacher; seamen; ocean going vessels (in the cases other than the case of the application of Chapter XVI); any agricultural farm where less than five workers work; in the case of domestic servants; and any establishment run by its owner with the aid of members of his family and where no worker is employed for wages.
However, section 1(4)(j) of the Act provides that the non-applicability provisions of the Labour Act (namely those mentioned above) do not apply to Chapter XII (Compensation for Injury Caused By Accident), Chapter XIII (Trade Unions And Industrial Relations) and Chapter XIV (Settlement of Dispute, Labour Court, Labour Appellate Tribunal, Legal Proceedings) of the Act. Therefore, in the cases of Compensation for Injury Caused by Accident, Trade Unions and Settlement of Dispute of Labour Court where the workers are employed in railway department; post, telegraph and telephone department; roads and highways department; public works department; public health engineering department; and Bangladesh Government printing press- the Act remains applicable.

6. Classification of Workers

Section 4 (1) lays out seven types of workers.[20] According to the nature and condition of work, the workers are classified as apprentice, substitute, casual, temporary, probationer, permanent and seasonal.

a) Apprentice Worker: A worker shall be called an apprentice if he is employed in an establishment as a learner, and is paid an allowance during the period of his training: section 4(2). An apprentice worker will only get allowance during the period of his training, and will not be entitled to other monetary benefits such as bonuses. In practice, an apprentice worker may be appointed for 6 to 12 months, however no time period or duration is specified in the Act. Section 4(2) states nothing about the length of duration of an apprentice worker. Generally, a worker who has no previous work experience can be appointed as an apprentice worker.

b) Substitute Worker: A worker shall be called a substitute (Badli) if he is employed in an establishment in the post of a permanent worker or of a probationer worker during the period who is temporarily absent: section 4(3). A Badli worker must work for a specified period of time – not for an indefinite period – in order to be legally classified as this kind of worker.

c) Casual Worker: A worker may be called a casual worker if he is employed on an ad-hoc basis in an establishment for work of a "casual nature" (section 4(4)). To be legally classified under this kind of worker, the "casual nature" of the work is an essential aspect, meaning that the worker cannot work on a full-time basis.

d) Temporary Worker: A worker shall be called a temporary worker if he is employed in an establishment for work which is essentially of a temporary nature, and is likely to be finished within a limited period (section 4(5)). A temporary worker is appointed for a temporary type of work and generally for a fixed period, and not for an indefinite one. The Employer may extend the period of the temporary worker if it is necessary. The Salary structure of temporary worker may be different from permanent workers, depending on the company rules.

The mere description of coining of a position as 'temporary' does not necessarily render it to be of temporary nature. Other criteria must be met.[21] Appointment of employees on a temporary basis cannot be also be probationers, since temporary workers cannot be given posts of a permanent

[20] Amended by the Bangladesh Labour (Amendment) Act, 2013. Previously, there were six types of workers. By the amendment of 2013, introduced 'seasonal' worker as new type of worker.

[21] *Managing Director Rupali Bank vs First Labour Court,* 46 Dhaka Law Reports 143.

nature. However in Rupali Bank Ltd v. Chairman, the Court held that temporary workers may be offered or absorbed into permanent posts on a preferential basis, and that companies may have regulations that allow this to happen. According to company regulations. In that case, although the number of temporary posts varied depending on the Bank's requirements, the service of temporary employees could be assessed for consideration of permanent positions.[22] Law provides that a "temporary worker" is a worker who has been engaged in work which is essentially temporary in nature and is likely to be finished within a limited period. On the other hand, that Act defines a "permanent worker" as a worker who has been engaged on a permanent basis or who has satisfactorily completed the period of his probation in the commercial or ' industrial establishment. The labour law empowers the employer to terminate the employment of a temporary worker due to completion or cessation of the work. As a consequence, the employer is under no obligation to give the employee any notice of termination of his job.[23]

e) Probationer Worker: A worker shall be called a probationer if he is provisionally employed in an establishment to fill a permanent vacancy in a post and has not completed the period of his probation in the establishment (section 4(6)). In practice, a worker is not directly appointed as a permanent worker. First, a worker is appointed as probationer worker, or conditional worker, by the employer for certain period as per company policy. During that time, the worker is given training, and their performance is assessed. If the employer is satisfied with the probationer worker's performance, then the worker will be appointed for a permanent position.

f) Permanent Worker: A worker shall be called a permanent worker if he is employed in an establishment on a permanent basis or if he has satisfactorily completed the period of his probation in the establishment (section 4(7)). Permanent workers, as the position title suggests, are appointed for permanent types of work. If a probation worker successfully completes his training period, then he will be considered as a permanent worker. In addition to wages, Permanent workers enjoy all types of monetary benefits, including bonuses, paid leave, yearly increment of wages, provident fund and gratuity. As a result, expense of the employer is increased. Labour law provides that a probationer worker who has completed his probation period without complaint or adverse report, will classified as a permanent worker.[24] If there was no adverse report

[22] *Rupali Bank Ltd v. The Chairman, Second Labour Court, Dhaka,* 22 Bangladesh Legal Decision (HCD) 143.

[23] *Md. Ibrahim Shaikh Vs. Chairman, Labour Court, Khulna Division, Khulna and others,* 15 Bangladesh Legal Decision (HCD) 647.

[24] *Managing Director Rupali Bank vs First Labour Court,* 46 Dhaka Law Reports 143.

against a worker during the probationary period, he becomes permanent after the probationary period, effective immediately.[25]

g) Seasonal worker: A worker shall be called a seasonal worker if he is employed in an establishment to do seasonal work and works throughout that season: section 4(11). For example, ABC Company is a manufacturing company, produces mango juice. During the season of mango, the company appoints workers for three months for each year for the purpose of harvesting particular types of mango from the different region of the country. These workers will be treated as seasonal workers. In the employment of workers at sugar mill, rice mill, and seasonal establishments, priority shall be given to workers employed in the previous season (section 4(12)).

7. Who is a Worker under the Bangladesh Labour Act?

i. Section 2(65) of the Labour Act 2006

Section 2(65) of the Labour Act defines the term 'worker' to mean any person including an apprentice employed in any establishment or industry, either directly or through a contractor, by whatever name he is called, to do any skilled, unskilled, manual, technical, trade, promotional or clerical work for hire or reward, whether the terms of employment are expressed or implied, but does not include a person employed mainly in a managerial, administrative or supervisory capacity.

Put simply, a worker is any person employed in any establishment to do any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward. However, under the labour law, a person is not be considered as a worker who is mainly employed in a managerial or administrative capacity. Moreover, a supervisory officer is not a 'worker' for the purposes of the Act.[26]

ii. Case Laws

A person does not cease to be a worker merely because they are employed in a supervisory capacity. More specifically, a worker ceases in their capacity as 'worker' if he exercises managerial or administrative functions. One important consideration in distinguishing 'worker' from a 'manager/administrator' is to assess the nature of the job done by him, and not so much the position title. The issue as to whether a person is a worker or not has to be resolved in each case with reference to the evidence or record.[27]

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[25] *Bangladesh Film Development Corporation vs. Chairman, 1st Labour Court. Dhaka and others,* 49 Dhaka Law Reports (1997) 399.

[26] *Karnaphuli Paper Mills Workers Union vs Karnaphuli Paper Mills Ltd and Others,* 22 Bangladesh Legal Decision (AD) 33.

[27] *Mujibur Rahman Sarkar vs. Chairman, Labour Court, Khulna,* 31 (1979) Dhaka Law Reports 301.

In *Sonali Bank and another vs. Chandon Kumar Nandi*, the High Court held that "…the person employed in any shop and commercial establishment, who is not employed in any managerial or administrative capacity is a worker. ……. the plaintiff being an Assistant Cashier was not doing a managerial or administrative job, but he was doing a clerical work. Therefore, the plaintiff can undoubtedly be said to be a worker."[28]

The High court has considered whether an employee who occasionally performs managerial or administrative duties should be considered a worker, in Indo Pakistan Corporation Ltd. Vs. First Labour Court of East Pakistan. In that case, the court was of the view that a worker, who in isolated occasions, performed a function of a manager or an administrative officer, does not lead to the cessation of their working status for the purpose of the Act. Only if a person who is mainly employed in a managerial or administrative capacity exercises functions mainly of managerial or administrative nature, then a worker shall be taken out of the purview of the definition of worker.[29]

In Managing Director, *Rupali Bank Ltd vs Nazrul Islam*, the Appellate court opined that the term 'worker' contemplates not only a person to be employed in the work for productive purposes in any commercial or industrial establishment but also embraces a person who on being employed does any skilled, unskilled, manual, technical, trade promotional or clerical work for hire or reward, whether the term of employment be express or implied.[30]

In General Manager, Shield Ltd. Vs. First Labour Court, Dhaka the court concluded that the respondent was working as Chief Inspector of a Company and his nature of work was to collect demands from different organizations and establishments and supply the guards. It was held that the respondent was a worker considering his nature of work.[31]

More importantly, the Appellate Court held that mere designation of the employee is not sufficient to indicate whether a person is a 'worker' or not for the purposes of the Act. Rather, it is the nature of work showing the extent of his authority which determines this.[32]

The High Court in another case held that if there is no evidence of the employee's managerial or administrative functions, that mere designation cannot used to imply the existence of these functions. In other words,

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[28] *Sonali Bank and another vs. Chandon Kumar Nandi,* 48 (1996) Dhaka Law Reports 330.

[29] *Indo Pakistan Corporation Ltd. Vs. First Labour Court of East Pakistan* 21 Dhaka Law Reports 285.

[30] *Managing Director, Rupali Bank Ltd vs Nazrul Islam* Patwary and Others, 48 Dhaka Law Reports (AD) 62.

[31] *General Manager, Shield Ltd. vs. First Labour Court, Dhaka*, 2 (1997) Bangladesh Law Chronicles 366.

[32] *Dosta Textile Mills vs. SB Nath* 40 Dhaka Law Reports (AD) 45.

designation is not considered to demonstrate the nature of employment.[33] The High Court of Bangladesh also ruled that that Pesh Imam, Muazzins, teachers of School and College and staff members of Medical Centre and hospital that were run by the factory management could not be equivalent with the works done by the workers or workmen in the factory. According to their job responsibilities, they were excluded from the definition of a worker.[34] In the same line, a school teacher of the secondary school that was set up by a Mill authority was not classified as 'worker' under the labour law.[35]

In another decision, the Foreman of a shoe industry was not categorized as 'worker.' It was held that a Foreman, who supervised and controlled the work of his staff was not 'labour' for the purposes of the Act. Because the Foreman enjoyed some discretionary powers in the job responsibilities. As a Foreman monitored, controlled and made report on the jobs performances of other employee. [36]

On the other hand, a Security Guard of a bank was defined as a worker.[37] A Store Keeper (Godown keeper) of a bank was also defined as 'worker' by the Court.[38]

iii. Special Definition of Worker for Compensation of 'Injury if Caused by Accident' (s.150(8))

Chapter XII of the Labour Act contains provisions regarding liability of employers to pay compensation to workers. Section 150(1) of the Act states that if a worker sustains physical injuries by an accident arising out of the course of his employment, his employer shall be liable to pay him compensation in accordance with the provisions of the Chapter.

Section 150(2) also provides a criteria - when an employer is not liable to pay compensation, including being under the influence of drugs, disobedience of safety rules and order.[39]

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[33] *Managing Director, Contiforms Forms Limited and Peasant Trading Cold Storage (Pvt) Limited vs. Member, Labour Appellate Tribunal Dhaka and Others,* 50 Dhaka Law Reports 476.

[34] *Amir Hossain Bhuiya (Md) vs. Harisul Haq Bhuiya and others,* 52 Dhaka Law Reports 267.

[35] *Md. Abdur Rahman vs. Secretary, Ministry of Industries & others* 1 Bangladesh Law Chronicles (AD) (1996) 159.

[36] *The Workmen of Bata Shoe Co. vs. Bata Shoe Co. Ltd*, 23 Dhaka Law Reports (SC) 60.

[37] Managing Director, Rupali Bank Ltd. vs. Nazrul Islam Patwary and others 1 Bangladesh Law Chronicles (AD) (1996) 159.

[38] *Managing Director, Sonali Bank and Others vs Md. Jahangir Kabir Molla,* 15 Bangladesh Legal Decision (HC) 575.

[39] Section of 150 (2) states: An employer shall not be liable to pay such compensation, if (a) a worker does not lose the ability to work, in whole or in part, for a period exceeding three days due to injury; (b) the cause of injury to a worker, not resulting in death, by the accident directly attributed to (i) the worker having been at that time under the influence of drink or drugs; (ii)

Most interestingly, section 150(8) provides a new definition of a worker for the purposes of Chapter XII (Compensation for Injury Caused By Accident). It states, 'worker' means any person employed by the employer directly or through contractors, who is defined- (a) as a railway servant according section 3 of the Railways Act, 1890 (Act No. IX of 1890), who is not employed in any permanent post of any administrative, district or *upazilla* office of the railway, or (b) who is employed in any post specified in the Fourth Schedule of the Bangladesh Labour Act.

According to section 3 (7) of the Railways Act, 1890 - "the railway servant" means any person employed by railway administration in connection with the service of the railway. In plain words, it creates ambiguities between the provision of the Labour Act and the Railways Act. According to the Railways Act, a railway servant means a person who is employed by the railway administration in connection with the service of the railway. But according to the Labour Act, a railway servant should not be employed in any permanent post of any administrative, district or *upazilla* office of the railway.

Furthermore, Schedule 4 of section 150(8) of the Bangladesh Labour Act provides a broader definition of worker that includes 31 categories of people in the case of compensation for injuries.

Under schedule 4, section 150(8) of the Act, the definition of a worker includes:

- any person who is employed in any premises wherein or within the precincts whereof five or more persons are employed in a manufacturing process (s.150(8)(2));
- employed for the purpose of making, altering, repairing, ornamenting, finishing or otherwise adapting for use, transport or sell any article or part of an article in any premises wherein or within the precincts whereof at least five persons are employed (s.150(8) (3));
- employed as master, seaman or otherwise on any ship or vessel which is propelled wholly or in part by steam or other mechanical power or by electricity, or which is towed by a ship or vessel so propelled (s.150(8) (6));
- employed in any construction or excavation work in which more than 25 persons are employed or explosives are used(s.150(8) (18));
- employed as a driver (s.150(8) (27));
-employed in warehousing, or working within the precincts of any warehouse or other place in which at least ten persons are employed, or employed in the

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the wilful disobedience by the worker of a clear order or to rules made for the purpose of securing the safety of workers; , (iii) the wilful removal or disregard by the worker of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workers.

handling or transport of goods in any market or precincts thereof in which at least 100 (one hundred) persons are employed(s.150(8) (28)).

iv. Section 175 Provides a Special Definition of Worker

Section 175 of the Bangladesh Labour Act 2006 provides a special definition of a worker for the purposes of Trade Unions and Industrial Relations. It provides the following:

In this Chapter, unless there is anything repugnant in the subject or context, 'worker' means a worker as defined in section 2 (65), and includes, for the purpose of any proceedings under this Chapter in relation to an industrial dispute, a worker who has been laid off, retrenched, discharged, dismissed or otherwise removed from employment in connection with or as a consequence of such dispute or whose lay-off, retrenchment, discharge, dismissal, or removal has led to that dispute; but does not include a member of the watch and ward or security staff, fire-fighting staff and confidential assistant of any establishment.

