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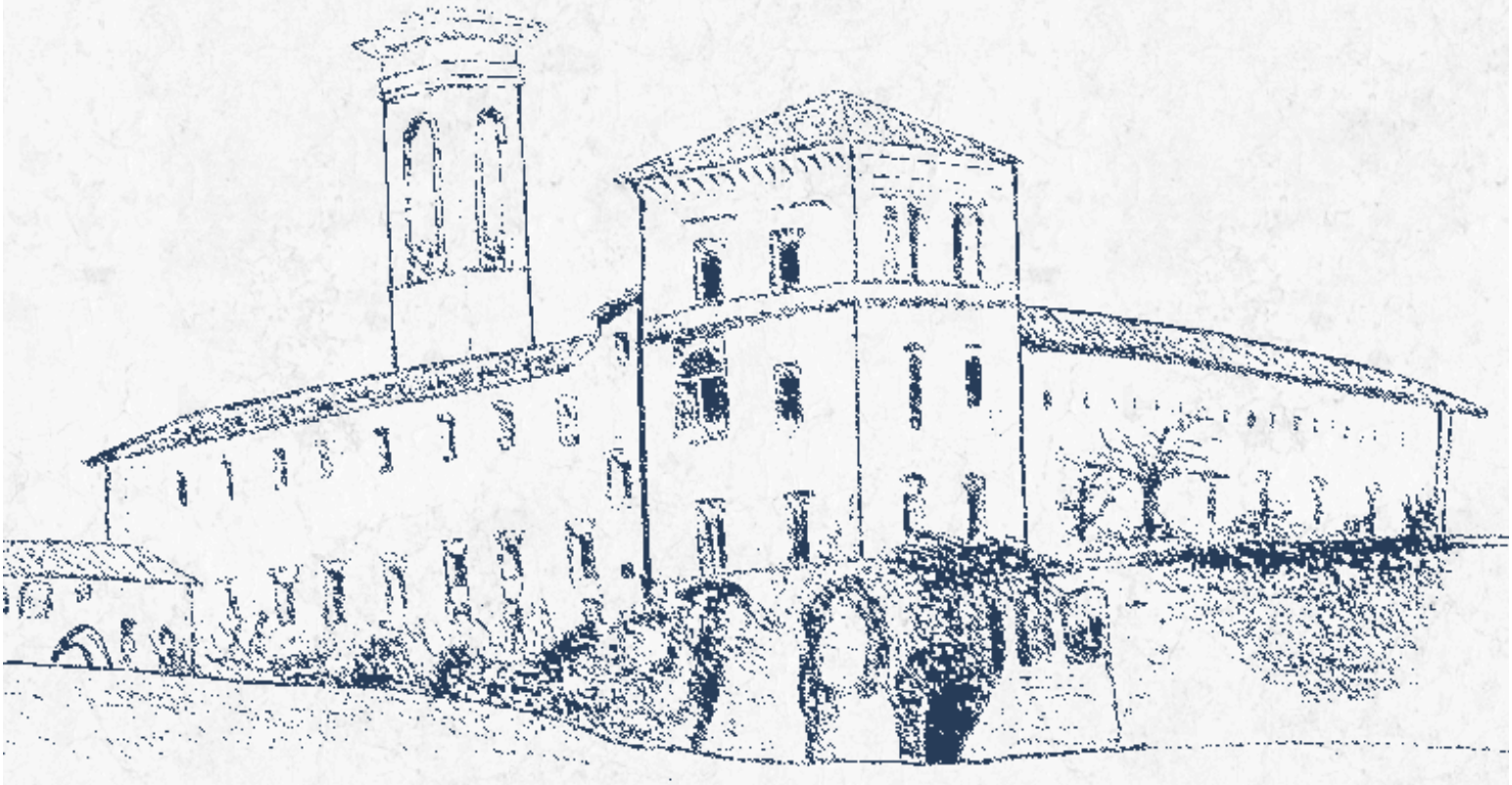

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Utilising Horizon Scanning and Foresight Techniques for Regulating Psychosocial Risks

Iván Williams Jiménez [1]

Abstract

Over the past few decades, the management of psychosocial risks has become a growing issue that is generating greater interest at a policy level. In this context working conditions are increasingly facing new challenges as a result of the impact of globalisation and digitalisation, together with the growing structural precariousness of labour.
In order to monitor legal developments in this changing labour landscape, the use of horizon scanning and foresight exercises for improving psychosocial risk management regulations is starting to become a common technique that helps to better understand the different responses from public policy in a particular issue, trend or development. This paper tries to address the effectiveness of this technique for the anticipation and future-proofing of policy responses regulating psychosocial risks.

Keywords: Psychosocial Risks, OHS, Horizon Scanning.

1. The Evolving Landscape of Regulatory Frameworks for Psychosocial Risk Management

Psychosocial hazards were defined by the International Labour Organization in 1984 as the 'interactions between and among work environment, job content, organizational conditions and workers' capacities, needs, culture, personal

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extra-job considerations that may, through perceptions and experience, influence health, work performance and job satisfaction' [2]. At that time, attention was drawn to technological changes as a future trend that was going to impact on working conditions in a severe way, and far different from traditional occupational safety and health concerns such as physical, chemical and biological hazards. As far back as 1959 bodies like the World Health Organization were drawing the novel links between technological changes and the psychosocial health of workers by reflecting on how adverse psychological impacts had the potential to occur not just of automation processes but even of the prospect of the implementation of automation technologies in the workplace[3].

According to most recent figures, traditional psychosocial risks, and work-related forms of violence, in particular, affect more than 40 million workers across Europe (European Foundation for the Improvement of Living and Working Conditions[4]. Work-related psychosocial risks are increasingly being considered as an emerging object of study, in comparison to more traditional safety risks associated with physical health, safety and wellbeing, which have traditionally attracted greater interest at a policy level.

Working conditions (including work organisation, work intensity, stress levels, poor management, work–life balance) are also facing new challenges[5], due to factors such as precarious employment, globalisation and digitalisation. Working environments are evolving and introducing new forms of work that need to be addressed by policymakers. The current labour market landscape and working practices are in constant disruption and are now characterised by new forms of employment relationships emerging in a changing world of work. In this particular context, occupational safety and health (OSH) policies are pointing to a greater effect on the psychological and mental wellbeing of workers. This new context allows interactions between new initiatives and norms that need to be a subject of study. In this scenario, psychosocial risk prevention regulations are likely to play a key role in protecting workers' safety, health and wellbeing in industrialised economies and emerging countries.

How psychosocial risks impact on the world of work is not considered a new concept anymore. It represents one of the major development areas being

[2] International Labour Organization (1986). Occupational Safety and Health series. Psychosocial factors at work. Geneva, 1986.

[3] World Health Organization (WHO). (1959). Mental Health Problems of Automation. Report of a study group. World Health Organization (WHO). Technical Report Series No. 183, 1959.

[4] EUROFOUND. 2017. Sixth European Working Conditions Survey – Overview report. Luxembourg: Publications Office of the European Union

[5] EUROFOUND. 2015. Violence and harassment in European workplaces: Extent, impacts and policies. Dublin.

monitored in occupational safety and health. As a result of this effort from the research and legislative sphere, legal interventions positively or negatively affecting workers' mental health and wellbeing are being reviewed and analysed. Carrying on doing the same things at a regulatory level has not demonstrated to be the right way forward. At the same time traditional and emerging psychosocial hazards aren't being properly reported, recognised, regulated and protected against by most national or international regulations. They are frequently neglected by occupational safety and health, working time, discrimination, equal treatment and labour law regulations, which makes them less effective to overcome legal obstacles. Still, a general duty of care on protecting workers' physical and mental health and the obligation to promote wellbeing (physical, psychological, moral and social) remain as key obligations for employers to comply with.

The complexity of regulating psychosocial risks has traditionally relied on the basis of the effectiveness of the existent fragmented approach of legislation. Legal provisions covering psychosocial hazards and risks can be included in Labour Codes, OSH Laws, OSH Acts, specific OSH regulations, codes of practice, technical standards, decrees and collective agreements[6], though this is far from being a common practice in a relative majority of jurisdictions.

There are other countries that have articulated national frameworks relating to some fragmented aspects of psychosocial risks such as stress, bullying/ harassment or quality of work.

Many countries consider psychosocial risks already covered by existing labour law, working time or occupational safety and health, discrimination or working time regulations. These legal frameworks can foresee the obligation of the employer to prevent all hazards and risks of any kind and prevent them in order to protect workers' health by implementing preventive measures.

At the same time, we do have recent examples that support the relevance of psychosocial issues and help to understand why regulatory frameworks for psychosocial risks are at a tipping point. The ´right to disconnect´ from workplace Information and Technology Communications (ICT) in France, the inclusion of more comprehensive definitions of these risks in legislation enacted in Belgium, Japan legislating on working time and intensive work shifts or the way that Indonesia has recently implemented new legislation to extend the protection of workers suffering work-related stress are just some examples of an evolving regulatory agenda in the world of work.

From a global policy perspective, the landscape is far from being static. The adoption and expected ratification of an ILO Convention and

[6] International Labour Organization. (2016a). Workplace Stress: a collective challenge. 978-92-2-230641-1 (print), 978-92-2-230642-8 (web pdf), Geneva.

Recommendation on workplace violence and harassment[7] means that for the first time a range of unacceptable behaviours and practices in the world of work is covered in new international labour standards. At the same time, we are witnessing the scope of workplace health and safety being expanded in the future to include the managements of psychosocial risks with a new standard in development. ISO 45003, Occupational health and safety management – Managing Psychosocial Risks in the workplace – Guidelines[8], is expected to be published in late summer 2021.

Previous research that reviewed the global aspect of regulating psychosocial risks anticipated Health and Safety legislation enforcing the protection of workers' mental health and wellbeing at a short-term scale. Those studies also highlighted the shortcomings of current regulatory frameworks by concluding that a higher level of awareness of the relevance of OSH legislation for the protection and promotion of mental health is needed in countries where relevant laws already exist. Experts also identified as areas for further improvement the harmonisation and adequate enforcement of legislation across countries, the recognition of stress-related disorders as occupational diseases, and the constraints on enforcement of legislation. Other contributing factors cited were lack of sharing of good practices and the need for building of key stakeholders. Awareness and engagement of public policy, improved social dialogue, the evidence-based knowledge and resource deployment were reported to be key aspects[9].

From a European standpoint there have been preliminary discussions on the potential for a specific directive on psychosocial risks. This review considered existing legal principles in European law on working time, work intensity and job insecurity that could be used as a basis for a European directive[10].

Other global initiatives are making a real change in the world of work. Activism and legal activism in particular are driving policy change and cultural changes. We can see how initiatives such as "Me Too" have changed the status quo on misconduct in the workplace. Similar initiatives have put the spotlight on workers' daily experience and expectations by raising awareness on ending

[7] International Labour Organization. (2019). World Employment and Social Outlook 2019. Geneva.

[8] International Standardization Organization. (2018). ISO 45003. Occupational health and safety management - Psychological Health and Safety in the Workplace – Guidelines.

[9] International Labour Organization. (2016b). Workplace stress a collective challenge. Turin: ISBN: 978-92-2-130641-2 (print).

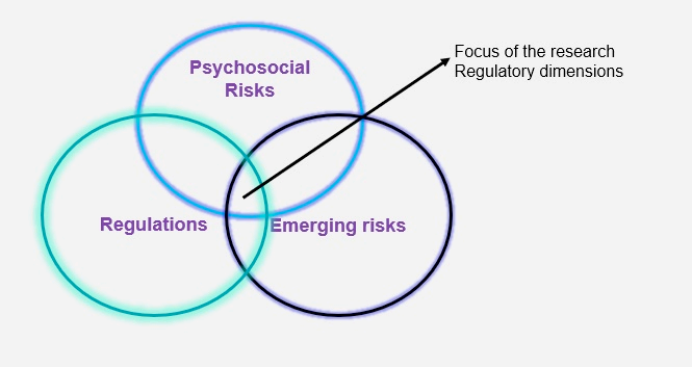
[10] European Trade Union Institute. (2019). Defining the spirit of a European directive on psychosocial risks https://www.etui.org/Topics/Health-Safety-working-conditions/News-list/Defining-the-spirit-of-a-European-directive-on-psychosocial-risks Brussels.

the stigma of mental illness and promoting the creation of mentally healthy workplaces.
All these recent developments wouldn't be considered or even imagined when these risks were defined for the very first time by the ILO in 1980s. Altogether they clearly help to build the policy and business case for things to change in this area and fill the existing gap in specific tools and guidance to further promote practice in this area of occupational health and safety[11].

2. Method

The findings of this paper are based on an exploratory study (see Figure 1)[12] that attempted to better understand the importance of emerging psychosocial risks and the changing policy environment for traditional psychosocial risks. This project examined the context and conditions for effective policy interventions in regulating psychosocial risks. The findings from the research provided a review of what good looks like in recent regulatory approaches for psychosocial risks and also identified gaps in legislative frameworks, something that at a research level has been somewhat overlooked.

Figure 1. Research focus on the regulatory dimensions of emerging psychosocial risks (adapted from Williams, 2019)



The research involved a literature and policy review including academic papers and a grey literature search to help to identify research priorities and emerging themes, some of which are covered in this paper. It is worth adding that the

[11] Jain, A. Leka, S. Policy, law and guidance for psychosocial issues in the workplace: an EU perspective. EU-OSHA OSHWiki. https://oshwiki.eu/wiki/Policy,_law_and_guidance_for_psychosocial_issues_in_the_workplace:_an_EU_perspective

[12] Williams, I (2019). Emerging Psychosocial Risks and their regulatory dimensions: an international perspective. Universidad Carlos III de Madrid.

literature review of foresight research had a generic focus on OSH and working conditions that might have consequences for psychosocial risk management.
After this initial review the study included two qualitative studies. The second stage involved an online survey of a broad spectrum of respondents, including figures from a policy, legal, professional or academic background. The third stage involved the development of a questionnaire focusing on the research questions.
The last part of the project involved 20 semi-structured interviews with different professionals. Respondents represented a cross-section of the international occupational safety and health community, policy experts, law/regulation experts, research/academic experts, occupational health experts, OSH professionals, psychosocial experts and consultants in the areas of wellbeing and health.
Some of the findings from these different stages have been extracted for the purpose of this paper.

3. The Imperative Need for Horizon Scanning in Psychosocial Risks

Globalisation is creating long-term transformations on labour relations, having a subsequent impact on workplaces and workers' safety and health. In order to properly assess the risks based on the probability and severity of the damage of new or emerging risks better anticipation is needed. Trends change quickly and need to be anticipated. For that specific purpose, the development of horizon scanning exercises has proved to be a useful tool. As a mechanism the added value of horizon scanning techniques is the potential to change mind-sets, challenge the status quo and provide more scenarios.
This paper uses the term horizon scanning and foresight (HSF) together, but it is important to note that horizon scanning is actually a method of foresight. Within the document, horizon scanning generally refers to methodological approaches that scan or review various data sources, while foresight generally refers to the wider group of more participatory methods.
Foresight can support government policy-making in the following main ways (Organisation for Economic Co-operation and Development[13]:

- Better anticipation: to identify and prepare sooner for new opportunities and challenges that could emerge in the future
- Policy innovation: to spur new thinking about the best policies to address these opportunities and challenges

[13] OECD (2019). Strategic Foresight for better policies. Paris.

- Future-proofing: to stress-test existing or proposed strategies against a range of future scenarios

In our globalised world of work thinking about the future constitutes a fundamental activity for new regulations to be formally articulated. Drafting new scenarios, probable future characteristics, events and behaviours have become a widely extended practice at a policymaking level. Applying Futures techniques helps policymakers anticipate and learn about future opportunities and challenges[14]. Despite the success and the validity of these studies in public policymaking, reviewing future issues that could affect occupational safety and health aspects is still considered a novel practice. In the particular field of psychosocial risk management, the evidence is scarce though the number of studies has experienced a significant increase in the last five years. Psychosocial hazards in these studies have been connected to these factors:

- The decline of physical illnesses and the growth of psychosocial illnesses
- The impact of technology in the world of work
- Globalisation linked to workers facing a burden of psychosocial demands
- Changes in working conditions and working practices
- Precarious working or insecure work

Recent studies have carried out in-depth examinations of how the future of work would look through the anticipation of different scenarios. In these scenarios the identification of psychosocial risks related to changes to job risks and hazards were significant. A study[15] by the National Institute of Occupational Safety and Health (NIOSH) in the US carried out a review on the topic of the future of work and occupational safety and health, based on peer-reviewed and grey literature in the 1999–2019 period. The research put a particular focus on the so-called emerging risks and on how new occupational risks in the form of psychosocial hazards could be created or exacerbated. The list of risks that the study identified included trends based on how globalisation is impacting working conditions in the new forms of precarious work, changes in how restructuring and downsizing processes can be managed, increased job insecurity, the increasing relevance of Information and Communication

[14] UK Gov. (2020). Futures, Foresight and Horizon Scanning. https://www.gov.uk/government/groups/futures-and-foresight

[15] P. Schulte, P. Streit, J. Sheriff, F. Delclos, G. Felknor, S. Tamers, S. Fendinger, S. Grosch, J. Sala, R. (2020) Potential scenarios and hazards in the work of the future: A systematic review of the peer-reviewed literature.

Technologies (ICT) and digitalisation leading to increasing intensification and increased time pressures at work, with a negative impact on the boundaries separating working time and personal time. More specific hazards, that we already knew about then are evolving in this new context. Some examples of these are based on the effect of stressful interactions with robots, fast pace of work, work intensification, loss of social skills, privacy invasion or decreased situational awareness.

The commission of this literature review on the future of work focused on aspects such as the impact of technology on job losses, the prevalence of automation or the proliferation of gig platforms employing growing numbers of people. Hence, we can see some similarities with previous studies that also based their rationale on the association of changes in working conditions as a result of globalisation or the impact of technological advances.

Here we need to be conscious of the limitations of these studies. There´s no doubt that changes in technology are noted to be one of the main contributing factors to the future of work. That said, we need to be conscious of other driving forces that are currently having a resounding impact on workers and workplaces. These have been left unconsidered and to some extent neglected.

The current COVID-19 crisis is an unfortunate example of this. The outbreak is challenging companies, workers and working conditions in unprecedented ways. The nature of this economic and labour disaster is highly unusual but still uncertain when it comes to the psychosocial impact in the workforce[16]. The profound mental health impact of this global pandemic will require evidence-based studies[17] to review the severe consequences on the psychological health, safety and wellbeing that the global workforce is likely to experience. A global and coordinated approach to research on the work-related ill health impacts resulting from COVID-19 will need to address knowledge and practice gaps on the following aspects:

- the impact on workforces in low- and middle-income economies
- the identification of hard-hit sectors
- the situation of workers employed in the informal economy or the gig economy
- the circumstances of workers with limited access to health, safety and wellbeing services

[16] World Health Organization (WHO). (2020). Mental health and psychosocial considerations during the COVID-19 outbreak https://www.who.int/docs/default-source/coronaviruse/mental-health-considerations.pdf Geneva.

[17] BBC News. Coronavirus: 'Profound' mental health impact prompts calls for urgent research. https://www.bbc.co.uk/news/health-52295894 April 2020.

- workplace strategies for those returning to work after experiencing common mental disorders
- the shift of remote working practices as the new normal
- the effects of new technologies on all aspects of our lives, including our mental health
- or the impact of organisational changes namely restructuring, automation becoming more pronounced, etc.

All these different psychosocial factors and the scale of the impact weren't properly considered when recent horizon scanning and foresight studies reviewed the evolution of psychosocial risk management and the state of the art of psychosocial issues.

4. Anticipating Regulatory Changes for Psychosocial Risk Management

There are several benefits associated with articulating policy initiatives through horizon scanning and foresight exercises. Simply put engaging in strategic foresight can contribute to shifting the approach from regulations being less reactive to being proactive in tackling a particular shortcoming. These studies can either help to highlight the problematic aspect of psychosocial risks management at a workplace level or can contribute to modelling new frameworks based on the knowledge acquired from previous regulations or lessons learnt from ineffective policy responses.
The use of these modelling practices can help to minimise the feeling of regulatory uncertainty. As a result of this, regulations might provide clearer pathways of compliance enforcement and increased levels of awareness. Foresight-based policy in occupational safety and health is traditionally represented through the exploration of future policy issues and scenarios through expert groups and specific studies. Some examples of initiatives in this field are normally supported by evidence base, in the form of occupational safety and health research priorities or existent knowledge gaps. Other extended tools are the design and modelling of scenarios, the establishment of observatories, the implementation of alert and sentinel systems for the detection of new and emerging risks or more traditional approaches such as the commissioning of literature and policy reviews to reflect on current patterns, and help to better understand future policy-related frameworks.
Anticipating the potential impact and implications for workplace health and safety of future trends can support policymaking in articulating preventive and proactive policies instead of reacting to workplace challenges. As awareness and better understanding through horizon scanning and foresight tools increases, OSH policies and strategies addressing psychosocial risks should be

recipients of this knowledge as well. The information obtained from these exercises has the potential to act as a catalyst for feeding debates and policy decision-making or to contribute to the solution of an ongoing or emerging issue.

5. Analysis and Results

This paper tries to demonstrate how this sort of studies can become a useful tool that helps contribute to policy guidance in a traditionally under-regulated area, despite psychosocial risks being considered an emerging risk and a key challenge in modern occupational safety and health (Partnership for European Research in Occupational Safety and Health)[18]. For the time being the creation of foresight centres or observatories has resulted in a successful initiative when addressing this knowledge gap.

Below are some examples on how Occupational Safety and Health observatories, foresight centres and research institutes have been active in addressing the existent gap for regulatory horizon scanning on emerging risks and on the impact of psychosocial risk management in particular. These centres have been responsible for monitoring new risks affecting working conditions, with a strong emphasis on the identification and detection of trends relevant to the workplace and new health and safety risks to workers. Some of these studies have been commissioned at a global scale to look at global trends and foresight of future scenarios in relation to the impact of psychosocial risks and work-related stress[19] by putting the focus on the detection of drivers, barriers, facilitators, inhibitors and needs in relation to the prevention and management of work-related stress. This has helped to bring the protection of work-related stress into the policy agenda and to provide further level of evidence to reinforce the body of scientific knowledge on that particular area.

At a policy-making level, anticipating change in occupational safety and health risks has been a critical issue in the agenda of different OSH regulatory bodies. European research organisations such as the European Agency for Safety and Health at Work (EU-OSHA) were tasked to set up a risk observatory to anticipate new and emerging risks, specifically anticipating new and emerging risks, whether they be linked to new scientific knowledge, which could be in

[18] PEROSH. (2017). Psychosocial well-being in a sustainable working organisation. Retrieved from http://www.perosh.eu/research-priorities/psychosocial-well-being-in-a-sustainable-working-organisation/.

[19] International Labour Organization. (2016a). Workplace Stress: a collective challenge. 978-92-2-230641-1 (print), 978-92-2-230642-8 (web pdf), Geneva.

form of new data, evidence, theory or model, new technological development, a heightened level of awareness or new ways of responding to a known issue[20]. This requires, first and foremost, ongoing observation of the risks themselves, based on the systematic collection of information and scientific opinions[21].
As a formal mechanism for policy intelligence-gathering the subject has also been embedded in regulatory frameworks as we can see in the recent European OSH strategies, such as the Community Strategy on Health and Safety at Work 2007–2012, as well as the current framework, the EU Strategic Framework on Health and Safety at Work 2014–2020. The latter addresses the importance of anticipating change as a key area for policy and encourages member states to actively monitor trends and changes in working environments through the development of information systems for national statistics on occupational accidents, work-related health problems and illnesses, and the prevention of potential risks, both physical and psychosocial.
These organisations based their approach when carrying out a foresight exercise on the systematic examination of potential problems, hypothetical threats, opportunities and likely future developments including those at the margins of current thinking and planning. Horizon scanning and foresight tools may explore novel and unexpected issues, as well as persistent problems, trends and weak signals[22] as represented in the table below.

Table 1. Simplified phases of a foresight process (adapted from Habegger, 2009).

Phase	Early detection (phase 1)	Developing policy options (phase 2)
Description	Identification and monitoring of issues, trends, developments, and changes	Assessing policy challenges, envisioning desired futures, and policy action
Decision-making chain	Information Knowledge	Insights Action
Policy tool	Horizon scans	Scenarios

[20] United Nations. (2016). Global Sustainable Development Report 2016. Department of Economic and Social Affairs. Geneva.
[21] European Commission. (2002). Community strategy on health and safety at work 2002-2006. Brussels.
[22] Habegger, B. (2009). Strategic foresight in public policy: reviewing the experiences of the UK, Singapore, and the Netherlands. Zurich: Futures, 42, pp.49-58.

Other organisations have focused their studies on the insights arising from a variety of scenarios[23] particularly to anticipate long-term prospects for better policymaking decisions. Currently, much of the informed decision making at a policy level tends to be designed on a short-term basis.
Further relevant research in this area is also being led by PEROSH through the joint research project Futures. Foresight and priority setting in OSH[24]. The European research network has also recently earmarked psychosocial wellbeing in a sustainable working organisation as a research priority challenge[25]. Based on this priority agenda setting, the following areas were highlighted as key themes for future investing in research for policy and practice purposes:

- Influence of individual and work-related resources on mental health
- Psychosocial risks: the role of a new organisation
- Social capital, health, and wellbeing at work
- Psychosocial risk management, including regulatory framework and actions at company level; psychosocial working environment
- New ways of working: implications for new OSH risk and benefits for knowledge workers
- Psychosocial and organisational working environment, including working hours thematic (shift work, long working hours, night work).

Other reports consulted found that future trends will imply a substantial change from the inception. This is where the foundations of the management of psychosocial risks and mental health and wellbeing in the workplace could form part of an important component of human capital in the context of quality of life and working conditions[26].
Findings from these studies will be utilised to influence the policy agenda but the problem remains when trying to explore how to turn those findings into practical solutions for workers and workplaces. It is also important to look beyond the scope of traditional policy silos and consider how multiple

[23] Ponce del Castillo, A., & Meinert, S. (2017). ETUI. Occupational safety and health in 2040 Four scenarios European Health and Safety strategic frameworks. A mixed instrument between regulation and dialogue. Brussels.
[24] INAIL. (2016). Facts. Futures. Foresight and priority setting in OSH.
[25] PEROSH. (2012). Sustainable workplaces of the future – European Research Challenges for occupational safety and health. Brussels.
[26] World Bank. (2019). World Development Report 2019: The Changing Nature of Work. Washington, DC: World Bank. doi:10.1596/978-1-4648-1328-3.

developments can intersect and interact in unexpected ways[27]. It´s difficult looking beyond current expectations and taking into account a variety of plausible future developments to identify implications for policies without having the whole picture. For that reason, analysing megatrends taking place in multidisciplinary areas can help to provide key insights to the strategic foresight method chosen. Exploring and reviewing large-scale changes building in the present at the intersection of multiple policy domains, with complex and multidimensional impacts in the future.

As the management of psychosocial issues and mental health and wellbeing in the workplace is gaining traction in the policy agenda, we are starting to notice how this relevance is being translated into different foresight interventions carried out by non-occupational safety and health bodies. Again, it needs to be emphasised that for the rationale of this paper the topic was deliberately restricted to studies analysing potential transformative changes of the future of work and implications for the articulation of regulations covering different aspects of psychosocial risk management.

Organisations like the World Economic Forum (WEF) have been facilitating strategic insights and contextual intelligence to the world of work for the past few years as part of their Strategic intelligence online platform[28]. The existing online information tool explores and monitors the issues and forces driving transformational change across economies, industries, and global issues. It also helps to provide access to a knowledge bank of resources including the latest research and analysis, videos, podcasts and interactive data on a wide variety of pressing topics.

One of the topics covered how the work-related complex transformations are having a profound psychosocial impact on people's lived experiences[29]. The WEF periodically monitors global trends in mental health, technology, addictions, automation, monitoring and workplace stress or psychological and emotional strain associated with the context of work. The following non-exhaustive list of emerging areas has been cited as key contributing factors affecting the wider global risks landscape:

- Workers' declining psychological and emotional wellbeing
- Uncertainty around how technological changes impact individual well-being

[27] OECD. (2019). Strategic Foresight for better policies. Paris. https://www.oecd.org/strategic-foresight/ourwork/Strategic%20Foresight%20for%20Better%20Policies.pdf

[28] World Economic Forum. (2020) Strategic Intelligence. https://intelligence.weforum.org/ Geneva.

[29] World Economic Forum. (2019). The Global Risks Report 2019, 14th Edition. Geneva.

- Rapid (technological) transformations in the workplace having the potential to affect workers´ emotional and psychological well-being
- Productivity targets causing an increasing psychological strain among the workforce.

Following a similar technology-related narrative advances in AI, robotics and other technologies are likely to change our lives, whether we like it or not. Many people, particularly low-skilled workers, may have to accept ever more insecurity and ever tighter control. However, jobs are increasingly subject to algorithmic management and workplace monitoring. But workers are subject to a new level of algorithmic oversight, with ratings systems now pervasive[30].
Working time and work-life balance regulations could suffer changes in enforcement practices[31] through the introduction of working time reductions. At a time when excessive long hours of work are rampant in global labour markets[32] we need to be conscious that an increasing body of empirical evidence underlines the adverse effects of regular long working hours (defined as more than 48 hours or more than 50 hours per week) on human health and workplace safety[33]. The psychosocial toll of these work shifts, in conjunction with automation, analytics and innovation, to push performance and productivity in the workplace to its limits is huge. It results in higher rates of anxiety, depression and sleep disorders. In some cases, they can be the contributing cause to mortality rates as we've seen with *´karõshi´* in Japan).
In this scenario the introduction of technology advances can have both positive and negative effects. When human effort is maximised through sophisticated use of enhancement techniques and devices, workers' performance and wellbeing is continuously measured, monitored and analysed. Changes on a short-term basis will be seen in the context of the Coronavirus pandemic as part of the recovery and back-to-work implementation strategies. One particular example of this will come through the increasing use of contact-tracing applications. Essentially, the objective of these tools is to monitor physical distancing compliance both in and outside the workplace environment. Companies will invest in monitoring and measuring, from the

[30] RSA. (2019). Dellot, B, Mason R, Wallace-Stevens Fabian. The four futures of work. March, 2019.
[31] Shain, M., & Nassar, C. (2009)Stress at Work, Mental injury and the law in Canada. A Discussion Paper for the Mental Health Commission of Canada. Canada.
[32] International Labour Organization. (2019). World Employment and Social Outlook 2019. Geneva.
INAIL. (2016). Facts. Futures. Foresight and priority setting in OSH.
[33] Messenger, J. (2018). International Labour Organization. Working time and the future of work. Geneva.

location of their workforce, their performance, health and wellbeing – both in and outside the workplace. Technology could be seen as a legitimate excuse for firms to actively invest in health resources to make their employees feel psychologically healthy and safe. Legal scholars are reacting and calling for better governance frameworks to be put in place through dialogue between the state, employers, and unions prior to and during any app rollout and implementation[34]. As with any other introduction of technology companies will have to abide to existing Health and Safety regulatory frameworks.

Some horizon scanning and foresight studies predicted this 'new' normal reality that we are living in where both companies and workers will be taking ownership of how they manage their mental health and wellbeing. An increasing amount of workers' decisions have the potential to be tightly controlled by either regulation or employer prerogatives. Mandatory digital health and wellbeing policies and practices (eg 'digital dieting' which involves spending time away from connected electronic devices)[35] are likely to experience an exponential growth in the workplace.

While these different trends and transformations illustrate how the global landscape is far from static, they don´t represent a resulting increase in the number of regulations, policies and practices to be articulated or implemented per se in the field of psychosocial risks. One of the things that the COVID-19 public health crisis is demonstrating is that when disruptive forces are at play at a major scale, existing regulatory strategies and linear predictions can be considered inadequate. The issue brings scholars and policymakers again to the argument that reflects on how occupational safety and health regulatory frameworks tend to be reactive, with a focus on compensation rather than prevention. For the time being, the lack of policy responses clearly undermines the potential for psychosocial risks to be enforced or prosecuted as legislative approaches are still fragmented and many states consider it implicitly covered by existing laws. But the disruptive nature of the trends previously presented will require different problem-solving solutions to be revisited, including the adequacy of governance structures and policy responses.

Likewise, with the increasing acceleration of social, economic, and technological developments in the workplace the role of the employer's duty of care is at stake. The central role of businesses in our evolving world of work will require a re-examination of the interrelation between employee productivity and healthy workforces.

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[34] De Stefano, V. J Colclough, Christina. Mind the App!. https://www.alainet.org/en/articulo/206107 2020.

[35] PricewaterhouseCoopers (2018). Workforce of the future. The competing forces shaping 2030, London.

The variety of scenarios summarised provides a starting point for considering a range of options around the multiple possible futures of psychosocial risk management. In addition, these examples reinforce why it is paramount for policymakers to create valid and robust data for strategic evidence when exploring and anticipating regulatory changes in this area. Horizon scanning and foresight exercises for analysing the impact of psychosocial risk factors are no longer considered a new approach in the occupational safety and health discipline but a necessary means to better understand how working environments and working conditions are changing.

6. What the Horizon for Changes in Regulations for Psychosocial Risks Might Look Like

Foresight-based policy in occupational safety and health is traditionally represented through the exploration of future policy issues and scenarios through expert groups and specific studies.
Some examples of initiatives in this field are normally represented by the definition of occupational safety and health research priorities and the monitoring of new and emerging risks through foresight analysis, the design of scenarios, the establishment of OSH observatories or the implementation of alert and sentinel systems for the detection of these emerging risks.
All these instruments applied to this discipline have proved to identify why anticipating change and future challenges, together with policy horizon-scanning exercises in the area, should remain critical in the future of work agenda. This should include the design and implementation of specific studies reviewing the progression of psychosocial factors in the workplace.
Anticipating the potential impact and implications of future trends on the mental health and wellbeing of the workforce can support future policy needs, articulating preventive and proactive policies instead of reacting to societal challenges. As awareness and better understanding through horizon-scanning and foresight tools increases, OSH policies and strategies managing psychosocial risks should improve in their effectiveness and applicability. This information has the potential to act as a catalyst for feeding debates and policy decision making. It can also contribute to the solution of an ongoing issue, where safety, health and wellbeing and psychosocial risk management specifically are lagging behind transformations in labour relations and employment markets.
From the outcomes of the research it can't be denied that key developments at the international and European level in the coming months and years will have major influence. We can already find in some countries signs of determination to address work-related ill health by adapting regulations on workplace safety

and health to better reflect today's changing world of work. This will imply a correlative increase of enforcement and prosecution on this area.

From a regulatory perspective some key initiatives are being revised. The concept of the employer duty of care is changing from a legal approach to a moral duty of care. Liability for inflicting mental suffering is also being considered. The protection of mental health could be included in collective bargaining. Changes in working time and workplace violence regulations are also taking place in different jurisdictions. In summary it's fair to say that what we are seeing is how regulations are becoming more 'aggressive' in issues related to working time and work-related stress. At the same time the promotion of workplace wellbeing is also gaining legitimacy on the regulatory agenda.

The foreseeability of harm to mental health resulting from exposure to risky practices can be said to attract a general duty of care, increasingly enforceable in law, to abate these hazards to mental health by all reasonable and practical means available. This duty can be seen as an extension of due diligence in occupational health and safety laws to embrace psychosocial as well as physical hazards'[36]. Prosecution for aspects linked to work-related stress, abuse of work intensification practices is likely to increase against an organisation for failing to manage psychosocial risks effectively. At a regulatory level there's a clear need to consider the following better provision of remedies and support for victims and improved enforcement for non-compliance and breaches or effective sanctions for perpetrators. This might be considered in a single incident that is particularly high profile or, more likely an incident involving a group of people who are all suffering from poor practices in the management of psychosocial issues and where the lack of compliance can point to corporate responsibility for the inflicted harm.

From a business perspective a series of trends was also identified as drivers of regulatory change: the stronger recognition of mental injuries as work-related or the progressive recognition of the positive benefits of workers' mental health and wellbeing in the business results (productivity) and quality of life of employees. Companies are being encouraged to address psychosocial risks through proactive management systems. Apparently, there is a perception that addressing mental health could be the next challenge for organisations and Occupational Safety and Health practitioners to incorporate in their management and engineering controls and processes.

[36] Shain, M., & Nassar, C. (2009)Stress at Work, Mental injury and the law in Canada. A Discussion Paper for the Mental Health Commission of Canada. Canada.

7. Conclusion and Ways Forward

The findings of the studies reviewed have provided some 'warning signals' that should contribute to policymakers assuming a better understanding of the importance of this momentum. It's never been the case before for such a great deal of regulations to be articulated at a national, European and international level. The recently approved Recommendation and Convention on violence and harassment in the world of work, the work started for the future ISO on guidelines for the positive management of psychological health and safety in the workplace and the new proposed directive on transparent and predictable working conditions are just some examples of this emerging legal landscape.

This momentum is not a coincidence. Policymakers are in active listening mode, eager for these warning signals to be as comprehensive as possible. Academics, scholars and professionals with a particular interest in regulating and managing psychosocial risks shouldn't miss this opportunity to shape these signals and translate them to the world of work through a sensible and pragmatic approach. This long-awaited milestone has also been demonstrated, based on the remarkable interest on this subject from other disciplines, namely international organisations such as the Organisation for Economic Co-operation and Development (OECD), the World Bank Group and the World Economic Forum. They are encouraging research in this area or revisiting their own strategies to place workplace mental health high in their agendas considering the ramifications and implications of the issue.

This clearly reinforces the call for a collective response. The regulatory landscape of psychosocial risks requires a better legal drafting in order to support legislation with content linked to psychosocial risks so that it is comprehensive, less 'patchy' and consistent. Workers, employers and the public need to be aware, educated, informed of their rights and obligations in this field, and be accountable too. Smarter and more simple terminology can make laws better understood and accessed by ordinary citizens, workers and employers.

It can also make regulatory frameworks more legitimate to communicate the message that psychosocial hazards should not be 'part of the job'. This desire for inclusiveness should also apply to both approaches from industrialised and non-industrialised economies to avoid psychosocial risk management being a tale of two stories. As we know the need for increased public awareness of psychosocial issues through additional knowledge, education, training and awareness is much needed in the later states.

Strategic horizon scanning and foresight studies are an evolving discipline and as an anticipatory governance practice applicable to occupational safety and health standards has proven to be a challenging concept. However, this paper

has demonstrated how useful these methodologies can result in developing robust, future-ready policy on a particular area of law.

While in the current scene, many still seem pointless to hope, in the short or medium term, for a legislative initiative in the area of regulating and managing psychosocial risks, governments and public policy need to be better equipped for a number of possible, even seemingly unlikely, outcomes. This should include policy and law for psychosocial issues and challenges in today's workplaces.

Supporting Organisational Justice through a Legal Framework for Performance Appraisal in the United Arab Emirates: Management Case and Comparison with the French System

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Abstract
The article outlines the regime for performance appraisal, as it applies to organisations operating in an emerging economy like the United Arab of Emirates (UAE). To this end, the management literature on performance appraisal is reviewed, as a strategy to pursue organisational justice and productivity in an equitable work environment. An analysis is also supplied of the regulatory framework of a civil law system with which many Arab jurisdictions bear historical vicinity—that of France—to ascertain a possible frontier of further legislative development. The paper situates performance appraisal—and the need for regulation—in the context of managerial strategies to enhance organisational justice, in order to align the goals of companies and their employees. The existing regime for performance appraisal in the UAE reveals a less than comprehensive legislative infrastructure, compared to that of France. For this reason, the paper advances suggestions for its further development.

Keywords: *Performance Appraisal, Organisational Justice, Human Resources.*

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1. Introduction

In a highly competitive business environment, cultivating a constructive relationship between employees and their organisation should be of prime concern. A constructive relationship between employers and employees has been shown to help enhance productivity: to this end, performance appraisal is a particularly useful tool. 'Appraisal' means 'to set a value for something', whereas 'performance' refers to the way something or someone is functioning. It follows that, at its most fundamental, employee performance appraisal refers to the activity of setting a value for the output of an employee. When a high level of integrity, justice, and fairness can be built into a performance appraisal scheme, this means interested parties—and particularly employees—might recognise it as a sound undertaking, accept it as objective, and relate to it as to a reasonable evaluation exercise. When this occurs, a virtuous cycle is set in motion, whereby employees' productivity is preserved or even enhanced, to the benefit of the overall performance of the organisation.[2]

The term 'performance appraisal' describes a business practice, and would not customarily be expected to come up in legal documents and judicial arguments. The process of setting a value for and rating employee performance is variously described in management literature as 'performance management', 'performance contract', 'performance appraisal', 'performance assessment', and 'employee evaluation', among others. Against this background, 'performance appraisal' is the term we will consistently employ in this paper. A positive performance appraisal can be understood as an attestation of 'effectiveness'. In economic terms, this has been often likened to 'competitiveness'—which portrays performance appraisal as a framework for supporting the efforts of an organisation in meeting the pressures of competition.[3] The lack of 'performance appraisal' as an established category in legal language invites a second terminological clarification. 'Performance appraisal' does not automatically cue a legal obligation. However, when it forms part of an agreement, then it may also give rise to legally enforceable obligations. Hence, in order to give contractual coverage to performance appraisal, the latter is at

[2] W.J. Heisler, M. Hannay, A Question of Ethics: An Examination of Stakeholder Perspectives in the Performance Appraisal Process, in Journal of Leadership, Accountability and Ethics, 2015, vol. 12, no. 4, pp. 31–45.

[3] S.D. Noisette, Performance et droit du travail, Ph.D. thesis, University of Aix-Marseille, 2018, p. 24.

times formalised in an agreement, beyond mere internal documents or spreadsheets measuring employee deliverables.[4]

These clarifications set the stage for the examination undertaken in this paper, concerning the legal issues that accompany the performance appraisal process, in the context of the United Arab Emirates (UAE). While the UAE is still developing an appropriate legislative framework, performance appraisal has for example received greater attention in the legal systems of many EU countries. This piece will especially refer to the French treatment of performance appraisal, in light of the vicinity that French legal categories still bear with the private laws of many Arab countries, through the mediation of the Egyptian Civil Code.[5]

In order to explore the legal aspects of performance appraisal, Section 2 begins by providing background on this business process, illustrating the management case for it in bolstering employee motivation, job satisfaction and engagement, and ultimately employee effectiveness within the organisation. This section also makes explicit the connection between fairness in performance appraisal procedures and employees' perceptions of organisational justice and integrity. Section 3 introduces the existing Emirati legal framework for approaching controversies arising in the conduct of performance appraisal procedures. Section 4 contrasts available legal options in the Emirati legal system with the French approach, based on comprehensive regulation of performance appraisal through dedicated contractual clauses and collective performance agreements. Finally, Section 5 comes back to the UAE, pointing to possible strategies for implementing a more reliable framework in support of business performance appraisal procedures, in order to enhance employees' perception of organisational justice. This is followed by a conclusion that summarises the main steps of our argument, and sets out findings and recommendations for business managers, policymakers, and legislative authorities.

[4] W.B. Zondi, The Concept of Performance Appraisal and Requirements for its Successful Implementation, in International Journal of Economic Perspectives, 2017, vol. 11, no. 2, pp. 638–644.

[5] W.M. Ballantyne, The New Civil Code of the United Arab Emirates: A Further Reassertion of the Sharī ah, in Arab Law Quarterly, 1986, vol. 1, no. 3, 245–64, p. 247. See also I.M. Jadalhaq, M.E.H. El Maknouzi, Reading UAE Contract Law through the Lens of Islamic Jurisprudence: A Case Study on the 'Extraneous Cause' Exception in the UAE Civil Code, in Global Jurist, 2019, vol. 19, no. 2, p. 4.

2. Fairness in Performance Appraisal: Employee Motivator and Driver of Organisational Productivity

Human resource departments customarily use a management tool called 'performance appraisal' to align individual employees' goals to the organisation's goals.[6] Its primary use is for assessing employees' outputs against the objectives, skills, and attitude demanded by their position. The importance of this instrument lies with a multitude of benefits it yields for both the individuals involved and the organisation to which they belong. Primarily, it is meant to spark employee motivation and activate their efforts towards achieving the company's desired goals. This is achieved by providing benchmarks, against which to measure expectations and to incentivise employees to 'go the extra mile'.[7] Performance appraisal may also be linked to reward schemes, whereby employees may obtain recognition for exceeding benchmarks.[8] It also feeds a range of other human resource management processes, such as: career path and succession planning, talent acquisition, fast track programs, promotions, demotions, management development programmes, and salary and incentive schemes. Finally, performance appraisal processes produce a documentary trail that might be called upon in the presence of grievance and appeals procedures, and when contractual conflicts arise between an organisation and its employees.[9]

Performance appraisal schemes that are explicitly linked to motivation are often well received by employees. In this respect, the different motivational theories in the field of human resource management provide blueprints for how to design performance appraisal schemes, in such a way as to generate effects on employee performance, using a vast array of practical methods, techniques, and tools.[10] For example, the performance appraisal technique known as 'management by objectives' (MBO) is the practical transposition of a motivational theory called 'goal setting'. This theory contends that goals that are specific and challenging results in motivated employees, more so than goals

[6] G. Martin, E. Farndale, J. Paauwe, P.G. Stiles, Corporate governance and strategic human resource management: Four archetypes and proposals for a new approach to corporate sustainability, in European Management Journal, 2016, vol. 34, no. 1, pp. 22–35.

[7] J. Hiltrop, C. Despres, Benchmarking the performance of human resource management, in Long Range Planning, 1994, vol. 27, no. 6, pp. 43–57.

[8] A. Reizer, Y. Brender-Ilan, Z. Sheaffer, Employee motivation, emotions, and performance: a longitudinal diary study, in Journal of Managerial Psychology, 2019, vol. 34, no. 6, pp. 415–428.

[9] F. Nickols, Performance appraisal: Weighed and found wanting in the balance, in Journal for Quality and Participation, 2007, vol. 30, no. 1, pp. 13–16.

[10] H. Aguinis, Performance Management, 3rd edition, Pearson, Boston, 2013. See also H. Aguinis, H. Joo, R.K. Gottfredson, Performance management universals: Think globally and act locally, in Business Horizons, 2012, vol. 55, no. 2, pp. 385–392.

that are not specific: when goals are specific, measurable, attainable, realistic, and time-bound ('SMART'), it is likelier that employees' motivation for higher achievement might come into play.[11] It follows that, from a managerial point of view, stretching targets can be one approach for triggering motivation and increasing productivity. At the same time, objectives should be mutually agreed between employees and their managers so that they remain realistic.

Employees also rely on their organisation maintaining an internal justice system to abolish performance appraisal errors and promote integrity at the every level.[12] Organisational justice unfolds along four possible dimensions: procedural, distributive, interactional, and corrective. Procedural justice touches on the fairness of the performance appraisal process, resulting in an outcome perceived as accurate in terms of the final performance score. Distributive justice speaks to concerns for consistency and proportionality in the allocation of resources, such as performance-related pay bonuses, promotions, or increments. Interactional justice is reflected in feedback that is perceived as fair, constructive, and accurate. In particular, it consists of two sub-factors. The first is interpersonal justice: the degree to which employees are treated with politeness, dignity, and integrity; the second is informational justice, and captures the production of accurate and thoughtful feedback, reviews, and other such forms of performance commentary by the appraiser. Finally, corrective justice relates to undertaking remedial action, in the face of mistakes occurring in the performance appraisal process.[13] Although the different forms that organisational justice may take are correlated, they produce distinct impacts on employees' behaviour. For instance, when it comes to performance appraisal, procedural justice nurtures employees' confidence in the performance appraisal scheme itself. Instead, distributive justice influences the level of overall job satisfaction; interactional justice facilitates employee satisfaction with the appraisers, and finally corrective justice mitigates the

[11] E.A. Locke, Motivation through conscious goal setting, in Applied and Preventive Psychology, 1996, vol. 5, no. 2, pp. 117–124.

[12] P.W. Thurston, L. McNall, Justice perceptions of performance appraisal practices, in Journal of Managerial Psychology, 2010, vol. 25, no. 3, pp. 201–228.

[13] While corrective justice isn't usually included in categorisations of the different forms of organisational justice, the ability to intervene to redress perceived unfairness is one of the dimensions of organisational justice that is most impacted by the presence of an appropriate regulatory framework. For a comprehensive discussion of the corrective dimension of organisational justice, see T. Nasidic, La main juste des manageurs: les stratégies visibles et invisibles de justice corrective des manageurs et leurs antécédents, Ph.D. Thesis, HEC Paris, 2008.

negative effects on employee performance of an appraisal outcome that's perceived as unjust.[14]

Performance appraisal that's perceived as accurate generates high levels of job satisfaction and motivates employees to be more productive, to develop their skills, and thereby to grow. Rich, constructive, and in-depth feedback also contributes significantly to employees' overall perception that mirrors the reality they experience. When it comes to communication of rich and comprehensive feedback, performance appraisal is perceived as a just and fair exercise.[15] At the same time, performance results are also used to categorise, promote, demote, reallocate—and even fire—employees. Therefore, performance appraisal exercises constitute a hazard for organisational justice when they are undertaken, for example, by self-interested managers whose primary focus lies in their personal benefit without paying due attention to subordinates' developmental goals.[16] Supervisors bring a decisive contribution to employees' overall perception of fairness in the course of performance appraisal, when they exercise their management prerogative of evaluating subordinates' performance. The decision concerning final performance scores lies within the discretion of the supervisor's judgement; still, because of the cognitive nature of the judgement itself, errors are to be expected.[17]

Supervisors approach performance appraisal differently to other non-supervising employees. While the latter experience performance appraisal primarily in terms of its impact on their careers, the former are more concerned with documenting the process. In addition, one way employees become sceptical of performance appraisal is when they notice supervisors' tendency to rotate high scores amongst subordinates, such that they effectively enforce turns in benefitting from financial increments or promotions. Such a practice affects employees' perceptions of performance appraisal fairness, since

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[14] See J.A. Colquitt, On the dimensionality of organizational justice: A construct validation of a measure, in Journal of Applied Psychology, 2001, vol. 83, no. 3, pp. 386–400; S. Taneja, R. Srivastava, N. Ravichandran, Consequences of performance appraisal justice perception: A study of Indian banks, in IUP Journal of Organizational Behavior, 2015, vol. 15, no. 3, pp. 33–57; T. Nasidic, La main juste des manageurs: les stratégies visibles et invisibles de justice corrective des manageurs et leurs antécédents, *op. cit.*, p. 148.

[15] T.T. Selvarajan, P.A. Cloninger, Can performance appraisals motivate employees to improve performance? A Mexican study, in International Journal of Human Resource Management, 2012, vol. 23, no. 15, pp. 3063–3084.

[16] S. Evans, D. Tourish, Agency theory and performance appraisal: How bad theory damages learning and contributes to bad management practice, in Management Learning, 2017, vol. 48, no. 3, pp. 271–291.

[17] The following is a non-exhaustive list of possible causes of judgement errors: comparison and contrasting with other employees' scores, the tendency to cluster scores together, first impressions, gender bias, or bias due to other inappropriate distinctions.

it shows that final scores are not based on well-defined measures that can be accounted for through objective feedback. In a 2005 survey of federal employees from 59 federal agencies in the US, almost 16% of respondents answered 'yes' to the question: 'During the past year, did you rate any employee higher or lower than you believe the employee deserved?' This answer is significant because it reports supervisors' own admission of unfair judgements in performance appraisal, which, in turn, reverberates on employees' reception of final scores.[18] Caution not to inflate financial budgets can also backfire by skewing employees' final performance appraisal scores. This is because organisations may then implement a forced ranking ratio distribution—particularly when performance results are linked to salary increments, promotions, or any other adjustment with a financial impact. This is another possible way in which employees might become dissatisfied with their score, as they would expect a different rating from the one made possible through a forced distribution quota.[19]

3. When Results Are Perceived as Unfair: Review Mechanisms and the Emirati Context

Ideally, performance appraisal should unfold through a transparent, clear, sound—and above all just—process that meets supervisors' and employees' expectations. This entails spelling out a systematic, structured procedure that helps maintain consistency and fairness in appraisal results. Furthermore, goals should be discussed and agreed upon directly, between the subordinate and his/her direct supervisor, at the beginning of each performance cycle. Thereafter, the supervisor continues to play a significant role in mentoring his/her subordinates and making available to them suitable opportunities for skills training, as well as resources, tools, and useful motivational practices to prevent potential drops in their performance. An ongoing feedback process should also be in a place for employees to share their impressions, worries, reactions, and thoughts, as well as for supervisors to offer guidance. This would minimise the risk of unexpected results showing up only at the end of the performance cycle. Finally, since performance appraisal results are usually linked to remuneration, promotion, and demotion decisions, the process

[18] Y.C. Lin, J.E. Kellough, Performance appraisal problems in the public sector: Examining supervisors' perceptions, in Public Personnel Management, 2019, vol. 48, no. 2, pp. 179–202.
[19] W.J. Heisler, M. Hannay, A question of ethics: An examination of stakeholder perspectives in the performance appraisal Process, *op. cit.*; see also H. Aguinis, H. Joo, R.K. Gottfredson, Why we hate performance management—and why we should love it, in Business Horizons, 2011, vol. 54, no. 6, pp. 503–507.

should take into account any legal requirements put down by the country in which a company operates.[20]

Despite this ideal scenario, not every company has a sound and transparent performance appraisal system in place, and this can lead to disagreements. For example, disagreements can arise as a consequence of poor communication on the part of managers; of refraining from providing ongoing feedback to employees; of performance goals that aren't sufficiently specific, clearly spelled out, mutually agreed upon, or that are unattainable due to factors beyond employees' direct control. In turn, this might lead to unsatisfactory performance appraisal results, and ultimately to termination of an employee's contract. When they are in place, internal review procedures can help address those cases when less than satisfactory performance might be ascribed to causes beyond employees' control. Typically, these internal procedures require discussion of employees' concerns with their line manager; if a conclusion is not reached between them, then appeals are usually escalated to the line manager's superior, the HR department, and finally to the top manager, whose decision will be final.[21]

External review mechanisms of performance assessments are equally necessary to incentivise managers to provide detailed feedback to their subordinates, and thereby avoid disagreements connected to performance appraisal. This is one of the reasons why the legal systems of many mature economies in the Western world have developed rules to govern the relationship between employers and employees in connection with performance appraisal. Moreover, pressure from formal groups, trade unions, and other legal entities generates additional incentives for organisations to produce accurate performance appraisal documentation—as doing otherwise would leave them exposed to employees' lawsuits upon allegation of discrimination in decisions concerning promotion, reallocation, hiring, and removal on the basis of biased performance scores.

The United Arab Emirates (UAE) is located in the Middle East, precisely on the Western Coast of the Arab Gulf. Culturally, it shares many common traits with other Arabic Gulf countries. It is also one of the fastest growing business environments,[22] as a consequence of the drive towards economic diversification.[23] At the same time, this is coupled with the UAE government's

[20] W.B. Zondi, The concept of performance appraisal and requirements for its successful implementation, *op. cit.*

[21] G. Dessler, Human Resource Management, 15th edition, Pearson, New York, 2017.

[22] N. Michael, Y. Reisinger, J.P. Hayes, The UAE's tourism competitiveness: A business perspective, in Tourism Management Perspectives, 2019, vol. 30, pp. 53–64.

[23] A.Z.E. Ahmed, The role of diversification strategies in the economic development for oil-depended countries the case of UAE, in The Business & Management Review, 2015, vol. 6, no. 2, pp. 207–216.

drive to increase wellbeing, to the point of establishing a Ministry for Happiness and Wellbeing. This invites attention towards concerns around employee motivation, job satisfaction, and overall wellbeing, in connection with their perception of accurate performance appraisal on the job.[24] On this basis, the UAE Federal Decree Law No. 11 of 2008, on Human Resources in the Federal Government ('UAE Human Resources Law'), contains a dedicated chapter—no. 5—on performance appraisal, which stipulates that employee output ought to be assessed primarily on the basis of defined objectives and competencies. This law binds all federal government entities, in connection with their procedures for allocating financial and non-financial rewards. Instead, private companies operating in the UAE are bound by the Federal Labour Law No. 8 of 1980 ('UAE Labour Law'), which differs from the UAE Human Resources Law, in that it does not explicitly regulate performance appraisal. This means that the adoption and design of performance appraisal schemes is left entirely to the discretion of individual companies, insofar as the private sector is concerned: this means that while large multinationals, as well as most medium-sized companies, have a performance appraisal system in place, the majority of small companies don't.

Finally, performance appraisal is a culturally bound technique, developed in the Western world and adopted widely, including in Middle Eastern countries. This might generate tensions with the role local cultures play—in the Arab world and the Middle East—in shaping human resource practices. For example, some commentators have suggested that bias in performance appraisal might occur as a result of a custom called '*wasta',* which is found in Saudi Arabia and also rooted in the culture of the wider Arab world.[25] 'Nepotism' is the nearest English translation of '*wasta',* which however cues a Middle Eastern culture of undertaking important decisions collectively, also by taking into consideration group memberships that define people's identities. These considerations evoke tension between Western approaches to performance appraisal and local culture. For instance, while Western managers might stick primarily to the level of an individual's performance—setting objectives and providing regular feedback—managers in the Arab world might also take into account the relationships, connections, and networks of their employees. This constitutes

[24] A. Reizer, Y. Brender-Ilan, Z. Sheaffer, Employee motivation, emotions, and performance: A longitudinal diary study, *op. cit.*

[25] S. Al Harbi, D. Thursfield, D. Bright, Culture, *wasta* and perceptions of performance appraisal in Saudi Arabia, in International Journal of Human Resource Management, 2017, vol. 28, no. 19, pp. 2792–2810.

an additional source of pressure on their decisions, which might, in turn, bias their feedback and employees' final scores.[26]

4. A Comparative Look at Performance Appraisal Regulation: The French Approach

We have just seen how the UAE Labour Law does not explicitly regulate performance appraisal with respect to private companies, despite the fact that this practice—supported by contractual requirements that employees achieve specific goals—is widespread. Having said that, different rules apply to civil servants working for federal agencies, for whom performance appraisal is mandatory in order to justify any increases in remuneration, pursuant to chapter 5 of the UAE Human Resources Law. If UAE legislation does not ordinarily interfere with performance appraisal agreements between employees and private employers, French legislation has instead moved towards a distinctive regulatory approach—which forms an important yardstick for comparison to imagine possible pathways for legal development in UAE Labour Law.

For this reason, this section introduces the French regulatory framework on performance appraisal. It does so in two steps. First, it clarifies the legal nature of the performance appraisal condition that employers might include in contractual agreements, in the light of the general theory of obligations and contracts, as well as of the judicial principles that have been put forth to aid interpretation and fill out legislative *lacunae*. Second, the section examines the regulatory impact of the newly introduced 'collective performance agreement', which has been allegedly introduced to allow for greater 'flexibility' in the employment relationship, by enabling dynamic adaptation of contractual provisions—including through the introduction or revision of performance appraisal procedures—to changing market circumstances.

4.1. The Performance Appraisal Condition in Employment Contracts

In their employment contracts, employers might include a clause to the effect of adding the achievement of specific thresholds (to be verified through performance appraisal) to the basic obligations of their employees. Such

[26] M. Branine, D. Pollard, Human resource management with Islamic management principles: A dialectic for a reverse diffusion in management, in Personnel Review, 2010, vol. 39, no. 6, pp. 712–727. See also P. Budhwar, K. Mellahi, Introduction: Human resource management in the Middle East, in International Journal of Human Resource Management, 2007, vol. 18, no. 1, pp. 2–10; S. Al Harbi, D. Thursfield, D. Bright, Culture, *wasta* and perceptions of performance appraisal in Saudi Arabia, *op. cit.*

thresholds may be spelled out in quantitative or qualitative terms, as laid out in the contractual clause. This type of contractual clause is known in French Law as a 'performance appraisal' clause or as a 'provided-targets-are-met' condition.
Employees are contractually bound to perform a particular type of work in exchange for their remuneration. However, this type of clause may also be added at a later time to the employment contract, in order to align the employee's work more closely to the needs of the organisation, so that the organisation might achieve envisioned results and improve its overall performance. Performance appraisal clauses in the employment contract offer an instrument through which management might try to amend the standards to which they wish to hold employees, at any time, in the light of the company's changing strategic priorities. The presence of one such clause would make those standards obligatory, to the point that the employment contract would be liable for termination without compensation, save for legally required severance pay. This type of condition is deemed to be valid, since the employer has the right to define goals for the employee's performance. However, it is not exempt from judicial review of the reasons underpinning contractual amendment, and of the extent to which those goals should be afforded priority.[27]
By signing a contract of employment with a clause stating 'provided targets are met' and annotating on the page where the clause appears, or on any other contractual document, the employee expressly and unequivocally manifests his/her will to accept the professional goals assigned to him/her by the employer. The employee also binds him-/herself to achieve these goals in conformity with specific parameters, especially concerning duration and unilateral review by the employer. Pursuant to Article 1231-1 of the French Civil Code, the goals that the employee undertakes to meet constitute an 'obligation of result'. This obligation is not limited to the nature of the goals to be achieved, but also extends to the agreed timeframe for achieving them. In view of this, a failure on the part of the employee to meet those goals amounts to a contractual fault. This means that the employee is, technically, in breach of contract when his/her work is found in the context of a performance appraisal exercise.
Although the 'provided-targets-are-met' clause is an expression of the parties' contractual freedom and derives from its binding character, employees might often challenge its validity. Predictably, this happens when the employer decides to terminate the employment contract on the basis of inadequate results on the part of the employee. This is where courts are usually asked to

[27] A. Mazeaud, Contrat de traval: exécution, in Répertoire de droit du travail Dalloz, 1993, vol. C, no. 39–39s, p. 18.

adjudicate the validity of including this type of condition in the context of an employment contract, or of other related documents.[28] This is how the French judiciary has been invited to clarify the basic principles pertaining to performance appraisal conditions.

In a case adjudicated by the Paris Court of Appeals, a seller of industrial equipment had been held liable for low demand for the brand, which he was in charge of marketing, and his dismissal for this reason had been upheld. The French *Cour de Cassation* reversed this decision, based on the absence of contractual documents obliging the employee to achieve the goals desired by the employer, as well as on the absence of proof that the brand's inability to break into the market could be attributed to the employee. Hence, the court held that the dismissal of the employee lacked a valid or substantive reason.[29]

In another court case, a coach had been dismissed by his football team on the basis of gross fault, in view of the poor results achieved by his team. In its ruling of 7 July 1993, the *Cour de Cassation* rejected the ground that the coach's poor results could be construed as gross fault.[30] Moreover, upon examining the coach's employment contract, it determined that he was only bound to an 'obligation of means'. It follows from these cases that an employee's failure to meet targets does not *per se* constitute a legitimate reason for dismissal, nor can it be construed as gross fault, whenever those targets haven't been stipulated in advance. Instead, when targets have been stipulated in the contract, French courts would uphold a dismissal on the basis of an employee's failure to meet them: since the lack of professional competence on his/her part now amounts to a breach of contractually stipulated obligations, it follows that the dismissal would be supported by a legitimate and substantive reason. In such a case, judicial review would rather focus on the validity of any targets that have been set, and on whether failure to achieve them can be ascribed purely to poor professional performance by the employee.[31] Performance appraisal clauses place employees under an obligation of result, such that, in order to establish an employee's failure to meet contractual obligations, the employer need only prove that the agreed result was not achieved. In his/her defence, the

[28] Y. Aubrée, Contrat de travail: clauses particulières, in Répertoire de droit du travail Dalloz, 2017, vol. C, no. 116–117, pp. 36–37.

[29] Cour de Cassation, Chambre sociale, September 22, 1993, 92-40.504, https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007185371 (accessed June 6, 2020).

[30] Cour de Cassation, Chambre sociale, July 7, 1993, 89-44.850, https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007189989 (accessed June 6, 2020).

[31] C, Gendraud, L'insuffisance de résultats d'un salarié peut-elle constituer une cause réelle et sérieuse de licenciement ?, in Revue Recueil Dalloz, vol. 38, 1994, p. 305

employee will then have to prove that such failure is due to a reason that is not attributable to him/her. As can be seen, the shift from an 'obligation of means' to an 'obligation of result' weakens the employee's position. This shift marks a significant development in the role that contracts may play in individual labour relations. Formally speaking, admitting the possibility that a clause might alter the nature of the obligation imposed upon an employee opens new possibilities for employment contracts. From the employer's perspective, the opportunity to shift the nature of the employee's obligation from one of means to one of result bears testimony to an increasing impact of competition and focus on effectiveness in the employment relationship. At the same time, this development heads in the direction of strengthening the leverage that the employer has, in imposing additional contractual obligations on the employee, and this inevitably deepens a relationship of dependence between him/her and his/her employer.