V. Definition of Worker Under Bepza

According to the 'Service Matters Concerning Workers & Officers Employed in The Companies Operating Within the Export Processing Zones of Bangladesh,' which was issued by the Bangladesh Export Processing Zones Authority provides a different definition of worker.

According to section 2 (h) "Worker" means any person including an apprentice employed in the office or factory of a company to do any unskilled, technical, trade promotional or clerical or supervisory work for hire or reward, whether the terms of employment be expressed or implied, but does not include a person who is employed mainly in a managerial, executive, or administrative capacity.

Whilst their definition of worker includes 'supervisory work,' it has already been pointed out by the Bangladesh Labour Act and case law that 'supervisory capacity' has been excluded from the definition of a worker, or in the very least, is not a material consideration in itself on whether a person is a 'worker' for the purposes of the Bangladesh Labour Act.

8. Recent Amendments to the Labour Act

In 2018, Government of Bangladesh made certain changes in exiting Bangladesh Labour Act 2006 by the 'Bangladesh Labour (Amendment) Act

2018'.[40] The aim of the amendment is to ensure more rights and benefits to labours in Bangladesh. There are fifty sections in the Labour Act (Amendment) 2018. However, this part of the paper only focuses on the most important provisions of the amendment.

According to the Bangladesh Labour Act (Amendment) 2018, workers of sea-going vessels are included in the definition of the worker which is a positive sign.[41] in earlier, the workers of sea-going vessel were excluded from the definition of worker and thus could not claim the benefit of the Labour Act of Bangladesh.[42] Gratuity payment to a labour is lawfully ensured by the amendment,[43] which is a financial support to a Labour. As a result, from now onwards, a worker will receive the wages of at least 30 (thirty) days, at the rate of the wages a worker received last, for every completed year of his/her service or for a period of his/her service exceeding 06(six) months or, in the case of his/her service of more than 10 (ten) years, the wages of 45 (forty five) days at the rate of the wages he/she received last, which is payable to such worker on the termination of his/her employment.[44] Festival bonus also ensured to all workers, which would be calculated according to service rules of industry or establishment where he/she is working.[45] In earlier, there was no clear provision of festival bonus to workers in the Labour Act of Bangladesh 2006, only mentioned about festival holidays.[46] Prior, handicapped worker could be appointed by employer, but 'no handicapped worker shall be employed in the work of a dangerous machine or hazardous work'. [47] However, at present, by the amendment of 2018, restriction has been imposed; now handicapped worker would not be appointed by employer.[48]

Special consideration is given to tea plantation (tea factory) worker in the 2018 amendment. According to the Bangladesh Labour (Amendment) Act 2018, if a tea factory employee retires, he/she will receive the same benefits with other sectors of employees.[49] In past, tea factory workers only received Provident

[40] Bangladesh Labour (Amendment) Act 2018, Act No 58 of 2018. Gazette Publication on 14 November 2018. (The labour Amendment Act 2018). The Labour Amendment Act of 2018 was originally published in Bangla language; till today there is no official English version. This write bears all the responsibilities regarding the English translation.
[41] Section 2, Bangladesh Labour (Amendment) Act 2018.
[42] Section 1(4)(m), Bangladesh Labour Act 2006.
[43] Section 3(b), Bangladesh Labour (Amendment) Act 2018.
[44] Section 2(10), Bangladesh Labour Act 2006.
[45] Section 3(a), Bangladesh Labour (Amendment) Act 2018.
[46] Section 118, Bangladesh Labour Act 2006.
[47] Section 44(3), Bangladesh Labour Act 2006.
[48] Section 7, Bangladesh Labour (Amendment) Act 2018.
[49] Section 5, Bangladesh Labour (Amendment) Act 2018.

fund,[50] but now their financial benefit has been extended. Moreover, particular attention is also provided in maternity benefit. In the amendment, if a woman before giving any notice to the employer about her pregnancy gives birth to a child, in that case, within three days of the notice to employer, the woman should receive all the benefit of maternity period including maternity leave of eight weeks.[51] In addition, the 2018 amendment also emphasised on good working environment. It repeals the previous section,[52] and replaced a new section which states that in every establishment if there are more than 25 employees, there should be a suitable lunch room and rest room where the employees can take rest and eat their food; moreover, the rest room must be neat and clean with sufficient light and air circulation.[53] If an employee is death or missing then his/her undistributed wages will be given to his/her nominated person or legal successor.[54] In earlier, there is no provision of unpaid wages to legal successor.[55] According to the amendment, penalty for unfair labour practice also reduced from two year to one year and fine is also reduced from 10,000 BDT to 5,000 BDT by the 2018 Act.[56] Now, if any person contravenes any provision of section 195 (unfair labour practices on the part of the employers) of the Bangladesh Labour Act 2006 or section 196 (unfair labour practices on the part of workers), he/she shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to 5,000 (ten five) BDT, or with both.[57]

9. Conclusion

The Bangladesh Labour Act 2006 is the principal labour law in Bangladesh that ensures the rights of millions of workers. After many years of campaigning, discussion and demands, it was finally enacted in 2006. It was expected that the legislation will meet the demands and needs of labours throughout the whole country. However, after a critical review of the Act, this paper has revealed that the law has many deficiencies and inadequacies; particularly the application and definition of 'worker' which is complex and ambiguous, and as a result, it is not

[50] Section 265, Bangladesh Labour Act 2006.
[51] Section 8(b), Bangladesh Labour (Amendment) Act 2018.
[52] Section 93, Bangladesh Labour Act 2006. In this section, for a specific rest room, the number of employee of an establishment was minimum 50.
[53] Section 10, Bangladesh Labour (Amendment) Act 2018.
[54] Section 18, Bangladesh Labour (Amendment) Act 2018.
[55] Section 131, Bangladesh Labour Act 2006.
[56] Section 39(a), Bangladesh Labour (Amendment) Act 2018. See, also previous section 291 (Penalty for unfair labour practice) of Bangladesh Labour Act 2006.
[57] Ibid.

a practically orientated law. Although the main definition of a worker is provided in s 2(65), but in different chapters of the Act, separate/special definitions of a worker have been mentioned that create difficulties and confusion in its application. Furthermore, section 3 of the Labour Act states that the act is applicable to the whole of Bangladesh subject to exceptions. However, these exceptions are not mentioned clearly; the provisions of its exceptions are scattered in different sections of the Act. Moreover, after reviewing the whole Act, this paper suggests that its application is limited to specific groups of people. For example, in the case of the agricultural worker, if the numbers of worker are less than five, the Act will not be applicable (s.4(n)). Moreover, whatever the number is, in the case of domestic worker - the Act is inapplicable (s.4.(o)). A more problematic issue is that these groups of people are excluded from the list of workers' compensation that are mentioned in the Fourth Schedule of the Act as per s.150(8).

Recently, the labour act of Bangladesh was amended in 2018 by the Bangladesh Labour (Amendment) Act 2018. The objective of the amendment is to remove the deficiencies and to make a more suitable law for the labour. By the amendment, the definition of worker is extended, now sea-going vessel's workers will also receive protection under the Bangladesh Labour Act. Moreover, women will enjoy more maternity benefit then the past, financial benefit to tea-factory employee has been extended, and emphasized is given on good working environment. In addition, handicapped workers no longer be appointed by an employer - all these are indicating positive signs for workers. However, in many cases, a country like Bangladesh, handicapped worker supports to his/her family while there is no social benefit. Thus, by providing restriction of employment to the handicapped worker, one side, government is ensuring their human rights; on the other side, if the disabled worker does not financially support their families, in that situation, they would face more financial challenges. Thus, alternative benefit or social support is needed to be considered for handicapped workers.

Therefore, this paper suggests that more review and consideration is needed for an effective labour law of Bangladesh that will more constructively ensure the rights of workers, whatever the designation he or she has.

Labour Involvement as a Participatory Mechanism in Developing Economies: Contrasting the European Model

John Opute, Karl Koch[1]

Abstract

Employee participation, well established in pluralist democracies, is a crucial factor in the process of democratisation in developing economies. This paper contributes to this issue in Nigeria by focusing on the contribution industrial relations makes and contrasting it with the European experience. Specifically, the study investigates the employee participation forms which have developed in Nigeria. The research methodology is an adapted case study approach of 7 companies with international affiliations in Nigeria, and recent qualitative data from a focused group interview, involving key stake holders in the industrial relations framework, expanding the research to the broader socio-economic context in Nigeria. Despite the constraints of the research methodology the conclusion points at a rich variety of employee participation structures, which in some instances compare with European employee models. Significantly the research reveals a clear pattern of democratic employee participation structures at company level.

1. Introduction

The last decades have been marked by the rapid economic evolution of developing economies and their integration into the economic fabric of globalisation, Nigeria being a notable example from Sub-Saharan Africa. The impact of the dynamics of globalisation has had a profound effect on the Nigerian economy bringing in "recent changes in the trends of trade and capital flow, which have continued to produce various impacts on the society". There is a cogent argument that one of the key driving forces has been the

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influence of globalisation[2]. Some authors have concluded that industrial relations have been part of the globalisation process, cross-fertilizing ideas and practices[3,4]. In this respect, the paper also examines and extends the argument that the European IR practices have influenced the approaches of employee participation initiatives in many developing economies. This assertion has been corroborated by many and thus enriches the study significantly[5,6,7]. However, a searching debate by some authors serves as a trajectory to the assignment of the paper as the views expressed bother on the link between perceived HRM practices, engagement and employee behavior (through a moderated mediation model) on the one hand, and the responsibility for the design, adoption, enactment and implementation of the strategy and practice on the other hand[8,9,10]. Thus, whilst the paper recognizes the influence of European IR in developing economies, concomitant to this is the extent and relevance of these to participatory mechanisms in developing economies[11].

Central to Nigerian politics, economics and society is the complex issues of the establishment and extension of democracy from political structures to societal underpinning of democracy. The gradual process of involvement in participatory democracy apply to structures at industry and company levels, a crucial adjunct to the broader movement of democratic embracement of civil society in Nigeria. The practical manifestation of democratic involvement has

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[2] Nwaogaidu, J. C. (2012*) Globalization and Social Inequality, An Empirical Study of Nigerian Society*, LIT Verlag: Berlin.

[3] Kaufman, B. E. (2004) *The Global Evolution of Industrial Relations: Events, Ideas and the IIRA.* Geneva: International Labour Organisation.

[4] Hayter, S., Fashoyin, T., and Kochan, T. A. (2011) Review Essay: Collective Bargaining for the 21st Century, *Journal of Industrial Relations,* (53) 2: 225-247.

[5] Farndale, E., & Sanders, K. (2017). Conceptualizing HRM system strength through a crosscultural lens. *The International Journal of Human Resource Management*, *28*(1), p.132–148.

[6] Ostroff, C., & Bowen, D. E. (2016). Reflections on the 2014-decade award: Is there strength in the construct of HR system strength? *Academy of Management Review*, *41*(2), p. 196–214.

[7] Kamoche, K. (2011) Contemporary developments in the management of human resources in Africa. *Journal of World Business.* Vol. 46. p.1-4.

[8] Beijer, S., Peccei, R., Van Veldhoven, M., & Paauwe, J. (2019). The turn to employees in the measurement of human resource practices: A critical review and proposed way forward. *Human Resource Management Journal.* https://doi.org/10.1111/1748-8583.12229

[9] Alfes, K., Shantz, A., Truss, C., and Soane, E. (2013) The link between perceived human resource management practices, engagement and employee behaviour: a moderated mediation model. *The International Journal of Human Resource Management,* 24 (2). pp. 330-351.

[10] Buyens, D., and De Vos, A. (2001) Perceptions of the value of the HR function. *Human Resource Management journal,* Vol. 11 (3) pp. 70-89.

[11] Opute, J., Hack-Polay, D. and Rahman, M. (2020). Globalisation and HR practices in Africa: When culture refuses to make way for so-called universalistic perspectives. *International Journal of Business and Globalisation.* ISSN 1753-3627.

been the increasingly active role of Nigerian trade unions with strategies, "to heighten the consciousness and awareness of the general public towards socio-political and economic development in the forms of campaigns and public awareness programmes." This can be interpreted as part of the major social changes, inclusive of social structure, political and economic liberalisation, and regional and urban development taking place in Nigeria[1].

It is in this context that employee participation can be observed, and this paper explores the concept, and practice, of employee participation at company level and its contribution to the broader evolution of democracy in the civil society of Nigeria. Employee participation structures across different national institutional frameworks do have marked variations but also reveal similarities; empirical research in this area for developing countries has been sparse, the research of, being a rare early study[12]. According to labels are plentiful in the area, extending to organisational democracy, industrial democracy, employee involvement, employee voice and high-involvement human resource management and the list continues[13]. Therefore, the focus of this paper is not to overcome the cacophony of potentially confusing terminology; rather it is aimed at a commonly held approach of collective bargaining (and emerging/related participation forms) as tool which in many developing economies provides the legal platform of engagement with employers in the work place and in fact a core institution in many developing economies, like Africa[14].

Developed economies with employee participation models have deeply embedded structures which, in western European countries, have progressed to accepted, and necessary, democratic structures. It is apparent that theoretical arguments differ on the future of workforce participation in developing economies therefore empirical studies are needed to provide greater clarity and more robust discussions[15]. One way of obtaining an in-depth understanding of the problems is to focus on a country where collective bargaining institutions have changed greatly within a fleeting period and Nigeria provides a good example for such an investigation for distinct reasons. It is, therefore, revealing that the empirical evidence presented in this paper

[12] Wood, G., and P. Mahabir. 2001. South Africa's workplace forum system: A stillborn experiment in the democratisation of work? Industrial Relations Journal 32 (3): 230-43.

[13] Markey, R., and Townsend, K. (2013) Contemporary trends in employee involvement and participation, *Journal of Industrial relations,* 55(4) 475-487.

[14] Kocer, R.G. and Hayter, S. (2011) Comparative study of labour relations in African countries, AIAS Working Paper WP 116, University of Amsterdam, Amsterdam.

[15] Lamarche, C. (2015) Collective bargaining in developing countries, IZA World of Labour 2015:183.

demonstrates the presence of participatory employee arrangements in selected Nigerian companies[16].

2. The Nigerian Political/Economic Framework

A key regional player in West Africa, Nigeria accounts for about half of West Africa's population with approximately 202 million people and one of the largest populations of youth in the world. Nigeria is a multi-ethnic and culturally diverse federation which consists of 36 autonomous states and the Federal Capital Territory. With an abundance of natural resources, it is Africa's biggest oil exporter, and has the largest natural gas reserves on the continent.
Nigeria has emerged as Africa's largest economy, with a GDP in 2017 estimated at US$ 508 billion. Oil has been a dominant source of government revenues since the 1970s. Regulatory constraints and security risks have limited new investment in oil and natural gas, and Nigeria's oil production contracted in 2012 and 2013. Nevertheless, the Nigerian economy has continued to grow at a rapid 6-8% per annum, driven by growth in agriculture, telecommunications, and services.
However, recent assessments of the democratisation process in Nigeria, and the issue of federalism, have concluded that gradual incremental steps are leading towards increasing the efficacy of democracy in Nigeria[17]. Hitherto, extensive obstacles in, for example, the exercise of trade union rights, collective agreements reached by trade unions were often subjected to stringent scrutiny by government[18]. In some circumstances, the enforceability of collective agreements was an intricate and difficult problem[19,20]

3. Employee Participation and Democracy

A central feature of industrial relations systems in the pluralist democracies of Europe has been the concept of employee participation, which has a direct linkage to societal democracy. Industrial relations actors, particularly trade

[16] Erapi, G. (2011) Privatisation, trade union strength and bargaining power in Nigeria's finance and petroleum sectors, *Industrial Relations Journal,* 42 (1) pp. 51-68.
[17] Elaigwu, J. I. (2014) *Federalism and democracy in Nigeria: fifty years after*, Institute of Governance and Social Research, Jos, Nigeria.
[18] Rapu, S. (2012) *Alleviating Poverty in Nigeria through the Improvement of the Labour Conditions in the Informal Economy*, Frankfurt am Main: Peter Lang.
[19] Edu, O.K. (2013) Imperatives for the enforcement of collective agreements in Nigeria, *Commonwealth Law Bulletin,* 39 (5) pp. 591-603.
[20] Nwinyokpugi, P. (2014) Workplace democracy and industrial harmony in Nigeria, *International Journal of innovative research and development,* 3 (1) pp. 441-442.

unions play an indispensable role, not only in the exercise of the process and stability of democracies but also, particularly in the case of countries such as Nigeria, in the genesis of democracy itself. Unionism at the workplace is regarded by numerous commentators as providing a fundamental democratic right, which enhances democracy[21,22,23]. The concept, and the practice, of participatory structures manifest wide variations in national models of industrial relations, but there are also comparable developments driven by European Union (EU) legislation[24]. Differences in employee participation are partly derived from distinctive historical predispositions, which in turn have provided contrasting theoretical frameworks.

A sharp distinction is between the Anglo-Saxon term of industrial democracy and the European concepts from codetermination to varieties of employee participation; the former based on collective rights and collective bargaining and the latter derived from individual rights of employees and a linkage to the right of economic democracy by employees. In addition, the rapid development of human resource management (HRM) has generated an expanding concept of employee involvement that is particularly linked with the expansion of direct forms of employee participation. Direct forms of employee participation are based on the principle of individual employees being actively involved in the mechanisms of participation. Indirect participation is exercised through processes such as collective bargaining and elected representational structures.

Definitional discussions of employee participation in the literature are complex and varied with key terminology, for example participation, involvement, voice and empowerment, frequently used as interchangeable terms[12,25,26,27,28]. For the

[21] Freeman, R. B. and Medoff, J. L. (1979), The Two Faces of Unionism, *Public Interest*, No. 57, pp. 69-73.

[22] Ogundiya, I.S. (2010) Democracy and good government: Nigeria's dilemma, *African Journal of Political Science and International Relations*, 4 (6) pp. 201-208.

[23] Sterling, J. (2011) Trade unions in a fragile state: The case of Sierra Leone, *Industrial Relations Journal,* 42 (3) pp. 236-253.

[24] Hann, D., Hauptmeier, M., and Waddington, J. (2017) European Works Councils after two decades, *European Journal of Industrial Relations* 23 (3), pp. 209-224

[25] Poole, M. (1978) *Workers' Participation in Industry*, London: Routledge.

[26] Salamon, M. (2000) *Industrial relations – Theory and Practice*, 4th ed. London: Prentice Hall.

[27] Rose, E. (2001) *Employment relations: continuity and change – Policies and practices,* Harlow: Prentice Hall.

[28] Wilkinson A, Gollan P, Marchington M, et al. (2010) Conceptualizing employee participation in organizations. In: Wilkinson A, Gollan P, Marchington M, et al. (eds) The Oxford Handbook of Participation in Organizations. Oxford: Oxford University Press, pp. 3–28.

purposes of this paper a wide, and pragmatic, approach has been adopted as expressed by Summers and Hyman[29].

"Employee participation can therefore be an umbrella title under which can be found a wide range of practices, potentially serving different interests. Any exploration of 'employee participation' has therefore to encompass terms as wide-ranging as industrial democracy, co-operatives, employee share schemes, employee involvement, human resource management (HRM) and high commitment work practices, collective bargaining, employee empowerment, team working and partnership…."

Although such a wide approach does not specify precise definitions it does allow the great diversity of European participation structures to be included and therefore the interpretation and identification of employee participation trends in Nigeria is facilitated. Moreover, there is a fundamental characteristic of all employee participation models; it is a process designed for employees to participate, impact or influence decisions, which are related to their working environment. In this respect employee participation is also an issue of power relationships and the ideological paradigms of the societies in which it functions. In this sense 'participation' includes all the processes that are applied to engage employees, or their representatives, at all levels of enterprises and companies in decisions affecting them.

In practice, European employee participation models demonstrate a spectrum from information rights to the comprehensive codetermination provisions of the German model, a crucial element is that at national level in many European countries legislations regulates the degree of participation and the level at which it can be exercised. In addition, the EU has had, since Fifth Directive on Company Law was discussed in 1972, an extended programme of debate on legislation to facilitate employee participation, the European Works Council (EWC) being the most prominent form so far. Thus, employee participation is a continuous process of development for EU member states, for example the European Company Statute and its employee involvement Directive were implemented in October 2004 and more recently information and consultation rights were introduced in Poland in May 2006[30]. However, employee participation developments at EU level are constrained by conflicting interests of member states and schisms between trade union and employers organisations[31]. Nevertheless, European and national models of employee

[29] Summers, J. and Hyman, J. (2005) *Employee participation and company performance. A review of the literatur*e, York: Joseph Rowntree Foundation.

[30] European Industrial Relations Review (July 2006), Issue 390, *New information and consultation legislation*, pp. 34 – 36.

[31] Gill, C. and Krieger, H. (2000) Recent survey evidence on participation in Europe: towards a European model? *European Journal of Industrial Relations*, Vol. 6, No. 1, pp. 109 – 132.

participation are dynamic and adaptive to the rapidly changing international economic environment[32].

The search by enterprises and companies in the highly competitive globalised economy for competitive advantages has been a significant driver for new models of partnership; not only direct participation forms but also new alignments between trade unions and employees and employers. The empirical literature assessing employee participation is extensive and continuous to expand, not only in Europe but also in the USA and the Asia-Pacific region. From the European perspective much research has focused on the impact of the legal forms of representative participation, the works councils and supervisory boards being two examples. At national level, for example Germany, Frege in 2002[33] has provided a detailed overview of the effectiveness and problems of the German works council and at European level EWC research has moved from broad assessments to specific studies such as by who focused on the issue of the impact of EWCs on decision-making at corporate level in UK and US-based MNCs[34,35].

The empirical evidence on the outcomes of employee participation processes are diverse and highly dependent on what variables are used, what industries and the methodologies employed in the studies. From a recent study evidence on EWCs is 'mixed, though there is little evidence of any significant negative effects either for the employer or for employees'[28] Far less controversial is the resonance that EWCs and other forms of European employee participation have had both on the enlarged EU and outside Europe. An example of the latter is the South African Workplace Forum, influenced by European legislative provisions, and allowing comparisons with the German works council[36]. Since such embryonic European influenced developments in some African countries the substantial increase of transnational companies has had a major impact on economic actors and the broader socio-political environment.

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[32] Whittall, M., Lucio, M. M., Mustchin, S., Telljohann, V., and Sanchez, F.R. (2017) Workplace trade union engagement with European works councils and transnational agreements: The case of Volkswagen Europe, *European Journal of Industrial Relations,* 23 (4) pp. 397-414.

[33] Frege, C. (2002). A critical assessment of the theoretical and empirical research on German works councils. *British Journal of Industrial Relations*, 40: 221 – 248.

[34] Rogers, J. and Streeck, W. (eds.) (1995). *Works Councils: Consultation, Representation and Co-operation in Industrial Relations,* Chicago: University of Chicago Press.

[35] Marginson, P., Hall, M., Hoffmann, A., Müller, T., (2004) The Impact of European Works Councils on Management Decision-Making in UK and US-based Multinationals: A Case Study Comparison, *British Journal of Industrial Relations*, 42: 209 – 233.

[36] Koch, K. and van Wyke, C. (1997) The South African Works Forum compared with the German Works Council", Joint Study Group Paper with Christo van Wyke, Dublin Conference, *International Industrial Relations Association European Regional Congress*, Dublin, unpublished paper.

Thus, corporate governance of international companies can both influence and shape industrial relations practices. Finding of a recent study suggests that there is functional equivalence of the European employee participation forms which have evolved in numerous cases[37]. Certainly, the variety of structures allowing forms of employee participation in Nigeria reflects this.
Comparative research, focusing on the United States, Germany, United Kingdom, and Australia, has revealed that there are common forces which have shaped developments in each country, but the form that industrial democratic structures evolve in individual countries have important differences[38]. In the African context the study by some scholars[39] of trade unions and workplace democracy, in selected African countries, distinctly reveals the critical role participation plays in the democratisation process[3]. However, what many text appear to hardly address is the 'What' (relative content), the 'How' (relative strength) and 'Why' (the related attribution) and how these can be advanced to capture the possible connections between national culture and HR strength[40]. An important lesson that stems from this is that whether we are aware of it or not, the African society has ways of forcing is values on us about what appears acceptable and this therefore poses the challenge of how far to go or not to go as this impacts on the HR function[41]. Much more complicated is that culture in Africa is an embodiment of social, moral, religious and economic values. Understanding how they manifest from country to country is crucial in managing the HR function and one viable approach is examining participation mechanisms that can build on this assertion.

4. Methodology

For this study, the methodology is based on an open-ended and semi-structured interview in a few selected companies to which access had been granted; in effect part of the study is based on the 'case study' model. The interviews were conducted with HR professionals in the seven companies, which formed the basis of the study. There were two sessions of interviews

[37] Hassel, A., von Versshuer, S., Helmerich, N. (2018) Workers' Voice and Good Corporate Governance, Düsseldorf, Hans Böckler Stiftung.
[38] Poole, M., Lansbury, R. and Wailes, N. (2001), A Comparative Analysis of Developments in Industrial Democracy, *Industrial Relations*, Vol. 40, No. 3: pp. 490-525.
[39] Kester, G. (2007) *Trade Unions and Workplace Democracy in Africa*. Bodmin: Ashgate.
[40] Wang, Y., Kim, S., Rafferty, A., and Sanders, K. (2020) Employee perceptions of HR practices: A critical review and future directions. *The International Journal of Human Resource Management*. Vol 31 (1) p. 128-173.l
[41] Idang, G., E. (2015) African Culture and Values, Phronimon, vol. 16 n. 2 Pretoria 2015.

conducted on company premises, for a period of around two hours on each occasion. The study is constrained by the narrow spectrum of respondents interviewed. The interviews were supplemented by data on the companies from company annual reports, journals and in-house publications, and from documents detailing collective agreements concluded by the individual companies. In addition, visits to the companies allowed a degree of observation and consequently the methodology can be characterised as a multi-method approach. Additionally, because framework of industrial relations in Nigeria is centred on a tripartite arrangement, additional interviews were achieved as follows:

a) NECA: Interview with officers of the zonal offices of the Nigeria Employers Consultative Association (NECA). This is the umbrella organization of employers' in the organised private sector and was formed in 1957. Its primary function is to guide and assist business on industrial and employee relations issues with trade unions.
b) Employers' Association: Interview with the Executive sectary of the National union of food, beverages and tobacco employers' association. The executive secretary heads the secretariat of the employer's association of the trade group and leads all national negotiations of the employer's association and maintains contact with HR practitioners in the group.
c) Nigeria Labour Congress (NLC): Interview with Assistant National Secretary of the Nigeria Labour Congress. The Assistant national secretary of the NLC is a key officer of the NLC and is conversant with all developments with respect to the trade union congress in Nigeria.
d) National Trade Union: Interview with the Deputy National President/Assistant National Secretary of the Food, Beverage and Tobacco National Trade Union. These are key officers of the national union and are conversant with all developments with respect to trade union matters in their respect trade group as well as in Nigeria.

The seven case study companies were multinational companies with activities in oil and gas, food and beverages and metal products. The companies, who have been given aliases to retain confidentiality, play a significant role in the Nigerian economy. As Table 1 reveals, the number of employees range from 650 in Crescent Aluminium Company Plc to 7,700 in the Rex Bottling Company Plc. All the companies share a high degree of trade union membership, representing three different trade unions. Importantly, the

business and organisational structures of the companies are compatible with industries competing in the global marketplace.
The selected companies, and their industry sectors, by no means reflect the major economic branches contributing to the Nigerian economy, predominant being the oil industry in terms of contribution to GNP, and the agricultural sector in terms of numbers of employees. This is, of course, a limitation and the study does not claim that generalisation can necessarily be made from its findings. However, given the paucity of empirical data in Nigeria this research has a pioneering dimension providing a start for further work in this area.