A long-standing jurisprudence from the *chambre sociale* (social issues section) of the *Cour de Cassation* upholds stipulations that place the employee under an obligation to meet professional targets, as long as these are set out in his/her employment contract.[32] On this basis, the court has also upheld the stipulation that an employee will be bound to achieve the professional targets set by the employer, subject to the employee's approval, whilst referring to a separate agreement for the determination of criteria and conditions to ascertain that those targets have been fulfilled.

In point of law, once an employee is found lacking in a performance appraisal exercise, with respect to targets that had been agreed upon, he/she will then become liable to dismissal due to the inadequacy of those results. The employee may dispute the dismissal decision, and demand judicial review of his alleged non-compliance with the contractual condition and of the legitimacy of termination of the employment relationship. French courts subject 'provided-targets-are-met' clauses to the same scrutiny as conditions of avoidance. Therefore, the condition needs to be realistic and achievable to produce effect. At the same time, in order to mitigate the negative effects on employees of such a position, courts have crafted an exemption in case the employee can establish a fault committed directly by the employer, or a fault not directly committed by the employer, but for which the employer's organisation remains liable.[33]

It is also worth noting that, in some cases, a 'provided-targets-are-met' clause was not found to be not strictly necessary for dismissal, but it helped the employer justify a decision to dismiss an employee who had been neglecting

[32] Y. Aubrée, Contrat de travail: clauses particulières, *op.cit.*, p. 37.
[33] Y. Aubrée, Contrat de travail: clauses particulières, *op.cit.*, p. 37.

his work duties for some time.[34] Therefore, another reason an employer might want to include a performance appraisal condition in the employment contract is to shelter him-/herself against the legal and financial consequences of arbitrary dismissal.

4.2. Introducing Performance Appraisal Through Collective Performance Agreements

In French Labour Law, there is a general principle whereby a collective agreement cannot ordinarily prevail over the most beneficial provisions of an individual employment contract, which do not grant the employer authority to amend it unilaterally.[35] However, the French Labour Code has witnessed limited attenuations of this principle at Articles 1224-3 and 1224-3-1. These articles specify that, in the event of transfer of a service—hitherto provided under private law rules—into public hands (or vice versa) an employee may be dismissed, independently of any economic reason, if he/she refuses amendments to his/her employment contract, whenever a collective performance agreement has been put into place.[36]

In line with this approach—and in addition to individual performance appraisal or provided-targets-are-met clauses—France has introduced a new type of collective agreement, with the intention of adding 'flexibility' to the employment relationship. So-called 'collective performance agreements' were introduced, as a new article of the French Labour Code, in two steps. First, by Ordinance No. 1385-2017 of 22 September 2017, and then by Law No. 217-2018 of 29 March 2018, which ratified the former.[37] The aim of collective performance agreements is to enable contractual stipulations to keep the pace of market developments or market decline. Such agreements are typically justified by economic downturns. However, they could equally form part of a proactive management strategy aiming to develop the business and promote its growth.

For this reason, Article 2254-2(I) of the French Labour Code identifies the conditions in which a collective performance agreement might amend certain elements of the organisation and remuneration of work, or introduce new

[34] F. Laronze, Portage salarial, in Répertoire de droit du travail, Dalloz, Paris, 2018, vol. P, n 36, p. 13.

[35] Y. Pagnerre, Les accords de performance collective, in Revue droit social, 2018, vol. 9., p. 694. In US and Canadian law, on the other hand, collective agreements are held to prevail over individual will.

[36] V. Loquet, Modification du contrat de travail pour un motif non inhérent à la personne du salarié: La clarification se poursuit, in Revue droit du travail, 2019, vol. 8, p. 576.

[37] B. Gauriau, L'accord de performance collective depuis la loi n. 2018-217 du 29 mars 2018, in Revue droit social, 2018, vol. 6, p. 504.

geographical or professional mobility policies. These agreements can be undertaken to respond to organisational necessities, or to the need of maintaining and developing employment. Art. 2254
2(II) emphasizes that a collective performance agreement replaces, by force of law, those conditions found in individual employment contracts, which stand in contradiction. Pursuant to Art. 2254-2(V), when an employee refuses the new conditions, he/she can be dismissed for a special reason, which constitutes a valid ground for termination, whilst enjoying certain minimum guarantees.
For the purposes of this article, it is worth noting more specifically what sort of elements of the employment relationship can be amended through a collective performance agreement, and how. One such agreement might (1) amend the duration of work, especially its organisation and temporal allocation; (2) amend remuneration, whilst complying with the minimum wage levels stipulated for different levels of organisational hierarchy; and (3) define the conditions for professional or geographical mobility within the organisation. A collective performance agreement may be focused on either *or all* of the points mentioned above, and may include provisions that are contrary to, or inconsistent with, those stipulated in individual employment contracts.
In connection with performance appraisal, this means that one such agreement might either introduce binding parameters for performance appraisal, where they were absent from the individual employment contract, or amend them in such a way as to keep pace with market developments. In this sense, therefore, collective performance agreements are another source—beyond individual contractual clauses—by which employers might introduce a regime of performance appraisal with binding targets. The textual basis for introducing performance appraisal clauses via a collective performance agreement might be found in Article 2254-2(I). This is because performance appraisal or 'provided-targets-are-met' clauses can be construed as changes to the way remuneration is calculated, by introducing conditions that might affect the employer's obligation to provide remuneration. Namely: if targets are met, then the condition for remuneration will be fulfilled, and the employer will be obliged to pay his/her employees. If they aren't met, then the payment of remuneration will be discontinued or reduced accordingly.[38]
When an employee rejects changes arising from the application of a collective performance agreement, he/she becomes liable for dismissal for a special reason, which is exempt from the basic guarantees relating to termination on

[38] Y. Pagnerre, Les accords de performance collective, *op. cit.*, p. 694; L. Bento de Carvalho, Le contentieux des accords d'entreprise au prisme du contrat d'adhésion, in Revue Droit social, 2019, vol. 10, p. 869.

economic grounds.[39] In response to this predicament, however, the French Constitutional Court has stated the same guarantees need to be provided as for the dismissal of an employee for personal reasons—especially with regard to pre-dismissal interrogation, notification, warning, and compensation.[40] A commentator has also suggested that, in a court of law, the employee might construe the employment relationship as a '*contact d'adhésion*' (standard form contract), which would make possible a degree of judicial scrutiny of any terms added or amended by means of a collective performance agreement.[41] These legislative developments in the French system demonstrate that, within the framework of labour law, a new approach co-exists with the general principle mentioned at the beginning of this section—a new approach that seeks to favour collective interest over individual interest, while still providing some guarantees.

Notably, collective performance agreements are allowed to amend certain key elements of the employment contract, like remuneration. However, it helps to remind oneself of the legal treatment of remuneration clauses as part of an employment contract—in order to delimit what kind of amendments are possible, even for a collective performance agreement. First, the terms of an employee's remuneration cannot be altered without the consent of the employee him-/herself, instead they can be changed only if a clause has been agreed for this purpose in the contract—or if the clause in the individual contract has been replaced by that of a collective performance agreement. However, on no condition can the employer reserve exclusive authority to adjust remuneration. On this basis, any conditions stipulating that the employer has the right, at any time, unilaterally to adjust the rates and terms of payment of remuneration will be deemed ineffective and void.[42]

While collective performance agreements provide added flexibility to increase economic returns, increasing the pace of work may equally have a direct impact on the health of employees. In connection to this trade-off, the French *Cour de Cassation* has acknowledged that the employer is equally under an 'obligation of result' to ensure the safety of employees. Therefore, 'it is forbidden for the

[39] L. Bento de Carvalho, Le contentieux des accords d'entreprise au prisme du contrat d'adhésion, *op.cit.*, p. 867.

[40] B. Gauriau, L'accord de performance collective depuis la loi n. 2018-217 du 29 mars 2018, *op.cit.*, p. 504.

[41] L. Bento de Carvalho, Le contentieux des accords d'entreprise au prisme du contrat d'adhésion, *op.cit.*, p. 867.

[42] M.-C. Escande-Varniol, Salaire: définition et formes, in Répertoire de droit du travail Dalloz, 2013, vol. S., no. 289-291, p. 66.

employer, in exercising his management function, to allow measures that would be detrimental for the security and safety of employees'.[43]

5. UAE Law at the Test of Performance Appraisal

The UAE has long been a destination for foreign workers. In recent years, it has also witnessed significant economic and social development and, with it, an increase in the number of employment contracts. In terms of employment relations, this has also ushered a trend for employers to set targets for their employees, and to evaluate the latter's performance accordingly. This section revisits the current legal coverage for performance appraisal in the UAE, in comparison with the developments just observed in French Labour Law.

Before examining the detail of legislative and jurisprudential solutions available in the UAE with respect to performance appraisal clauses—compared to France—it is worth recalling some macroscopic differences between the two systems. The UAE, unlike France, is not a signatory to the International Labor Organisation's Right to Organise and Collective Bargaining Convention of 1949 (No. 98) and to its Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87). It is without a doubt that acceptance of the provisions contained in those agreements would alter the practice of industrial relations as well as affect the position of the UAE judiciary in the face of any attached litigation. At the same time, much of the existing Emirati legislation in the field of labor law finds its inspiration in international treaties and agreements[44]—including some of the ILO conventions signed by other Arab Gulf countries[45]—which primarily demand extending any existing legislative protection to workers, regardless of their nationality. [46]

Looking at domestic sources of law, the UAE Federal Labour Law No. 8 of 1980 ('UAE Labour Law') remains the primary source regulating industrial relations.[47] It establishes a number of formal and objective conditions that

[43] Cour de cassation, Chambre sociale, March 5, 2008, n° 06-45.888, cited in S.D. Noisette, Performance et droit du travail, *op.cit.*, p. 20.

[44] A.H. Najida, Compendium of the Labor Law and Social Legislation of the United Arab Emirates, 1st edition, Al Bayan Commercial Press, Dubai, 1998, p. 70.

[45] K.A.R. Al-Mishaal, Labor Standards, the World Trade Organization and the Expected Effects on the Kingdom of Saudi Arabia, in Imam University Journal, 2015, vol 2, p. 211.

[46] I.A. Belhoush, Z.A. Zayed, Protecting Worker's Wages According to the Provisions of the Federal Labor Law, in University of Sharjah Journal of Legal Sciences, 2020, vol. 17, no. 1, p. 208.

[47] B.A.F. Al-Sarhan, A Study of Employers' Authority to Seize Employee Wages: An Analytical Study of Labor Relations in the UAE Labor Law No. 8 of 1980, in University of Sharjah Journal of Legal Sciences, 2018, vol. 15, no. 2, p. 242.

must be fulfilled in the event of termination of employment contracts. It follows that the power to terminate employment is subject to state control, both through the intervention of administrative agencies and through judicial oversight.[48] Historically, the law has been met with consistent efforts towards implementation by the Ministry of Labor, irrespective of the nationality of workers.

Moving closer to the specific focus of this piece on performance appraisal clauses, the main legislative reference applying to private sector employment is the aforementioned UAE Labour Law, and subsequent amendments. In that source, no explicit reference is made to performance appraisal and to the achievement of targets, neither in connection to individual employment agreements, nor to collective ones. At the same time, the UAE Labour Law does not prohibit the inclusion of a 'provided-targets-are-met' clause in the employment contract or any attached documents.

Article 117/1 of the UAE Labour Law allows both the employer and the employee to terminate an open-ended employment contract for a valid reason. This means that, if the reason for termination is not deemed valid, arbitrary termination will have occurred, which is sanctioned by Article 122 of the same Law.[49] If UAE courts were to follow the approach adopted by French courts, a performance appraisal condition included in an employment contract should alter any attached obligation of the employee from being an 'obligation of means' to an 'obligations of result'. This, in turn, ought to focus judicial scrutiny on whether the goals set by the employer under the contract are valid or not, and whether failure to achieve them might be ascribed solely to poor professional competence on the part of the employee.

However, when reviewing the grounds for termination, UAE courts do not seem to distinguish between obligations of result and obligations of means. It is respectfully submitted that this leads to decisions that, upon closer examination, may lack strong and convincing reasons. For example, a recent ruling from the Dubai Court of Cassation states that the defendant's termination of an employment contract due to the worker's failure on a number of counts (failure to develop a marketing strategy, to apply professional standards to new proposals, to enforce operational standards in budgeting and reporting, and to manage professional marketing plans) was not to be deemed an abusive termination. In so doing, the court did not nuance its distinctions, based on whether the worker was obliged to deliver a determined

[48] O.A. Al Aidarous, Federal Law No. 8 of 1980 on the Regulation of Labor Relations: A Comparative Study with Arab Gulf Labor Laws, 1st edition, Al Ain Modern Press, Al Ain, 1989, p. 335.

[49] A. Sarhan, A.A. Al-Mahdawi, Y.M. Obaidat, Federal Law No. 8 of 1980 Regulating Labour Relations and Its Amendments, 1st edition, University Library, Sharjah, 2012, p. 282.

result, or whether he had simply committed to best efforts (obligation of means). [50]

This approach seems to us to lack precision. When an employee fails to achieve targets that were not first put to his agreement, this should not automatically amount to a valid reason for dismissal, nor should it be construed as a grave fault on the employee's part. This is because an employment contract is based on personal consideration between employer and employee, with the former presumably weighing the latter's skills and suitability towards the desired work.[51] It follows that only when targets have been spelled out in the contract, should failure to meet them constitute a material and valid reason for termination—a breach of contractual obligations. The approach adopted by French courts seems to offer greater precision and to reduce arbitrariness in the employer's decisions. Hence, it would have been desirable if the Dubai Court of Cassation had first ascertained whether the claimant had committed to best efforts (obligation of means), or to the achievement of an actual result, before upholding a dismissal due to poor performance.

UAE Labour Law does not regulate collective performance agreements as an *ad hoc* source of obligations in labour relations, in the same way the French legal system does. Instead, Articles 154–165 of the UAE Labour Law address 'collective labour disputes'. These articles allow for the mediation of collective disputes by the competent Labour Department, then by a Conciliation Commission formed by the Ministry of Labour and Social Affairs, and finally usher the intervention of a Supreme Arbitration Committee for the Resolution of Collective Labour Disputes. These interventions are meant to solve collective disputes between an employer and a group of employees, for instance as might arise in the course of introducing or altering performance appraisal parameters in line with market needs—a situation that in French law is explicitly accounted for through collective performance appraisal agreements.

At the end of this mediation process, Article 163 of the UAE Labour Law establishes that neither party to the mediation may re-initiate a dispute in respect of which a final decision has been made by any of the mediating bodies that have been referred to above—except with the consent of both parties to the dispute. In this sense, a similar result to a collective performance agreement appears to be possible—through a different avenue—also in the UAE. In

[50] Dubai Court of Cassation, Labor Decision No. 2018/11153, December 27, 2018, unpublished.

[51] A.R.H. Yassin, An Introduction to Labor and Social Security Laws, 1st edition, Publications of Dubai Police College, Dubai, 1992, p. 399.

addition, Article 164 of the UAE Labour Law clarifies that the aforementioned committees are to reach a decision through the application of any laws in force in the UAE, but also of the provisions of Islamic *Shari'a* law, and any compatible rules of custom, principles of justice, of natural law, or of comparative law. For our purposes, the explicit reference to comparative law greatly widens the scope of the rules that can be applied to this type of dispute—which underscores the importance of comparative studies like the present one.

While the UAE Labour Law applies to private sector employment, Articles 30–35 of Federal Law Decree No. 11 of 2008, on Human Resources in the Federal Government (UAE Human Resources Law) explicitly regulate performance appraisal—although with a limited scope of application to civil servants working in ministries, in other government authorities and organisations, as well as in any federal regulatory bodies. In this piece of legislation, the regulation of performance appraisal occurs in connection with the employee reward system.

On this basis, the UAE Human Resources Law establishes a legal framework for performance appraisal, laying down objective criteria for rewarding employees for their achievements, in terms of productivity, attendance, innovation, and quality of output. [52] Accordingly, it is established that line managers are to review employee performance on an annual basis through an apposite appraisal report, [53] while employees are undergoing performance appraisal. In particular, an employee's annual appraisal in accordance with the performance management system ought to provide the primary criterion for determining any special allowances pertaining to salary increments and promotions.

This regime is markedly different to the one applying to private sector employees. First, employee performance appraisal finds its source in the law, and not in an individual employment contract or other collective form of agreement: government ministries, public authorities and organisations, and federal regulatory bodies do not need to include an express term to that effect in any contractual documents. Secondly, performance appraisal is regulated solely in connection to the allocation of rewards. Instead, failure by an employee to achieve targets, or his/her poor performance, do not

[52] S.S.A. Albloushi, Promotion System and its Impact on Employee Satisfaction: the Case of the Ministry of Higher Education in the UAE, 1st edition, Federal National Council Publications, Abu Dhabi, 2010, p. 32.

[53] Y.E.H. AlSaberi, The Main Employee Appraisal Systems in Government Organisations of the United Arab of Emirates in Comparative Perspective, Paper presented at the Eighth International Seminar on Civil Service in Gulf Cooperation Council Countries, Publications Series of the Management Development Institute, 2002, no. 2, p. 50.

automatically become grounds for termination of his/her service, but only for cancelling or reducing his/her remuneration on a case-by-case basis.

In view of this, it is respectfully submitted that legislative and judicial intervention in the UAE ought to correct this disparity, in light of the principle of distributive justice. Equality among employees is an important basis for performance appraisal, which reflects positively on job satisfaction and, consequently, on productivity in the organisation. There is no doubt that equality requires the application of fair standards in performance appraisal exercises. How these standards of fairness ought to be determined depends on the concept of justice adopted by the organisation and by the court entrusted with judicial review. In this respect, there are two specific notions of justice that might apply here, namely: distributive and corrective justice.

Distributive justice is based on proportional equality—i.e. allocation of an organisation's resources (whether in terms of remuneration, rewards, or promotion) among its employees according to their respective merits and characteristics. At the same time, distributive justice also requires that what the employee receives in the allocative process is not just proportional to his/her individual situation, but also holds up in comparison with his/her colleagues, and with his/her peers in other organisations. Instead, corrective justice is based on arithmetical equality— i.e. treating all individuals on an equal footing regardless of merit—and thereby makes sure inequalities are addressed on the individual level at which they occur, without regard to comparative and distributive concerns.[54]

Consistency of treatment on the job is a key factor in organisational justice, and if this is not addressed it can impact the outcomes of performance appraisal: there is an inevitable correlation between job satisfaction and distributive justice, taken as a dimension of overall organisational justice. The more an employee perceives the stable application of distributive justice as a criterion, the more satisfied he/she will be, with positive spillovers on his/her productivity.[55] This point must be weighed alongside the other parameters in performance appraisal exercises; however, equality and consistency of treatment must be borne in mind as a primary criterion to enable distributive justice within an organisation—and should therefore be encouraged through appropriate organisational and legal incentives.

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[54] M.H. Malin, Topic in jurisprudence: The distributive and corrective justice concerns in the debate over employment at-will: some preliminary thoughts, in Chicago-Kent Law Review, 1992, vol. 68, p. 117. See also E.J. Weinrib, Corrective justice in a nutshell, in University of Toronto Law Journal, 2002, vol. 52, no. 4, pp. 349–356, at 351.

[55] R. Al-Fadhil, T. Somia, Distributive justice and its relationship with job satisfaction of the organization's employees, in Journal of Development and Human Resources Management, 2017, vol. 6, p. 202.

6. Conclusion

In this paper, we have started out by situating performance appraisal as a management technique. We remarked the importance of organisational justice—in its procedural, distributive, interactional, and corrective dimensions—for driving productivity. This feature isn't so prominent in Emirati corporate life, partly as a result of the collectivism that pervades certain cultural attitudes like *wasta*. This is where a legal framework may guide organisations towards embedding the different dimensions of justice, even in the presence of a performance-conscious style of management.

At the management level, fairness in performance appraisals could be secured more easily, if organisations were to adapt their bylaws with an eye for the multiple dimensions of organisational justice. This would also open up a middle ground between the alternatives of organisations appealing adverse decisions and employees' lawsuits. Sound internal appeals procedures, with outside legal options, would afford employees more opportunities for redress if they perceived their performance assessments as unfair. Finally, training managers in providing ongoing feedback to employees would play another significant role in mobilising employees towards organisational outcomes.

From a legal standpoint, placing performance appraisal conditions in contractual documents is a way for employers to seek a direct increase in productivity through making certain standards of performance obligatory. However, there is a fine line to be trodden before contractual targets overshoot what is possible for the employee to achieve. Therefore, to counterbalance the employer's right to benefit from a performance appraisal condition, judicial review should be allowed on whether the employer has put employees in the condition of meeting those targets—and refuse enforcing them it is established that the employee has been tasked with unattainable goals.

A performance appraisal clause in the employment contract works by shifting the nature of the obligation from one of means to one of result. This makes any dismissal for failure to meet targets more resistant to legal scrutiny. At the same time, legal checks need to exist to prevent employers from arbitrarily transferring to the employee a substantial part of his/her entrepreneurial risk. In France, stipulation of a performance appraisal clause in the contract, or in any of its attachments, often marks the difference between valid and arbitrary dismissal, when employees fail to meet targets. At the same time, this is counterbalanced by judicial review that the conditions set by the employer are not difficult or impossible to achieve, in order to afford an excuse for termination at will. In order to avoid this and to protect the interests of employees, competent judicial authorities must ensure that any contractually stipulated targets are attainable, specific, measurable, realistic, and time-bound.

Another notable development in French labour law is the possibility for collective performance agreements to prevail over the more favourable provisions of an individual employment contract (with the risk, in case of refusing the contractual amendment, for employees to be dismissed on special grounds). This marks a change in approach, where previously protection of the employees' interests against the bargaining power of the employer took undisputed priority. At the same time, guarantees are still needed to protect employees from the arbitrary use of collective performance agreements as a shortcut towards terminating the employment relationship, ensuring guarantees in connection with pre-dismissal interrogation, notification, warning, and compensation. Secondly, another set of guarantees pertains to health and safety. Increased burdens on employees through performance appraisal clauses or collective performance agreements must be accompanied by measures to ensure that their health is safeguarded. Therefore, if the employee proves that any additional goals assigned to him/her by the employer are a direct cause of health damage, French courts will hold the employer liable for it. This forces the employer to strike a balance between the drive to increase employees' performance, by 'raising the bar' through contractual means, and preserving employees' health.

When it comes to the UAE, the Human Resources Law mandates performance appraisal for the allocation of benefits to civil servants employed by a public institution. Instead, the Labour Law—which applies to the private sector—leaves performance appraisal largely to the parties' agreement and managerial practice. In view of the balance that legal regulation has made possible in French law, we deem it would be desirable to update the UAE Labour Law to mandate that performance assessment criteria be to be agreed contractually, either through individual or collective bargaining. This can be a suitable way of striking a balance between the interests of the employer and those of the employee, while at the same time establishing legal checks that allow judicial review in case of disputes. When it comes to judicial review of dismissal for unsatisfactory performance, we also deem it more precise to distinguish systematically between obligations of means and obligations of result, as a way of ascertaining whether failure to meet desired targets might constitute *per se* a valid reason for dismissal. Lastly, addressing the disparity of treatment between private and public employees in the UAE cues the broader question of ensuring distributive justice in performance appraisal, to ensure the workforce perceives a consistent assessment of performance. Distributive justice, by bringing predictability in allocating decisions, can powerfully increase incentives towards productivity, at the same time as strengthening organisational justice

Mediation in Labour Disputes: its Implementation in Ukraine and the International Experience

Mykhailo Shumylo [1]

Abstract

The aim of the paper is to study and compare the experience of implementing mediation in individual and collective labour disputes in the United States and in some countries of the European Union (Italy, France). Both quantitative and qualitative approach is implemented, supported by historical-legal and comparative methods. The Government of Ukraine is attempting to implement mediation, particularly in labour disputes. The implementation of mediation is a necessary decision in which legislative, executive and judicial branches of power are interested. This paper focuses on issues of quicker labour dispute resolution in Ukraine, on the improvement of collective labour dispute resolution and it examines the idea of bringing the protection of labour rights in Ukraine closer to the EU standards.

Keywords – *mediation; labour disputes; ECJ case law; individual labour disputes; collective labour disputes.*

1. General Remarks

In Ukraine, mediation has been a well-known and thoroughly studied form of alternative dispute resolution for a long time. In this respect, there is no need to give a lengthy explanation of the tools and goals of mediation. In general,

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mediation in Ukraine can be described with two synonymous words, which however might have some differences: a *bazaar* (a spontaneous, disorganized and unregulated trade) and a *market* (a system of regulated relations in different areas, in particular trade). Ukrainian mediation is more reminiscent of the bazaar, since it exists *de facto* and this form of ADR (alternative dispute resolution) is in the stage of active development. There has been some progress in some areas of mediation, such as the provision of mediation services, training of mediators and development of professional associations. However, until recently mediation practice *de jure* has been actively ignored at the government level. Despite the fact that many draft laws on mediation were submitted to the parliament, all the attempts to establish a legal framework were futile and the legislative process did not progress further than the registration stage. Accordingly, the mediation sector is a self-regulating system at this moment, and it is characterized by a chaotic state of things. As of today, there is hope that the law will be enacted in the near future. Draft law (№ 3504) "On Mediation" was registered in the Verkhovna Rada of Ukraine on 19 May 2020, and it passed the first reading on 15 July 2020. The adoption of this act can lead to a major development of mediation services in different areas.

2. *Ad Fontes*

Mediation in the United States has its roots in the colonial period. The early colonists had a strong need to avoid any conflict that would undermine the stability of their community. In the late 1800s, the growing unrest between labour and management in the railway industry forced the federal government to intervene. The congress first passed the Arbitration Act of 1888, which provided for mediation and arbitration of railway labour disputes. The Erdman Act of 1898 followed in an attempt to strengthen the Arbitration Act. The Newlands Act of 1913 led to the establishment of the Board of Mediation and Conciliation, and in 1926, the congress passed the Railway Labour Act, which created the Board of Mediation, later renamed the National Mediation Board. In 1947, the Taft-Hartley Act created the Federal Mediation and Conciliation Service "to prevent or minimize interruptions in the free flow of commerce growing out of labour disputes, to assist parties to labour disputes in industries affecting commerce, to settle such disputes through conciliation mediation."[2]
In view of the above, we can conclude that mediation as a form of ADR originated in labour disputes, and therefore, it is natural that mediation procedures will be enshrined in labour legislation.

[2] W. J. Barry, *Appropriate Dispute Resolution*, Wolters Kluwer Law & Business, New York, 2017, p. 81.

3. Court Statistics on Labour Disputes

Statistics indicate that the number of cases regarding individual labour disputes is still significant. There were 20,593 labour disputes in 2018 and 21,133 labour disputes in 2019 before courts of general jurisdiction. Among them, the following categories should be highlighted:

- reinstatement claims – 2,756 cases in 2018 and 2,650 cases in 2019;
- claims for unpaid salary – 11,762 cases in 2018 and 11,880 cases in 2019;
- compensation for material damage caused to state enterprises and organizations by employees – 334 cases in 2018 and 406 cases in 2019.

The total number of cases heard in courts was 14,400 in 2018 and 14,418 in 2019, among which a final decision was made in 12,327 cases in 2018 and 12,424 cases in 2019. The compensation awarded by courts amounts to 482,548,638 UAH in 2018 and 370,815,058 UAH in 2019, in which moral damage was estimated at 4,378,106 UAH in 2018 and 21,501,095 UAH in 2019. In reinstatement cases, courts awarded 34,261,552 UAH (2018) and 25,748,751 UAH (2019) including moral damage that amounts to 466,816 UAH (2018) and 898,471 UAH (2019); unpaid salary cases – 390,877,525 UAH (2018) and 269,510,022 UAH (2019); cases regarding compensation for material damage caused to state enterprises and organizations by employees – 2,159,970 UAH (2018) and 7,969,407 UAH (2019). In general, courts of first instance upheld claims in 68% of cases in 2018 and 84.2% of cases in 2019.

As for statistics on judgments passed by appeal courts in 2018/19, the overall number of judgments made by lower courts that were reviewed by appeal courts was 3,408, and this number increased to 4,341 in 2019. Among them, mention should be made of judgments regarding reinstatement claims – 768 (2018) and 683 (2019), recovery of unpaid salary – 1,116 (2018) and 1,563 (2019), compensation for material damage caused to state enterprises and organizations by employees – 40 (2018) and 39 (2019).

Appeal courts upheld 2,127 decisions made by lower courts in 2018 and 2,579 decisions in 2019, specifically: judgments regarding reinstatement claims – 435 (2018) and 378 (2019), collection of unpaid salary – 744 (2018) and 109 (2019), compensation for material damage caused to state enterprises and organizations by employees – 26 (2018) and 19 (2019).

The number of overturned decisions amounts to 916 in 2018 and 1,202 in 2019, specifically: judgments regarding reinstatement claims – 244 (2018) and 240 (2019), recovery of unpaid salary – 249 (2018) and 305 (2019), compensation for material damage caused to state enterprises and organizations by employees – 11 (2018) and 20 (2019).

The number of amended decisions is 303 in 2018 and 532 in 2019, namely: judgments regarding reinstatement claims – 87 (2018) and 58 (2019), recovery of unpaid salary – 114 (2018) and 243 (2019), compensation for material damage caused to state enterprises and organizations by employees – 3 (2018) and 0 (2019).

To sum up, appeal courts upheld 62.4% of appeals in 2018 and 59.4% of appeals in 2019, overturned 28.2% of decisions in 2018 and 27.7% of decisions in 2019, modified 8.9% of decisions in 2018 and 12.3% of decisions in 2019.

The third-largest category of cases received by the Civil Court of Cassation is "labour disputes" (2,138 in 2018 and 2,276 in 2019) surpassed only by contract-related disputes (8,940 in 2018 and 2,869 in 2019) and disputes concerning the collection of damages (2,687 in 2018 and 2,869 in 2019), with this tendency which is still visible nowadays.

Throughout 2018, the Civil Court of Cassation issued a judgment in 1,542 cases regarding labour issues. Within this category, the Court upheld 1,187 lower courts' decisions, that is 77% of all labour cases; 343 decisions (22,2%) were overturned.

In 2019, the Civil Court of Cassation handed down a judgment in 1,841 cases regarding labour issues. The Court upheld 1,459 lower courts' decisions. i.e. 79.3% of all labour cases; 355 (19.3%) decisions were overturned.

Due to the enormous workload of the Civil Court of Cassation, there is a high probability that cases relating to labour disputes will be delayed, and this may lead to a breach of the reasonable time requirement.

4. Status Quo

The current Labour Code still contains the old provisions (Chapter XV) that govern the activities of the Labour Dispute Committee (one of the bodies established within a company, organization, or institution) that is responsible for the resolution of individual disputes between an employee and an employer. The adoption of the Constitution of Ukraine in 1996, which states that everyone has the right to appeal directly to a court and the jurisdiction of the courts extends to all legal relations that arise in the State, has resulted in the dismantling of the Labour Dispute Committees.

In this context, it is necessary to remember that the law should not be a compilation of statutory provisions covered with dust but it must be a compilation of frequently-used and effective legal norms. In case of inefficiency and conflict of legal norms that arise during their application, the legislature is required to fix this problem by updating and improving relevant provisions. It would be unreasonable to revive legal provisions that govern Labour Dispute Committees, given that these forms of dispute resolution have

become a thing of the past. Yet the implementation of mediation services in the future has to bring a positive impact.

Due to the fact that the parliament did not adopt the law on mediation, new changes to the civil procedure law were made as an alternative strategy. The amendments to the Civil Procedure Code in 2017 stipulated that the dispute could be settled with the involvement of the judge. However, the implementation practice of the new instrument has been ineffective, and, as a result, there have been only a few cases regarding family matters. Also, there is no specific data that would indicate the reduction of labour disputes before courts of general jurisdiction after the amendments.