Table 1: Company background

Companies	*Company Size No of people Employed*	*Industry Group Category*	*Trade Union Structure Membership/ present*	*Written Agreement*
Britannia Food Plc	**2,200**	Food, Beverages & Tobacco	**1,800** (NUFBTE)	**x**
Rex Bottling Company Plc	**7,700**	Food, Beverages & Tobacco	**7,150** (NUFBTE)	**x**
Precious Bottling Company Plc	**4,700**	Food, Beverages & Tobacco	**4,500** (NUFBTE)	**x**
Crescent Aluminium Company Plc	**650**	Metal Products	**600** (SEWUN)	**x**
Zorex Oil Producing Company	**2,250**	Petroleum and Natural Gas	**2,000** (NUPENG)	**x**
Kwabever Products Plc	**2,025**	Food, Beverages & Tobacco	**1,920** (NUFBTE)	**x**
Delta Aluminium Plc	**2,500**	Metal Products	**2,300** (SEWUN)	**x**
Kwabever Products Plc	**2,025**	Food, Beverages & Tobacco	**1,920** (NUFBTE)	**x**
Delta Aluminium Plc	**2,500**	Metal Products	**2,300** (SEWUN)	**x**

Note: NUFBTE: National Union of Food, Beverages and Tobacco Employees. SEWUN: Steel and Engineering Workers' Union of Nigeria. NUPENG: National Union of Petroleum and Natural Gas Workers.

5. Nigerian Industrial Relations – An Overview

The Nigerian economy has undergone major structural changes since independence in 1960. The origin of government dominance of the economy can be traced to the immediate post-colonial era that witnessed a low domestic

capital base. Accordingly, the government set up various corporations to carry out projects, which ordinarily would have been executed by private organisations. The mid 1967 post civil war focus of reconstruction and rehabilitation coupled with the abundance of wealth generated through oil exports intensified the practice. This was the genesis of government dominance of the economy on the one hand and as a dominant employer on the other hand. Although the Nigerian labour movement developed alongside independence of the country in 1960, with the first concerted collective bargaining pioneered by the Nigerian civil service union, the growth of unions in Nigeria could not match the growth of the country due to incessant military intervention on government and the Nigeria civil war of 1967.

Nigeria seemed to have overcome the uncertainties surrounding the long period of military rule with the successful organisation and completion of the second democratic election in succession. Some scholars[42,43] predicted that the economic and political rebirth and rejuvenation will promote political and economic stability and thus an investment atmosphere.

The framework of industrial relations in Nigeria is centered on a tripartite arrangement of government and its agencies, workers and their organisations and employees and their associations. This partnership according to Olorunfemi[44] can be illustrated and summarised as follows:

5.1 The State

According to Udogu[42], with the inception of a democratically elected government in 1999, the government's focus has been directed towards the process of developing and institutionalising democracy and true federalism in the country. This approach has brought about a new dispensation in labour policy with a view to pursuing voluntarism, and thus democratising the trade union. Accordingly, the Federal Government of Nigeria passed the Trade Union (Amendment) Act, 2005 "to provide amongst other things, the democratisation of the labour movement through the expansion of opportunities for the registration of Federation of Trade Unions as well as the granting of freedom to employees to decide which unions they wish to

[42] Budhwar, P.S.and Debrah, Y.A. (2001) *Human Resource Management in Developing Countries*. London: Routledge.

[43] Udogu, E.I. (2005) *Nigeria in the Twenty First Century – Strategies for Political Stability and Peaceful Co-Existence*. Trenton: Africa World Press, Inc.

[44] Olorunfemi, J.F. (1997) *40 years of Promoting Industrial Harmony and Enterprise Competitiveness in Nigeria: The History of NECA 1957-1997*. Lagos: Malthouse Press Ltd.

belong". (Trade Unions (Amendment) Act, 2005)[45]. Some of the significant clauses are:

- Withdrawal of one central labour union in Nigeria

This implies that employees can only contract into their respective unions for deductions to be made from their wages. Union membership thus becomes voluntary.

- Conditions for strike action/lock out

There are several 'hurdles' to go through before a strike action or lock out can be carried out. This implies some procedural restriction.

5.2. The Employers

Although the employers have formed associations along industry lines, primarily for the purposes of presenting a united front with respect to collective bargaining, they have built on this by maintaining close contact with Nigeria Employers' Consultative Association (NECA)[46]. As a federation of employers, as well as a parliament of employers, NECA's role among its members is purely consultative, since it does not enforce its advice on its members[47,48]. Amongst its key role is, advising members on negotiations on wages, conditions of work, dispute handling and representation to government (on behalf of employers) on specific labour matters.

At its inception in 1957, the association had 54 members but by 2006 it had grown more than 350 members, an indication of its acceptance and relevance to employers.

During 2006, NECA's annual report confirmed 15 employer's association (Trade groups) in industrial groups, important examples are:

- Association of Food, Beverage and Tobacco Employers
- Petroleum and Natural Gas Employers Association
- Association of Metal Products, Iron and Steel Employers of Nigeria.

[45] The Trade Unions (Amendment) Acts, 2005 was passed into law by the Nigerian National Assembly on 23rd March 2005, for the democratisation of the labour movement in Nigeria

[46] NECA is the Nigeria Employers' Consultative Association. It is the umbrella organisation of employers in the organised private sector of Nigeria and was formed in 1957. It has membership strength more than 350 organisations.

[47] Opute, J. and Koch, K. (2011) The Emergence of Collective Bargaining Structures in a Transformation Economy: The Example of Nigeria, *Bulletin of Comparative Labour Relations,* Vol. 77, pp. 39-57.

[48] Opute, J.E. (2010) 'Compensation Strategies and Competitive Advantages in the Globalised Economy: Nigerian Based Study', PhD Thesis, January 2010 (London South Bank University, London, UK).

5.3. Trade Unions

The labour unions have been structured along industrial lines by the state for better coordination of all employee/employer activities, such as collective bargaining. Accordingly, the NLC serves as the central negotiating body for workers, albeit with now a rival central body. The role of the NLC is political. It represents workers interest at the national level and in recent times has continuously engaged the government on matters of national interest. It resolves inter-union and intra-union disputes and takes the lead in providing education and counselling to members. However, the Trade Union Congress (TUC), which is now a rival/optional centre trade union has been given legal backing with the democratisation of the unions. It is intended to operate in a similar fashion as the NLC.

National Union (e.g.: Steel and Engineering Workers' Union of Nigeria)

The national union takes on the role of industry wide collective bargaining for its affiliate unions. This has diminished the role of the branch unions in collective bargaining.

State Council

It is the supervisory and coordinating organ of the national union of the industrial groups in the various states within the country. They work closely with the branch union and provide guidance and counselling.

Branch Union

With the centralisation of trade unions, the key role of the branch union has become grievance settlement, interpreting and administering the collective agreement in the workplace. Also, most procedural agreements leave out some items (such as burial expenses and education allowances) for in-house negotiations and some items (such as canteen subsidy, company service awards, and uniforms) for in-house consultations/discussions so that some relevance can be accorded officers of the union at the branch level.

However, with the recent development of the 2005 trade union legislation, employees can establish plant unions and deal directly with their employers. Some of the prominent industrial/senior staff unions/associations cover such key economic areas as follows:

- Metal Products
- Petroleum and Natural Gas.
- Food, Beverage and Tobacco
- Bank, Insurance and Allied Institutions
- Nigerian Union of Teachers
- Nigeria Civil Service
- Nigerian Railways

In collectivist cultures, harmonious inter-personal relations and teamwork are prevalent. Most employees are thus organised for collective bargaining to obtain outcomes they believe may not be easily achieved as individuals. According to Fajana[49] the processes and institutions of industrial relations have emerged very strongly because of the inability of employers and employees to have a proper dialogue regarding employment relations. Besides, the average employee lacks proper education and awareness and therefore looks towards the union for direction and support. The societal and infrastructural settings of most developing countries like Nigeria are hardly developed. Accordingly, issues for negotiations and collective bargaining are both economic and none-economic thus leading to the increased importance of trade union activities in developing economies. Additionally, most scholars have expressed the view that collectivism is a prominent cultural trait in Africa and the associated approach to employment relations is paternalism. Thus, employees tend to view the employer as an extension of the family[50,51].

The state continues to be involved in trade union matters essentially to encourage industrial peace and promote economic development. Such interferences (at the onset) come through regulated incomes and productivity policies to inhibit inflations; encouraging freedom of association through legislations to permit national and plant negotiations through the machinery of collective bargaining process; setting up Arbitration Panels and the National Industrial Court for the settling of industrial relations disputes. On the part of employers, the NECA provides a forum for encouraging the setting up of employers' association for industry wide collective bargaining processes, advice and consultations amongst members and as a liaison body with the state on behalf of employers. The framework for collective bargaining is completed by the centralised trade unions with some issues left at company/plant level.

The amendment to the Trade Union Act in 2005 (seemingly the only noticeable trade union legislation) has emphasised the importance of freedom of association and increased relevance of collective bargaining at both national and plant levels. Unfortunately, the political transformation of the country has attracted limited advancement in labour laws or the management of trade unionism.

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[49] Fajana, S. (2000). Industrial Relations in Nigeria: Theory and Features (2nd ed.) Lagos: Labofin and Company.

[50] Beugre, C.D., and Offodile, F. (2001) Managing for Organisational Effectiveness in Sub-Saharan Africa: A Cultural-Fit model. *The International Journal of Human Resource Management,* 16 (7) pp. 1083-1119.

[51] Jackson, T. (2004) *Management and Change in Africa: A cross-cultural perspective.* London: Routledge.

Nevertheless, what appears as the established means of participation mechanism in Nigeria is driven by trade unions and centred on collective bargaining. Whilst the latter is well embraced and established participation mechanism (particularly in collectivist societies), the study has ventured into exploring other participation mechanism that can be regarded as 'cooperative participation' without diminishing the importance or relevance of the trade unions in the work place.

6. Nigerian/European Comparison

Nigerian industrial relations were shaped by the Anglo-Saxon model; collective bargaining and negotiations being the major mechanism of dialogue and interaction between management and trade unions. The latter retain a significant role in the industrial relations arena of Nigeria; and in this respect Nigerian trade unions exercise a fundamental and significant role of indirect participation of employees. In contrast to European practices, where pluralist democracy is established, Nigerian employee participation is a crucial constituent of the process of democratisation. The JCC, the legacy of colonialism, can be compared to participation bodies in Europe, particularly with extant structures in Britain. As an information and consultation structure there are valid comparisons with some continental European works councils. However, it is not surprising, given the historical evolution of Nigerian industrial relations, that the concept of codetermination is absent.

The cultural trait of many developing economies is collectivism; in contrast the European cultural trait is individualism. This fact is mainly responsible for the continued strength of trade unionism in Nigeria; it is believed that a collective approach provides a more forceful platform to pursue demands by employees. This apart, the established concept of employee participation in Nigeria follows the Anglo-Saxon concept of information and consultations through established channels of discussion with employee representatives

The drive of companies towards competitive advantages, in the globalised economy, has given, as demonstrated by the companies in the study, common organisational, marketing and business characteristics to companies. Taking the broad definition of employee participation suggested by Summers and Hyman, it can be noted that there are common elements between Nigerian and European manifestation of employee participation structures[28]. Information, and to a lesser degree consultation, have become important human resource tools.

The socio-economic setting of most developing countries, such as Nigeria, restricts labour mobility, unlike the experience of the developed economies of Europe. Accordingly, employees have long-term employment interests with

their employers. Apart from the benefit of enhanced separation package (resulting from seniority), employers can institute employee share ownership schemes as a means of enhancing and committing employee participation in the future of the company. Such schemes are only applicable to serving employees and thus a unifying symbol for both employee and employer. The study revealed that three of the companies had employee trust schemes. These companies, with operations across the country and multinational affiliations, reflect the modern business environment in Nigeria.

7. Findings and Discussion

The concept of labour involvement as participatory mechanism is hinged on democracy at the work place and facilitated by the cooperative behavior of both employees (in some cases, represented by the trade unions) and employers. It is the pursuit of the existing forms of participation in the work place (albeit focusing on Nigeria as an example of a developing economy) that this study has examined other means of labour involvement as a participatory mechanism in the work place. The study reveals that management participation, trade unions and collective bargaining, joint consultative committee, employee trust scheme and employee forums are identified as existing mechanisms of participation in the selected organisations. These formalised mechanisms were derived from the broad forms of participation and structures as captured in tables 2 and 3 in the participating companies. They are therefore an amalgamation of these structures and forms and have been embraced by employees and employers based on internal and external considerations and can serve as extension of 'cooperative participatory mechanism' that can be employed by different organisations to address their peculiar circumstances. Furthermore, these participation mechanisms have been supported/complimented by the comments of the respective HR practitioners as evidenced in the accompanying foot notes.

7.1 Management and Participation

Management practitioners have increasingly been aware of the organisational significance of information, consultation and communication and this aspect was confirmed in the companies surveyed. As means of building on a relationship of support and co-operation with employees, the companies have structured channels of communication with employees, employing various avenues for educating employees, achieving feedbacks and thus building on a relationship that is based on partnership. One common view that is held

amongst HR practitioners, GG[52] and FF[53], is that employee participation is a very prominent human resource management tool for the purposes of exercising partnership in the workplace. Accordingly, such events as staff conferences and briefing sessions provide a platform for management to share strategic visions/goals and developmental issues with employees. Although these meetings are mainly focused on updating employees, some consultative events also feature, particularly on matters that relate to immediate employee benefits.

A HR Director, HH[54], confirmed participation as a human resource tool for widening employee participation in company activities through such avenues as company magazines and journals; providing opportunities for employees to share opinions and suggestions and serve as a medium for increased information dissemination apart from company notice boards. Analysis of procedural agreements and company handbooks disclose that at industry and plant level, companies provide for periodic meetings as well as quarterly consultative meetings. In addition, Quality circles and work groups/committees, seen partly as employee participating improvement initiatives, are prevalent within company practices, as confirmed by all the HR practitioners interviewed.

7.2. Trade Unions and Collective Bargaining

As Table 1 reveals, all the companies have a high degree of trade union membership, reflecting the general strength of trade unionism in Nigeria, partly because of specific legislation. Prior to the Trade Union (Amendment) Act of 2005, there was an automatic check-off system, which was intended to ensure that the trade unions had enough funds to operate and function properly. Membership to the trade unions was therefore automatic and employees were required to 'contract out' if they did not wish to maintain membership. The government's intention in amending the Trade Union Act was to democratise the trade unions and thus withdraw the automatic check-off system. Accordingly, the withdrawal requires employees to 'contract in' to union membership. Whilst this latter approach is intended to create freedom of association, the long-established role of trade unionism in Nigeria means that the trade unions view this development with considerable scepticism. On the part of the employees, the cultural setting of collectivism makes non-association a 'taboo'. This cultural characteristic also explains the persistence of

[52] GG, Human Resources Manager of Britannia Foods Plc.
[53] FF, Human Resources Director of Rex Bottling Company Plc.
[54] HH, Human Resources Director of Precious Bottling Company of Nigeria Plc.

collective bargaining in the difficult political and economic climate of Nigerian industrial relations.