We can state that the number of labour disputes does not decrease and the practice of dispute resolution with the involvement of the judge did not become widely used. Thus, there is a strong need to establish mediation procedures as an out-of-court instrument for settling labour disputes.

5. *Quo Vadis?*

The draft law «On Labour» contains Chapter VIII, titled «Individual Labour Disputes». Article 86 of the draft law provides that mediation in labour relations is a pre-trial and out-of-court dispute resolution procedure, whereby the parties assisted by one or more mediators settle a dispute through negotiation. In order to resolve a dispute, the parties to the labour relations have the right to initiate a mediation procedure and invite a mediator (mediators). The mediation procedure is based on the parties' mutual consent. If the parties decide to settle a dispute, they will conclude a settlement agreement in a written form signed by the parties and the mediator. In case of a breach of the settlement agreement by one of the parties, the other party will be entitled to take legal action. In the event of a labour dispute, the parties have the right to initiate a mediation process before filing a lawsuit or during the judicial proceedings.

Moreover, the draft law introduces an incentive to mediate in the form of an exemption of court fees for submitting a claim, and the provision applies to these relations regardless of the result of mediation. On the one hand, this initiative would be approved by the parties to civil litigation, but on the other hand, it is inconsistent with Draft law № 2427 «On Amendments to Certain Laws of Ukraine on Court Fees» dated 13 November 2019. According to the draft law, section 5(1)(1) of the Law of Ukraine «On Court Fees» states that, if a labour dispute arises, employees (former employees), who filed a lawsuit, are exempt from payment of court fees. If the legislature approves the draft law, the parties' motivation to start mediation will disappear because they are no longer under the obligation to pay court fees.

The draft article on the exemption of parties who concluded the mediation procedure is consistent with clause 16 of Guidelines for a better implementation of the existing Recommendation on alternatives to litigation between administrative authorities and private parties dated 7 December 2007. All states have to promote mandatory participation in ADR procedures as a prerequisite to start judicial proceedings.

6. Mediation and Collective Labour Conflict

Particular attention should be given to collective labour disputes. Current legislation provides for the out-of-court settlement of collective labour disputes, and some judicial practice exists that confirms the application of the relevant legal norms (Decision of the Civil Court of Cassation of 29 May 2019, case no. 479/58/19; Decision of the Grand Chamber of the Supreme Court of 1 October 2019, case no. 916/2721/18). Provisions of the previous draft laws on mediation were not applied to collective labour disputes, an aspect which generated confusion within the legal community. The analysis of the draft law «On Mediation» no. 2706 indicates that it does not contain similar restrictions in comparison with the former proposals, and this approach is justified. However, the draft law «On Labour» defines mediation as a tool for resolving individual labour disputes. In our view, it would be also appropriate to apply mediation to collective labour disputes. At present, these relations are governed by the Law «On Resolution of Collective Labour Disputes (Conflicts)» (1998). This law establishes the legal and organizational basis to resolve collective labour disputes, and it seeks to encourage cooperation between the parties during the settlement of collective labour disputes. Under the Law «On Resolution of Collective Labour Disputes (Conflicts)», a collective labour dispute is defined as a disagreement between the parties to the social and labour relations regarding the following issues: a) establishment or changing of working conditions; b) conclusion or modification of a collective agreement; c) performance of a collective agreement or its certain provisions; d) failure to comply with the requirements of the legislation on labour.

A collective labour dispute can be resolved by 1) *a conciliation commission* made up by representatives of parties, the aim of which is to make a decision that would be satisfactory to all parties engaged in a collective labour dispute. It is stipulated that an independent representative may be involved in order to facilitate cooperation between the parties, and this person also assists the conciliation commission in decision-making; 2) *an arbitration body* authorized to make a decision. It is comprised of experts invited by the parties.

Also, there is the National Mediation and Conciliation Service (hereinafter referred to as «the NMCS»), which was established by the President of Ukraine

and has a specific role in resolving collective labour disputes. Its main objectives are to improve labour relations, prevent collective labour disputes and encourage decision-making within a reasonable time. The decisions of the NMCS are recommendatory and should be taken into account by the parties to the collective labour dispute (conflict), government agencies and local authorities. In fact, the NMCS, which is financed by the state budget, acts as a mediator that is not directly involved in a dispute resolution. These procedures could be characterized as mediation, but the current law does not stipulate the resolution of collective labour disputes without the involvement of a conciliation commission or an arbitration body.

7. The U.S. Experience

In the interstate private sector, the parties are required by the National Labour Management Relations Act (LMRA) of 1947 to notify the Federal Mediation and Conciliation Service (FMCS) an independent Federal agency, when they commence bargaining over new or renewed collective agreements. Although disputing parties have the option of finding and employing their own private mediators, the most interesting examples of mediation in the US are provided by the FMCS, which has a roster of approximately 240 mediators located in 10 District Offices and more than 60 Field Offices throughout the United States. In addition to its primary function of mediating labour management collective disputes, the FMCS also provides mediators for rights or grievance disputes.[3]
Mediation in collective labour disputes is also enshrined in specific legislation of the United States. The Railway Labour Act (RLA) was enacted in 1926 to provide dispute resolution services for railways and the thirteen unions representing their employees. Through subsequent amendments, that jurisdiction now concerns parties in the airline industry. The 1934 amendments to the RLA created a government agency, the National Mediation Board (NMB), which provides mediation services for the transportation industry equivalent to those provided to the rest of the private sector by the FMCS.[4] To handle disputes involving the federal government and its own employees, The Civil Service Reform Act was passed in 1978, establishing the Federal Labour Relations Authority (FLRA) to provide two million federal employees with rights comparable to those provided to the private sector in 1935 by the

[3] A. M. Zack, T. A. Kochan. *Mediation and Conciliation in Collective Labor Conflicts in the USA* / *Mediation in Collective Labor Conflicts* / M. C. Euwema, F. J. Medina, A. B. García, E. R. Pender (editors), Springer, 2019, p. 310.
[4] A. M. Zack, T. A. Kochan. *Mediation and Conciliation in Collective Labor Conflicts in the USA* / *Mediation in Collective Labor Conflicts* / M. C. Euwema, F. J. Medina, A. B. García, E. R. Pender (editors), p. 311.

National Labour Relations Act. The Authority provides assistance to federal agencies in developing dispute resolution services including mediation, and through the office of the Federal Service Impasse Panel may seek the assistance of FMCS mediators to help resolve collective bargaining disputes between federal agencies and the unions of their employees.[5]

8. The French Experience

In France, mediation developed during the 1970s out of practical judicial experience, mainly in the field of collective labour disputes and in family law.[6] There are two groups of collective labour disputes: a) *«conflits collectifs de travail»* such as strikes, with their repertoire of symbols and ritual actions; b) *«conflits collectifs au travail»* which concern a whole range of management—employee tensions and hostilities in the workplace. Study of the first type of conflict has traditionally been linked to that of the unions and the *«workers movement»* of course. Analysis of the second *«horizontal»* type of conflict, where neither top management nor unions may be involved, is relatively recent in France. In France *«classical»* union-management conflicts are usually handled – if a third party is needed – by a local labour administration and by local *«Inspecteurs du travail»* (work inspectors): this is called a process of conciliation.[7]
The French Labour Code refers to three legal mechanisms (in Laws L.2522-1, L.2523-1 and L.2524-1): conciliation, mediation and arbitration.[8]
Mediation in individual and mediation in collective labour disputes need to be established in parallel with each other, and these procedures have to involve mediators. With regard to collective labour disputes, the conciliation commission and arbitration body should be preserved.

9. The Italian Experience

Of particular interest is the Italian experience in the mediation field. Its history of development and transformations can serve as a role model for the

[5] A. M. Zack, T. A. Kochan, *Mediation and Conciliation in Collective Labor Conflicts in the USA / Mediation in Collective Labor Conflicts* / M. C. Euwema, F. J. Medina, A. B. García, E. R. Pender (editors), p. 311.
[6] K. J. Hopt, F. Steffek (editors), *Mediation: Principles and Regulation in Comparative Perspective*, Oxford University Press, Oxford, 2013, p. 457.
[7] A. Jenkins, C. Thuderoz, A. Colson, *Mediation and Conciliation in Collective Labor Conflicts in France / Mediation in Collective Labor Conflicts* / M. C. Euwema, F. J. Medina, A. B. García, E. R. Pender (editors), Springer, 2019, p. 86.
[8] A. Jenkins, C. Thuderoz, A. Colson, *Mediation and Conciliation in Collective Labor Conflicts in France / Mediation in Collective Labor Conflicts* / M. C. Euwema, F. J. Medina, A. B. García, E. R. Pender (editors), p. 89.

implementation of mandatory mediation for certain types of cases in Ukraine. Mediation in Italy has gone through five key phases during its lifetime so far, being characterized by:
1) voluntary mediation with no regulation (the 1990s to 2004);
2) voluntary mediation before accredited mediation service providers (2005 to 2010);
3) mandatory mediation in certain civil and commercial disputes following Decree no. 28/2010 (March 2011 to October 2012);
4) cessation of mandatory mediation following the decision of the Italian Constitutional Court holding that the prior legislative decree was unconstitutional for procedural reasons, voluntary mediation remained (October 2012 to September 2013);
5) required initial mediation session for limited categories of cases following law decree 69/2013 (2013 to present).[9]

On 4 March 2010 the Government issued Legislative Decree n. 28 having regard, *inter alia*, to Directives 2008/52/EC of the European Parliament and 21/2008 of the Council concerning mediation in civil and commercial matters. This Legislative Decree 28/2010 introduced, among other provisions, *«mandatory mediation»* obliging parties to attempt mediation before commencing proceedings concerning certain civil and commercial subject matters. Preparatory discussion clearly indicates that the objective of introducing *«mandatory»* mediation for a number of listed disputes was to secure an effective *«deflationary»* measure to deal with the enormous backlog of cases pending before the Italian courts, as well as to contribute to the promotion of a culture of alternative dispute resolution.[10] In that context, it must be noted that there are still excessive delays in the examination of civil cases and it led to a large number of applications submitted to the European Court of Human Rights.
Besides, it is worth mentioning that the Italian legislation contains provisions on conciliation which is performed before judicial proceedings. The conciliation is prescribed by article 410 of the Italian Code of Civil Procedure. It is performed by the commission established within the Provincial Labour Directorate. The conciliation has been voluntary since 2010.

[9] F. Maiorana, *Mediation in Italy, how does it differ?*, London School of Mediation, 2019, https://www.londonschoolofmediation.com/story/2019/02/06/mediation-in-italy-how-does-it-differ-/107/ (accessed April 23, 2020).
[10] C. Mastellone, L. Ristori, *Italy / EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes*, N. Alexander, S. Walsh, M. Svatos (editors), Wolters Kluwer, 2017, p. 471.

10. The Case Law of the Court of Justice of the European Union

It is necessary to mention the judgment of the ECJ in *Rosalba Alassini and Others v Telecom Italia SpA and Others* (C−317/08-C−320/08) of 18 March 2010.[11] The judgment answered the question of whether pre-trial mandatory mediation was consistent with the Charter of Fundamental Rights of the European Union.

The ECJ ruled in *Alassini v Telecom Italia SpA* that a domestic provision requiring litigants in Italy to attend mandatory mediation before being able to enter legal proceedings did not contravene Article 47 of the EU Charter. The clause, which requires providers and end-users to try to solve their dispute by using mediation first, derives from Directive 2002/22/EC on Universal Service and users' rights relating to electronic communications networks and services. Telecom Italia argued before the ECJ that the plaintiffs were not admissible because they had not used mediation first, before taking their case to the court, which is mandatory under the national law. The plaintiffs argued that mandatory mediation unlawfully restricts their right of access to the court. According to the court, mandatory mediation (this includes mediation stimulating measures) can be sought by the courts and the government. This indeed restricts access to the court, but the court also ruled that there are limitations to these restrictions, which are needed to protect litigants.[12]

These restrictions cannot infringe on the very substance of the right guaranteed, they must be proportional and they must pursue a legitimate aim. In this case, these restrictions had a legitimate aim, which was the general public interest. Italian courts dealt for years with excessively long proceedings, which undermined the judicial system as a whole. By legislating mandatory mediation, which is faster and cheaper than a judicial procedure, Italy is actually protecting the rights of its citizens. The principle of proportionality is not violated as long as mediation does not cause a substantial delay in legal proceedings and it does not give rise to significant costs. Regarding the facts of the case, the court stated that all litigants still have the possibility to bring their case before the court, as access to the court was only delayed by 30 days and no fees were incurred.[13]

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[11] *Rosalba Alassini and Others v Telecom Italia SpA and Others* (C-317/08-C-320/08) of 18 March 2010, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0317 (accessed May 6, 2020).

[12] L. Ramović, *'Compulsory' mediation and article 6 ECHR*, 2018, p. 32, http://scriptiesonline.uba.uva.nl/document/655099 (accessed April 24, 2020)

[13] L. Ramović, *'Compulsory' mediation and article 6 ECHR*, p. 33.

11. The Mandatory Mediation Dilemma

The draft law «On Labour» enshrines voluntary mediation and encourages pre-trial procedure by repealing court fees. As was mentioned above, if the parliament repeals court fees in labour disputes, this incentive will be meaningless. Therefore, we believe that mandatory mediation should be applied to labour disputes.

Paragraph 3 of article 124 of the Constitution of Ukraine (as amended in 2016) states that a mandatory pre-trial settlement of disputes may be prescribed by the law. If the mediation process fails, the person retains the right to apply to a court that will resolve a labour dispute. It means that the right to a fair trial prescribed by article 6 of the European Convention on Human Rights is not a subject to any limitations.

The Constitutional Court of Ukraine in its Decision No. 1-2/2002 of 9 July 2002 stated that a mandatory pre-trial settlement of disputes, which excludes filing a lawsuit in the relevant court, violates the right to a fair trial.

The recourse to ADR can enhance the parties' legal protection, and it does not undermine the principle that only courts are empowered to dispense justice. In response to a need for strengthening legal protection, the government can incentivise parties to use alternative dispute resolution, and in this context, it is worth mentioning that the application of ADR is the right of a person who seeks legal protection, not an obligation.

12. The Alternative to Mandatory Mediation

The draft law «On Labour» states that employment contracts must be concluded in writing. One of the essential elements of the employment contract could be a mediation clause that is similar to arbitration clauses in commercial contracts. By including the mediation clause, the parties to the labour relations decide to make mediation mandatory. At the same time, this practice would contribute to the promotion of mediation in labour disputes. Also, the mediation clause may be included in the collective agreement, in which employees acknowledge mandatory mediation in individual labour disputes.

Since the government plans to lay the foundations for mediation in Ukraine, it needs to make amendments to the provisions of the draft law «On Labour» regarding the period for bringing a case to court. These amendments have to prescribe the suspension of limitation periods during the mediation process, but there must be restrictions concerning the suspension period (from one to three months) in order to prevent the violation of the right of access to a court.

The significant shortcoming of the draft law «On Labour» is a lack of the provision concerning the legal aid for parties who meet eligibility criteria to receive legal assistance and decided to resort to the mediation procedure.
If mediation remains voluntary, it makes sense to establish full or partial reimbursement of mediation costs within the legal aid programme. It could play the same encouraging role as the exemption from court fees mentioned above.
In case of legal action following the breach of obligations stipulated in a mediation settlement, the court may order the party who acted in violation of the provisions of the settlement to pay litigation costs.

13. Conclusions

While appreciating the efforts of the Government to enshrine mediation in the draft law «On Labour», we can conclude the following.

1) In Ukraine, mediation should be established in the form of a mandatory pre-trial procedure, which in turn will allow parties to settle individual labour disputes quicker and more effectively, and, moreover, it will reduce the court workload.

2) Also, it would be appropriate to extend the scope of the legal aid to parties who meet eligibility criteria to get legal assistance and decided to participate in the mediation process. These legal aid programmes may offer full or partial reimbursement of mediation costs.

3) In case of engaging in mediation before the start of judicial proceedings, it is important to have appropriate rules that define the moment when the limitation period should be suspended or resumed.

4) If mediation remains voluntary, it makes sense to discuss the issue of whether an employment contract or collective labour agreement has to include the clause concerning mandatory mediation in individual labour disputes.

The scope of mediation needs to be extended to collective labour disputes in order to eliminate the conflict between the law on mediation, which doesn't include any limitations on mediation in collective labour disputes, and the specific legislation on collective labour disputes that doesn't say anything about the application of this ADR tool.

Mechanisms implementing Minimum Wage Policies and Compliance with the ILO's Provisions: The Case of Bangladesh's Garment Global Supply Chain

Robayet Ferdous Syed [1]

Abstract

The main purpose of this paper is to analyze a comparative implementation mechanism between Minimum Wage (MW) policy drafted under chapter XI of the Bangladesh Labor Act, 2006, and other countries in the world. Another purpose of this study is to remind the State of its obligations under the ILO as well as regional and international instruments to protect workers' rights. In response to the research question, this study shows that present MW provisions under chapter XI of the Bangladesh Labor Act, 2006 were not drafted in accordance with the standard of international instruments adopted under the UN. Furthermore, there are inadequate mechanisms when it comes to implementation of MW provisions under the labor legislation in Bangladesh. Therefore, the present MW policy has not been implemented to its fullest, as required to protect workers in Bangladesh. It is maintained that the ILO's Conventions and Recommendations related to Minimum Wage will be a standard guideline for enacting and implementing MW legislations in Bangladesh.

Keywords – *Minimum Wage; ILO; Bangladesh; Garment Industry; Workers' Rights.*

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Introduction

The Bangladesh Garment Manufacturing industry is an organization that warrants global attention. One of the key reasons is that this industry is the world's second largest exporter of ready-made garments, after China. It contributes remarkably to rebuilding the country as well as its national economy by the revenues it earns. Out of 63 million workforces in Bangladesh, nearly four million workers are working in 4,482 RMG (Ready-Made Garments) businesses, and among those workers, eighty percent are women.[2] Around 20 million people directly and indirectly depend on this industry for their immediate livelihoods.[3] Though this manufacturing industry has been playing a vital role in alleviating poverty, reducing unemployment and earning foreign currency, this industry is under attack due to deficiency of MW (Minimum Wage) policy drafted under *chapter XI* of the Bangladesh labor legislation.[4] In many cases, it has been observed that the MW system in Bangladesh has not functioned according to the ILO's Conventions and Recommendations pertinent to minimum wages. In contrast, many national, regional as well as international instruments have drafted standard MW policy following ILO Conventions and Recommendations. For examples, The American Declaration of the Rights and Duties of Man, 1948[5] promulgated by the Organization of American States in 1948, includes a provision with respect to "right to work and fair remuneration". Specifically:

> Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.[6]

Further, the African Charter on Human and Peoples' Rights, 1986,[7] also known as the Banjul Charter, 1986, has also recognized a minimum wage policy for workers. According to the Charter, 1986:

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[2] Syed, R. F., '*Minimum wage policy for garment manufacturing workers in Bangladesh*'. (2018), LL M (thesis), School of Law, University of Ottawa, Ontario, Canada.

[3] Syed, R. F., '*Theoretical debate on minimum wage policy: a review landscape of garment manufacturing industry in Bangladesh'*. Asian J Bus Ethics (2020). https://doi.org/10.1007/s13520-020-00106-7.

[4] *Ibid*,

[5] American Declaration of the Rights and Duties of Man, 1948. <https://en.wikisource.org/wiki/American_Declaration_of_the_Rights_and_Duties_of_Man>, Accessed on July 12, 2019.

[6] *Ibid,* art. XIV.

[7] African Charter on Human and Peoples' Rights, 1986. http://hrlibrary.umn.edu/instree/z1afchar.htm, Accessed on July 12, 2019.

> Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work[8]

Furthermore, a standard minimum wage policy is recognized by the Council of Europe. The European Social Charter (revised), 1996[9] has recognized the right of workers for a fair remuneration. In particular,

> The right of workers to a remuneration such as will give them and their families a decent standard of living [10].

With respect to the Council of Europe, the Community Charter of the Fundamental Social Rights of Workers, 1989,[11] provides that,

> All employment shall be fairly remunerated. To this effect, in accordance with arrangements applying in each country: workers shall be assured of an equitable wage, i.e. a wage sufficient to enable them to have a decent standard of living …[12]

Above all, the International Labor Organization (ILO) adopted different Conventions and Recommendation relating to minimum wages, such as:

- The Minimum Wage Fixing Convention 1970, No. 131.[13]
- The Minimum Wage-Fixing Machinery Convention 1928, No. 26.[14]
- The Minimum Wage Fixing Recommendation 1970, No. 135.[15]
- The Minimum Wage-Fixing Machinery Recommendation 1928, No. 30.[16]

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[8] *Ibid,* art. 15.

[9] European Social Charter, revised in 1996. https://rm.coe.int/168007cf93, Accessed on July 12, 2019.

[10] *Ibid,* art. 4(1).

[11] Community Charter of the Fundamental Social Rights of Workers, 1989. <http://aei.pitt.edu/4629/1/4629.pdf>, Accessed on July 12, 2019.

[12] *Ibid,* art. 5(i).

[13] Minimum Wage Fixing Convention 1970, No. 131 with Special Reference to Developing Countries (Entered into force: 29 Apr 1972). Adoption: Geneva, 54th ILC session (22 Jun 1970). <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312276>, Accessed on July 17, 2019.

[14] Minimum Wage-Fixing Machinery Convention 1928, No. 26. Entry into force: 14 Jun 1930. Adopted in Geneva, 11st ILC session (16 Jun 1928). <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C026>, Accessed on June 30, 2019.

[15] Minimum Wage Fixing Recommendation 1970, No. 135 with Special Reference to Developing Countries. Adopted in Geneva, 54th ILC session (22 Jun 1970). <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:R135:NO>, Accessed on July 3, 2019.

As a research statement, my contention is that (i) Bangladesh is an active member of the United Nations since the inception of its independence[17]; (ii) she has ratified a number of international human rights instruments, including, the Universal Declaration of Human Rights, 1948[18] the International Covenant on Economic, Social and Cultural Rights, 1966[19] as well as International Labor Organization, 1919[20] Conventions, and (iii) Bangladesh must honor her obligation in the protection of her workers' rights.
Therefore, this study is an endeavor to assess, evaluate, and analyze the present MW policy in Bangladesh. To what extent has this policy functioned and complied with the standards stipulated under ILO's pertinent Conventions and Recommendations has been the underlying focus of the study. Furthermore, in my discussion, I have referred to standard MW strategies of a number of countries that have been adopted and incorporated in their national legislation with adherence to ILO Conventions and Recommendation.

1. Problem Statement

Bangladesh has no specific separate legislation to deal with the minimum wage system. However, under *chapter XI* (ss. 138 to 149) of the Bangladesh Labor Act, 2006,[21] also known in Bangla as *Bangladesh Shromo Ain, 2006* (from now on Bangladesh Labor Act, 2006 or BLA 2006) the country has adopted a few provisions relating to minimum wages. Unfortunately, these provisions were not adopted in accordance with the standard of ILO's pertinent Conventions

[16] Minimum Wage-Fixing Machinery Recommendation 1928, No. 30. Adopted in Geneva, 11st ILC session (16 Jun 1928). <http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:312368,fr:NO>, Accessed on July 12, 2019.
[17] United Nations, "Member States" <http://www.un.org/en/member-states/>, Accessed on July 17, 2019.
[18] Universal Declaration of Human Rights, 1948. Adopted on 10 December 1948 (A/RES/217(III)) during the 183rd plenary meeting of the General Assembly. <https://www.ohchr.org/en/Library/Pages/UDHR.aspx>, Accessed on July 12, 2019.
[19] International Covenant on Economic, Social and Cultural Rights, 1966. Adopted on 16 December 1966 by General Assembly resolution 2200A (XXI). <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, Accessed on July 12, 2019.
[20] International Labor Organization, 1919. <https://www.ilo.org/asia/about/WCMS_377171/lang--en/index.htm>, Accessed on July 17, 2019.
[21] Bangladesh Labor Act, 2006, (XLII of 2006). <https://ogrlegal.files.wordpress.com/2015/11/bangladesh-labour-act-2006-english.pdf>, Accessed on May 5, 2020.

and Recommendations. Also, there is no MW enforcement mechanism under *chapter XI* of the labor legislation in Bangladesh. For example:

- There is no publicity provision to disseminate MW policy in various ways among the illiterate workers so that they can know the required level of minimum wages;
- They have no adequate inspection mechanism to ensure the effective application of the provisions related to minimum wages; the fact which also contradicts Labor Inspection Convention, 1947, No. 81;[22]
- There is no adequate penalty, incarceration or other sanctions for breach of the provisions relating to minimum wages;[23]
- BLA 2006 has no legal provisions and other appropriate means for enabling workers to reclaim the wages that they were denied to;
- No provisions to defend workers against any victimization;
- The employers' and workers' organizations have no participation policy to enforce MW provisions; and
- The wage definition under the Bangladesh Labor Act, 2006 does not adhere to the Equal Remuneration Convention 1951, No. 100.[24]

Above all, inequity between the inputs and outcome is a problem in the labor industry of Bangladesh. Therefore, social and economic inequalities between workers and employers are a serious concern in the developing economies like Bangladesh. In particular, workers in the global garment manufacturing industry are deprived in all spheres of life.[25] Numerous studies reveal that they work hard[26] from dawn to dusk for their survival[27] but receive minimum

[22] Labor Inspection Convention, 1947, No. 81. The Convention concerning Labor Inspection in Industry and Commerce (Entry into force: 07 Apr 1950). Adopted in Geneva, 30th ILC session (11 Jul 1947), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081>, Accessed on August 5, 2019.

[23] Supra note 21, s. 138-149. Bangladesh Labor Act (2006).

[24] Equal Remuneration Convention, 1951, No. 100. Adopted in Geneva, 34th ILC session (29 Jun 1951). Date of entry into force: 23 May 1953. Bangladesh ratify on 28 Jan 1998. <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245>, Accessed on June 17, 2020.

[25] Supra note. 2. Syed, R. F., , (2018). Also, Chowdhury, N. J., & Ullah, M. H. '*Socio-Economic Conditions of Female Garment Workers in Chittagong Metropolitan Area: An Empirical Study*'. Journal of Business and Technology 5, no. 2 (2010): 53-70.

[26] Ahmed, J. U., and Hossain, T. '*Industrial Safety in the Readymade Garment Sector: A Developing Country Perspective'*. Sri Lankan J. Manag 14, no. 1 (2009): 1-13.

[27] Islam, M. S. '*Profit over Life: Industrial Disasters and Implications for Labor and Gender. In Social Justice in the Globalization of Production'*. Palgrave Macmillan UK (2016): 126-143.

returns[28] which are insufficient to meet their basic needs.[29] The employers and buyers of the garments products unfairly gain profit, keeping the workers in a disadvantaged situation for which worker cannot meet their fundamental needs. The buyers enter into contract with the garments owners and not necessarily have any stake in ensuring that the owners (employers) of the garments industries would play fair in terms of providing appropriate salaries and benefits to their workers and upholding all the national and international acts and treaties. Hence, the placement of a standard MW policy along with an implementation mechanism will have greater effectiveness to ensure workers' well-being as well as social justice.

2. Research Question

a) To what extent does the present MW policy under the Bangladesh Labor Act follow the ILO's standard compared to other countries in the world?

In addition, another objective is to remind the State of its obligations under the ILO as well as the regional and international instruments to protect workers' rights in Bangladesh.

3. Methodology and Method of the Study

As labor abuse is a common phenomenon experienced in developing countries, my stance would be to use interpretative phenomenological approach[30] which creates a room for a comparative study with other countries in regard to the MW policy, rather than come up with a general theory. The purpose or goal of the phenomenological research is to explore the depth, gain insight and understand the complexity inherent in the phenomenon.[31]
I have also adopted descriptive approach in my paper and the goal of this is to systematize or map information, i.e., look at the patterns of laws and develop a taxonomy.

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[28] Nazneen Ahmed, and Dev. Nathan. '*Improving Wages and Working Conditions in the Bangladeshi Garment Sector: The Role of Horizontal and Vertical Relations'*. Published by the University of Manchester, Capturing the Gains. (2014) Working Paper 40, <www.capturingthegains.org> Accessed on August 1, 2018.
[29] Supra note 26, Islam, M. S. (2016).
[30] Arslan, M. '*Mechanisms of labor exploitation: the case of Pakistan'. International Journal of Law and Management* 62, no. 1 (2020): 1-21, available at: <https://doi.org/10.1108/IJLMA-07-2018-0145>. Also, Smith, J.A. and Shinebourne, P. '*Interpretative Phenomenological Analysis, American Psychological Association'*. (2012).
[31] McLeod, S. A. '*Qualitative vs. Quantitative* (2017). <www.simplypsychology.org/qualitative-quantitative.html>, Accessed on July 19, 2018.

To obtain the best outcome, I have used a mixed approach (phenomenological and descriptive) of qualitative methodology. The strength of this type of research is that it is beneficial for the practitioner and the pertinent stakeholders alike in order to gain new insights. Moreover, the mixed approach of the qualitative methodology can develop an in-depth understanding of how people observe their social realities and how they act within the society.[32]

As a method of this study, a 'problem statement' has been developed in the beginning of this manuscript. The problem statement shows that the present minimum wage policy in Bangladesh is substandard. The present minimum rates of wages in the garment manufacturing industry are not adequate to meet the basic necessities of workers and their families.

Based on the problem statement, data were collected from both primary and secondary sources. To get an open-ended scenario, this study focused on MW standard policy adopted by several countries with adherence to many regional and international instruments relating to MW. And then it endeavors to compare the MW policy with regard to garments global supply chain labor industry of Bangladesh.

In response to the research questions, both primary and secondary data have been collected for this study. Among the primary sources, information has been collected from the national labor legislations, litigations, numerous national minimum wage policies, different regional binding instruments, international instruments adopted by the UN and several Conventions and Recommendations relating to MW policy drafted under the ILO. The scholarly literature, i.e., articles, international labor conferences on minimum wage, published thesis reports, book chapters in edited volumes, legal blogs, relevant theories, published data and figures from quantitative and qualitative research have been analyzed to pursue the research objectives, and research questions.

[32] Supra note 2, Syed, R. F., (2018).

Table 1: Research Question

Research questions	**Method**	**Primary sources**	**Secondary sources**
a) To what extent does the present MW policy under the Bangladesh Labor Act follow the ILO's standard compared to other countries in the world?	Qualitative	The national labor legislation, litigation, ILO's pertinent Conventions, and Recommendations, different national minimum wage policies, regional binding instruments, and international instruments adopted by UN.	Scholarly literature, published data from quantitative and qualitative research, labor conferences on minimum wage, and theories.

4. Comparative Implementing Mechanism of MW policy which adheres to ILO

With regard to the response of my research question, I cited many evidence on how the international community incorporated MW laws under their national legislation in accordance with the standards stipulated under ILO Conventions and Recommendations and other international instruments relating to MW policy. This testifies the fact that the ILO Conventions and Recommendations and other international instruments relating to MW policy are conclusive and it has insights into workers' welfare. Therefore, it takes me to my following discussion to justify the research question about the MW policy under the ILO Conventions and Recommendations and to what extent has this policy been adopted under the Bangladesh Labor Act, 2006.

There are two Conventions and two Recommendations adopted under the International Labor Organization relating to the MW. The Conventions are as:

- The Minimum Wage Fixing Convention 1970, No. 131, (hereinafter Convention No. 131);[33] and
- The Minimum Wage-Fixing Machinery Convention 1928, No. 26, (hereinafter Convention No. 26).[34]

The Convention No. 131 was designed particularly for developing countries. This Convention was adopted to take into account the needs of workers and their families depending on the level of economic development in a developing country. This Convention also has a Recommendation known as:

[33] Supra note 13. Minimum Wage Fixing Convention (1970).
[34] Supra note 14. Minimum Wage-Fixing Machinery Convention (1928)

- The Minimum Wage Fixing Recommendation 1970, No. 135, (hereinafter Recommendation No. 135).[35]

The Convention No. 26 also has a Recommendation known as:

- The Minimum Wage-Fixing Machinery Recommendation 1928, No. 30, (hereinafter Recommendation No. 30).[36]

The Conventions and Recommendations have different standard provisions. For instance;

- The minimum rates of wages which have been fixed shall be mandatory for the employers as well as workers, and the rates are not to be subject to reduction by individual agreement without the authorization of the competent authority or by collective agreement.[37]
- According to the Convention No. 131, the minimum wages shall have the force of law and failure to apply its provision shall be held liable to appropriate penal or other sanctions.[38]
- Also, the Recommendation No. 135 reaffirms an appropriate penal or other sanction for non-compliance with the minimum wage provision.[39]

In this regard, the minimum wage provisions under the Bangladesh Labor Act, 2006 state that:

- The minimum rates of wages that are set by the Minimum Wage Board (MWB) are binding on all employers, and employers are not entitled to pay them less than the set rates.[40]

Further, there is no penalty provision if employers fail to pay the minimum rates of wages set by the MWB. In the absence of appropriate penal or other sanctions, the employers tend to fail to comply with the provisions mentioned under *chapter XI* of the national labor legislation. Therefore, in many circumstances, employers do not pay the wage at the rate set by the MWB.