From the perspective of participation as a trade union strategy, leadership conferences, targeted at plant union officials, and other identified opinion leaders, were having improved union/management relationship (MM[55], KK[56]). Firstly, it creates an avenue for training on leadership qualities and challenges. Secondly, it serves as an informal atmosphere for interactive sessions with key management employees, providing opportunities for building on mutual support and understanding. To some extent, in the words of KK[57], "it creates an atmosphere for feeling the pulse of the union, against future negotiation and thus a strategic tool in trade unionism". This perception accentuates the importance of partnership between Nigerian trade unions and management as a key to stable industrial relations and this is dependent on collective bargaining. According to CC[57], MM[56] the future structure of collective bargaining will require flexibility and independence to determine cost of input and remain competitive in sourcing these inputs. Most organisations have achieved this through effective participating initiatives.

7.3. Joint Consultative Committee

Five of the companies have a Joint Consultative Committee (JCC); these bodies can be regarded as the oldest established form of employee participation having their origin from the British model, which was introduced under the influence of colonial rule (DD[58], EE[59], and JJ[60]). This consultative committee provides a forum for management to obtain and share views across the entire work force. The JCC is also used as a platform for addressing issues that are not covered by collective bargaining, which are mutually beneficial to management and all employees. Examples of such issues are canteen facility, long service awards and staff uniforms. In recent times, (as confirmed by nearly all HR professionals interviewed) most employers have introduced other employee work groups/committees that are charged with specific matters, such as safety work groups and welfare committees.

[55] MM, Chairman of the Personnel Practitioners of the Rubber Products Employers' Association.
[56] KK, Head of HR, Packaging Division of Crescent Aluminium Plc.
[57] CC, Head of Industrial Relations, Research and Information of the Greenland Employers' Consultative Organisation.
[58] DD, Manager, Site/Field Human Resources of Zorex Oil Producing Unlimited.
[59] EE, Company Industrial Relations Manager of Kwabever Products Plc
[60] JJ, General Manager HR of Delta Aluminium Plc.

Membership to these work groups (including JCC) is through random selection by the HR unit or through nominations by in plant employee unions or associations. They are usually made up of a group of two individuals, representing junior, senior and management staff categorisation and usually headed by the Head of the HR unit or his representative. Other than the JCC meetings, the representative of the HR department heads most other work groups. JCC meetings are usually held quarterly, except for work group meetings, which are held weekly. The meeting times may vary if an emergency arises. Decisions of JCC and work group/committee meetings are usually communicated to management as recommendation and not agreement. However, in most cases, management accepts the recommendations.

7.4. Employee Trust Schemes

Three of the companies examined have partnership models based on employee trust schemes, involving the ownership of stocks/bonds/shares of the company by all permanent employees. This arrangement thus provides continuous partnership and participation in the affairs of the company. A typical example of such employee trust scheme is that of Crescent Aluminium Plc[61] which has highlighted the salient points of the scheme as follows:

1) "As part of its scheme for welfare of its employees, the company has resolved to make available to its employees 1,214,140 ordinary shares of 50 kobo each in the capital of the company on condition that the shares will be held in trust for all employees."
2) "Unless there is an undisclosed doubt as to the method of distribution or as to the identity of the persons entitled thereto, the entire amount of the income of the Trust Fund shall be distributed equally among all employees on the company's payroll as at 31 December of the year in which the dividend is declared."

Capital accumulation schemes by employees, and the associated 'participation', are an interesting alternative participation model in the Nigerian context.

[61] Crescent Aluminium Plc was incorporated during the early sixties as one of the early manufacturing plants in Nigeria. It became a quoted company in the Nigerian stock exchange market during late 1992.

7.6. Employee Forums

There was evidence from four companies (that recently established participation structures) were in the form of 'Employee Forums'. These essentially are an integrated information and consultation body with participation cutting across all categories of employees, inclusive of senior management and trade union representation. The forums are initiated by senior management, nominating around 20 representatives, and are designed to reflect the comprehensive composition of the entire workforce. Membership is by invitation from senior management; there is an annual meeting giving opportunity for all employees to be informed and engage in dialogue. Employee forums are clearly management structures with the objective of fostering participatory inclusivity. Significantly trade unions regarded these forums as an opportunity to enter discussion with both management and the entire workforce. The HR managers interviewed recognized the tensions that can arise between union representation and employee committees generated by management and therefore, in some cases, actively encouraged unions to nominate union members to these committees.

Table 2: Forms of Participation

Companies	Information	Consultations	Negotiation	Employee Trust Scheme
Britannia Food Plc	x	x	x	-
Rex Bottling Company Plc	x	x	x	-
Precious Bottling Company Plc	x	x	x	-
Crescent Aluminium Company Plc	x	x	x	x
Zorex Oil Producing Company	x	x	-	x
Kwabever Products Plc	x	x	x	x
Delta Aluminium Plc	x	x	x	-
Total	7	7	6	3

Note 1: Negotiations are both at national and plant levels, except in Zorex oil where all negotiations are at national levels only. Note 2: Brittania Foods Plc, Rex Bottling Company Plc,

Precious Bottling Company Plc and Crescent Aluminium Company Plc hold an employee forum as an annual event for the purposes of information and consultation.

Table 3: Participation Structures

Companies	*JCC*	*Quality* Circle	*Work* Group	*Work* Committee	*Others*
Britannia Food Plc	x		x		
Rex Bottling Company Plc	x			x	
Precious Bottling Company Plc			x	x	
Crescent Aluminium Company Plc	x	x		x	
Zorex Oil Producing Company	x		x		
Kwabever Products Plc	x		x	x	
Delta Aluminium Plc			x	x	

8. Conclusions

Two important critical constraints for inferences from the empirical study require emphasis. Firstly, the small sample size, both in terms of the selected industries and the geographical concentration of the companies. The latter point is important given the ethnic and political cleavages which characterises Nigerian federalism. Secondly, the main respondents of the interviews predominantly reflected management perception and therefore broader conclusions were supplemented from secondary sources.

The conclusion from the data collected is that information and consultation are perceived as significant elements in both HR practises and trade union strategy. Over and above this participation is a vital component of the democratisation process in developing countries. In this respect the Trade Union (Amendment) Act 2005 provides a basis for the democratisation of the Nigerian labour movement through the expansion of opportunities for the registration of the Federation of Trade Unions, as well as the granting of the freedom of employees to select the trade union of their choice. This is an important recognition of the role industrial relation actors and employees have in the establishment of a stable democracy in the difficult political and economic climate of contemporary Nigeria.

The employee participation forms revealed from the company studies show a rich and varied variety. The major European influence, as particularly

exemplified by the JCC, is rooted in the historical legacy of British colonialism; the focus on negotiation and collective bargaining based on strong trade unionism. This contrasts starkly with, for example, South African employee participation developments, which have been influenced far more by continental European employee participation models. On the other hand, Nigeria has moved, at least in the companies examined, towards implementing management/employee structures to facilitate the efficacy of company performance.

Information, and limited consultation, structures have created a web of communicative pathways, which, in the Nigerian context, is dominated by management. Nevertheless, this facilitates an important catalyst for employee participation development in the transformation economy of Nigeria. Moreover, there is convincing evidence that employee participation is driven by cultural factors as well as the institutional paradigms. The Anglo-Saxon influence, and not the statutory employee forms of Europe, has exercised a strong influence on Nigerian employee participation structures.

In furtherance to this, many authors[40,62,63] have eluded to the fact that the expansion to the range of empirical context and the need for research to expand to the dynamics of culture and institutional environments because (as they further argue) the same set of HR practices and functions may attract divergent employee outcomes in different societies, which can impact on national values of cultures and countries[4]. Building on these assertions, this study has focused on HR systems and emerging participatory mechanisms/practices as not just the target of employees' perception (and expectation) but as well as employers' perceptions as the working together of these 'two unions' provides a better perception on how to manage the HR functions to achieve effective employee outcomes and participation in many developing economies and thus improving organisational efficacy.

9. Acknowledgements

The authors thank the companies, institutions and individuals that made this study possible. Additionally, the authors wish to acknowledge that a substantial detail of an earlier paper, titled "Emerging forms of employee participation in transformation economies – The influence of European models on Nigeria",

62 Sanders, K., Jorgensen, F., Shipton, H., vanRossenberg, Y., Cunha, R., Li, X., Dysvik, A. (2018) Performance-based rewards and innovative behaviors. *Human Resource Management*, *57*(6), 1455–1468.

63 Kim, S., & Wright, P. M. (2011). Putting strategic human resource management in context: A contextualized model of high commitment work systems and its implications in China. *Management and Organization Review*, *7*(1), 153–174.

presented at the European Congress of the International Industrial Relations Association in Manchester, 2007 is contained in this paper.

The Québec Parental Leave Insurance Program: an Innovation in Parental Leave for a Canadian Province

Diane-Gabrielle Tremblay[1]

Abstract

The paper analyses the Québec Parental Leave Insurance Program in order to point out its effects on the behaviour of companies and parents in relation to the use of parental leave to take care of their child. After the individuation of the legal framework of parental insurance plan in Québec comparing it in the context of the Canadian legal system, the contribution deepens through qualitative methodology (i.e. case studies) the condition of parents highlighting both the relevant effects of the Program in promoting the use of parental leave, but also the resistances both from companies and parents that limit the success and the effectiveness of the QPLIP.

1. Introduction

Over the years, my research has focused on work-life reconciliation, parental leave, and the receptiveness of workplaces and organizations to work-life arrangements, particularly towards fathers, whose behaviours towards their own family involvement has undergone significant changes in recent years.[2] The advent of the Québec Parental Leave Insurance Program (QPIP) has been one of the drivers of this change.

This scheme has introduced many innovations in the workplace, the main one being the fact that Quebec fathers now feel legitimate and allowed to take leave

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[2] Tremblay, D.-G., (2019a). *Conciliation emploi-famille et temps sociaux*. Québec, Presses de l'Université du Québec; Tremblay, D.-G. & N. Lazzari Dodeler (2015). *Les pères et la prise du congé parental ou de paternité*, Québec: Presses de l'Université du Québec, 134 pages.

for the birth of a child, thanks to the new paternity leave, which is non transferable to the mother. Indeed, while only one in five Quebec fathers took part of Canadian parental leave until 2006 (and only 10-15% of Canadian fathers outside Quebec[3]), Quebec fathers are now 80% to take paternity leave for either 3 or 5 weeks, about one-third also taking weeks of parental leave, which they can share with the mother.[4]
In total, Quebec fathers take an average of 7 weeks at the time of the birth of their child, those who take paternity leave and part of the parental leave taking on average 13 weeks. Of course, women continue to take longer leave, averaging 29 weeks, according to QPIP data.

2. The Legal Framework

Quebec's parental insurance plan is very innovative at the Canadian level, similar to programs offered in the Nordic countries. The following table shows the differences between the Canadian and Quebec parental leave legislation as presented in the Annual Review of Parental Leave programs.[5]According to Canada and Québec legislation, parents must pay premiums through insurable employment to qualify for benefits, and as the Québec program is somewhat more generous, and thus more costly, Québec employers and employees have a little more to pay in comparison with the Canadian premiums. However, as Table 1 shows, the benefits are higher in Québec and are more accessible. Leave can be taken at any time in the 70 weeks that follow birth, but for benefits it is during the 52 weeks following birth.

[3] Findlay, Leanne C. & Dafna E. Kohen (2012). « Pratiques relatives aux congés des parents après la naissance ou l'adoption de jeunes enfants », *Tendances sociales canadiennes, Statistique Canada*, July 30th 2012.
[4] Lamalice, O. & H. Charron. 2015. *Pour un partage équitable du congé parental*, Québec, Conseil du statut de la femme.
[5] Doucet, A., Lero, D.S., McKay, L. and Tremblay, D.-G. (2019) 'Canada country note', in: Koslowski A., Blum S. and Moss P. (eds.) *International Review of Leave Policies and Research 2019*. Available at: http://www.leavenetwork.org/lp_and_r_reports/.

Table 1. Québec Parental Leave Insurance Program characteristics, in comparison with the Canadian Program[6]

	Canada EI	Québec Basic Plan	Québec Special Plan
Eligibility (in past year)[1]	600 hours	$2,000 earnings	
Self-employed workers	If opted in the year before, with minimum net income of $7,121 in self-employed earnings (2018)	Automatically covered (Must have stopped working or seen a reduction of at least 40 per cent of usual income)	
Waiting period	1 week per couple	None	
Weeks by wage-replacement rate (% of gross earnings during a qualifying period up to the Maximum Insurable Earnings level)			
Maternity [2,3]	15 at 55%	18 at 70%	15 at 75%
Paternity	None	5 at 70%	3 at 75%
Parental (may be shared)	35 at 55% or 61 at 33%	32 (7 at 70% + 25 at 55%)	25 at 75%
Parental if shared	41 at 55% or 69 at 33%		
Maximum total weeks per couple	76 (84 if shared)	55	43
Adoption (shared)[4]	35 at 55% or 61 at 33%	(12 at 70% + 25 at 55%)	28 at 75%
Low-income supplement[5]	Up to 80%	Up to 80%	
Adjusted annually:			
Maximum insurable earnings, 2018	$53,100 /year	$76,500 /year	
Maximum weekly benefit, 2018	$562	$1,067	

Source: Doucet, Lero, McKay, and Tremblay, 2019.
The table is adapted from data from "EI maternity and parental benefits: What these benefits offer," Service Canada (2019), https://www.canada.ca/en/services/benefits/ei/ei-maternity-parental.html and "Québec Parental Insurance Plan," Emploi et Solidarite sociale, Québec, http://www.rqap.gouv.qc.ca
Table Notes:
- The 600 hours are of insurable employment in the 52 weeks before the claim is made (or since the last EI claim e.g., for unemployment, sick leave, or Compassionate Care benefits). In Québec, CAD$2,000 must be earned in the fiscal year but an extension to 104 weeks is allowed if unable to work. Note that the exchange rate as of November 2019 is about 1,5 Canadian dollar to 1 euro.

[6] Doucet, A., Lero, D.S., McKay, L. and Tremblay, D.-G. (2019) 'Canada country note', in: Koslowski A., Blum S. and Moss P. (eds.) *International Review of Leave Policies and Research 2019*. Available at: http://www.leavenetwork.org/lp_and_r_reports/.

- Only birth mothers (including surrogate mothers) are entitled to Maternity leave in both plans.
- The benefit calculation for both programmes uses a 'best weeks' formula to determine 'average insurable earnings' up to the Maximum Insurable Earnings level for that year. EI uses previous 52 weeks; Québec uses past 26 weeks (an extension is granted if earnings were lower for certain reasons).
- Only QPIP has a separate option for adoptive parents; EI Parental leave benefits are the same for biological and adoptive parents
- The low-income supplement is for families with a net annual income of less than CAD$25,921. The amount, up to 80 per cent, is calculated based on net family income and the number of children and their ages.

The Canadian legal framework for parental leave is fragmented; it is not one policy throughout the country. Indeed, through the Employment Insurance (EI) programme, the federal government offers Maternity and Parental leave benefits to the parents who reside in other regions outside Québec. This program is funded by employers and employees and administered by the Department of Employment and Social Development Canada. In Québec, the program is also funded by employers and employees, but administered at the provincial level, with different levels of eligibility and payments. In Québec as in Canada, the right to a job-protected leave from employment is granted in Labour laws (employment standards acts).[7]

In Québec, this is regulated through the 'Loi sur les norms du travail', and in other provinces, this is under the jurisdiction of the ten provinces and three territories. Also, for 7% of employees in federally regulated industries, the Canada Labour Code applies and ensures the job-protected leave.

There are thus 14 different legislated leave entitlements. The differences between jurisdictions have mainly to do with the access and use of (unpaid) legal entitled leave, whereas the paid leave is regulated by the Québec Parental Insurance Program (QPIP) for the province of Québec, and by the Employment Insurance Program in other provinces.

As mentioned in the Canadian profile presented in the *International Review of Leave Policies and Research 2019*, the concept of "Leave" in Canada therefore refers to unpaid, job protected time off work, or to specific benefit programmes, those of QPIP or that of Unemployment Insurance for the other provinces. As indicated also in the *International Review of Leave Policies and Research 2019*, "In 2011, self-employed parents outside Québec became eligible for federal benefits on an opt-in basis." This was an important change, brought

[7] Doucet, A., Lero, D.S., McKay, L. and Tremblay, D.-G. (2019) 'Canada country note', in: Koslowski A., Blum S. and Moss P. (eds.) *International Review of Leave Policies and Research 2019*. Available at: http://www.leavenetwork.org/lp_and_r_reports/

about by the fact that in Québec, self-employed parents were eligible as of 2006.

A few other elements on Québec Maternity leave regulation, again from our collective article in the *International Review of Leave Policies and Research 2019* [8], in its most recent version. The benefits offered in Québec are equivalent to 70 per cent of average weekly income up to an earnings ceiling of CAD $76,500 [about 50 000€; the € is worth about 1.5CAN$] per year in 2018 for 18 weeks of Maternity leave. Also important to mention, there is also no waiting period[9]. There is some flexibility in use of Maternity leave. It is possible to receive a higher income replacement rate for a shorter period, or a lower income for a longer period. Also, under the 'special' plan, Maternity leave benefits can be paid at 75 per cent of weekly income for 15 weeks, while under the 'basic' plan they are 70 per cent of weekly income for 18 weeks. The Basic plan is more frequently used, but it is possible for mothers who wish to return to work sooner to use the Special plan, which is shorter, but offers higher benefits.

Benefits in Québec are financed by contributions from employers and employees and self-employed, who pay the standard contribution to EI; they have a reduction in EI contribution but a supplementary contribution to cover the higher benefits offered in Québec. In 2019 contributions are 0.526 per cent for employees, 0.736 per cent for employers and 0.934[10] per cent for self-employed (maximum contributions respectively of CAD$405.52 , CAD$567.58 and CAD$720.02 , up to a maximum insurable income of CAD$76,500 [11] compared with 0.36 per cent of insurable income, up to a maximum of CAD$53,100 as an EI premium in other parts of Canada.

In Québec, self-employed workers became eligible for Maternity, Paternity, Parental and Adoption benefits if they had a minimum of CAD$2,000 in self-employment earnings in the previous year. However, in the other provinces and territories of Canada, it was only in 2010 that EI special benefits (Maternity, Parental, Sickness and Compassionate care leave benefits) were extended to the self-employed on a voluntary 'opt-in' basis. Until 2011, most self-employed parents (outside Québec), especially women, were not eligible for benefits as they usually work under business contracts and are not seen as having insurable employment. Since 2011, self-employed persons residing

[8] Doucet, A., Lero, D.S., McKay, L. and Tremblay, D.-G. (2019) 'Canada country note', in: Koslowski A., Blum S. and Moss P. (eds.) *International Review of Leave Policies and Research 2019*. Available at: http://www.leavenetwork.org/lp_and_r_reports/

[9] Government of Québec (Travail, Emploi et Solidarité Social). Information on QPIP available at: http://www.rqap.gouv.qc.ca/Index_en.asp.

[10] http://www.rqap.gouv.qc.ca/employeurs/cotisations.asp

[11] http://www.csst.qc.ca/glossaire/Pages/salaire_maximum_annuel_assurable.aspx

outside of Québec can receive Maternity/ Parental benefits, but for this, they must have registered one year previously. They qualify if they have reduced the amount of time devoted to their business by more than 40 per cent because of childbirth/caring, if they have paid contributions to the regime, and earned at least CAD$ 7121 (in 2018) from self-employment in the reference period of the previous 52 weeks[12].

As for Paternity leave, it is only in Québec that there is a statutory leave under QPIP. Indeed, Québec fathers are the only Canadian fathers who are entitled to Paternity leave, and this has been a great success story since 2006. While only one in 5 fathers took leave under the Canadian parental leave system, they are now 80 % taking the paternity leave in Québec, and some also take part of the parental leave, which can be shared.

For fathers, Québec offers up to five weeks after the birth. Indeed, paternity leave may be taken for three weeks at 75 per cent of average weekly earnings or for five weeks at 70 per cent up to an earnings ceiling of CAD $76,500 [50 000 € approximately] per year. Funding is the same as for Maternity leave. Fathers in Québec (including self-employed workers) are eligible if they have earned at least CAD$2,000 in the 52 preceding weeks.

As concerns costs, Québec has reduced by 4 per cent the employer-employee contributions to the regime for 2019, as they found the QPIP no longer needed as high contributions. The contributions are now the following:

Table 2. contributions for QPIP, in percentage of wages or wage bill, 2019

Type of contributor	Level of contribution in 2018	Level of contribution in 2019
Employees	0,548 %	0,526 %
Employers	0,767 %	0,736 %
Self-employed	0,973 %	0,934 %

The new Quebec parental leave policy is thus a major change in parental leave policy, as there are very few countries that offer Paternity leave, outside the Nordic countries (Sweden, Norway, Finland and Denmark). It thus is important to note that such a policy could be developed outside the Nordic countries, often seen as exceptional in parental leave and family policy, and all the more so in the North-American context.

[12]Employment Insurance Maternal and Parental Benefits, Service Canada, 2018, https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/maternity-parental.html. Cited in Doucet, A., Lero, D.S., McKay, L. and Tremblay, D.-G. (2019) 'Canada country note', in: Koslowski A., Blum S. and Moss P. (eds.) *International Review of Leave Policies and Research 2019*. Available at: http://www.leavenetwork.org/lp_and_r_reports/

This new leave has made it possible to change habits within the family, including the gendered division of labour between women and men[13], fathers being increasingly active in children's education, not all workplaces seem to have evolved as much as families. This is a major change and brings about other changes in firms, for example fathers asking for working time arrangements to be more present within the family and take on more responsibilities and chores. Many advocates across Canada had been asking for some improvements to the Canadian parental leave regulation, including a reserved paternity leave, but there have not been as many changes as might have been expected with the return of a Liberal government in place of the Conservative government in place previously. While this new paternity leave is indeed a great realization, we have investigated the actual practices within firms and the second part of our paper will present some elements of this research in order to show how some elements still need to be followed as concerns the application of the paternity leave.

3. Paternity Leave's Application in Workplaces

While the QPIP has clearly brought about major and very welcome changes in the participation of fathers in parental leave and parental care, there are some resistances in Québec workplaces, as there still are some in the Nordic countries and Sweden[14], where paternity leave dates back a few decades.
These resistances can manifest themselves in a variety of ways, from asking the father to postpone his weeks of leave, to a time when the company will need him less, or asking him to reduce the length of the leave, or to be allowed to contact them to ask them work a little or follow their files or tasks during the leave. Sometimes, firms will also ask the father not to take any weeks of parental leave, but to limit himself to paternity leave (which can be shared at will between father and mother), firms considering the paternity leave is enough for the father! Fortunately, Quebec fathers, at least the most progressive, claim their right to take this leave, whenever and for as long as they wish, even if it may affect their careers, or have an impact on promotions, or at least that's what they're made to feel.[15]

[13] Tremblay, D.-G. & N. Dodeler (2015). *Les pères et la prise du congé parental ou de paternité*, Québec: Presses de l'Université du Québec, 134 pages.
[14] Haas, L., K. Allard et C. P. Hwang. 2002. « The impact of organizational culture on men's use of parental leave in Sweden », *Community, Work & Family*, vol. 5, no 3, p. 319-342.
[15] Tremblay, D.-G. & N. Dodeler (2015). *Les pères et la prise du congé parental ou de paternité*, Québec: Presses de l'Université du Québec, 134 pages.

However, our research with fathers has shown great progress over more than 16 years[16], but also some challenges for fathers who want to fully play their role as fathers. We see, however, that colleagues and employers sometimes show some resistance, asking the father to work a little while on leave....and some will even call the period of leave a "vacation"!

3.1. Work during leave, a form of employer resistance to fathers' paternity leave

Some employers do not hesitate to call or e-mail fathers on paternity leave, asking them to do some work. Also, some fathers worked a few hours or even days here and there during their leave. A few fathers worked one day a week, many went to the office to introduce their child to their colleagues but they sometimes got caught up in the game and had to talk about work!

"I worked a little during the leave, something like a day a week at home sometimes, if my partner took a day, I worked in the evenings too sometimes. I have never worked more than one day a week however."

"Yes, there were little glitches and I had to settle small cases, maybe a day or two of work."

"I was able to work during naps, often on my few hours of work, there were students calling for things and I'm in a field where journalists call, so I took 2 or 3 calls a week."

An employer insisted on a father trying to get back to work earlier than expected. This father had to insist on stopping his employer's increasingly urgent phone calls and email, and he managed to prevented them to keep him from taking advantage of his leave with his child.

"During the first two weeks of the home leave, I was called at least three times a week, I was asked "don't you want to come back to work ? you must be tempted to come back to work ?" and then I wrote and told them not to contact me for any more until the end of my paternity leave."

However, it must be recognized that some fathers do not want to isolate themselves from the workplace and even, as some say, it feels good to "see what is happening in the world (besides the child!)", to "open up to something else"! They therefore have a rather positive and voluntary attitude towards this connection to the workplace[17].

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[16] Tremblay, Diane-Gabrielle (2003). Articulation emploi-famille : Comment les pères voient-ils les choses ? *Politiques sociales*. Bruxelles et Madrid. Vol. 63, no 3-4. Automne 2003. Pp.70-86.

[17] See also : Harvey, Valérie & Diane-Gabrielle Tremblay (2019).The workplace: challenges for fathers and their use of leave. In Peter Moss, Ann-Zofie Duvander & Alison Koslowski (2019). *Parental Leave and Beyond: Recent developments, current issues, future directions*. London: Palgrave. Pp. 223-240.

"I loved doing a day's work a week, it felt good to see a few people, to change my mind even I actually thought it was ideal, everyone should be able to do that if possible."

In our research, only one father experienced major career problems, but perhaps these fathers volunteered less to speak on leave, or did not have time to do so. This father claimed to have been considered an "absolute plague", these are his terms, because he had taken paternity leave. He said he had been changed position within the organization, saying his boss now hated him because he had taken paternity leave. Another father also said he had a nasty surprise upon his return, as a replacement had been hired and he had finally taken his place, which had created conflicts. It must be recognized that the situation of Quebec fathers is much more advantageous than that observed in other countries, notably in Japan, where it is very frowned upon for fathers to take leave[18], but even if it is generally seen positively in Québec, there were a few issues here and there.

For women, our research has shown that, in general, they are rarely disturbed while on leave. On the other hand, among women with low wages, they are often the ones who will try to get back to work as quickly as possible, because they need a full salary and cannot afford the reduction during maternity and parental leave. However, in professional and executive circles, the company sometimes wants them to maintain the link with customers... or sometimes they are the ones who wish to do so, knowing that the employer will not necessarily preserve their " personal clients", and they might have to reconstruct their client base upon their return. This is also common in large lawyer firms.[19]

Harvey, Valérie & Diane-Gabrielle Tremblay (2018): Paternity leave in Québec: between social objectives and workplace challenges, *Community, Work & Family,* ISSN: 1366-8803 (Print) 1469-3615 DOI: 10.1080/13668803.2018.1527756; link to this article: ; https://doi.org/10.1080/13668803.2018.1527756; https://www.tandfonline.com/doi/full/10.1080/13668803.2018.1527756?scroll=top&needAccess=true

[18] Harvey, Valérie et D.-G. Tremblay (2015) Le père japonais dans une société ultramobile de célibataires. *Alterstice - RevueInternationale de la Recherche Interculturelle.* vol. 5 no 1. pp. 7-22.

[19] Tremblay, Diane-Gabrielle (2013): Can Lawyers take parental leave and if so, with what impacts? The case of Québec. *Employee Responsibilities and Rights Journal.* Volume 25, Issue 3 (2013), Page 177-197. SpringerLink:http://www.springerlink.com/openurl.asp?genre=article&id=doi:10.1007/s10672-013-9214-1;

3.2. A Case Study of Lawyers

In our research on lawyers,[20] we did not see this type of situation for all women, but many left large law firms because of this. Indeed, in the case of lawyers in large offices, women will sometimes hesitate to move away from their cases for too long, and it is not uncommon for them to be called back to work during their leave. In this case, it is often the employers who put pressure on the lawyer to maintain a certain working relation with the client, but it is also sometimes the lawyer herself who does not want to "lose her client" to co-workers by taking too much time off. For example:

"At the office, I felt the need to say, "I'm not sure I'm going to take a year, I'm going to share the leave with my spouse. I'm going to take eight months. I felt that need. I think it was very well received anyway, for sure they are aware of the impact it has on the firm's income, but at the same time, it is a reality that we cannot escape. »

"Certainly for work it's... It's not that it's suicidal, but honestly it's not ideal to take a year, but it's not just work in life.»

In some cases, women continue to be under pressure to shorten their maternity leave, as is also the case for men. It would seem that it is not so much the environment that plays, but the attitude of the supervisor and the very limited, if not inexistent organizational support, for example the fact that professionals and managers can hardly delegate their files and are often not replaced during their leave. A lawyer employed in the legal department of a large company said she was pressured by her superior to take a six-month leave instead of twelve; otherwise, her clients would be transferred to others and she would have to rebuild her clientele.