It is also rational to think that in many developing countries like Bangladesh, a threat of incarceration is the effective deterrent against the failure of employers to pay the MW. Therefore, several countries inserted penalty provisions in their labor legislation for breach of MW policy with adherence to ILO. Along with punishment provisions, many countries have taken different initiatives. For example, in Bolivia, the company in question may be closed for non-compliance with the MW provisions; in Hungary, an employer may be

[35] Supra note 15. Minimum Wage Fixing Recommendation (1970).
[36] Supra note 16. Minimum Wage-Fixing Machinery Recommendation (1928).
[37] Supra note 14. Art 3.2 (3).
[38] Supra note 13. Minimum Wage Fixing Convention (1970).
[39] Supra note 15. Minimum Wage Fixing Recommendation (1970).
[40] Supra note 21, s. 148- 149. Bangladesh Labor Act (2006).

prohibited from applying for state subsidies for non-compliance with the MW provisions; in Portugal, the labor legislation prohibits the employers from operations, access to public contracts, and finally publishes violation reports in different media.[41] In addition to a fine, the Russian Federation can suspend the administrative activities of the breaching company for a period of ninety days, and in cases of repeated offences, the government can impose fines or suspend all administrative functions of the organization for a period of up to three years. In Vietnam, depending on the seriousness of the offence, the government can impose administrative penalties, including withdrawal of license for the violation of MW legislation.[42] According to the General Survey Report on the Minimum Wage Systems,[43] some countries publish violation reports for non-compliance with the MW legislation on the website of their Labor Inspectorate or Ministry. Such measures have been approved in the United Kingdom, Quebec, Canada,[44] and Israel.[45] Compared to this, unfortunately, there is no enforcement mechanism under the current MW policy in Bangladesh. Government law enforcement agents are reluctant, and entrepreneurs are far from wanting to comply with existing labor provisions. The deficient enforcement mechanism creates dissatisfaction among workers in Bangladesh,[46] which contradicts Recommendation No. 135.[47]

The Convention No. 131 as well as Recommendation No. 135 further propose a variety of ways for fixing of minimum wages i.e., by- statute; competent authority; wage boards or councils; labor courts or tribunals; or collective agreements for ensuring satisfactory minimum living wages.[48] In this regard, the Government of Bangladesh has established the MWB under *chapter XI* of the Bangladesh labor legislation.[49] But, the MWB has failed to fulfil the obligation mandated under the national labor legislation.

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[41] International Labor Conference (2014). The General Survey of the Report on the Minimum Wage System, (103rd Session) Report III (Part 1B). Paragraph 309; International Labor Office, Geneva <http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_235287.pdf>, Accessed on July 14, 2019.

[42] *Ibid,*

[43] *Ibid,*

[44] Labor Standards Commission, (nd). The annual list of offences against labor legislation, and particularly minimum wage violations, is published on the website of the: <http://www.cnt.gouv.qc.ca/?id=968>, Accessed on August 5, 2019.

[45] Ministry of Industry, Trade and Labor. 'Progress Report on the Implementation of the OECD Recommendations: Labor Market and Social Policies'. (June, 2012) Israel, p. 11.

[46] Supra note 3. Syed, R. F., (2020).

[47] Supra note 15, para. 1. Minimum Wage Fixing Recommendation (1970).

[48] Supra note 15, para. 6. Minimum Wage Fixing Recommendation (1970).

[49] Supra note 21, s. 138. Bangladesh Labor Act (2006)

Other significant redress under the Convention is that, in order to encounter enforcement barrier of MW legislation there is a need to collect data to carry out a study for the information to be used by MW fixing authority.[50] Further, the Convention also recommended adjusting the minimum wages from time to time.[51] However, there is no effective mechanism against the enforcement barrier of MW provisions under the Bangladesh Labor Act, 2006.

To fix a rational minimum wage, it should be a general procedure that the representatives from workers and employers have equal voting strength and are equal in number. The wage-fixing authority must also include one or more independent member(s) whose votes would count towards taking effective decisions. Most importantly, the independent member(s) should be a neutral person, and as far as possible has to be appointed after a discussion with the representative of workers and employers is made.[52] Moreover, where a substantial percentage of women are employed in an establishment, a woman among the workers' representatives should likely be included and independent member(s) may be selected from among the women.[53] In response to the provision, the MWB is constituted with a Chairperson along with one representative member from the employers, one representative member from the workers and one other independent member with an equal voting strength for all.[54]

What I am arguing in this paper is that the workers' representative cannot play a strong role on behalf of all the workers due to their dishonest and unreliable characteristics. For example, Union leaders maintain a personal relationship with employers to get personal benefits instead of working to establish workers' rights. Therefore, they act against the interest of the workers for which they have been selected, and end up standing by unethical and illegal decisions of the employers with regard to the welfare of the workers. Furthermore, as far as representation of women is concerned, there is no provision to involve them in this representation process under the current MW policy in Bangladesh[55] despite the fact that about eighty percent of the garment manufacturing workers are women.[56] Thus, it is irrational not to include

[50] Supra note 15, para. 7. Minimum Wage Fixing Recommendation (1970).
[51] Supra note 15, para. 11. Minimum Wage Fixing Recommendation (1970).
[52] Supra note 16, para. II (a). Minimum Wage-Fixing Machinery Recommendation (1928).
[53] Supra note 16, para. II (c). Minimum Wage-Fixing Machinery Recommendation (1928).
[54] Supra note 21, s. 138 (2) (a) (b) (c) and (d). Bangladesh Labor Act (2006).
[55] Supra note 21, s. 138-149. Bangladesh Labor Act (2006).
[56] Syed, R. F., Asaduzzaman M. Asraful I, et al. *'The RMG Sector: Prospects and Challenges and Role of Different Stakeholders'.* A Study Report of the National Human Rights Commission, Bangladesh (2015). <https://www.researchgate.net/publication/281319914_The_RMG_Sector_Prospects_and_Challenges_and_Role_of_Different_Stakeholders>, Accessed on July 16, 2018.

women in the decision-making process as it has bearings on their rights. This decidedly makes female workers the most vulnerable in this industry.[57]
For example, they often encounter physical and sexual harassment inside and outside the factories,[58] but the garments management does not act to ensure their security.[59] Additionally, maternity benefits are rarely provided to female workers,[60] and they are also compelled to work on their prohibition time.[61] In many cases the female workers are forced to work during night-shifts as well.
The ILO Convention has some mechanisms to ensure that workers and employers are informed about the set minimum wages. The Convention No. 131 emphasizes adequate inspection and effective application of MW provisions.[62] Similarly, the Recommendation No. 135 specifies taking some measures, including appointing sufficiently trained inspectors with facilities needed to carry out their responsibilities.[63] The Convention states that the workers will not be paid less than that of the decided rate, and with those who have been paid less shall be entitled to the balanced sum through judicial or other legislative proceedings, which will be subjected to time limitation according to the law of the land.[64] The Recommendation No. 30 further suggests taking the following actions so that wages are not paid less than that of the minimum rates which have been fixed by a wage-fixing authority:
"(a) arrangements for informing the employers and workers of the rates in force;

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[57] Lu, Jinky Leilanie. '*Occupational Health and Safety of Women Workers: Viewed in the Light of Labor Regulations'*. Journal of International Women's Studies 12, no. (1) (2011): 68-78. <http://vc.bridgew.edu/jiws/vol12/iss1/5>, Accessed on September 19, 2019. Also, Alam M.J., Mamun, M.Z. and Islam, N. 'Workplace Security of Female Garments Workers in Bangladesh'. Social Science Review 21, no. 2 (2004): 191-200.
[58] Agenda, N. L. '*Wealth and Deprivation: Ready-made Garments Industry in Bangladesh'*. Economic & Political Weekly 46, no. 34 (2011): 23. Also, Khosla, Nidhi. 'The Ready-Made Garments Industry in Bangladesh: A Means to Reducing Gender-Based Social Exclusion of Women?'. Journal of International Women's Studies 11, no. 1 (2009): 289-303. <http://vc.bridgew.edu/jiws/vol11/iss1/18>, Accessed on July 31, 2019. Also, Mahmud, S. and N. Ahmed. 'Accountability for Workers Rights' in the Export Garment Sector in Bangladesh'. Bangladesh Institute of Development Studies (2005), Dhaka.
[59] Niluthpaul, Sarker, Hossain SM Khaled, and Mia Md Kohinur. '*Are the Functional Factors of Human Resource Management Subsisting in the Ready-Made Garments (RMG) of Bangladesh? Theory Conflicts with Reality'*. International Journal of Business and Management 11, no. 7 (2016): 150.
[60] Afrin, S. '*Labor Condition in the Apparel Industry of Bangladesh: Is Bangladesh Labor Law 2006 Enough?*'. Developing Country Studies 4, no. 11 (2014).
[61] Islam, M. Z. '*Maternity Benefits in Bangladesh Labor Law: An Empirical Study on Apparel Industry'*. Manarat International University Studies 4, no. 1 (2015).
[62] Supra note 13, Art. 5. Minimum Wage Fixing Convention (1970).
[63] Supra note 15, para. 14 (b). Minimum Wage Fixing Recommendation (1970).
[64] Supra note 14, Art. 4 (1) (2). Minimum Wage-Fixing Machinery Convention (1928)

(b) official supervision of the rates actually being paid; and
(c) penalties for infringements of the rates in force and measures for preventing such infringements".[65]
Moreover, the Labor Inspection (Agriculture) Convention,[66] No. 129 and the Labor Inspection Convention 1947, No. 81[67] include a Labor Inspectorate with accountability for securing the enforcement of the legal provisions related to wages as well as conditions of work.
In the context of Bangladeshi MW system, there is no supervision policy to check compliance of the minimum wages set by the MWB. In the absence of a supervision policy under the MW legislation, employers are unlikely to be accountable for both an "overt and a covert or latent failure"[68] and a covert or latent failure in this regard means inadequate training and insufficient supervision.[69] This may be counted as one of the significant gaps in the MW system in Bangladesh. In the absence of the supervision process, employers tend to fail to comply with the provisions. The Government does have an overall labor inspection policy which is supposed to monitor labor rights violations in different factories, and labor inspectors are also supposed to notify the national authorities about defects and loopholes in labor legislation. Sadly, the present labor inspection system and the inspectors are inadequate in number to supervise millions of workers and thousands of factories.[70]
The study demonstrates that compliance of labor law depends on an effective labor inspectorate, but this industry does not have sufficiently trained inspectors with logistics support; as a result, the inspectors fail to perform their duty comprehensively.[71] Of those inspectors who carry out their functions

[65] Supra note 16, para. IV (a) (b) and (c). Minimum Wage-Fixing Machinery Recommendation (1928).
[66] Labor Inspection (Agriculture) Convention, 1969, No. 129. Entry into force in 19 Jan 1972. Adopted in Geneva, 53rd ILC session (25 Jun 1969), <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C129>, Accessed on August 6, 2019.
[67] Supra note 22. Labor Inspection Convention (1947).
[68] Celia Wells, Derek Morgan and Oliver Quick. '*Disasters: A Challenge for the Law*'. WASHBURN L.J. 39, no. 496 (2000): 499-501.
[69] James Reason. '*Managing the Risks of Organizational Accidents*' (Routledge, 1997, p. 10).
[70] Syed, R. F., Asaduzzaman M., Emdadul. H., et al. '*Security and Safety net of Garments Workers: Need for Amendment of Labor Law*'. A study report of National Human Rights Commission, Bangladesh (2014). <http://nhrc.portal.gov.bd/sites/default/files/files/nhrc.portal.gov.bd/page/348ec5eb_22f8_4754_bb62_6a0d15ba1513/Security%20and%20Safety%20Net%20of%20Garments%20Workers.pdf>, Accessed on August 1, 2019.
[71] Ferdous Ahmed. '*Working Conditions in the Bangladesh Readymade Garments Industry: Is Social Compliance Making a Difference?*'. (2011) Ph. D thesis, Faculty of Law and Management, La Trobe University, Australia. Page 116.

somewhat satisfactorily, do not stand by the labor legislation due to ignorance of the law. There are also others who take bribes from industry owners and refrain from implementing labor policies.[72] Therefore, I argue that, in view of the insufficient number of labor inspectors, the government has an obligation to start a national campaign to uphold compliance with the payment of minimum wages, as is the case in countries like Costa Rica, where the government had a similar movement in 2010.[73]

Furthermore, there is no recovery provision through the judiciary or other legislative proceedings for workers who are paid less than set minimum wages. As a result, the MW provisions under the labor legislation are not implemented.

In contrast, in many countries, their legislation allows labor inspectors to carry out supervision with extensive powers. They are permitted to enter into workplaces spontaneously without prior notice and to conduct inspections; they can carry out inquiry or conduct a review, whichever they may deem appropriate, to ensure that the lawful provisions are upheld. They may also make recommendations to the workers and employers and issue written comments, warnings and violation reports.[74]

Inspectors frequently have discretionary powers as to whether to file an abuse or violation report. In some countries, inspectors have powers to impose penalties in the event of a breach of MW provisions. Romania, Albania, Nicaragua, Burkina Faso, Lithuania, Netherlands, and Nepal are examples.[75]

Similarly, many countries in the world complied with the provisions of ILO Conventions and enacted or amended their national legislation to recover workers' wages which are due to them. According to their legislation, workers have the right to recover the amounts due through tribunals or courts if they were underpaid in respect of the applicable MW. Such instances are witnessed in Indonesia, Kenya, Israel, United States, Viet Nam, Nepal, Netherlands, and Sri Lanka, among others.[76]

The same survey report shows that in Burkina Faso, the court has documented the obligatory amount of MW rates, under the provisions of Convention No. 131 as well as Convention No. 26, and has accordingly awarded workers who

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[72] *Ibid,* p. 194. Also, Mondal, A. H. '*Role of the Export Processing Zones in the Industrialization Process of Bangladesh: Lessons for the Future*'. Rushidan Islam Rahman (ed.), Performance of the Bangladesh Economy: Selected Issues, Bangladesh Institute of Development Studies (2003), Dhaka.

[73] Supra note 41, paragraph 304. International Labor Conference (2014).

[74] Supra note 41, paragraph 301. International Labor Conference (2014).

[75] Supra note 41, paragraph 301. International Labor Conference (2014).

[76] Supra note 41, paragraph 311. International Labor Conference (2014).

were underpaid the difference in their pay.[77] The report demonstrates that in Honduras, in addition to the wages owed, the workers concerned may seek damages. In Mauritius and Barbados, the courts impose fine on the employers, and in addition to fines, employers are compelled to pay the amounts due to workers who were underpaid.[78]

In some countries, a recovery claim may be placed to an administrative authority. For example, in Barbados, a worker may place a complaint either in person or anonymously by telephone to the Ministry of Labor.[79] These are all instances of the standard provisions related to MW under the ILO Conventions and Recommendations.

Notwithstanding the fact, the General Survey on Minimum Wage[80] observed that the recovery of amounts due to the workers who have been underpaid will not be effective for protection of workers if a sanction is not imposed. This observation could be more relevant for developing countries like Bangladesh, where workers are paid less than that of the rate set by the MWB. Therefore, incarceration along with compensation may be a provision for effective application of MW legislation in Bangladesh. As far as standard MW law is concerned, at present, there is no standard provision under the MW law in Bangladesh to recover dues of the workers, let alone imposing sanctions against the employers. Moreover, I have demonstrated that despite gross violations of labor rights, employers have rarely faced legal actions. Rather, workers continue to be marginalized and were compelled to toil at their workstations for long-hours. For instance, they work eight to twelve hours a day, and sometimes seven days a week in order to fulfil the demands of employers and to meet their basic needs, which is clearly labor exploitation.[81]

The Convention No. 131 has a provision to disseminate MW policy to workers in various ways.[82] The Convention also encourages giving publicity of MW provisions in a language that is understood by workers. This helps workers who are illiterate in understanding the provisions of the law and policies initiated by the government. Similarly, the Recommendation No. 135 refers to

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[77] *Ibid,*

[78] *Ibid,*

[79] Supra note 41, paragraph 312. International Labor Conference (2014).

[80] International Labor Conference (1992). The General Survey Report on Minimum Wage, 79th Session. Report III (Part 4 B). Paragraph 359, <http://ilo.org/public/libdoc/ilo/P/09661/09661(1992-79-4B).pdf>, Accessed on July 12, 2019.

[81] Robinson, C. and Falconer, C. 'The Bangladeshi Garment Industry: Mode for Exploitation?'. (2013) <https://www.huffingtonpost.co.uk/carolinerobinson/bangladesh-primark-factory_b_3208407.html?guccounter=1>, Accessed on July 30, 2019.

[82] Supra note 13, Art. 5. Minimum Wage Fixing Convention (1970). Also, Supra note 14, para. 14. Minimum Wage Fixing Recommendation (1970).

some measures to ensure effective application of MW provisions.[83] In compliance with these policies, many countries have published the MW in their official journals; some governments have published their minimum rates of wages indicating the provisions in force on minimum wages, and information disseminated broadly through other publications.[84] In many countries, employers are accountable for notifying their workers about the current rates of minimum wages. They are also responsible for informing their workers about the pertinent terms and conditions of employment.[85]

Furthermore, in compliance with the ILO Conventions, the United Kingdom has established a helpline through which employees can report any abuse at the workstation and seek advice about national MW legislation. In some countries like Belgium, the labor inspectorate has regionalized services and hotlines for people to get information about minimum wages.[86] According to the same survey report, in several countries including South Africa, Hungary, Vietnam and Poland, the labor inspection services are accountable, among other duties, for giving information on minimum wages.[87] In Peru, these responsibilities have been imposed on the 'Department of Training and Labor of the Ministry of Labor and Employment Promotion'.[88]

On the contrary, in Bangladesh, the minimum wage rates are published only in the official gazette. The government has no other publication policy or strategy to inform the workers about MW. In absence of a standard publication policy, most of the illiterate workers do not know about the minimum rates of wages. The study reveals that most of the lower grade workers in the garment industry freshly arrives from remote, rural areas in Bangladesh.[89] Also, the study demonstrated that about sixty percent of the workforce in the garment manufacturing industry is concentrated in the lower grades of the pay scale, i.e., 5, 6 and 7.[90] They are mostly uneducated, and they have no idea regarding MW policies. The study also shows that the majority of Bangladeshi garment workers are women who come from rural areas and are illiterate or with minimal schooling. Moreover, they are exploited due to their lack of training,

[83] Supra note 15, para. 14(a). Minimum Wage Fixing Recommendation (1970).
[84] Supra note 41, paragraph 296-297. International Labor Conference (2014).
[85] Supra note 41, paragraph 298. International Labor Conference (2014).
[86] Supra note 41, paragraph 299. International Labor Conference (2014).
[87] *Ibid,*
[88] Supra note 41, paragraph 299. International Labor Conference (2014).
[89] Supra note 28, Nazneen and Dev. Nathan (2014).
[90] Moazzem, K.G., et al. *'Estimating a Living Minimum Wage for the Ready-Made Garment Sector in Bangladesh'*. Centre for Policy Dialogue (CPD) and Berenschot, the Netherlands. (2013) p. 25.

technical knowledge, and skills.[91] Further studies reveal that, these women might not even know where to seek assistance.[92] They have no helpline to take recourse to regarding any issue pertinent to the MW system. On the other hand, employers are also not accountable under the present MW policy to inform the workers about their MW rights; rather, employers are inclined to pay less to the workers than that set by the MWB. It is also pertinent to assume that an illiterate person who has been from rural areas will have no idea about a MW system.

As the common pastime activities of workers include listening to news and music on local FM radio stations, and watching television, the government should seize the opportunity of using radio and television to carry out campaigns in an effort to reach MW information along with an effective publication policy to the garments workers.

In this regard, the General Survey Committee admitted that, for practical reasons, the publication of MW rates in the official gazette is not sufficient to ensure that the workers and employers concerned are aware of the same.[93]

In compliance with the provisions of the Convention, in Barbados, the Commercial Wage Council takes into account the comparative wage levels of employees in similar employment. And in Japan, provincial minimum wages are fixed taking into account workers' wages in the province. Finally, in Manitoba (Canada) minimum wages are fixed taking into account the comparative wage levels of neighboring provinces.[94]

Though Bangladesh garment industry has been playing a vital role in reducing unemployment in the country,[95] the workers in this industry receive minimum returns in exchange of their long hours of hard work. Therefore, they still live below the standard.[96] Coupled with minimum return, non-compliance with the labor law intensifies dissatisfaction among the workers, the fact which results in decrement of work efficiency and creation of unrest in this industry.[97] In contrast, to reach this objective of reducing poverty, South Africa, Czech

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[91] Kabeer, N. and Mahmud, S. 'Globalization, Gender and Poverty: Bangladeshi Women Workers in Export and Local Markets'. Journal of International Development 16, no. 1 (2004): 93-109.

[92] Supra note 71, p. 205. Ferdous Ahmed (2011).

[93] Supra note 80, paragraph 359. International Labor Conference (1992).

[94] Supra note 41, paragraph 256. International Labor Conference (2014).

[95] Marilyn, C. & Martha, C. '*Globalization, Social Exclusion and Work: With Special Reference to Informal Employment and Gender*'. (2004) Working Paper No. 20 Policy Integration Department, World Commission on the Social Dimension of Globalization, International Labor Office, Geneva.

[96] Supra note 27, Islam, M. S. (2016).

[97] Islam, M, S, & Hossain, M, I. '*Conclusion: Social Justice in the Globalization of Production'. In Social Justice in the Globalization of Production* (London: Palgrave Macmillan UK, 2016)

Republic, United Republic of Tanzania, Kenya, Armenia and some provinces in Canada, among other nations, amended their national minimum wage legislation.[98]

Recommendation No. 135 refers to the importance of employers' and employees' organizations in efforts to protect workers against exploitations.[99] This role is often carried out by trade unions to protect workers' rights. In Belgium, the social partners, who regulate minimum wages through collective labor agreements, have moral accountability to implement these agreements and to inform their members of their contents.[100] Likewise, in Indonesia, employers' and workers' organizations are associated with the broadcasting of information about the MW among their members. Also, the Palestinian General Federation of Trade Unions (PGFTU) demonstrates that they are trying to establish direct contact with workers through a media campaign on the MW policy. They are organizing demonstrations and distributing leaflets with the aim of raising awareness on issues related to the MW.[101] In Pakistan, under their national labor policy of 2010,[102] it planned to set up tripartite monitoring committees at the federal, provincial and district levels to monitor implementation of labor laws.[103] Hence, it can be summarized that many countries have taken different initiatives to comply with the ILO Conventions and Recommendations so that workers are protected against all forms and manifestations of exploitations. On the contrary, there is no standard policy in Bangladesh to protect workers from exploitation in accordance with the standard of ILO Conventions under the MW law. The workers have been accorded trade union rights by ILO Conventions, but to form or join a trade union is a very complicated area under the present labor law in Bangladesh.[104] As a result, workers in this industry are regularly deprived of the right to form or join a trade union.[105] Unionization is actively discouraged in Bangladesh while trade unions are mostly banned from the export processing zones (EPZ).[106] The study reveals that the ban on these activities is a severe violation

[98] Supra note 41, paragraph 249. International Labor Conference (2014).
[99] Supra note 15, para. 14 (e). Minimum Wage Fixing Recommendation (1970).
[100] Supra note 41, paragraph 315. International Labor Conference (2014).
[101] *Ibid,*
[102] National Labor Policy of Pakistan (2010). <http://www.ilo.org/dyn/travail/docs/995/Government%20of%20Pakistan%20Labour%20Policy%202010.pdf>, Accessed on July 23, 2019.
[103] Supra note 41, paragraph 318. International Labor Conference (2014).
[104] Supra note 21, chapter XIII. Bangladesh Labor Act (2006).
[105] Core Labor Standards Handbook (2006). International Labor Organization, Asian Development Bank. Manila, Philippines.
[106] Dasgupta, S. '*Attitudes towards Trade Unions in Bangladesh, Brazil, Hungary and Tanzania'*. International Labor Review 14, no. 1 (2002).

of labor rights, and leaves a large number of labor and human rights defenders at risk of exploitation, intimidation, harassment, violence, and arrest.[107] The importance of trade unions can best be described as follows:

> there is no denying that the low wages and poor working conditions in a large number of RMG units make workers vulnerable to many problems, and without the trade unions, there is no legal means at hand to ensure their interests and rights.[108]

Therefore, effective trade union practices are indispensable in the case of Bangladesh and there is a need to strengthen the union for the best interest of the workers' rights.

Recommendation No. 135 also provides measures for the effective application of MW legislation by protecting workers against victimization.[109]

In this regard, many countries have taken several initiatives to protect workers. For example, the United States, Canada, and Australia have anti-retaliation legislation to protect workers from victimization or discrimination.[110] Similarly, Japan, Philippines, Israel, Malta, and Gambia, have legislation that forbids employers from taking actions to intimidate or punish workers who exercise their rights by lodging complaints to obtain due salaries or benefits. This protection is, however, significant to ensure workers' rights and to get legal solutions if they are paid below the set rates of minimum wages.[111]

In the setting of Bangladesh, there is no anti-retaliation legislation to protect the workers from victimization or discrimination. Rather, workers are unwilling to file lawsuits against the employers if employers fail to pay less than the rate set by the MWB. The reasons for the unwillingness to file lawsuits are that they are not on an equal footing compared to the employers: they are poor and there is no pro bono legal services available for workers. As a result, this lack of litigation fund demotivates them to file lawsuits. Most importantly, judicial biases (employers' personal or other forms of affinity with the judge in court makes way for nepotism in favor of the employers), judicial backlog due to excessive workload, judicial bureaucracy (unnecessary and cumbersome formalities) generate distrust to the litigation process as a whole in Bangladesh. Sometimes judges use employers' political powers for their material gains and professional success, which ultimately creates a lack of trust in the judiciary.

<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1564-913X.2002.tb00247.x> Accessed on July 31, 2019.

[107] *Ibid,*

[108] Supra note 71, p. 42, Ferdous Ahmed (2011).

[109] Supra note 15, para. 14 (f). Minimum Wage Fixing Recommendation (1970).

[110] Supra note 41, paragraph 320. International Labor Conference (2014).

[111] *Ibid,*

Thus, workers are unarmed and reluctant to file lawsuits against the employers. The absence of severe punitive provisions under the present labor law is another factor for this reluctance.[112]

In response to the research question, it can be summarized from the above-mentioned comparative analysis that the minimum wage provisions under *chapter XI* of the Bangladesh Labor Act, 2006 hardly comply with the standards of the Convention No. 131, the Recommendation No. 135, the Convention No. 26 as well as the Recommendation No. 30 - all of which have been adopted under the International Labor Organization (ILO).

5. State obligations

One may argue that the provisions under the American Declaration of the Rights and Duties of Man 1948,[113] the African Charter on Human and Peoples' Rights 1986,[114] the European Social Charter (revised) 1996,[115] the Council of Europe, the Community Charter of the Fundamental Social Rights of Workers 1989[116] are all applicable for the setting of their respective regional jurisdictions and thus will not be applicable for Bangladesh.

But I argue that, Bangladesh garment manufacturing business is one hundred percent global supply chain industry, with most of the buyers coming from Europe, America and Africa. Thus the provisions under the regional instruments may be laid down in a way so as to ensure that issues like labor discrimination and adherence to minimum wage are addressed and dealt with by the prospective buyers and investors while investing in countries like Bangladesh.

Moreover, Bangladesh has not ratified either Minimum Wage Fixing Convention 1970, No.131[117] or Minimum Wage-Fixing Machinery Convention 1928, No. 26.[118] Therefore, the provisions drafted under these Conventions will not be applicable in Bangladesh according to art. 8 and art. 7 of these Conventions respectively. But I contend by adopting the view of Anker:

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[112] Solaiman, S. M. '*Unprecedented Factory Fire of Tazreen Fashions in Bangladesh: Revisiting Bangladeshi Labor Laws in Light of Their Equivalents in Australia*'. Hofstra Labor & Employment Law Journal 31, no. 1 (2013). <http://scholarlycommons.law.hofstra.edu/hlelj/vol31/iss1/3>, Accessed on June 7, 2019.

[113] Supra note 5. American Declaration of the Rights and Duties of Man (1948).

[114] Supra note 7. African Charter on Human and Peoples' Rights (1986).

[115] Supra note 9. European Social Charter (revised) [1996].

[116] Supra note 11. Community Charter of the Fundamental Social Rights of Workers (1989).

[117] Supra note 13. Minimum Wage Fixing Convention (1970).

[118] Supra note 14. Minimum Wage-Fixing Machinery Convention (1928).

> …considering the unequal development of the employment and labor market in all sectors, given the global competitiveness of the readymade garment sector the criteria related to the Convention 131 could be easily implemented in the context of the readymade garment sector.[119]

Further, the present labor legislation in Bangladesh has some shortages. Thus, the State remains responsible under the following regional and international instruments. For example, Bangladesh is one of the active members of the South Asian Association for Regional Cooperation 1985,[120] which adopted the "SAARC Social Charter" in 2004. This Social Charter recognizes labor policy for workers. More particularly,

> the States parties agree to promote the equitable distribution of income and greater access to resources through equity and equality of opportunity for all.[121]

It is mentioned in this manuscript that the inequality between the inputs and outcome is one of the challenges in the developing labor industry. This discrepancy creates social and economic disparities between employees and employers of the labor industry in Bangladesh. So, as an active member of SAARC, the State is obliged to uphold the SAARC Social Charter.
The UDHR further makes provisions of right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.[122]
Some argue that the UDHR is not a legally binding authority to draft or prescribe a convention or a covenant, but my contention is that the UDHR is a powerful tool in applying diplomatic and moral pressure to governments that violate any of its articles. The UDHR was drafted to define the meaning of 'human rights' and 'fundamental freedoms' mentioned in the UN Charter, which is binding on all of its member states. As a result, UDHR is an important constitutive document of the United Nations, and thus, Bangladesh is liable to follow the provisions of the UDHR.

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[119] Anker, Richard. '*Estimating a Living Wage: A Methodological Review* (2011). Conditions of Work and Employment Series No. 29. ILO Working Papers 994663133402676, International Labor Organization <http://www.ilo.org/public/libdoc//ilo/2011/111B09_199_engl.pdf>, Accessed on June 19, 2019.
[120] South Asian Association for Regional Cooperation (1985). http://www.saarc-sec.org/, Accessed on July 7, 2020.
[121] SAARC Social Charter (2004), art. II, para. 2(viii), <https://www.jus.uio.no/english/services/library/treaties/02/2-03/saarc-social-charter.xml>, Accessed May 4, 2020.
[122] Supra note 18, art. 24. Universal Declaration of Human Rights (1948).

Furthermore, Bangladesh has ratified the International Covenant on Economic, Social and Cultural Rights (1966), which has specific provisions for standard labor condition as follows:

[The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant].[123]

Apart from these provisions, the Constitution of Bangladesh has reaffirmed the same policy for the wellbeing of the labor [art. 14; 15 (a) (b) (d); 20 (1) (2) Constitution of Bangladesh 1972].[124] Therefore, the State is responsible not only by the provision laid down under art. 7 of the International Covenant on Economic, Social and Cultural Rights 1966, but also under the supreme law of the land to uphold and implement them.

Additionally, Bangladesh is an active member of Labor Inspection Convention 1947, No. 81. Under articles 12(1), 15(c) and 16 of this Convention, inspections can be carried out without prior notice. But it has been observed that there is no visible provision regarding inspection under the labor law in Bangladesh. Also, it is a concern that at present the Government has only one legal officer at the Directorate of Inspection for Factories and Establishments (DIFE) for the follow-up of labor law violations detected by labor inspectors.[125] This arrangement is insufficient for labor inspectors to effectively address a volley of labor law violations.

Furthermore, Bangladesh has ratified the Equal Remuneration Convention 1951,[126] No. 100. In its recent annual report submitted to the committee of the Convention, it has been reported that there are invisible pay differences existing in the informal sectors which do not adhere to the Articles 1 to 4 of the Convention that assesses and addresses the gender wage gap. It is also

[123] Supra note 19, art. 7. International Covenant on Economic, Social and Cultural Rights (1966).

[124] Constitution of the People's Republic of Bangladesh (1972). Art. 14; 15 (a) (b) (d); 20 (1) (2), <http://bdlaws.minlaw.gov.bd/act-details-367.html>, Accessed May 1, 2020.

[125] International Labor Conference (2020). Application of International Labor Standards, 109th Session, Report III (Part A), International Labor Office, Geneva. P. 465 (print) <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_736204.pdf> accessed on June 18, 2020.

[126] Supra note 24. Equal Remuneration Convention (1951).

excluded from the scope of application of the Bangladesh Labor Act, 2006.[127] Article 1(a) of the Convention sets out a broad definition of wage, but the definition under s. 2(45) of the Bangladesh Labor Act, 2006 does not cover Art. 1(a) of the Convention. Therefore, the state must keep in mind that it is also responsible to uphold and implement the ratified Conventional provisions.

6. Conclusion

The labor industry can play a significant role in the development of the national economy. Therefore, a standard labor policy is the *sine qua non* in the context of the global economy. Although, labor law has gradually fallen into a deep philosophical and strategic crisis due to globalization and industrialization,[128] yet labor law is highly effective in promoting social goals through the compliance of standard wage policy.[129] Therefore, a standard labor policy with adherence to ILO is indispensable for industries to compete in the global economic landscape.

With regard to developing countries in Asia, India, Pakistan, Sri Lanka, Nepal, Cambodia and China are the competitors of Bangladesh garment global supply chain manufacturing business. So, the potential buyers and investors would inevitably favor those countries who have a standard labor policy that adheres to ILO over the ones like Bangladesh which have a rather sub-standard one. Let me give an example to clarify my point. Imagine that there are two products (product- A and product- B) of the same quality, value and attractiveness. Product- A is manufactured in a country which follows a standard labor policy with adherence to ILO, whereas product- B is manufactured in a country which does not. In this circumstance, a buyer may not place his/ her order in a country where workers are abused due to deficient labor law. Rather, a buyer would do well to place his/ her order in the country where a standard labor strategy with adherence to ILO is in complete effect.

Again, one may argue that due to a comparatively cheap labor cost, product prices are low in Bangladesh compared to other countries in Asia, though the quality, value and attractiveness remains the same. Therefore, buyers might be attracted to place their orders in a country like Bangladesh where they can get the lowest price, disregarding issues like the deficient labor law, labor exploitations etc.

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[127] Supra note 125, print p. 368. International Labor Conference (2020).

[128] Joanne Conaghan, Richard Michael Fischl, & Karl Klare, *Labor Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press, 2004).

[129] Freeman, R. B. *Labor Market Institutions without Blinders: The Debate over Flexibility and Labor Market Performance* (2005). NBER Working Paper no. 11286 at 12-17, DOI: <10.3386/w11286>, Accessed on Oct. 13, 2019.

I argue against this stance by saying that in Western countries, buyers' tendency has been to adopt utilitarian business philosophy in their business decision making process. And utilitarianism falls under the exceptionist category, which in turn, is considered as deontological that prefers to rely on moral principles as guidelines of business dealing.[130]

As Western buyers tend to prioritize ethical practices over economic gains, I am certain that they would not place their orders considering the lowest price only. Instead, they would prefer to place their orders in a country which has ethically correct labor practices and has enacted a standard labor policy with adherents to ILO. Today's customers are more concerned and educated about issues like eco-friendliness and adoption of fair-policy as cogs in the overall wheel of circular-economy in respect of manufacture of products. So a company which can boast of its products as having been produced ensuring, for example, labor rights would certainly gain market reputation, along with customers' confidence (and money). Employers association may present the case to national and international forums to pressure buying countries to be ethically correct when it comes to choosing countries to place their orders. Therefore, if Bangladesh does not mend its ways and drastically makes a facelift in terms of ensuring labor rights and implementing MW policies and provisions in favor of its demographically disadvantageous workforce, it runs the risk of losing business to other attractive neighbors who are more compliant. Bangladesh being a country that depends heavily on exports of garment products for revenues, can hardly afford such negligence. So it is high time for Bangladesh to address issues and lacunae discussed in this paper with regard to labor welfare, and move forward to comply with pertinent labor laws and regulations to the fullest.

[130] Yongsun Paik, Jong Min Lee and Yong Suhk Pak. '*Convergence in International Business Ethics? A Comparative Study of Ethical Philosophies, Thinking Style, and Ethical Decision-Making Between US and Korean Managers*'. Journal of Bus Ethics 156, (2017): 839–855. DOI 10.1007/s10551-017-3629-9.

Betting on the Future: A Comparison Between Trade Unions' Strategy in the Restructuring of Fiat and Volvo Cars

Federico Fusco [1]

Abstract

Nowadays, a key factor for business competitiveness is the ability to change structure adapting to markets shifts. Restructuring often requires negotiation with trade unions, which must calibrate their action in order to protect workers' interests. Based on these considerations, the present paper analyses trade unions' role in the restructuring processes of Fiat and Volvo cars during the 2008-2010 economic crisis. Both companies opted for innovative strategies, clashing with their respective national models of restructuring and based on the logic of a "common bet" between employer and employees towards a better future. The Swedish trade union managed to combine its efforts with the Volvo one, to quickly adopt necessary measures. Conversely, some Italian unions clung to old inefficient schemes, affecting the firm's action and almost causing the shutdown of the plant. Those different approaches could be the outcome of opposite public intervention strategies in the economy, especially in relation to enterprises' crisis.

Keywords: industrial relations, trade unions, restructuring, FIAT, Volvo.

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1. Introduction

A key feature for the contemporary trade unions is its ability to abandon inefficient working models in favour of better ones, embracing together with the employer some kind of "bet" for the future of the firm[2].
Contemporary companies require an increased amount of managerial flexibility, thus to ensure the achievement of the mutable productivity goals. In the global economy, enterprises are exposed to economic shocks coming from different markets and so, as for every earthquake, there is an increasing need for flexible structures to better resist the stress. For those reasons, the ability to promptly adapt to the shifts of the market has become a key factor for the competitiveness of a system. In this framework, the tools devoted to the restructuring of companies play an essential role. In this context, the trade unions have a crucial part. In fact, the protection of workers' rights requires the ability to recognize and abandon strategies that are no longer efficient[3].
The abovementioned remarks faced an important test during the crisis spread in 2008, which deeply affected the world economy. Focusing on the automotive industry, between 2008 and 2009, the vehicles production decreased by 21.7% in Europe and 34.2% in the U.S. This drop was so dramatic that, even if in this sector the labour cost is not one of the major expenses, employers were forced to undersize their labour force, mainly as part of a restructuring strategy.
Moving from this framework, the present paper will analyse how the restructuring process took place in two different automotive companies, which successfully counteracted the crisis. In both cases, the key of the success laid in deviating from the classical model of restructuring generally used in the respective national experience. Within this perimeter, the analysis will focus on the role played by the trade unions and their contribution in managing the process.
To achieve those goals, the present work is divided in three parts. The first part analyses the main features of the national frameworks in which the restructuring processes took place, so to better frame the innovative aspects of the firms' choices. The second part describes the restructuring strategy followed by each company and the role played by the trade unions. The third part investigates the effects of the aforementioned experiences produced on the respective national legal systems.

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[2] See T. A. Kochan, , A. E. Eaton, R. B. McKersie, P. S Adler, *Healing together: The Kaiser Permanente labor management partnership*, Cornell University/ILR Press, 2009; A. Bryson, J. Forth, *The added value of trade unions*, Trade Union Congress, London, 2017, 29.
[3] P. Ichino, *A che cosa serve il sindacato? Le follie di un sistema bloccato e la scommessa contro il declino*, Mondadori, 2006, chap. 1.

2. Notes on the Italian and Swedish systems of restructuring under a labour law perspective

Both in Italy and Sweden trade unions play an important role in the restructuring process of the firm. In fact, because of their strength and the high coverage rate of the collective agreements[4], they are usually consulted by the employer. Moreover, in both countries the traditionally strong role played by sectoral level collective agreements also affects the restructuring process, generally setting boundaries that enterprise level contracts could not easily overcome[5].

On the other hand, some important differences between the two systems consist in the trade union structure and in how the State intervenes in the restructuring process[6]. In Sweden, workers are mainly organized following the distinction between blue-collars and white-collars: LO organizes the former; TCO the latter. SACO, instead, is addressed to the graduated employees[7]. For this reason (with some recent exceptions between SACO and TCO), they generally do not compete among each other to increase their affiliates. Moreover, they are politically independent (the traditional LO's link with the social democratic party is loosening). Thus ideological issues do not influence their actions very much.

On the contrary, Italian trade unions generally organize all types of workers. Thus, they can join different associations (i.e., CGIL, CISL and UIL and many others). This situation generates a competition among trade unions to attract affiliates, forcing them to characterize themselves somehow. For historical reasons, this differentiation mainly consisted in the political orientation of the union, so that for a long period there were tight links between some unions and political parties[8]. Since the beginning of the 90's those links started to

[4] The trade union density is significantly lower in Italy (it decreased from about 50% of the 70's to 37% of 2013, while in Sweden it moved from about 80% of the 90's to 67% of 2013 – OECD data). However, the coverage rate of the collective bargaining is similar (around 90% in Sweden and 83% in Italy, according to OECD data).

[5] However, as we will see in the last part of this paper, the 2008 crisis boosted the decentralization process of the collective bargaining system.

[6] Among the numerous differences between the two systems, this paper will specifically focus on the mentioned ones. For a comprehensive analysis of the features of the trade unions in Europe see R. Hyman, *Understanding European Trade Unionism: Between Market, Class and Society*, Sage, 2001.

[7] See A. J. Westregård, *Sweden*, in U. Liukkunen eds., *Collective Bargaining in Labour Law Regimes*, Springer, 2019.

[8] Among the major confederations, CGIL was linked to the Communist party; CISL was linked to the Christian Democratic Party; and UIL was associated with the Socialist party. It should be mentioned that a comprehensive analysis of the features of the Italian trade unions

loosen, but they still produce important effects on the trade unions' actions. Thus, sometimes, ideological issues can become the major point of discussion with the employers' organizations, with the result to exacerbate the conflict[9].
Moving to the role of the State in managing the restructuring process, the two national systems represent the perfect antipodes. While Italy has a tradition of State intervention in the restructuring process with direct injections of public money in private companies, almost no support of this type has usually been provided in Sweden[10].
The main Italian tools to address the restructuring process of the firm have traditionally been the so called "Wage Guarantee Fund" and the "Job-security agreement"[11]. Those institutes are pretty complex and have been frequently amended. However, their basic mechanism is to allow the employer to quickly lay-off workers (rather than dismiss them), while a public allowance replaces the wage[12]. The goal is to avoid that a momentary downturn could lead to the dispersion of a well-organized and skilled human capital or to the shutting off of still-valuable enterprises.
The extraordinary Wage Guarantee Fund (CIGS), historically reserved to major firms[13], allows the employer[14] to cut working hours, saving on the wages. The

and of the factors shaping them goes beyond the extent of this paper. On this topic see I. Regalia, M. Regini, *Between voluntarism and institutionalism: industrial relations and human resource practices in Italy*, in R. M. Locke, T. A.Kochan, M.J. Piore, *Employment relations in a changing world economy*, MIT press, 1995, 133 ss.

9 The so-called "Fiat case" that will be described in the second part of this paper is a clear example of collective action ruled by ideological issues. For another relevant example, see the Arese's factory experience described by P. Ichino, *A che cosa serve il sindacato? Le follie di un sistema bloccato e la scommessa contro il declino*, Mondadori, 2006, chap. 1.

10 The bank sector's crisis of the beginning of the 90's represents an important exception. However, this case does not change the features of the Swedish system, considering that in the credit sector the key role played by State and Monetary Authorities is to act as a lender of the last instance. For an overview of this topic, see C. Panico, F. Purificato, *The debt crisis and the European Central Bank's role of lender of last resort,* PERI, University of Massachusetts, Working paper n.2013/306. Another important example of public intervention in private companies is the steel and shipyard crisis in the late '70s'. The high cost of the operation was one of the reasons that future interventions were discouraged.

11 The former mainly in its "extraordinary" form and, until 31 December 2016, also in its "in derogation" form. The latter in its "defensive" form, which is similar to the German *Kurzarbeit*. For a seminal analysis see M. V. Ballestrero, *Cassa integrazione e contratto di lavoro*, Franco Angeli, 1985.

12 For further information, see R. Pedersini, D. Coletto, 27 National Seminar Anticipating and Managing Restructuring, National Background Paper – Italy, ITC, 2009.

13 The number of firms entitled to apply to the CIGS has grown in the last years, including nowadays a diversified number of enterprises, whose complete list can be found here: https://goo.gl/1vFxvZ

employee obtains an allowance paid by the fund and equal to the 80% of the lost pay (until a maximum threshold). The employment contract remains in place; thus the worker is bound to the company.
The Wage Guarantee Fund "in derogation" is similar and it extends the abovementioned scheme to enterprises which do not meet the criteria required for the extraordinary intervention.
A basic difference between the two instruments relies on the fundraising system. The former should (in theory) finance itself, thanks to the compulsory contributions paid by the firms entailed to benefit from it[15]. The latter, being an extemporary intervention, was mostly funded by the annual general public budget[16]. Thus, the companies benefiting from it were not directly bearing its costs.
Moving to the Job security agreement (in its defensive form), it aimed at sharing among all the employees the risks and costs of dismissals. In case of redundancies, the employees, rather than let someone lose their job, collectively reduced their working time (and wage). This result was obtained due to an enterprise level collective agreement[17] and was promoted via the concession of a public grant aimed to compensate part of the income loss[18].
Both the solutions are similar to schemes used in other countries (such as the German *Kurzarbeit* or the *Chômage temporaire* in Belgium), but the hallmark of the Italian experience consists in how they have been practically used.
In fact, the abovementioned instruments have been often misused and subverted[19]. On one hand, measures that should have been only temporary have been extended for too long[20]. On the other hand, the aid was granted also

[14] At the end of a procedure involving a collective bargaining phase and an authorization from the Ministry of Labour.
[15] However, especially during economic crisis periods, it is quite common for the State to provide extra funds also amounting to several € billions per year.
[16] Between 2009 and 2015, the CIG "in derogation" cost amounted to over 8 €billion. Data from the INPS database "Operazione porte aperte – ammortizzatori sociali in deroga", www.inps.it. For a comprehensive analysis of the utilization and costs of both types of CIG, see the INPS annual reports available at https://goo.gl/G0sUaW.
[17] Which is one of the few cases in which a collective agreement also binds workers that do not belong to the signatory association.
[18] For the firms that could apply for CIGS it consisted in an allowance for each worker up to the 60% of the lost wage; for other firms the State paid an amount of money equal to the 50% of the non-worked hours. It should be mentioned that this type of contract has been abolished as from 1 July 2016 (see art. 46 d.lgs. n. 148/2015), But it played an important role in shaping the behavior of the trade unions in relation to the crisis since the legal scheme was in place for many years. .
[19] S. Buoso, *Uso e abuso della cassa integrazione in deroga*, *Diritto delle Relazioni Industriali*, n. 2, 2016.
[20] The intervention of the CIGS could previously last up to 36 months, but it was often extended through special laws, especially in the most depressed areas.

to firms with no recovery possibilities. Thus, public money was used to keep in place jobs that, from an economic perspective, where in practice lost (so-called "displacement")[21].

This problem clearly emerged during the parliamentary debate concerning the refinancing of the CIG in derogation. As senator P. Ichino pointed out, in seven to eight cases this instrument "is given to workers that have been laid off more than two years (while the firm is inactive), and there are cases in which this situation of inactivity could last up to ten years[22]". Moreover, in some cases this kind of intervention lasted even more, as happened for "the ex-workers of the nursing home of Bari whom, after 18 years of "social shock absorbers", among which also the CIG in derogation, are still waiting for a new job relocation"[23].

Another clear example of misuse of the public money in managing enterprises crises is the Alitalia case. In 2008, a restructuring process generated 1500 redundancies, and a special law granted the intervention of the Wage Guarantee Fund for four years. However, thanks to further extensions the total period covered by public grants reached the overall length of nine years. In this time span, even if there were no real possibilities for the employees to resume their work for Alitalia, they remained linked to the company and only a few of them looked for other job opportunities[24]. Moreover, thanks to special legal provisions and an additional tax on flight tickets, the legislator removed the maximum threshold for the public allowance. Thus, some workers received more than €20.000,00 per month without working[25].

In the automotive sector, a similar case is the one of the Alfa-Romeo automotive plant of Arese, which also testifies how the misuse of public money can affect the behaviour of some trade unions.

Alfa-Romeo was founded in 1910 (as Alfa) and, after being owned by the state for over 50 years, Fiat acquired it in 1986. The company already suffered from major inefficiencies and after this privatization, the plant of Arese (Milan) continued to produce in loss. Thus, during the next 15 years its labour force was steadily reduced, but only a small portion of the workers were directly fired. Most of them received the protection of the CIGS (in some cases up to five years), without any real perspective to resume working.

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[21] Such problems emerged before the reform of the extraordinary Wage Guarantee Fund of 1991 (l. n.223/1991) and, more recently, a cause of the increasing use of the Wage Guarantee Fund in derogation.

[22] See Senato della Repubblica Italiana, *Resoconto stenografico 69° seduta pubblica, mercoledì 17 luglio 2013*, speech of P. Ichino, https://goo.gl/TdeSs5

[23] Ibidem.

[24] See P. Ichino, *Il peccato originale di Alitalia*, www.pietroichino.it

[25] See INPS, Fondo Speciale per il Trasporto Aereo (FSTA) – aggiornamento, www.inps.it

In 2001, Fiat sold the entire plant's area and the buyers wanted to use it for activities different from car manufacturing. However, the left wing trade unions fiercely opposed this plan, because they thought that the area should have been addressed to the automotive industry. In the following years, this led to a series of harsh collective actions aimed to prevent the establishment of firms not related to car manufacturing. In addition, those unions also opposed new job offers for the unemployed, and some of those unions physically dispelled recruiters willing to hire workers. As a result, the CIGS kept the workers linked for years to a "dead" factory, hindering the search of new jobs and even making them to refuse several new job opportunities[26].

This case testifies the dangers of the misuse of public assistance during an enterprise crisis. If public aid is granted to companies with no possibility of recovery, part of the trade unions (and workers) are pushed to believe that the state will sustain the financial burden. Thus, they do not accept that the old economic reality should be abandoned because it is not profitable anymore. In other words, this generates a trend for some trade unions to refuse any type of change, severely hindering the restructuring process of the firms[27].

The Fiat case of 2010 that will be later analyzed, represents another example of this behavior.

The Swedish model of enterprise restructuring is the opposite of the Italian one. The Swedish State provides almost no financial support to companies in distress and trade unions prefer to face a collective dismissal, rather than accord a wage reduction (including in this notion also a shortening of the working time)[28]. This is part of the Rehn-Meidner model that, to enhance exports (fundamental for a Country with a small internal market such as Sweden), introduces the idea of "solidaristic wage". If each firm faces the same labour cost, they are obliged to base their competitiveness on higher productivity levels (reached through new investments and rationalization of the production process). Thus, restructuring is accepted as "a normal and fundamental principle"[29]. Enterprises that are not able to deal with the normal standards should close and their employees should move to more competitive

[26] For a complete list of the events in the Arese factory, see P. Ichino, *A che cosa serve il sindacato? Le follie di un sistema bloccato e la scommessa contro il declino*, chap. I..

[27] P. Ichino, *A che cosa serve il sindacato?, cit.*

[28] See also O. Bergström, *Managing Restructuring in Sweden. Innovation and learning after the financial crisis*, Irene, 2014, 5.: "In Sweden, restructuring is typically managed by adapting the size of the workforce through dismissals, and by supporting the dismissed workers to find new jobs with the help of a system of job security councils, which are governed by collective agreements between social partners".

[29] O. Bergström, *Anticipating and Managing restructuring. Sweden, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden*, 2009, 7.

companies. For this reason, the public intervention focuses on the labor market, and it aims in easing the transition among different jobs. In line with this policy, trade unions address their actions to ensure that workers can be hired by more profitable companies. This leads to the valorization of their skills and allows them to enjoy a full wage rather than a reduced allowance[30].
Because of this contest, trade unions are not afraid of restructuring processes. In fact, they are open to those changes that can lead to better economic performances, which are the unavoidable premise to assure higher working conditions.
To summarize, it could be pointed out that Italy and Sweden have different systems of restructuring of the firms. The former invests a large amount of public money to avoid dismissals. This scheme has often been abused, conveying to some workers and trade unions the message that the State will shelter the existing jobs from the shifting economic needs[31].
On the other hand, the Nordic country bases its competitive strength on the prompt adjustment to the markets turns. Thus, public money is invested in order to help workers to move towards more performing companies, abandoning the inefficient ones.

3. The restructuring strategy followed during the crisis. The Fiat case

The economic crisis caused a sudden drop in demand, which forced companies to react. Fiat chose to use the period of production stoppage to restructure some factories. This was part of a long-term investment programme aimed to modernize the production facilities, thus to be more competitive once that the crisis had passed[32]. To achieve this goal, it was (also) necessary to shift to a more efficient system of work organization. In fact, in 2009, the Mirafiori plant (in Turin) had been used only at 64% of its productive capacity; the Cassino plant at 24%, Melfi at 65% and Pomigliano at 14%. At the same time, the Polish plant of Tychy registered a saturation index of 93% and the 6100 employees of Fiat Poland produced as much as the 22000 Italian employees[33].
The restructuring process started from the "Giambattista Vico" plant located in Pomigliano d'Arco. This plant was a former Alfa-Romeo factory with very low productivity levels and where in the previous years most of the employees had experienced quite long periods of CIGS. Moreover, this plant was

[30] O. Bergström, *op. cit.*
[31] P. Ichino, *A che cosa serve il sindacato?*, *cit.*
[32] On this point, see the speech of Fiat's Ceo S. Marchionne at the Italian Parliament meeting on 15/02/2011, available at http://webtv.camera.it
[33] Datas from R. De Luca Tamajo, *Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane*, *Rivista Italiana di Diritto del Lavoro,* 2010, n. 4, 800.

manufacturing several car models whose production would have been stopped in the near future.

For those reasons, in order to keep the factory running, an investment of several hundreds of millions of € was needed to modernize the assembly lines, converting them to the newest models. Such investment would have assured the continuation of production for many years, securing a large amount of jobs[34].

A condition for the feasibility of the operation was the full exploitation of the productive capacity, also adopting a new work organization scheme. This required a company level collective agreement, which, however, would have deviated under some minor aspects from the sectoral agreement[35].

In spring 2010, all the major trade unions signed the contract, except Fiom-Cgil[36]. In addition, the agreement was approved with a referendum among all the workers. It should be noted that Fiom represented only 8.75% of the workers, while to other unions, considered together, represented a much greater share of employees. Notwithstanding those circumstances, Fiom's refusal had several important consequences.

Fiom is the oldest Italian trade union and has always been one of the strongest. Thus, its clash with the biggest Italian firm and other major trade unions had a large impact in the media.

In addition, the collective agreement binds only the signing unions (and their members). Under certain circumstances, it can be extended also to other employees, but the strong opposition of Fiom hindered this option.

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[34] It is relevant that the only other option was to close the factory and produce the new models in plants (such as the Tychy one) with well-known standards of high productivity. Thus, realizing the investment plan was the only solution to keep Giambattista Vico running.

[35] It is not possible to describe here the entire content of the agreement. However, its most important points concerned: 1) the realization of a big investment, keeping high occupational rates for the coming years; 2) no pay cuts, the increase of compulsory overtime (for a total of 120 hours a year per person); and introduction of a new shift on Saturday night; 3) the rescheduling of breaks during working time; 4) some provisions to avoid a fraudulent use of sick leaves; 5) a peace clause aimed to control the proliferation of strikes (which would still remain perfectly legal). For a more detailed analysis of the content of the Fiat agreements (of which the Pomigliano one is only the first step) see R. De Luca Tamajo, *I quattro accordi collettivi del gruppo Fiat: una prima ricognizione*, *Rivista italiana di Diritto del Lavoro,* 2011, n. 1, 113 ss. It should also be noted that in that period, a sectoral collective agreement for the automotive sector did not exist in Italy. Thus Fiat was applying one of these agreements for the engineering industry.

[36] It was uncommon that the Italian main trade unions did not agree on a unique position, as they traditionally used to. However, the Fiom action was in line with the position of CGIL that since 2009 was clashing with CISL and UIL. On this topic see F. Carinci, *Il lungo cammino per Santiago della rappresentatività sindacale: dal Tit. III dello Statuto dei lavoratori al Testo Unico sulla Rappresentanza 10 gennaio 2014*, *WP Massimo D'Antona, It*, 2014, n. 205, 21 ss.

Thus, Fiom had almost a right of veto. Without its consent its members and non-unionized workers (which were the majority) would have not been bound by the new company agreement, but only by the sectoral one. Those agreements laid down incompatible models of work organization and they could have not coexisted in the same plant[37].

For this reason, the sole solution for Fiat to not shut down the plant, was to unbind itself from the sectoral agreement. In this way, the contract signed by the (new) company would have been the only one in force. This situation would have eliminated the clash between different work organizations models.

This goal was achieved in two steps: on 29 December 2010, it was signed a new sectoral collective agreement addressed to the automotive industry (which traditionally was applying the one of the engineering industry). The deal was named "first level contract" and was signed by Fiat and the national boards of the trade unions favorable to the Pomigliano agreement. Neither Fiom, nor any employers' association signed it.

In the meantime, Fiat created a new company (Fip) that was not part of any employers' association. Thus, it was not bound by the sectoral (engineering) collective agreement. Fip rented the industrial area where the Pomigliano plant was previously locatedand used it to realize a new factory for the production of the new car models. In doing so, it applied the "first level" automotive agreement, integrated by a company level one. The latter (signed on 17 February 2011, not by Fiom) was shaped on the model of the Pomigliano agreement of 2010. Concerning the workforce, Fip reemployed most of the former workers of Fiat Pomigliano, which had been recently dismissed because of the closure of the plant.

The second step consisted in the extension of the Pomigliano model to all the Italian plants of Fiat[38]. In fall 2011, Fiat withdrew from the employer's association with effect from 1st January 2012. At the same time, it gave notice of termination of all the old collective agreements both national and local, with effect from 1st January 2012. Thus, from that date the only collective agreements binding Fiat were the "first level one" (born on 29 December 2010

[37] In addition, some provisions controlled the proliferation of strikes, obliging the trade unions to not promote actions against the scope of the agreement, as well as to try to influence workers not to take part in these actions. This obligation was only towards the unions, and it did not impact on the lawfulness of the strike. Thus, the employees were free to go on strike whenever and for whichever reason they wanted. The issue with this clause was that Fiom's programme was to firmly oppose the application of the agreement.

[38] For a detailed description see F. Carinci, *La cronaca si fa storia: da Pomigliano a Mirafiori*, *WP Massimo D'Antona, It*, 2011, 113. In a general overlook on the Italian industrial relation system of those years: VV.AA., *Da Pomigliano a Mirafiori: la cronaca si fa storia*, edited by F. Carinci, Ipsoa, 2011.

and renewed on 13 December 2011) and the plant level ones specifically designed upon the specific local needs.

This quick chronicle shows the relevant difficulties faced to save the Pomigliano plant and its workers, even if Fiat was willing to invest in it hundreds of millions of € and the new agreement was supported by the majority of trade unions and workers. In fact, the opposition of a minority (Fiom) risked to wreck the entire project.

It must be noted that both Fiat and Fiom played by following the rules and had the right to behave as they did. Thus, the described paradoxical scenario was the outcome of an unsatisfactory legal regulation of the enterprise level collective bargaining system[39].

Postponing to the last section of the paper the analysis of the impact that the Pomigliano case had on the Italian legislation, we should now focus on the role played by the trade unions.

The key element consists in the opposite behaviors of the trade unions in dealing with Fiat's ambitious plan. While the majority embraced the challenge of creating an innovative plant serving as an example for the sector[40], Fiom refused any agreement because it required the adoption of a different model of working organization. The impression is that Fiom's opposition stemmed from the refusal to adapt to a new model, rather than from dissatisfaction for working standards[41].

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[39] R. De Luca Tamajo, *Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane*, cit., 811. points out four major problems of the company level collective bargaining. Those problems are: 1) the lawfulness of *in peius* derogations of the sectoral collective agreement; 2) the lack of rules concerning the internal decisional mechanism of the RSU; 3) the lack of a majority rule (instead of unanimity) in order to have a company level collective agreement with general effects; 4) the legal uncertain regarding the binding effects of the peace clauses.

[40] Under this aspect, in 2012 the plant won the Automotive Lean Production award, one of the most important in Europe. In 2013 it obtained the Gold medal in the World Class Manufacturing system, becoming the best Fiat plant in Europe. For an interesting description of the result of the plant transformation, with some adverse remarks from Fiom, see P. Ichino, *Pomigliano: quando la sinistra sbaglia il bersaglio*, *www.pietroichino.it,* 2012, 1 ss.

[41] As already stressed, the agreement slightly increased the compulsory overtime and introduced minor modifications in the workers' break schedule. However, those changes were of lesser importance and they were not the main ground of the dissent. Fiom's major claims concerned a hypothetical violation of the worker's constitutional rights to health and of strike (see Fiom *Così non possiamo firmare. Il 25 giugno sciopero generale metalmeccanici*, *la Repubblica,* 10 june 2010.). However, in ten years of application of the agreement (and an incredibly high number of court decisions about it) any judge has never found such violations. In reality, those alleged infringements were simply an excuse to refuse changes in the way of working. In fact, the whole restructuring plan moved from the idea that employers and employees must embrace a common effort in order to build a strong and competitive firm. Their interests, even if still opposed, share a common base: the working standards that can be obtained cannot be separated from the economic performance of the firm. Thus, workers carry a self-interest in

Thus, the Pomigliano case represents a conflict between two opposite ways to conceive the role of the trade unions, rather than a confrontation on the labour standards. Some of its actors agreed that the trade union should play an active role in sponsoring solutions that, increasing the competitiveness of the firm, create the basis for better working conditions. Other actors ignored such need and, with a shortsighted vision, seemed to assume that good working standards can be granted regardless of the good performance of the firm.

A possible explanation for this latter attitude looks at how Italy has traditionally handled enterprises' crisis. The massive use of public money to avoid dismissals even in "dead" companies[42], pushed some trade unions to believe that decent working conditions can be granted irrespectively from the economic performance of the firm. If the company performs poorly, this is not a matter for the trade union because the state will intervene and pay the workers instead of the employer. Thus, there is no need for the union to support actions aimed to increase the competitiveness of the firm.

In this context, the restructuring process, instead of being seen as a physiological event and as a tool to implement performances, is perceived as a danger that should be fought back. In fact, why should the workers accept the challenge towards a better future, when they can just stay still and wait for the emergency parachute of the public support?

For all the above-mentioned reasons, the Italian system suffers from the misuse of the public intervention in the economy. The practice of saving job positions, even when this is not economically convenient influenced the way of

enhancing productivity. In the Pomigliano model this concept leads to the empowerment of every employee. Everyone is asked to take an active part in the improvement of the production process, suggesting changes (even minor) that could ameliorate it. The contested (but totally legal) clauses concerning sick leave and strikes were just another step in this direction. The former excluded the payment of the sick allowance for the initial days in case of a grounded suspect of fake illness (such as in case of a peak of sick absences concurrently with a strike, an important football match or between two red days). However, upon request a joint commission could ascertain the authenticity of the illness. The latter was related to the peace clause signed by the trade unions. In Italy, those clauses are devoid of a specific sanction, thus they risk not being effective at all. The Pomigliano agreement tried to enforce them relating via contractual sanctions. Thus, when violations occurred, the trade unions would have lost some of the rights stemming from the agreement. So, the strike would have been legal and the union would have still enjoyed the rights granted by the law. However, this union would have lost some of the benefits that the contract added to the ones given by the legislator. On this topic see also F. Carinci, *Se quarant'anni vi sembran pochi: dallo Statuto dei lavoratori all'Accordo di Pomigliano*, *WP Massimo D'Antona*, 2010, 108, 17 ss.