"Actually, my boss thought I was going to take six months, she wanted me to take six months, but she couldn't say anything, it was clear that I had the choice to take a year. She wasn't very happy, but she had no choice, it's the law."

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[20] Tremblay, Diane-Gabrielle (2013): Can Lawyers take parental leave and if so, with what impacts? The case of Québec. *Employee Responsibilities and Rights Journal*. Volume 25, Issue 3 (2013), Page 177-197. SpringerLink:http://www.springerlink.com/openurl.asp?genre=article&id=doi:10.1007/s10672-013-9214-1;

Tremblay, D.-G. & E. Mascova (2013). *Les avocats, les avocates et la conciliation travail-famille*. - Montréal : Éditions du Remue-Ménage. 175 p.

Tremblay, D.-G. & E. Mascova (2014). La gestion des temporalités familiales et domestiques et la carrière des avocats et avocates : différents modèles de conciliation? SociologieS. http://sociologies.revues.org/4449.

Parental leave is still a reality that is beginning to be well accepted in Quebec, both among women and men. However, the issues related to this leave are not the same for men and women. Among lawyers, we encountered few women who were unable to take maternity leave, regardless of the type of practice or organization, although they often paid the price for this. Only a few female lawyers were forced to return to their professional activities in the months following delivery. There seems to be a good acceptance of these leave by lawyers as well as other professional women and managers, although this is less obvious in large organizations, and sometimes also for self-employed lawyers, who have no one to transfer their clients to, for a temporary period. There is always the risk the clients won't come back after their leave. As a result, many executives and professionals, including lawyers, maintain some level of work activity throughout the leave (calls, email follow-ups or other). Also, the return to work sometimes brings some nasty surprises...

Private lawyers appear to be the most penalized by their maternity leave, both in terms of their day-to-day activities and their prospects for career advancement. Indeed, in this environment where advancement is subject among other things to the requirement to preserve its clientele and develop it (with the associated results in terms of turnover), the prolonged absence has a destabilizing effect. Current files are usually assigned to other colleagues, and absentees should expect to lose their clients and, despite promises to the contrary, never recover them.

"Certainly when you go on maternity leave and when you come back, since I left for a year, all my clients have been transferred to another lawyer. [...] big customers, and there are not 50 who come by every week. The fact that I'm gone a year makes it more difficult for me to return, because I have to recreate a clientele. [...] At the moment, I am not entirely autonomous in the sense that I work on other people's files."

Indeed, difficulties arise when returning from leave, particularly with regard to the advancement and recovery of cases: some of the lawyers we met described to us the negative effects that their leave had on their professional activity and their advancement, including the requirement to participate in evening outings to look for new clients, due to files transferred to others and therefore lost. The negative effects of parental leave on career development would therefore be real, and it is especially women who pay the price[21]. In general, women use

[21] Tremblay, Diane-Gabrielle (2013): Can Lawyers take parental leave and if so, with what impacts? The case of Québec. *Employee Responsibilities and Rights Journal*. Volume 25, Issue 3 (2013), Page 177-197. SpringerLink:http://www.springerlink.com/openurl.asp?genre=article&id=doi:10.1007/s10672-013-9214-1;

strategies to postpone certain activities and intensify their work (no coffee break or lunch, or processing files during breaks, etc.) to achieve work-family balance, and this is even more true when you return from a leave of absence, when you have to make up for the time that is somehow lost..[22].

On the other hand, the system of informal relations, which are crucial not only for obtaining interesting and well paying mandates, but also for being able to rely on colleagues in the event of an overflow, is also called into question. Thus, the lawyer who has just returned from maternity leave is somehow forced to "start over".

On the male lawyers' side, those who are self-employed are those for whom the interruption of work is the most difficult, although they are often less engaged than women in family responsibilities and tasks, which reduces the difficulties for them compared to women. Nevertheless, both self-employed women and men tend to shorten paternity or parental leave. As one lawyer-father told us:

"Unfortunately, births are more or less planned. What I do at that time, I don't set a trial a little before and a little after. I try not to have too many court cases, to put as few as possible, but I have to do some of them. In those cases, there is no long paternity leave, two weeks, and it is a part-time job during those two weeks, I am not at home all the time, as much as possible, but not totally. But these are not long holidays, I find it very bad for my wife and children."

With trial dates set in advance, it was difficult for him to transfer the files and get replaced, although he stated that he had a real desire to be present during the month following the birth.

In fact, while most organizations are beginning to open up to this issue of parental leave, including some large offices that are under pressure from women and men regarding the length of leave, there is still a phenomenon self-censorship among lawyers who are also parents as well as many professionals or executives with respect to leave. This is mainly about the length of leave and when they will take the time off. The reasons can be diverse, but many of them limit these leaves without the employer asking them so as not to hinder their careers and not lose their reputation as professionals fully invested in work. So it's not just the employer and co-workers who are lobbying, but also the lawyers themselves who sometimes limit themselves.

Tremblay, D.-G. & E. Mascova (2013). *Les avocats, les avocates et la conciliation travail-famille.* - Montréal : Éditions du Remue-Ménage. 175 p.

[22] Tremblay, D.-G. & E. Mascova (2013). *Les avocats, les avocates et la conciliation travail-famille.* - Montréal : Éditions du Remue-Ménage. 175 p. ;

Tremblay, D.-G. & E. Mascova (2014). La gestion des temporalités familiales et domestiques et la carrière des avocats et avocates : différents modèles de conciliation? SociologieS. http://sociologies.revues.org/4449.

3.3. It also Depends on the type of Couple

However, these decisions also depend on the type of couple you're dealing with. Indeed, people will be more or less open or more or less resistant to their employer's requests depending on the type of couple in which they are.
Lapeyre distinguishes three models of couples: traditional, transitional and egalitarian models[23]. These models seemed relevant to the study of the Quebec and Canadian cases and to work-life issues in general. According to our research, the models most often observed among lawyers, executives and professionals are the traditional model and the transitional model. The egalitarian model is also present, although rarer.
The traditional model refers to couples with a traditional gender-sharing of roles, which is not challenged by spouses. In this model, employment is more valued the man while the family takes precedence for the woman. The employer will tend to take advantage of this situation for fathers on leave, as we have seen above. Women secretaries or nurses are more often found in this traditional model and they will not be bothered by their employer for a quicker return to work, nor to do some work while on leave.[24] In this model, for women, professional strategies, but also professional temporalities are systematically adapted according to domestic and family requirements. The role of wife and mother is considered to be fundamental, and superior to professional identity, or perhaps it is also sometimes that the underinvestment of their spouse in the family forces women to overinvest in the family. We have sometimes observed this pattern among nurses, who sometimes work part-time to maintain a strong presence in the family; it is often under constraint that they 'choose' part-time work, due to the difficulty of reconciling nursing work schedules with the family, especially evening and night hours, or changing schedules.[25]
The transitional model is characterized by attempts at more egalitarian arrangements within couples, with a revision of the causes of the dominant traditional assignments. The professional sphere is not seen as the space dominated only by men, with aspirations for legitimate careers. It is considered also open to women, who can achieve it, as we have observed for example

[23] See : Lapeyre, N. (2006). *Les professions face aux enjeux de la féminisation*, Toulouse, Octarès. Lapeyre, N. et Le Feuvre, N. (2004). « Concilier l'inconciliable? Le rapport des femmes à la notion de "conciliation travail-famille" dans les professions libérales en France ». *Nouvelles questions féministes*, 23(3), 42-58.
[24] See : Tremblay, Diane-Gabrielle (2014). *Infirmière : vocation, engagement et parcours de vie*. Montréal : Éditions du Remue –ménage. 153 pages.
[25] See : Tremblay, Diane-Gabrielle (2014). *Infirmière : vocation, engagement et parcours de vie*. Montréal : Éditions du Remue –ménage. 153 pages.

among police women and social workers[26]. In such a case, the employer may try to limit the woman's leave, but this is rather rare, as women are considered to be the first "natural" beneficiaries not only of maternity leave, but also of parental leave, that some employers barely distinguish. Women may also want to take advantage of the leave, but among professionals and managers, this may conflict with career projects. This model is developing more and more in Quebec, and in other countries, with women often insisting on pursuing their own careers, as we have observed for police women and social workers, but also among executives and professionals in Québec.

In the so-called egalitarian model, there is a greater symmetry of behaviour between men and women, on all levels: professional, domestic and family. This model values an equal division of labour between spouses, although this is often done at the cost of ongoing negotiations. This model often characterizes couples where both partners have the same status and share the same vision of the couple, where roles are interchangeable and where there are no male or female tasks, reserved for one or the other. These couples operate on the basis of a certain *despecialization* of roles and tasks, but they are much less common than others. In this case, both the employer and co-workers will be more reluctant to try to change this fragile "balance". However, it may happen, more often for fathers, that the employer will try to impose his needs by asking to transfer domestic duties to the spouse, saying something like, "But your wife can do it, can't she?". This may encourage some men to agree to work on leave, return to work earlier or later to accommodate the employer, essentially to preserve their career opportunities thereafter. This also happens for women executives and professionals, and the model is also spreading in society, where many young women claim an egalitarian model of couple, without it being generalized of course.

For example, in the case of Quebec female lawyers, as in the majority of women's professions and occupations, we found that they are found in all three types of configurations. On the other hand, while most of our respondents in the field of law are in the transitional type, both men and women seem to think that the legal community is dominated by the traditional model, especially for male lawyers in the large offices. Women tend to reject this model and leave for smaller offices, as self-employed workers, or for the public service, where they find more regular schedules and fewer employer requests, and certainly no demands to reduce their maternity leave. The same

[26] See : Tremblay, D.-G., (2012). *Articuler emploi et famille. Le rôle du soutien organisationnel au coeur de trois professions (infirmières, travailleuses sociales, policiers)*, Québec, Presses de l'Université du Québec. Tremblay, Diane-Gabrielle (2014). *Infirmière : vocation, engagement et parcours de vie.* Montréal : Éditions du Remue –ménage. 153 pages.

kind of behaviour is found in executives, with some large companies offering more flexibility and allowing two executive careers for both spouses[27], but this is often more difficult when the company offers little support or flexibility of schedules to executives.

4. Conclusion

In conclusion, while it must be recognized that employers rarely exert very strong pressure for people on leave to work or make themselves somewhat available to the employer, our research has found that it is still sometimes the case. This is more often the case for fathers than for mothers, but the quotes above show us that some men do not necessarily see it as an intrusion into their leave, some even find contact with the workplace rather welcome. If women are less likely to be subjected to such pressures, to shorten leave or to return to "help" at work, professional women and managers sometimes feel compelled to maintain contact with clients, at the risk of losing them and having to start from scratch on the way back. This is particularly the case in professional settings where clients are somehow attached to a person, such as in law firms, accountants or in certain executive positions.
Thus, the leave associated with the QPIP has largely been accepted in Quebec, and that this is clearly an important advance, unique in North America, and even infrequent in Europe outside the Nordic countries. On the other hand, it should be noted that there is still sometimes resistance in the workplace, to get fathers to reduce the length of their leave or to move it at a time that is more suitable for the company. On the mothers' side, it is mainly professional women and managers who can be pressured to do so. It is also observed that both men and women managers and professionals have often internalized the norms and requirements of their workplace, so that they impose on themselves constraints in terms of the length of leave or the maintenance of the link with workplace. We consider that it is then the professional ethos that intervenes[28].

[27] Grodent, F., D.-G. Tremblay et A. Linckens (2013). La conciliation vie privée-vie professionnelle des gestionnaires hommes et femmes: le cas d'une société de transport. Revue *@GRH*. No 6-/2013-1, pp. 117-147.

[28] Tremblay, D.-G., (2019). *Conciliation emploi-famille et temps sociaux*. Québec, Presses de l'Université du Québec.

The 30th Anniversary of the Convention on the Rights of the Child and Child Labour Exploitation

Michele Riondino[1]

Abstract

On the occasion of the 30th anniversary of the Convention on the Rights of the Child, a reflection on how the international community in the 20th century responded to issues of child labour and child rights provides context for the work still to be done. International bodies as well as Nation States have made Declarations and adopted Conventions with varying degrees of tangible impact on the lived experience of children, particularly those most vulnerable to abuse and neglect, child labour and poverty. There are both unique contributions and uniting principles apparent across each development, from the ILO's Convention No. 5 in 1919 through to the UN Convention on the Rights of the Child, and more recently, the UN's 2015 Sustainable Development Goals. Dialogue around the rights of children has shifted from a primary focus on child labour, to the protection of children from violence and abuse, to not only protection from harm but the promotion of the holistic development of children, and consideration of the best interests of the child.

1. The Rights of the Child: a Brief Overview

During the past century, the protection of children's rights has been one of the biggest challenges for contemporary societies[2]. And although one of the aims of the CRC was to positively affect the juridical regulation of states, both individually and corporately, as well as in other public spheres, such efforts

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[2] See Resta E., *L'infanzia ferita*, Roma – Bari, 1998, pp. 41-54.

have not always had a satisfactory outcome[3]. We are not morally free to ignore these failures, and whatever our good intentions toward social and cultural contexts beyond our own, we overlook grave and alarming contradictions on the rights of the Child much closer to home.
Everyone knows there are too many neglected children everywhere, some are abandoned even within their own families. There are children abused in a physical but also in a psychological way, not to mention through the terrible and growing forms of violence that are ignored. Children are forgotten and defenceless because their fundamental rights are not recognised by educational agencies that have marginalised them, by public services that are negligent, and by families that are emotionally absent, or unable to provide an environment where the child can be adequately educated. There are invisible children: migrants and minors who are unaccompanied, and because of this, their childhood is not acknowledged and is wounded on a daily basis; infants who at times are tolerated but hardly ever truly accepted and integrated. There are also those children whose childhood has been denied because they are overburdened with heavy responsibilities too quickly and at a vulnerable age. Many families of children with disabilities leave these children alone. Another factor that plays into this disability is their personal encounter with other families that don't share the same burdens, more so since they struggle to socialise with children of the same age in their neighbourhoods or in the schools they attend. In other words, their challenges pervade every sphere of their life. In this regard there is no doubt that the several international declarations and conventions from the past century have helped limit such violations of children's rights as they recognise that children have particular rights and interests, according to their conditions as trainees[4].