[42] It is interesting to notice that the Pomigliano plant is a former Alfasud one that has experienced major organizational failings for many years (F. Pirone and F. Zirpoli, *L'Alfa Romeo e l'industria automobilistica italiana*, in F.Russolillo (ed.), *Storia dell'IRI. 5. Un Gruppo singolare. Settori, bilanci, presenza nell'economia italiana*: Laterza, 2015.).

thinking of some trade unions, encouraging them to refuse restructuring processes. Such situation affects the competitiveness of the system on the global market.

4. The Volvo case

As already seen, the economic crisis deeply affected Sweden as well. The average monthly number of notice of termination raised from 4.000 to 20.000 and in a 10 months span (September 2008 – June 2009) almost 150,000 people were declared redundant[43]. Focusing on the industrial sector, between 2007 and 2009 the production fell by 65% and the automotive production was almost halved between 2008 and 2009.

In order to save the national economy, several measures were quickly adopted: between 2008 and 2010 the global value of the interventions amounted to 733 billion Sek, of which 25 billion were allocated during the acute phase of the crisis (15 billion were destined to industrial policy). The actual cost of the economic intervention was significantly lower (around 600 – 700 million Sek)[44] and companies did not receive any direct support.

The business-oriented initiatives aimed to: avoid a liquidity crisis granting loans to financial institutions; grant support to dismissed workers via employment services and retraining; provide advice to companies in crisis; and support restructuring and development of the automotive industry[45].

Thus, the governmental reaction was in line with the key feature of the Swedish restructuring model. It avoided a direct expenditure of public money in private firms[46] and provided a comprehensive set of services to help both

[43] Data from Tillväxtanalys, *Näringspolitik i kriser – vad kan vi lära av finanskrisen 2008–2009?*, 2013, 11 ss.. See also O. Bergström, *Anticipating and Managing restructuring, . Sweden*, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden, at 29.: "Sweden was the country with the largest number of announced job losses in Europe during the period 2008-2009 if calculated by the size of the labour force".

[44] Tillväxtanalys, *Näringspolitik i kriser – vad kan vi lära av finanskrisen 2008–2009?*, 11 ss.

[45] For a comprehensive analysis of those initiatives see ibid., 37 - 44. Here we can just underline that companies within the automotive sector had the possibility to obtain loans of up to 5 million Sek in order to counter the crisis. However, the conditions in terms of payback time and warranties were so strict that no one applied for these loans. See also ibid., at 13. where it is clarified that one of the major reasons of the refusal to provide direct support to private companies was the outcome of the shipyard and steel crisis of the late 70's - early 80's, when the final public cost "amounted to 60 billion SEK at 1986 prices".

[46] See O. Bergström, *Anticipating and Managing restructuring. Sweden*, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden, 8.: "There is in general a political agreement that industrial policies should not be focused on keeping up the existing production structure. Instead, "taxpayers' money" should be used for

companies and workers strengthen their position in the market[47]. This feature is even more remarkable considering that several actors asked for a public rescue of private companies.

In December 2008, the debate concerning the role of the government in managing the crisis also interested the automotive sector. Before the crisis, this industry accounted for 15% of the Swedish exports, directly employing over 140,000 people and with an important net of sub-contractors and suppliers. However, at the early stages of the downturn, the total production was halved[48]. At the same time, other EU member states were implementing public schemes to support their automotive sectors. For those reasons, in autumn 2008 and winter 2009, IF Metall (the blue-collar union) formally asked for a public intervention. In February 2009, Volvo also demanded some support. Both the proposals aimed to introduce a type of layoff financed by public funds aimed to provide vocational education as well as training as an alternative to dismissal[49]. The IF Metall's suggestion shared the salary cost between the companies and the unemployment fund. The proposal from Volvo divided those costs between government (70%) and firm (30%)[50]. However, the conservative Government refused both proposals and only in March 2009 granted to Volvo a public guarantee for a loan from the European Investment Bank[51].

In this framework stands out the innovativeness of the restructuring strategy followed at Volvo. Opposite to the predominant idea of sticking to the classical Swedish restructuring model, several actors chose a restructuring strategy specifically designed for that situation.

developing the infrastructure and resources that stimulate and attract new industries and investments".

47 The analysis of the impact of the interventions on public costs shows that the only certain expenses are the ones related to the advice services for the companies (20 million Sek) and to the competence development measures for dismissed workers (650 million Sek). Those expenses represent almost all of the global cost). See Tillväxtanalys, *Näringspolitik i kriser – vad kan vi lära av finanskrisen 2008–2009?*, 44.

48 Between 2007 and 2009 the number of cars sold by Volvo decreased from 458.323 to 334.808 (data from Volvo Cars Newsroom; Volvo 2013:7).

49 It should be noted that layoffs were theoretically possible in Sweden, but moving from the fact that in 1995 the public allowance was abolished (equal to the 45% of the salary), employers stopped using layoffs because they would have been obliged to pay the workers' full salaries.

50 K. Lovén, *Social partners in motor industry seek to bring back layoff pay*: Eurofound, 2009b 1 - 2.

51 See O. Bergström, *Anticipating and Managing restructuring. Sweden*, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden, 61 - 62.

IF Metall and some employers' associations considered the labour market would have not be able to reabsorb the exceptional number of unemployed[52]. Moreover, being a financial crisis, it could have led to bankruptcy companies still profitable[53]. Finally, after the crisis, companies should have selected and trained new staff to resume the normal production[54]. For those reasons, on March 2nd 2009, a temporary framework agreement on temporary layoffs was signed. The agreement allowed each employer to agree with the shop stewards a reduction of working time and wage by maximum 20%. This possibility was only temporary and available until March 31st 2010 (but the deadline was later extended to October 31st 2010)[55]. With this solution, employees not only kept their jobs, but also received an income greater than the unemployment benefit.
The agreement was shaped on the model of several foreign experiences (especially the German *Kurtzarbeit*, but the Italian CIGS is also similar) and its uniqueness was the lack of public funding.
Volvo Car Corporation was the first company to implement the agreement, signing in April 2009 a local understanding to avoid redundancies. Instead of dismissing the workers, the company (between April 1st and December 31st 2009) was able to lay them off, stopping the production for a maximum of 6 days every wage period. For the non-working employees the wage reduction was at most up to 4% every month. Another important point for the firm was the postponement of the wage revision process. On the other hand, Volvo took the obligation to not dismiss any worker during the period covered by the agreement, under the sanction of having to pay them the lost wages.
This strategy turned out to be effective: the agreement saved 1000 jobs in Volvo[56] and the firm was able to quickly increase the production once the crisis had passed. At sectoral level the agreement covered more than 50,000 workers,

[52] In fact, 25.000 IF Metall members were unemployed and another 40,000 were facing the risk of dismissal. See O. Bergström, A. Broughton, and C. E. Triomphe, *EU Synthesis Report - 27 National Seminars on Anticipating and Managing Restructuring - A.R.E.NA.S.*, 2010, 49.
[53] See S. Murhem, *Security and change: The Swedish model and employment protection 1995–2010*, *Economic and Industrial Democracy,* 2012, 621 - 36, 629. where the A. also points out that the lack of a short-term work plan was seen as a competitive disadvantage of the Swedish system compared to other European countries.
[54] It should be pointed out that the crisis quickly blew over. Between 2009 and 2011 the automotive sector in Sweden grew by 150% and in 2011 Volvo sold almost as many cars as in 2007 (449.255 vs 458.323 - data from Volvo Cars Newsroom; Volvo 2013:7).
[55] The agreement was signed between IF Metall and Teknikarbetsgivarna (engineering employers), Metallgruppen (metal employers) and Industri- och Kemigruppen (Industry and chemical employers). Another agreement was signed on March 10th 2009 between IF Metall and representatives of the transportation sector. For an extensive analysis see O. Bergström, *Anticipating and Managing restructuring. Sweden*, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden, 62..
[56] K. Lovén, *Agreement on temporary layoffs reached in manufacturing*: Eurofound, 2009c at 1.

and the over 400 local hang-on agreements saved between 10,000 and 12,000 jobs, with an average working time reduction of 18% and a pay decrease of 13%[57].

The described process was not easy to realize: as mentioned, the strategy followed by IF Metall and Volvo was entirely "against the Swedish model, with its wage policy of solidarity, which meant that companies that were unable to pay the normal wages should go into bankruptcy, and thus enforce technological change"[58]. Thus, criticisms were levied from some IF Metall members, and especially from the white-collar union Unionen[59]. For this organization, the new strategy entailed the risk of an "internalization" of the restructuring costs. Instead of resort to the public system (assistance to the dismissed workers paid by the State[60]), it would have pinned the restructuring costs to the employees. They would have suffered a wage reduction, possibly hindering the future wage bargaining rounds[61]. Moreover, Unionen feared a domino effect, with other firms forced to lower wages in order to remain competitive[62]. In addition, in an overall perspective lower wages would have affected the spending power. Thus, consumption would have declined, worsening the crisis. Finally, Unionen was scared that this could have become a permanent arrangement[63], without any proof of its positive effects on the employment rate[64].

For all of those reasons, the innovative agreements of IF Metall and Volvo represent an important milestone in the Swedish restructuring model. Their relevance is not represented by the type of solution adopted, but by the course of action that led to their conclusion. The practice to lay off workers during crises is widespread among European countries and it had been used also in Sweden in the past. Instead, it is remarkable that the mentioned trade union

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[57] Estimations respectively from Teknikföretagen's employers association and IF Metall. See S. Demetriades and M. Kullander, *Social dialogue and the recession*, *EurWORK,* /107, December 08 2009, 12.; Teknikforetagen, *Lokala krisöverenskommelser i teknikföretag – utvärdering av avtalsenliga krisåtgärder*, 2010, 4.; S. Clauwaert et al., *The crisis and national labour law reforms: a mapping exercise. Country report: Sweden*, *European Trade Union Institute,* 2016,1; Oecd, *Back to Work: Sweden: Improving the Re-employment Prospects of Displaced Workers*, *OECD Publishing,* 2015, 68.

[58] Murhem, *Security and change: The Swedish model and employment protection 1995–2010*, 629.

[59] O. Bergström, *Anticipating and Managing restructuring. Sweden*, 27 National Seminars on Anticipating and Managing Restructuring, A.R.E.NA.S., National background paper – Sweden, 62.

[60] Highlights this feature of the Swedish system O. Bergström, *Managing Restructuring in Sweden. Innovation and learning after the financial crisis*, 7.

[61] See C. Axelsson, 'Facklig vånda efter krisavtal', *Svenska Dagbladet,* 18 May 2009.

[62] K. Lovén, *White-collar unions under pressure to sign agreement on temporary layoffs*: Eurofound, 2009a, 1.

[63] K. Lovén, *Agreement on temporary layoffs reached in manufacturing*, 2.

[64] O. Bergström, *Managing Restructuring in Sweden. Innovation and learning after the financial crisis*, 22.

and company decided to deviate from the Swedish mainstream strategy, searching for a better one. Thus, the merit of IF Metall was to foresee the peculiarity of the situation and bet on a tailor-made solution, avoiding to reiterate old inefficient schemes only because in line with the "Swedish tradition".
For those reasons, the Swedish case represents a bright example of the key role that the trade union should play. In a globalized economy in which firms (and workers) geographically distant are in constant competition, the competitiveness of the firm becomes a key concern for the employees as well. Thus, an essential part of the duty of the trade union is to tackle together with the firm those challenges that, enhancing the competitiveness, result in an improvement of the workers' condition.

5. The outcome of the Fiat and Volvo experiences on the corresponding national frameworks

The Fiat case had the merit to expose the ongoing crisis of the Italian system of industrial relations[65]. In particular, it revealed its limits concerning four fundamental aspects: the links between the different levels of collective bargaining; the conclusion process and the binding effect of the enterprise level collective agreement; the definition of the trade unions entailed to have shop stewards and the effectiveness of the peace clauses. Hence, in the following years both the legislator and trade unions had to face those problems.
A first major response was the so-called "Accordo interconfederale" of 28 June 2011, a framework collective agreement that laid the foundations for a reform of the collective bargaining system. It set up more democratic rules regarding the conclusion of collective agreements and solved some issues related to the enterprise level one (such as its binding effects and its possibility to derogate to the sectoral one). Remarkably, this agreement was signed also by CGIL (the confederation of which Fiom belongs). This ended a conflict with the other main trade unions started in 2009[66]. The agreement was followed by other two, the "Protocollo d'intesa" of 31 May 2013 and the "Testo unico sulla rappresentanza" of 10 January 2014. The former reformed the shop stewards and realized a mechanism to calculate the effective strength of the different

[65] R. *De Luca Tamajo, Accordo di Pomigliano e criticità del sistema di relazioni industriali italiane*', cit. at 799.
[66] More in detail, the clash moved from being among different confederations (CGIL vs CISL and UIL), to being internal within CGIL. In fact, Fiom did not accept the CGIL decision to sign the 2011 agreement (nor the subsequent agreements), creating a serious fracture within the trade union itself.

trade unions, linking to this strength the whole collective bargaining process. The latter resumed and completed the two previous and became the comprehensive set of rules of the Italian collective bargaining system[67].
Moving to the legislative remedies, the art. 8 of d.l. n. 138/2011 (of August 2011), almost subverted the entire system of collective bargaining. The decree introduced a type of local agreement generally binding and able to derogate, in a large set of subjects, from the sectoral level agreement and the law.
This reform was strongly criticized by the trade unions, which perceived it as an invasion in their private domain that they had recently modernized with the agreement of June 28. Thus, in September 2011 they added a final clause to that agreement, committing to not resort to the tools introduced by the new law[68].
Finally, another important change came from the case law of the Constitutional Court. One of the consequences of the refusal of Fiom to sign the collective agreements with Fiat (not a member of Confindustria at that point), was its impossibility to have shop stewards. In fact, according to the wording of art. 19 l. n.300/1970, this right pertains only to the trade unions who signed a collective agreement. With the decision n. 231/2013 the Court gave a new interpretation of the provision, stating that can appoint shop stewards all the trade unions taking part in the collective bargaining process. The same right pertains to those unions that, because of their strength, could have legitimately taken part in it. This new interpretation permitted to Fiom to have shop stewards in Fiat, but created a greater confusion in many different cases. In fact, it is not clear how to identify which unions should be involved in the collective bargaining process. Thus, the decision of the Court created a major legal uncertainty.
For those reasons, the Pomigliano case deeply affected the Italian industrial relations, initiating an important renovation process leading to a greater decentralization. The company level collective agreement can now better comply with the specific needs of the firm, also derogating (within some limits) from the national standards. The replacement of the unanimity rule with the majority one rationalizes the collective bargaining process, eliminating the veto power of small dissenting unions. Nowadays, if an agreement is signed by a

[67] Other important agreements are the ones of the 4th July 2017 and of 8th March 2018. The former introduced some technical amendments to the "Testo Unico". The latter addresses a wide range of topics related to collective bargaining, expressing the willingness to start checking the strength of the employers' associations as well.
[68] See V. Filì, *Contrattazione di prossimità e poteri di deroga nella manovra di ferragosto (art. 8 D.L. n. 138/2011)*, *Il lavoro nella giurisprudenza*, 2011, 10, 977 ss. For a comprehensive analysis of the reform and of its legal implications see VV.AA., *Contrattazione in deroga*, edited by F. Carinci, Ipsoa, 2012.

number of trade unions representing the majority of the workers, it is binding for all the trade unions that have signed the Testo Unico of January 2014. This mechanism relies on the measurement of the representativeness of each trade union, which is another important innovation introduced by the agreement[69]. Moreover, the respect of the collective agreements can now be enforced via more effective contractual sanctions against the non-compliant unions. Lesser changes interest the functioning of the shop steward council, reformed in a more democratic way (decisions are taken by majority instead of by unanimity and the election process has a greater importance).

On the other hand, this reformation action also left severe wounds in the system. Its complexity and length brought a high degree of legal uncertainty. In addition, an important player such as Fiat-Chrysler Group withdrew from the major Italian employer association. In its place, FCA created a parallel system, governed by its own set of rules and in which the major Italian confederation (Fiom-Cgil) is not represented[70]. Finally, as already seen, the new interpretation of art. 19 l. 300/1970 creates relevant practical problems.

In an overall perspective, the Fiat case kicked off a reformation process of the industrial relations system, which, however, is still far from being completed.

Moving to the Swedish experience, the economic crisis and the reactions put in place by both the government and trade union (IF Metall) gave rise to a relevant debate[71].

The emergency exposed the lack of legal tools to counteract "external crises" characterized by a sudden, but temporary, shortage of demand. In such a situation, the only option was to dismiss employees and move them to more profitable companies. However, this implied to push away skilled workers that in a near future would become necessary again, increasing restructuring costs and times. Moreover, most of the EU countries had legal solutions to lay off workers, thus creating a competitive disadvantage for the Swedish economy[72].

For those reasons, and thanks to the positive outcome of the layoff agreements of 2009, in 2012 several trade unions and employers' organizations published a

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69 However, this mechanism is not fully working yet.

70 Fiom, thanks to the Constitutional court decision n.231/2013 is entitled to have shop stewards in Fiat's plants. However, it has not signed any agreement with the company and is not part of the system of industrial relations designed by those agreements.

71 Concerning the political debate, it should be taken into account that Mr. Stefan Löfven, who, in his quality of IF Metall chairman, strongly wanted the layoff agreement, became the leader of the Social Democrats party in January 2012, and, after the elections of fall 2014, was appointed Prime Minister.

72 See Gruvornas Arbetsgivareförbund – GS – IF Metall – Industri- och KemiGruppen – Skogsindustrierna – Stål och Metall Arbetsgivareförbundet – SVEMEK – Sveriges Ingenjörer – Teknikarbetsgivarna – Unionen, *Korttidsarbete. Ett partsgemensamt förslag för Sverige*, Stockholm, 2012, 5.

joint proposal for a short-time work scheme[73], which was transposed into law in 2013[74].

However, because of the strict conditions required to obtain the support, in late 2013 IF Metall and Teknikföretagen signed another agreement shaped on the 2009 one, which allows layoffs without the support of public money.

Therefore, from an ante-crisis situation in which Sweden was devoid of any solution in order to lay off workers, there are now two different schemes, governed by different rules.

The scheme designed by act 2013:948, as recently amended, limits the support only in cases of very deep recession linked to a fall in demand, so as to avoid helping companies whose difficulties depend on internal structural problems. This assessment is now mandated to the *Tillväxtverket* (Growth Agency) that should determine if there are the general economic conditions to resort to the subsidized short time work. When this preliminary condition is fulfilled, two different collective agreements are necessary. A first agreement must be signed at the central level and should "give the permission" to use short time work. The second is a local agreement and it should set the details such as time reduction, duration and workers involved. The maximum length is 6 months and can be extended for another 3 months (followed by a cool down of 24 months). Concerning the levels of working time reduction and pay cut, the law lays down three options. For time reductions up to 20% the worker gets a pay cut of 4%, so that the short time subsidy is equal to 16% of the normal salary (15% paid by the government and 1% by the employer). For time reductions up to 40% the pay cut is equal to 6% of the normal salary. The subsidy is equal to 34% (30% by the Government and 4% by the employer). Finally, for time reductions up to 60% the pay cut is 7.5% and the subsidy is 52.5% (45% by the Government and 7.5% by the employer). Thus, the employee can get a wage cut of 7.5% maximum, while the employer can save up to 53% of the wage cost. In addition, the cost paid by the employer increases with the augmentation of layoff hours, and this should discourage an abusive use of the tool[75].

[73] Ibidem.

[74] See *Lag 2013:948 om stöd vid korttidsarbete*, www.riksdagen.se. The debate concerning public intervention during the crisis continued in the following years, mainly because the solution designed in 2013 was too rigid. The actual version of the law, described above, is the one resulting after the amendments introduced by lag 2020:207, which updates the system to better face the Covid-19 crisis.

[75] On April 14, 2020 the Government proposed a new amendment to introduce a fourth option with a working time reduction of 80%. This measure should be limited to the months of May, June and July 2020.

The second model is fully bipartite and binds only the signing parties[76]. It can be activated without any statement from the *Tillväxtverket*, as the decision is left to the social partners. Moreover, the process is decentralized and the agreement is signed by the local trade union. There is no need of preventive authorization from the central level, but only a subsequent duty of notification. Focusing on the content of the short time work program, the only provisions are that the wage reduction can be at maximum equal to 12%, regardless of the working time cut. The maximum duration of the scheme should be 9 months[77]. Of course, being a "private" model there is not a public allowance or support.
The above mentioned changes testify to the footprint left by the 2009/2010 crisis agreements. Those agreements have been able to modify one of the main pillars of the Swedish system, generating an ideological change. Nowadays, getting public support to avoid dismissals is a right for companies and this shift stemmed from the ability of the Swedish social partners to discuss the weaknesses of their system, experimenting new solutions.
The ongoing Covid-19 pandemic represents the first test bench of the new system of publicly funded layoffs, which, so far, is playing a key role in handling the economic aspect of the crisis.

6. Conclusion

The Fiat and Volvo experiences represent two opposite ways to deal with a similar situation. In order to face the same crisis it was necessary to adopt innovative solutions, not affecting the working standards[78], but (and this was the critical point) deviating from the "traditional" restructuring strategy.
Thus, the challenge for the trade unions stood in recognizing the need of new solutions and in embracing them together with the firm.
This is exactly what has been done in the Volvo case, while the contrary happened at Fiat. Of course in both countries, relevant debates took place. However, the issue of the Italian experience laid in the obstructionist strategy adopted by Fiom, aimed to subvert the democratic decisions of the majority of workers and trade unions.
A possible cause of such behavior could consist in the traditional misuse of crisis management tools. The habit of the Italian authorities to avoid dismissals subsidizing activities not profitable anymore, could have created for some trade

[76] As already mentioned, the first agreement was signed between IF Metall and Teknikföretagen, and similar agreements have been signed with other employers' associations.
[77] However, the agreement could be renewed indefinitely, even without a cool down period.
[78] Concerning Fiat, we have already clarified this point. Concerning Volvo, it is sufficient to consider that the hourly wage remained untouched and that laid off workers got a monthly pay considerably higher than the unemployment benefit.

unions an expectation for this type of public rescue[79]. Thus, there would be no need for the trade union to embrace together with the employer the quest for a better performance of the firm. In fact, the availability of public money would grant decent working standards regardless of the performance of the company.
In the contemporary economic framework, this feature of the Italian system represents a major competitive disadvantage. In this light, the boost to the industrial relations reformation process provided by the Pomigliano case constituted an important step towards a more efficient model.
On the contrary, in Sweden, the Governmental intervention is traditionally oriented in sustaining the change. Restructuring is an essential part of the industrial relations culture, and trade unions are used to facing changes and innovations. It is rational to assume that this contest played an important role in the Volvo case. In fact, even if the proposed strategy was very innovative, it shared the fundamental idea of requiring an active role of the trade unions in handling the crisis. Thus, the merit of the Volvo experience "simply" consisted in shifting this active role from the labour market (after the dismissal), to the labour relation (so to avoid the dismissal).
In conclusion, both cases exposed the issues of the respective national systems, starting reformation processes that resulted in better models. In Sweden, the cooperative approach made this change smooth and quick. In Italy, the harsh conflict fought by part of the trade unions made the process long and difficult, risking hindering it.
Thus, in an overall perspective, the Swedish system appears more efficient, being able to improve itself in a leaner and more effective way.

[79] Underlines this approach with regard to the Alitalia case P. Ichino, *Il peccato originale di Alitalia*, *www.pietroichino.it,* 2017, par. 1.

Trade Mechanisms as a Way to Improve Labor Rights Compliance and Its Policies. A Case Study from The United States-Peru Free Trade Agreement

Maria Eugenia Rodriguez-Florez [1]

Abstract

This paper documents the process behind the filing of the submission using the labor chapter of the Free Trade Agreement between Peru and the United States and how the submission has developed up to January 2020. In this case, Peruvian unions attempted to use international pressure to change the Decree 22342 (also known as the Traditional Export Law) that enables repeated use of short-term employment contracts for the export of 'non-traditional' products and therefore allows systematic violations of fundamental labor rights. The claim is still open, and there has not been any legislative change. The process of filing the submission also highlights the textile union's dependency on international aid to finance technical assistance.

Keywords: free trade agreements; freedom of association; cross border solidarity; international aid; labor rights.

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Introduction

Negotiations of a free trade agreement not only catch the attention of government and business. Trade union federations have learned that free trade agreements are also an opportunity for unions to strengthen their relationship, build cross border solidarity, and push for improvements in areas of labor rights' lack of compliance.
In this framework, the process of filing the submission using the labor chapter of the Free Trade Agreement between Peru and the United States is an example -of the many outcomes- that joint efforts achievements while they seek to improve worker rights and, take advantage of the opportunity offered by this milestone labor chapter in the history of American free trade agreements.
This paper documents the process behind filing the submission using the labor chapter of the Free Trade Agreement between Peru and the United States, and how the submission has developed up to January 2020. The paper also states the importance that the international aid to finance technical assistance played in the Peruvian case.

1. Submissions Backgrounds

Advocacy Campaign for raising awareness about labor rights violations

In 2009, the American Center for International Labor Solidarity (Solidarity Center or SC) published a report called "Peruvian Society, Workers and Labor Law" that portraits the status quo of Peruvian labor rights and offers some policy recommendations. This report was initiated during the free trade agreement's negotiations. Its goal was to identify legal loopholes, weak legal enforcements, and recurrent violations of labor rights. Among its findings, the report listed laws and regulations that contradict fundamental workers' rights established by the International Labour Organization (ILO).[2]
A *consultant* [who prefers to remain anonymous] states that policymakers have understood that in order to increase the benefits of trade, it is essential to

[2] The report describes how the slow judicial process and lack of enforcement, such as cases with unenforced fines, make it tough to get and enforce legally binding decisions and create a culture of impunity. It also pointed out other issues, such as legal restrictions and barriers preventing workers from striking, and the increase of indirect employment which undermining workers' protections, among other problems. See Solidarity Center Staff, *Peruvian Society, Workers and Labor Law,* 2009. Retrieved September 2019, from Yumpu: https://www.yumpu.com/en/document/read/11354288/peruvian-society-workers-and-labor-law-solidarity-center

improve the institutions and actors that shape labor relations in the trade sector, rather than only guarantee the free trade-off of goods. Some of those actors are unions and civil societies that advocate for enhancing labor rights. For this reason, the implementation of the Free Trade Agreement –signed on February 1st, 2009- opened a window of opportunity to channel resources to the export-oriented sector. For example, USAID financed a project led by the Solidarity Center between February 2010 and March 2013 called "Empowering Workers, Strengthening Worker Organizations, and Improving Labor Rights Enforcement in Peru". The goal of this project was to "increase the active and constructive participation of unions with state and tripartite institutions and at the international level on topics of strategic importance to vulnerable workers."[3]

In this project the SC worked with sixteen economic sectors,[4] developing capabilities in the following areas: (i) training of vulnerable workers in economic literacy and fundamental labor rights, (ii) union organizational capacity building and, (iii) unions in networks and advocacy. A relevant outcome of this project was the design of a *form to document labor rights violations* (Box 1), that was developed between the SC and a Peruvian NGO called Programa Laboral de Desarrollo[5] (PLADES).[6]

[3] Solidarity Center, *Solidarity Center Trade Union Capacity Building Program: Empowering Workers, Strengthening Worker Organizations, and Improving Labor Rights Enforcement in Peru. USAID Cooperative Agreement #: CA AID-527-A-10-00002. Final Report,* 2013. Retrieved September 2019, from USAID: https://pdf.usaid.gov/pdf_docs/PA00JP19.pdf

[4] Like cement, food, agribusiness, textile, mining, among others.

[5] PLADES also created a database to sort the cases.

[6] Solidarity Center (2013), *op. cit.*

Box 1: Labor Documentation Form's Information

Plaintiff: union name, filed case identification number, date, number of people involved, people involved characteristics -gender, age, is a union member or no.-
Defendant: business name, tax number, address, phone number, legal representative (lawyer), legal representative's phone number, industry.
Description: kind of legal case, prima facie case.
Follow up: case identification number, identify the forum -administrative, judicial, international-, and observations. Moreover, for each forum, there is a list of its stages. For example, administrative -conciliation, labor inspection, etc.-, international -ILO, national contact point OECD, etc.-
Posture: list of possible outcomes like liable, no liable, appeal, denied, accepted, conciliation process, etc.
How was the case closed? date, case identification number, administrative or judicial resolution on behalf of the defendant/plaintiff, report or conciliation proceedings on behalf of the defendant/plaintiff.

Source: Sample provided by the FTTP.

During this project, the two textile federations in Peru, Federación de Trabajadores en Tejidos del Perú (FTTP) and Federación Nacional de Trabajadores Textiles del Perú (FNTTP) received training on labor rights under the new trade agreement's legal framework. Furthermore, both federations "used the labor rights documentation form[7] to organize information regarding twelve new cases[8] and related labor inspections that demonstrate the linkage between temporary contracts and violations of trade union rights in the textile sector."[9] The information that they systematized using the labor documentation form served as evidence of how the Decree 22342[10] (a Peruvian law that enables repeated use of short-term employment contracts for the export of 'non-traditional' products) also known as the Non-

[7] This form was reviewed and edited by other actors involved in the labor rights defense. See Solidarity Center (2013), *op. cit.*
[8] During the project, the form was used to document 105 cases of labor rights violations across sixteen sectors. See Solidarity Center (2013), *op. cit.*
[9] Solidarity Center (2013), *op. cit.*
[10] For a deep discussion about this law, See: A. Solozarno. *International Pressure on the Peruvian Government to Repeal Decree 22342: Corporate Social Responsibility and Labor Reform in Peru*, 2015. North Carolina Journal of International Law and Commercial Regulation*, 40*, 805-848.

Traditional Export Law (NTE) allows systematic violations of fundamental labor rights.[11]

Moreover, with those cases, the FTTP and the FNTTP highlighted the need for actions from the government to protect workers under this regulation and, developed a "joint advocacy campaign"[12] to raise awareness about the pervasive effects of the Decree 22342. During the joint advocacy campaign, both federations learned how to coordinate advocacy actions. They also built an advocacy network and multi-stakeholder alliances with global organizations like "Worker Rights Consortium, Social Accountability International, the Maquila Solidarity Network, the International Labor Rights Forum, and the U.S. Labor Education in the Americas Project"[13] and with some apparel brands.

One of the major lessons of the USAID & SC's project was that the unions learned that they are immersed in an international network that demands some commitment from its stakeholders and offers different mechanisms to enforce them. The union's leaders reinforced the idea that they could continue to use those mechanisms to highlight practices that undermine their labor rights and add pressure to change or improve those practices.[14]

The Relevance of Trainings and Technical Advice

The labor chapter also established a "cooperation and capacity building mechanism"[15] allowing both parties to work together on labor issues of common interest to enforce the agreed-upon fundamental rights of the ILO.[16] To take action, the United States Department of Labor[17] (USDOL) signed a

[11] Solidarity Center (2013), *op. cit.*

[12] According to the Solidarity Center's report, this was the first time that both federations worked together.

[13] Solidarity Center (2013), *op. cit.*

[14] Solidarity Center (2013), *op. cit.*

[15] According to Powell and Chavarro (2008) "The objective of the labor cooperative mechanism is the seeking of bilateral or regional cooperative activities regarding labor fundamental rights, law and practice related to the principles and rights of the ILO Declaration on Fundamental Principles and Rights at Work." See Powell, S. J.; Chavarro, P. A. *Toward a Vibrant Peruvian Middle Class: Effects of the Peru-United States Free Trade Agreement on Labor Rights, Biodiversity, and Indigenous Populations*. Fla. J. Int'l L., 2008, vol. 20, p. 93.