2. The International Labour Organization

The initiative of having taken, within the international sphere, a commitment to protect children dates back to the oldest existing international organisation, the *International Labour Organization* (ILO), from its establishment in 1919 at which time it supported the ratification by States of Convention No. 5. This ILO Convention set the minimum age at fourteen for children who work in

[3] See James A., *Giving Voice to Children's Voices: Practices and Problems, Pitfalls and Potentials*, in *American Anthropologist*, Vol. 109, 2007, pp. 261-272. For analysis of the global economy of slavery and its impact on children, see Wall J., *Children's Rights: Today's Global Challenge,* London, 2016, pp. 105 ff.
[4] For a brief analysis of key international treaties regarding the protection of Children's Rights, see Riondino M., *La tutela del minore nelle fonti di diritto internazionale*, in Cerato M. – Turlon F. (eds.), *Scuola, Famiglia e Minori. Profili normativi e psicologici*, Pisa, 2018, pp. 220-224.

industrial environments, notwithstanding some derogations or restrictions found within the aforementioned Convention.

Eventually, the minimum age was later raised to fifteen years old as expressly foreseen. This is according to ILO Convention No. 138 (1973) on the Minimum Age for admission to Employment. The ILO's tenacious commitment over the years is also particularly evident in the Convention No. 182 (1999), aimed at abolishing the worst forms of labour exploitation of children, including illegal activities and the recruitment of minors for armed conflict. Both Conventions (No. 138 and No. 182) distinguish between unacceptable *"child labour"* and *"hazardous child labour"* that are to be abolished, and *"child work"* that may contribute to a child's healthy development. The Minimum Age Convention states in its Preamble: *"National legislation should fix a minimum age or ages at which children can enter into different types of work"*. Although the Convention states that the general minimum age should not be less than the age for completing compulsory schooling, and in any event should not be less than 15 years of age with the ultimate aspiration being 16 years, it offers some flexibility for developing nations that are unable to meet this target. It allows them to set a minimum age of 14 years old until they are able to comply fully with the Convention. Light work may be permitted for children who are 12 years old and older, and non-hazardous work is allowed for children who are 15 years old or with an older age. Hazardous work and the worst forms of child labour are never allowed for children[5].

In Europe, for example, Belgium, Italy, Germany and Spain had already been Parties to the ILO Convention No. 138 for several years before the *CRC* was established. By contrast, many Western European countries, such as France, Sweden and Denmark, became Parties to ILO Convention No. 138 only after having ratified the CRC.

According to data released by the ILO, on 12 June, on the occasion of the World Day against Child Labour, today more than 150 million children around the world are categorised as child labourers. The region with the highest level of exploitation of children is Africa, with more than 72 million children involved in Child labour. The Asia Pacific ranks the second highest. The ILO's *Global Estimates on Child Labor*, published in Geneva in 2017, note that attempting to address child labour without considering the economic and social forces that produce it is unlikely to be successful. It also recommends that policy responses to child labour need to be integrated into broader national development efforts and adopted to local circumstances.

[5] See Ray R., Lancaster G., *Efectos del trabajo infantil en la escolaridad. Estudio plurinacional*, in *Revista Internacional del Trabajo*, Vol. 124, 2005, pp. 209-232.

3. The UN Convention on the Rights of the Child

Working together to defend the most vulnerable citizens, international standards have made further and significant, though limited, progress. Let us consider, for example, the *Declaration of the Rights of the Child*. Adopted in Geneva in 1924, it recognised in the international juridical system, for the first time, some fundamental rights of the child with the goal of children's harmonious growth and development. This led to the UN *Declaration of the Rights of the Child*, which was also unanimously approved by the General Assembly of the United Nations in New York in 1959.

Both declarations, by their own nature, are characterised by a value that is merely programmatic, devoid of binding legal force for the States. But the very principles enshrined in the two international treaties cited above, although not exigible within state sectors (according to their nature as non-binding declarations), have prompted the development whereby some concrete values inherent in different legal systems have resulted in gradual recognition of the rights of children[6].

The evolution outlined, as with the long steps taken from the legislation under review, have proved the way for the conclusion of international agreements that would bind States, such as the aforementioned United Nations *Convention on the Rights of the Child*. The CRC, adopted in New York in 1989, of which we celebrate next month the 30th anniversary, gathers in a unified form the civil, political, economic, social and cultural rights that must be recognised at a developmental age[7]. The general principle, which is the most important interpretive key of all the legal institutions for the protection of children, coincides with the highest interests of the child, which article No. 3 of the CRC explicitly mentions. In fact, it states: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a paramount consideration"*. It seems clear that the purpose of article No. 3 is to explicitly and inarguably place the primary interests of children at the forefront. Indeed, we can affirm that the obligation to guarantee the real protection of the rights of every child must be pursued even in cases that are in clear opposition to the interests of adults. This means that adults must be precluded from taking any action to limit the development of any child.

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[6] For a comparative and international overview of the incorporation of Children's Rights principles in State juridical systems, see Verhellen E., *Convention on the Rights of the Child*, Antwerp, 2006, 4th ed., pp. 63-87.

[7] See Tobin J., *The Development of Children's Rights*, in Young L., Kenny M. A., Monahan G. (eds.), *Children and the Law*, Butterworts, 2017, 2nd ed., pp. 25-54.

Reading and reflecting on the article No. 3 of CRC, inevitably reminds us of that event of November 20, 1989, which in a sense commemorates the bicentenary of the Universal Declaration of the Rights of Man and of the Citizen, set up by France's National Constituent Assembly in 1789. The *Magna Carta* of children's rights was presented to the UN Assembly for approval. It is a legislative instrument composed by 54 articles, ratified by the majority of the Member – States. This, as we know, radically modified the juridical concept underpinning the status of the child within the various legal systems. In the light of this new covenant amongst People and Nations, the active subject of rights must be considered, as opposed to a passive recipient of mere protection. Nowadays, there are 196 States that have ratified the Convention. In fact, the last country that ratified the Convention was Somalia in 2015 after a long and difficult process, and thanks to the commitment and efforts of international diplomacy, can boast of having successfully reached this noble goal. Today's conference, the seventh in the series, along with the university's authorities who are hosting and sponsoring this event will, I hope, encourage the United States of America to ratify, as soon as possible, the *Magna Carta* of children's rights.

The right of every child to be protected against any kind of violence, exploitation, abuse and negligence is explicitly endorsed by the combination of various articles in the CRC. See, in this regard, articles No. 19, 28 and 37. In an area closely linked to the protection of the child against any type of labour exploitation, we can find the main reference in article No. 32. According to the CRC it is required that all States (or Governments) must protect children from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral or social development. This is, once again, in the name of the aforementioned general principle of the *best interest of the child*.

We can finally affirm, clearly, that for the first time in the CRC, emphasis has been placed on the need to promote the harmonious development of the child's personality whose legitimate aspirations, potential and natural inclinations are to be respected by adults and by the social community[8]. In this perspective there emerges a clear reminder that every adult should commit him/herself not only to contribute to the child's growth but, in particular, to the child's personal potential, limiting fear and incertitude in a way that renders more easily children's mature and responsible integration into society. As we already know, in 2015 the wider Agenda of the UN adopted a set of *Sustainable Development Goals* (SDGs), including Target No. 8.7, calling for the abolition of

[8] See Freeman M., *Why It Remains Important to Take Children's Rights Seriously*, in *The International Journal of Children's Rights*, Vol. 15, 2007, pp. 5-23.

all the worst forms of child labour immediately, and for all other forms of child labour to be eradicated by 2025.

4. Conclusion

In conclusion, we can stress three main words: *trust*, *protection* and *willingness*. They have to be fundamental prerogatives to guarantee qualities that will help every child in the solid development and construction of his destiny not only as a human being, but as a responsible citizen who is able to meet the diverse and demanding challenges which will confront every person throughout life[9]. Therefore, to ensure protection of the rights and interests of those who seek to live life to its fullest, more than ever becomes a priority from which no human being can feel exonerated. It is only in embracing this dutiful challenge that we can pass from a theoretical level into a practical one. The duty for us adults to recognise a moral leadership to the legitimate interests of the child does not derive, in the final analysis, from a mere compassion for children, that is, from considering every child as subjects who are constitutionally weak. Rather comprehending that their weakness and innocence create an explicit duty on the part of whoever is preparing to work with them. Only in this way we can help them to flourish, and never to confine their legitimate interests.
More than a quarter of a century has passed from the adoption of CRC by the UN General Assembly. We should not wait another 30 years to give full effect to the principles embodied in the Convention. What is at stake is not our own good, but the present and future good of all humanity.
My wish is that the international and national commitments, but also the efforts of scholars, experts and practitioners who deal with childhood and adolescence, continue and reinforce the direction set by the international legislation to which I briefly referred. Only in this way the Jean – Jacques Rousseau's admonition, written in 1762 in his famous book *"Emile, or On Education"*, according to which *"Nature wants children to be children before men"*, will be followed up by everybody, particularly in these rapidly evolving times.

[9] For further comment on the particular role of education in the development of responsible citizens, see Riondino M., *The right to education: a fundamental and universal right*, in *Jus*, Vol. LXIII, 2016, pp. 287-300.

Collective Bargaining and Collective Action. Labour Agency and Governance in the 21st Century? Edited by Julia López López. A Review.

Ilaria Armaroli, Paolo Tomassetti[1]

1. Introduction

The book edited by Julia López López makes an important contribution to the labour law theory of collective bargaining and collective action. It is grounded on a tradition of research that sees collective bargaining and collective action as political processes whose justification and effect go far beyond the regulation of working conditions. From the beginning, the editor is clear that the legal analysis proposed "looks beyond narrow disciplinary boundaries in order to promote an understanding of changing in the world itself" (p. 1).

All the articles collected in this book are of great interest to labour lawyers and employment relations scholars researching on forefront themes that range from the implications of populism on the idea of labour law, to how traditional forms of collective action relate to new channels of labour conflict, from the internationalization of employment relations, to the coordination of collective bargaining at a decentralized level, from the challenges that refugees and asylum seekers pose to trade unions logic of collective action, to the role of collective bargaining in responding to welfare state retrenchment.

The cross-cutting (legal) concept behind the book is solidarity. The idea of solidarity is regarded as crucial to recompose the fragmented interests in modern labour markets and societies. Solidarity is framed both as a normative

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goal and mean. In this connection, the declared aim of the book is "to reframe our understanding of collective bargaining to fully incorporate within it several phenomena that are rooted in the pursuit of solidarity" (p. 5). The different contributions made by the distinguished group of scholars involved in the book are meant to explain and analyze how and why solidarity can be rebuild through collective bargaining and collective action.

2. Key Messages

The key messages of the analysis are the following. Labour law is vulnerable to populism. In times of social, political and economic upheaval, Alan Bogg and Mark Freedland argue that "it is predictable that the norms and institutions of labour law will come under great pressure and that they will be subjected to a severe populist critique" (p. 34). A pluralistic constitution based on democratic ideals should therefore be reaffirmed as a countermovement to populist narratives. Labour rights and autonomy of trade unions – they argue – should be central in this process.

Judicialization of labour conflict is a response to frontal attack to trade unions rights. According to Julia López López, "strike, protest and the judicialization of labour opposition to austerity policies have together composed the overall set of union actions to defend labour rights" (p. 46).

Traditionally, there has been a linkage between labour conflict and collective bargaining. In contrast, Margarita I Ramos Quintana and Dulce Maria Cairós Barreto show how and why collective agreements are no longer considered to be determinant of labour peace. Collective disputes gain more and more independence from collective bargaining, "so the regulation of working conditions is separate from the management of labour conflict" (p. 72).

As a way to build solidarity among workers, coordination can be disentangled from centralized collective bargaining. Assaf Bondy and Guy Mundlak make an excellent contribution to show how forms of coordination can be identified at a decentralized level. "While sectoral agreements remain a useful form of coordination, they also have some disadvantages that can be partially addressed through enterprise bargaining" (p. 99).

On-demand and just-in-time work organizations have made labour more precarious. In this context, Katherine V.W. Stone is clear that new forms of collective action are necessary "to empower precarious workers and enable them to protect their livelihoods and enjoy stable and meaningful life" (p. 116). The proposals of wage insurance, shared security and a workplace sabbatical go in that direction.

Despite international forms of collective bargaining, such as the global framework agreements, are indicative of the potential for multi-level labour

regulation, Tonia Novitz argues that they can be effective only if combined with the multi-level "legal matrix" of regulation that include international, regional and national law. "If we forget the significance of this legal matrix and allow this plurality of multi-level labour standards to be eroded, then it is unlikely that framework agreements can be sustained or more significantly regenerated" (p. 138).

European institutions and national governments are failing to create a more human response to refugees' needs. Therefore, for Consuelo Chacartegui trade unions can be crucial agents to facilitate the inclusion of immigrants and asylum seekers in the labour market. Despite this, local trade unions are found to enlarge their service function via the adoption of strategies of *assistentialism* targeted to individual refugees and asylum newcomers: the interaction of this new area of individualism with the trade union collectivist inclination is considered as potentially problematic.

National industrial relations frameworks are more and more affected by processes of both "vertical Europeanisation", deriving from the progressive enlargement of EWCs' competences especially in the field of collective bargaining, and "horizontal Europeanisation", spurred by the increasing coordination and exchange of information between national and transnational fora. According to Sergio Canalda, these possibilities of convergence are largely attributed to the agency of labour, particularly as defined in labour geography literature.

Robust systems of labour law and collective bargaining, like the Swedish one presented by Mia Rönnmar, are under pressure from both internal and external factors. There are signs of increasing tensions and diversity within the collective bargaining systems deriving from European integration, posted work and labour market segmentation.

Alexandre de la Court focuses on how and why collective bargaining across Europe plays an increasing role in guaranteeing social protection of workers in the labour market. Despite the great potential for collective bargaining in this field, he argues that it tends "to be limited to supplementing existing systems of unemployment insurance" (p. 225).

3. Conclusion

As any original and looking-forward book can do, this one raises as many questions as it answers.

While providing a convincing narrative on the central importance of solidarity in modern societies and employment contexts, the book says little about the root causes that in the last decades have progressively led to the breakdown of the after-WWII social contract in many western jurisdictions. The overall

impression is that authors are more concerned with the symptoms and effects of the problems identified, than on their root causes, thus preventing many of the great ideas advanced in this book from actually contributing to rebuild the basis for a better society. In this connection, the book only partially meets the editor and readers expectations.

Linked to this aspect, is the one on the theoretical framework in which the overall analysis is developed. Beyond the scant coordination with general theories and other existing debates in labour law doctrine, the analytical framework adopted is mainly based on legal approaches to collective bargaining and collective action. Industrial relations theory, for example, is largely neglected and this is unfortunate as many of the important issues raised could have benefit from connecting to novel research outcomes in close fields of study.

Excessive generalization is also a weakness for some contributions. Many arguments cannot be generalized to other jurisdictions. This again reflects the lack of theoretical engagements with general theories as well as the non-comparative nature of the book.

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