[16] USTR, *The United States - Peru Trade Promotion Agreement - Summary of the Agreement,* nd. Retrieved July 2019, from Office of the United States Trade Representative - USTR.GOV : https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/peru/Peru%20TPA%20Chapter%20Summaries.pdf

[17] USDOL provided $2.2 million to this project that also included Haiti, so the resources were split between both countries.

two-year Cooperative Agreement[18] with the Solidarity Center to "support the implementation of union capacity strengthening projects in Peru" from December 27, 2012 to December 26, 2014.[19]

The Cooperative Agreement focused on activities, such as "training, technical assistance, and advocacy initiatives," and can be qualified as very ambitious due to its two short-term goals: "(1) strengthening unions' capacity to organize and effectively represent vulnerable workers in key export-oriented sectors, and (2) improving union advocacy for vulnerable workers in labor rights enforcement and policy reform." [20] Moreover, the project focused more on sectors characterized by high precarity due to outsourcing and the high prevalence of short-term contracts.[21] The project also offered trainings[22] designed to help the unions improve their abilities to protect their rights.

Since the unions usually go to governmental agencies to request inspections, or to file claims about labor rights violations, a key element during the training was learning about how to track their cases easily through the organization of their legal documents. For this reason, the Solidarity Center continued promoting the use of the rights documentation form that was created during the project financed by USAID between 2010 and 2013. As a result, the unions learned the criteria to identify emblematic cases of systematic labor rights violations. The criteria to identify it were: (1) if there are many employees affected; (2) if the failure is very severe; or (3) if the violations were against fundamental labor rights. These criteria helped them to prioritize cases.

Both projects -USAID and USDOL- created a virtuous circle because the unions used the information that they gathered and processed to raise a concern across different actors about the harmful effects of the NTE law during the advocacy campaign.[23] Although the institutional and political

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[18] See O'Brien and Associates International. *An Independent Final Evaluation of the Strengthening Unions to Promote Vulnerable Workers' Rights in Peru Project. Funded by the United States Department of Labor Cooperative Agreement No. IL-23987-13-75-K.* 2015. Retrieved October 2019, from DOL.GOV: https://www.dol.gov/sites/dolgov/files/ILAB/reports/Final%20Evaluation%20Report%20Peru%20Stregthening%20Unions%20Project.pdf

[19] However, the Solidarity Center requested and provided a no-cost extension until April 30, 2015.

[20] O'Brien and Associates International (2015), *op. cit.*

[21] For example, textile, mining, and agriculture sectors.

[22] These training sessions covered topics such as internal organizing, how to build capabilities, international mechanisms to protect labor rights, leadership, communications, and legal advice, among others.

[23] Albertson, P. (2010) claims that a "framework for technical assistance and created tools for advocacy efforts" are an alternative example of how to address problems with labor law enforcement. Moreover, she states that "technical assistance has helped thousands of workers in trade partner countries and can help bridge divides surrounding FTA passage." See

context has not changed, unions now have more skills to navigate through the system and raise their voices when their rights are vulnerable.

Cascade Effects of Multi-stakeholder Alliances

During November 2012, the Fair Labor Association[24] (FLA) hosted a multi-stakeholder forum to discuss the causes of the precarious work in the Americas. In the case of Peru, the panel members identified the Decree 22342 as a key barrier to addressing the rise of precarious employment, enabling the abuse of short-term contracts under a suspect 'legal' justification.[25] As a result, there was a consensus to work closely on addressing strategies to support the repeal of Decree 22342.

One relevant change in 2011 by the Code of Conduct and Compliance Benchmarks of the FLA was to consider as a reiterate violation the use of multiple short-term contracts to perform permanent business activities. Consequently, brands or suppliers affiliated to the FLA would have to work together to eliminate the practice or gradually offer a reparation for the affected workers.

The first audit -in Peru- under the new rules was done to one of the firms that belong to the Forty-Seven Brand's supply chain in the apparel sector. The audit report pointed out as a second finding "It is a factory employment practice to use temporary contracts on a regular basis for multiple short-term periods. All production employees renew their employment agreements every three months." Moreover, the audit report recommended ending this practice, and defined a two-year action plan between the factory and the company to address this issue.[26] According to Jessica Vasquez, the Regional Manager for the Americas from FLA, the textile industry in Peru did not welcome this new

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Albertson, P. *The Evolution of Labor Provisions in US Free Trade Agreements: Lessons Learned and Remaining Questions: Examining the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).* Stan. L. & Pol'y Rev., 2010, vol. 21, p. 493.

[24] The FLA has the mission to promote the improvement of labor standards. In 2011, the organization changed the norm No. 9 of the Employment Relationship of its Code of Conduct and Compliance Benchmarks (See Annex 1). Since then, brands affiliated to the FLA (and their supply chain) shall not use contingent or temporary workers for regular activities of the business and shall not hire the same employees for this work multiple and consecutive times.

[25] FLA, *FLA Hosts Americas Group Meeting on Precarious Work*, 2012a. Retrieved October 2019, from Fair Labor Association: https://www.fairlabor.org/blog/entry/fla-hosts-americas-group-meeting-precarious-work

[26] FLA, *Independent External Assessment Report - Company Forty Seven Brand in Peru - Assessment Number AA0000000021*. 2012b. Retrieved October 2019, from Fair Labor Association: https://www.fairlabor.org/transparency/workplace-monitoring-reports

practice; the firms' CEOs did not understand why an NGO was considering a legal practice as a violation of the FLA's code of conduct.

However, Martin Reaño, manager director of Comité Textil y Confecciones de la Sociedad Nacional de Industrias,

highlights that the auditory processes have been part of their client's requirements every time the industry sells products abroad, and that the textile sector's exports has been growing since 1992.[27]

Meanwhile, the congressman and former trade unionist, Justiniano Apaza, introduced, endorsed by the FNTTP, a draft law/bill N° 761/2011-CR aimed at changing the Decree 22342. Apaza proposed to repeal the articles 32, 33, and 34. The draft proposed that workers under Decree 22342 would be under the Decree-Law 728 that rules the private sector. As of January 2020, this draft is still waiting for approval. The draft law also was endorsed by the IndustriAll Global Union's General Secretary Jyrki Raina, who visited Peru in May 2013 to advocate for the 80 thousand textile workers who are hired under this system.[28]

In this framework, two correspondences to President Humala in March 2013 helped to raise awareness in the textile sector, specifically about the importance of improving their labor practices and their compliance with international labor codes:

- The Executive Director of the FLA expressed to the affiliated brands' concerns about the "legislation that permits the employment of workers through the use of repeated short-term employment contracts." Moreover, the letter explains that "this practice does not provide stability to workers in employment and erodes workers' access to fundamental labor rights."[29]
- The corporations 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp, and VF Corporation expressed: "We are also concerned that Decree Law 22342, which allows 'non-traditional' exporting companies to employ workers on fixed-term contracts, acts to encourage and condone violations of labour rights and therefore

[27] Indeed, Reaño states that Sociedad Nacional de Industrias (SDI) has also served as a connecting point or mediator between brands and firms when a firm has refused to comply with the audits because they embrace and promote a strong commitment with good business practices.

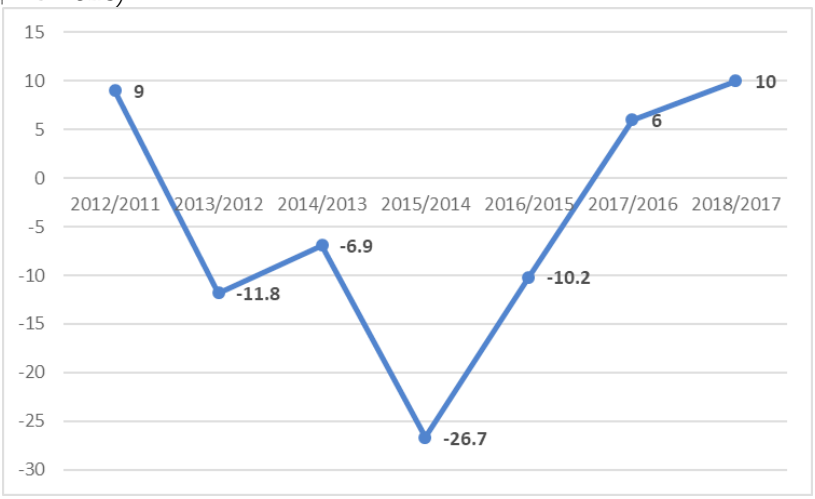
[28] J. Paucar. *El actual régimen laboral textil es una amenaza para trabajadores y empresarios,* 2013, Lima, Peru. Retrieved July 2019, from https://lamula.pe/2013/5/14/el-actual-regimen-laboral-textil-es-una-amenaza-para-trabajadores-y-empresarios/jorgepaucar/

[29] FLA, *Open letter to Ollanta Humala Tasso - President of Peru, from Jorge Perez-Lopez Executive Director - Fair Labor Association,* 2013. Retrieved October 2019, from Fair Labor Association: https://www.fairlabor.org/sites/default/files/lettertoperupresident_fla_march_4_2013.pdf

poses an obstacle to the proper application of our codes of conduct."[30] Moreover, they requested President Humala's support to repeal the labor provisions of DL 22342 in Congress.

However, the Executive branch sent a clear message through the Ministerio de Trabajo y Promoción del Empleo (MTPE). The Minister Nancy Laos Caceres claimed that it was not a good time to change the law.[31] In fact, during the first trimester of 2013, most of the nontraditional export sector decreased. For example, the exports in the textile sector decreased by 20 percent during the first trimester of 2013 -compared to the first trimester 2012-[32] and this negative trend continued up to 2016 (Figure 1).

Figure 1: Percentage Change of Peruvian Textile Sector's Total Export (US$ Millions)



Source: Monthly Report (December) on Foreign Trade (2011- 2018) – Mincetur.

[30] 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp and VF Corporation, *Joint Letter to President Ollanta Humala Tasso from 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp and VF Corporation,* 2013. Retrieved October 2019, from Maquila Solidarity: https://en.archive.maquilasolidarity.org/sites/maquilasolidarity.org/files/Joint-Letter-to-President-Ollanta-Humala-March-4-2013.pdf

[31] Asociación de Exportadores, *ADEX defiende régimen de contratación laboral para impulsar exportaciones no tradicionales. Peru Exporta*, 2013, p. 36. Retrieved November 2019, from https://issuu.com/adex_1/docs/385final/36

[32] Mincetur, *Reporte Mensual de Comercio Exterior,* 2013. Retrieved December 2019, from https://www.mincetur.gob.pe/wp-content/uploads/documentos/comercio_exterior/estadisticas_y_publicaciones/estadisticas/exportaciones/2013/RM_Expo_Marzo_2013.pdf

Jessica Vasquez states that the letters also sent a message to the firms: their clients favored repealing the law that allows employers in the textile sector to hire workers on consecutive short-term employment contracts and limits workers to exercise their labor rights freely. Consequently, the clients will pressure to implement sustainable remediation actions to revert this practice in the garment sector.

Therefore, trade associations[33] representing the employers in Peru sent a letter to the brands' CEOs as a reply to the letter signed by the heads of HR or Corporate Compliance's departments.–In this letter, representatives from those trade associations expressed that "the amendment and/or repeal of the Decree No. 22342, which your office intended to recommend to our authorities, is not subject to any international commitment of Peru, and therefore, our country is free to maintain this regimen."[34,35]

Furthermore, Reaño highlights that "some of the brands that signed the letter to President Humala, did not have their principal activities in Peru." He argued that "Peru is sometimes the second best and, others the serving because Peruvian prices are higher than other countries." To illustrate, during 2011 Peru accounted for only 2.5% of American imports of clothing made with cotton.[36] By extension, it would be fair to say that FLA indirectly acknowledged Reaño's point in its Annual Report 2014 when they mention that "despite a very small commercial presence (less than five percent of the factory [in Peru] total production capacity), New Balance took an active role in investigating the initial complaint"[37] The FLA statement made reference to the third-party complaint against the Hilandería de Algodón Peruano S.A. (HIALPESA) accepted in 2013.[38, 39]

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[33]Such as Sociedad Nacional de Industrias (SDI), Cámara de Comercio Americana del Perú (AMCHAM), Asociación de Exportadores (ADEX), Sociedad de Comercio Exterior de Perú (COMEXPERU), Cámara de Comercio Lima (CCL) and, Confederación Nacional de Instituciones Empresariales Privadas (CONFIEP).

[34] See SDI, et al. Joint letter to 47 Brand, The Life is Good Company, New Balance, Nike, PVH Corp, and VF Corporation; from SDI, AMCHAM, ADEX, COMEXPERU, CCL, and CONFIEP. 2013, March 18. Lima, Peru.

[35] Although there was not a real change in the regulations, both letters were discussed in different news outlets.

[36] "Evaluación del Proyecto," *Evaluación del Proyecto de Ley 761 que propone derogar el régimen laboral de las exportaciones no tradicionales. Exposición a la Comisión de Comercio Exterior y Turismo,* 2012. Retrieved September 2019, from Doc Player: https://docplayer.es/78109087-Evaluacion-del-proyecto-de-ley-761-que-propone-derogar-el-regimen-laboral-de-las-exportaciones-no-tradicionales.html

[37] FLA, *2014 Annual Report,* 2014a. Retrieved October 2019, from ISSUU: https://issuu.com/fairlabor/docs/2014_fla_apr

[38] FLA, *Final Report: Third Party Complaint - HIALPESA (Peru),* 2014b. Retrieved October 2019, from Fair Labor Association:

According to Solorzano (2015) "from the Peruvian, pro-business perspective, perhaps most repugnant was the idea that such foreign, international companies were trying to undermine Peru's recent competitiveness in the global market."[40] Thus, the reason why the business sector strongly resists any attempt to change the Decree 22342 is because this law allows them to reduce non-wages costs. Under the General Regime, the non-wages costs represent about 60 percent of the total labor cost.[41] Otherwise, the Peruvian export sector claims that they would not be able to compete (e.g., against Asian countries who have lower labor costs) and therefore gain a share of the U.S. market.

In March 2014, a new hiring guideline under Decree 22342 was issued by the Second Chamber of the Constitutional Court through the Judgment of the File EXP. N.° 02278-2013-PA/TC.[42] It established jurisprudence defining guidelines about when a contract would be subject to the Decree 22342. The sentence set that firms can hire under Decree 22343 if the worker's settlement includes the international purchase order that originated the need to have an additional worker or the production plan to accomplish it. In brief, the contract must express the objective case that requires new hiring. Otherwise, the agreement cannot be considered valid under the NLE law.

A judge [who prefers to remain anonymous] stated that this judgment was relevant for two reasons. First, it was the first time that the judiciary moved forward to protect workers under Decree 22342. The judge stated that there have been many similar cases, but the court decisions were in favor of the firms. Second, before the judgment, the only way that the court would agree to "denaturalize a labor agreement" was if they found evidence that the firm did not sell 40 percent of its production in the international market. However, the judge stated that firms learn quickly, so since then, most of the contracts include the new requirement.

Notwithstanding, the Constitutional Court's judgments have not run away from controversies. For instance, Miguel Canessa [Professor at Pontificia

https://www.fairlabor.org/sites/default/files/documents/reports/hialpesa_final_report_october_2014.pdf

[39] The primary arguments of this complaint were that the use of short-term contracts affected the calculus of the seniority and the closure of the plants to reduce the number of union members.

[40] See Solozarno, *op. cit.,* 838.

[41] Consejo Privado de Competitividad, *Informe de Competitivad 2019,* 2019. Retrieved July 2019, from Peru Compite: https://www.compite.pe/wp-content/uploads/2019/02/informe-de-competitividad-2019.pdf

[42] Tribunal Constitucional, *Sentencia del Tribunal Constitutional EXP. N.° 02278-2013-PA/TC - Víctor Luis Acero Gómez,* 2014, Lima, Perú. Retrieved from https://tc.gob.pe/jurisprudencia/2014/02278-2013-AA.html

Católica del Perú] states that since 2002[43] The Constitutional Court has been delivering sentences in favor of protecting workers' labor rights. By contrast, others believe that those judgments curtail the firms' flexibility to manage their workforce because any labor dispute can end up in a trial that would define new guidelines or interpretation for the current labor regulations.
Meanwhile, the FLA is one of the international organizations that has been very active in raising awareness about the excessive use of hiring temporary workers. The FLA keeps encouraging brands to work with their supply chain and unions to reduce this practice. To illustrate, in an Issue Brief published in 2014 the FLA stated "because the law allows employers in the apparel and textile export sector to re-hire the same workers repeatedly, employers can undermine the original intent of the law, and in so doing, deny their workers the benefits of full-time employment." For this reason, the FLA "encourages such affiliates to express strong preferences for permanent contracts and employment stability, and to explain to their suppliers how repeated temporary contracts violate the FLA Code of Conduct" and meet higher standards than the Peruvian laws.[44]

2. The Submission

A New Mechanism is Ruling

The FTA established a clear commitment for each party to supervise and enforce its labor law.[45] Specifically, Peru and the United States committed to (i) "reaffirm their obligations" as an ILO's members; (ii) "Each Party shall adopt and maintain in its statutes and regulations, and practices […] the ILO

[43] Prof. Canessa refers to the Judgment's Chamber of the Constitutional Court (File EXP. N.° 1124-2001-AA/TC), which established jurisprudence that the dismissal for union activities is not only illegal, but it also demands that the dismissed workers must return to their jobs. For more information see: Tribunal Constitucional, *Sentencia del Tribunal Constitucional EXP. N.° 1124-2001-AA/TC. Sindicato Unitario de Trabajadores de Telefonica del Peru S.A. y FETRATEL*, 2002. Retrieved January 2020, from https://www.tc.gob.pe/jurisprudencia/2002/01124-2001-AA.html

[44] FLA, *Issue Brief: Short-term Contracts in Peru,* 2014c. Retrieved October 2019, from Fair Labor Association: https://www.fairlabor.org/sites/default/files/documents/reports/october-2014-short-term-contracts-in-peru_0.pdf

[45] Harrison (2019) highlights that "while there were only three trade agreements with labour provisions in 1995, this increased to 77 by 2016, elevating the overall share of trade agreements with labour provisions from 7.3 per cent in 1995 to 28.8 per cent in 2016[…] As of 2016, 136 countries had at least one trade agreement that included labour provisions." See Harrison, J. *The Labour Rights Agenda in Free Trade Agreements*. The Journal of World Investment & Trade, 2019, vol. 20, no 5, p. 705-725.

Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998);" (iii) "does not derogate from or waive the protections of its labor laws to encourage trade with the other Party or to attract investment;" and, (iv) ensure that workers have access to "fair, equitable, and transparent procedures in the enforcement of labor laws." [46]

Since the FTA also established a supervisory system (see Box 2), and an explicit sanction[47] if a party does not comply with its commitments,[48] the workers in the textile and agriculture sector expected that the complaint would add enough pressure to abolish Decree 22342.

[46] USTR, nd, *op. cit.*

[47] This feature, contrasted with other labor mechanisms like the ones offered by the ILO, are not binding. For example, although Peru has ratified the eight* ILO's Fundamental Conventions all in force, Peru has faced around 374 Complaints procedures only for Freedom of Association cases** in the ILO since the 1950's. Nevertheless, Mujica claims that the Peruvian government -most of the time- tends to disregard ILO's recommendations.

* Fundamental Conventions: 8 of 8, Governance Conventions (Priority): 3 of 4, Technical Conventions: 65 of 178. See ILO, *Ratifications for Peru*, nd. Retrieved November 2019, from NORMLEX - Information System on International Labour Standards: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102805

**Peru is member since 1919. Peru has 161 closed cases since the 50's, 14 active cases and 19 follow-ups complaints regarding Freedom of Association. See ILO. *Supervising the application of International Labour Standards for Peru*, 2019. Retrieved November 2019, from NORMLEX - Information System on International Labour Standards: https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:::NO:::

[48] Basically, the commitment is to show enough effort to enforce its labor codes.

Box 2: Supervisory System[49]

The FTA has a supervisory system to make partners accountable for their commitments. The Office of Trade and Labor Affairs (hereinafter OTLA) of the U.S. Department of Labor's Bureau of International Labor Affairs takes up complaints -and determines whether to accept it or not- from any person who alleges that any of the parties fail to comply with its obligations under the labor chapter. If the OTLA accepts the submission for revision, the OTLA will conduct an examination that shall include a process that allows the public to submit information -by file or public hearings- about the submission. Once the review is completed, OTLA publishes a report with a summary of the proceedings, findings, and recommendations.[50,51]

If the OTLA considers that its counterpart is not complying with its commitments, OTLA can invoke cooperative consultations to determine whether the other party is failing "to effectively enforce its labor law." After those consultations, it is also possible to invoke the Agreement's general dispute settlement mechanism requesting more consultations or meetings with the Free Trade Commission. If the former cannot resolve the dispute, the issue should be referred to the dispute settlement panel.[52] This panel can hold more consultations, panel procedures, or suspend benefits if the matter is not resolved.[53]

Source: Office of the Secretary of Labor, *op. cit.*

There is no clear clue of which organization came up and promoted the idea to file the complaint under the FTA's labor chapter. However, there is an apparent consensus that this initiative was a result of all the training and the

[49] Powell & Chavarro (2008) describe the new mechanism as following "the Chapter 21 dispute settlement provides for dispute panel procedures which set high standards of openness and transparency through open public hearings, public release of legal submissions by parties, special labor or environment expertise for disputes in these areas, and opportunities for interested third parties to submit views. Even though Chapter 21 emphasizes promoting compliance through consultation and trade-enhancing remedies, it establishes an innovative enforcement mechanism which includes monetary penalties to enforce commercial, labor, and environmental obligations of the trade agreement. See Powell, S. J.; Chavarro, P. A., *op. cit.*

[50] Previously consulted with at "the Office of the United States Trade Representative and the Department of State.

[51] Office of the Secretary of Labor, *Bureau of International Labor Affairs; Notice of Reassignment of Functions of Office of Trade Agreement Implementation to Office of Trade and Labor Affairs; Notice of Procedural Guidelines,* 2006. Retrieved October 2019, from Federal Register: https://www.federalregister.gov/documents/2006/12/21/E6-21837/bureau-of-international-labor-affairs-notice-of-reassignment-of-functions-of-office-of-trade#p-30

[52] Office of the Secretary of Labor, *op. cit.*

[53] USTR, nd, *op. cit.*

advocacy campaign developed during the execution of the projects financed by USAID and USDOL and executed by the Solidarity Center. Among the labor NGOs and unions, there was a genuine interest to explore how this mechanism would help to enhance labor rights compliance in Peru.

By contrast, Mujica disagrees with this idea. He argues that the Peruvian's labor trade unions have used international mechanisms to advocate for their rights in the past.[54] Consequently, he clarifies that SC's training strengthened capabilities that the labor unions were already developing with the support of other local actors such as CEDAL and PLADES. Thus, this initiative cannot be understood as a result of a single event (such as the learning that the unions acquired there) or attributable to a single actor.

Giovanna Larco, PLADES's Executive President, highlights that the local labor action did not have enough consensus to make legislative changes. There was no support in Congress to approve any amendment to the Decree 22342. Consequently, it is not surprising that the mechanism offered by the FTA became a viable alternative to include international pressure that pushed the Peruvian government to improve labor conditions.[55]

Gerardo Olortegui, FNTTP's Secretary of Defense, argues that the U.S. and Peru agreed to respect the ILO's Core Conventions. However, even though the NTE law does not mention anything about free association, it allows violations to the convention No. 87 because if a worker becomes a union member, they will never get a new contract.

Vicente Castro, FTTP's National Secretary-General, affirms that the practice of using short term contracts in the textile sector increased after the FTA's implementation.[56] Similarly, Maximiliano Guitierrez, Hialpesa's General

[54] To illustrate, he mentions: (i) the submission filed in 1994 in the USTR due to the Collective Labor Relations Act (in Spanish Ley de Relaciones Colectivas de Trabajo), (ii) in 2000, joined with the AFL-CIO and ILFR; they requested a revision to Peru as a beneficiary of the Generalized System of Preferences (SGP) and, (iii) their participation during the middle 2000s in the bargaining process that modified some aspect of the Free Trade Agreement between the U.S. and Peru.

[55] Paiement (2018) highlights that "FTAs offer a tempting venue for labor unions and workers' rights groups to draw attention to systematic rights infringements when domestic courts prove incapable or unwilling to protect labor rights." Moreover, he recommends to keep in mind "the strategic use [in transnational labor law] of the arbitral venue as a potential means for transnational labor enforcement, and the broader goal of achieving social and economic justice for laborers, wherever they work." See Paiement, P., *Leveraging Trade Agreements for Labor Law Enforcement: Drawing Lessons from the US-Guatemala CAFTA Dispute*, Georgetown Journal of International Law 49, no. 2 (2018): 675-692.

[56] The number of short-term contracts under Decree 22342 increased in an annual rate of 10 percent between 1991 and 2011. See EQUIDAD, P., CGTP, CATP, FNTTP, CUT, ILRF, FENTEAGRO e Inspectores de Trabajo de la SUNAFIL. *Documento de Actualización referido a la Queja presentada ante la Oficina de Asuntos de Comercio y Trabajo de (OTLA) Bajo capítulos 17 (Trabajo)*

Secretary, states that Hialpesa's union decided to participate in the claim because the NTE law harms workers, and the Peruvian system does not offer an effective channel to enforce workers' rights. Instead, new law drafts are oriented to cut benefits.[57]

It is relevant to mention that the unions have been able to get some court' settlements in the worker's favor. However, workers state that the rule is still there. So along with its pervasive effects that go beyond the workplace, as Castro indicates, there has also been a negative impact on workers' personal life.

Mujica also claims that the textile unions presented their cases during the public and yearly hearing of the Labor Council in October 2014. This council is one of the supervisory bodies created by the FTA, having representatives from both governments, Peru and the U.S. At that moment, different members from the society can raise their voice and express their opinion about the implementation of the FTA. However, after the hearing, there has not been any concrete action in this regard, Thus, the unions decided to explore the new mechanism and file the complaint.

How to Make a Case?

For making the case, the complaint attempted to address four key factors: (i) identify how the Peruvian government fails its commitments under the FTA; (ii) identify the channel that allows the failure to become a pattern; (iii) find well documented examples that illustrate systematic violations and, (iv) offer a sense about how many workers are affected by this failure.

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y 21 (Solución de Controversias) del Acuerdo de Promoción Comercial entre Estados y Perú con respecto a la falta de voluntad del Gobierno de Perú para cumplir con las recomendaciones propuestas por el Departamento de Trabajo (USDOL) para garantizar el respeto de las normas laborales incluidas en el acuerdo de promoción comercial Perú – Estados Unidos. Junio 2019*,* Lima. PLADES et al. (2014), state that the short-term contracts raised 16.6 percent between 2011 and 2012. Moreover, during this time, 30 percent of the cases investigated by the National Superintendence of Labor Inspection corresponded to short-term contracts. See PLADES, CEDAL, IESI, P. E., CGTP, CUT, CATP, & CTP, *La Agenda Laboral Pendiente del TLC Perú - Estados Unidos: Cuando la Competitividad se basa en la reducción de los derechos laborales,* 2014. Retrieved septiembre 2019, from IESI PERU: https://www.iesiperu.org.pe/documentos/publicaciones/TLC%20EEUU%20PERU.pdf

[57] For instance, (i) Hialpesa's union has members that have worked with short-term contracts over twenty years; (ii) if a worker affiliated to the union or refuses to work overtime they will not get a new contract, (iii) the labor inspectorate did not have enough staff to enforce labor law, (iv) if the firms do not comply, the labor inspection
ns are useless, and, (v) judiciary processes take around ten years.

The submission states that the Peruvian government fails to protect the right of freedom of association. Employers from the nontraditional export sectors can dismiss workers who are affiliated to a union using the legal argument that the contract has expired because workers were hired under the Decree 22342.

According to Olortegui, around 80 percent of the textile workers -in the formal sector- have short term contracts under the NTW law.[58] The low rate of unionizations -about 5 percent in the private and formal[59] sector- allows firms to keep low wages in the textile sector because collective bargaining is at the firm's level.[60] Nevertheless, Larco states that most of the time, once a union settles a contract, the firms tend to expand the benefits agreed in the collective bargaining agreement to the rest of non-union workers to discourage that more workers join the union.

Larco highlights that most of the unions are in the spinning sector because they are most likely to have permanent jobs. However, the spinning sector represents a small part of firms in the textile sector. The rest of the firms are in the garment business, which has a younger workforce, a more female prevalence, more short-term contracts, and less unions. This context may explain why Mincetur does not find a significant difference between worker's wages in the textile sector affiliated to unions and their non-union peers.[61] This is an unusual result in the literature that compares different labor outcomes between union and non-union workers. Olortegui claims that under this

[58] In some large firms the number of employees hired under the Decree 22342 represents around 90 percent of the total labor force of the firm. See ILRF, Peru Equidad, CGTP, CATP, CTP, CUT, FNTTP, FTTP, FENTAGRO y Sindicato SUNAFIL, *Presentación Pública a la Oficina de Asuntos de Comercio y Trabajo (OTLA) bajo Capítulos 17 (Trabajo) y 21 (Solución de Controversias) del Acuerdo de Promoción Comercial entre Estados Unidos y Perú con respecto a la falta del Gobierno de Perú de cumplir con las normas laborales incluidas en el acuerdo de promoción comercial Perú-Estados Unidos,* Julio 2015.

[59] "In 2004, nearly 75.2% of the non-agricultural labour force had informal employment, a percentage that fell to 68.6% in 2012." See FORLAC-ILO. *Trends in informal employment in Peru: 2004 – 2012,* 2014. Retrieved January 2020, from ILO: https://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/documents/publication/wcms_245891.pdf

[60] Larco states that the unions in the textile sector are mostly minority; this means that they only can bargain with their employers for their affiliates. According to Larco, the largest union in the sector is the Topy Top's union, with 600 members, while the rest are unions of 100 or at most 200 members in firms with more than a thousand employees.

[61] See Mincetur, *Posición del Gobierno del Perú respecto de la comunicación presentada por organizaciones de la Sociedad Civil por un supuesto incumplimiento del Perú en sus compromisos laborales y ambientales, contenidos en el acuerdo comercial entre el Perú y la Unión Europea,* 2018. Retrieved July 2019, from Acuerdos Comerciales: http://www.acuerdoscomerciales.gob.pe/images/stories/union_europea/2018/PosicionPeru-ComercioyDesarrolloSostenible.pdf

context, firms can compete in the international markets avoiding non-wages costs that workers with open-ended contracts are entitled under the General Regime.

Although the average number of workers with contracts under Decree 22342 represents a small part of the workforce,[62] between 2.18 and 2.3 percent of the total private and formal workforce in Peru during 2013 and 2017,[63] most of the workers employed under this regime belong to the textile sector.

The Ministry of Labor reports the number of contracts presented under Decree 22342. Table 1 shows that Lima holds about 64 percent of those contracts in Peru. The average number of contracts presented by the textile sector in the capital city was 127,148, representing about 84 percent of the total contracts in Lima, and about 54 percent of the total contracts presented in Peru that used the Decree 22342. This evidence suggests that the textile sector is the sector that most relays on the intensive use of short-term contracts under the NTE law.

TABLE 1: Number of Contracts presented by the Manufacturing Industry (Textile Sector) 2002-2014 - Decree-Law No 22342

	2002	2004	2006	2008	2010	2012	2014
Preparation and Spinning Textile Fibers, Textile products	16,988	19,565	25,077	29,124	36,462	31,238	30,547
Manufacture of Fabrics and Articles of knitting and crochet.	14,724	15,972	18,989	22,914	17,772	12,479	7,364
Manufacture of Clothing clothes, except leather clothes	34,373	70,045	99,751	95,714	99,415	96,425	72,368
Other textile classifications			2,065	5,002	8,724	3,878	3,064
Sub Total Textile Sector (1)	66,085	105,582	145,882	152,754	162,373	144,020	113,343
Total Lima (2)	86,581	126,776	171,216	179,504	196,025	164,539	131,921
% (1) / (2)	76%	83%	85%	85%	83%	88%	86%

[62] Between 2013 and 2017, the average number of workers hired monthly under Decree 22342 has been between 68,888 and 76,123 workers. See Mincetur (2018), *op. cit.*

[63] See Mincetur (2018), *op. cit.*

Total Renewal Lima Textile (3)	46,743	66,173	91,139	127,731	111,764	109,667	89,506
% (3) / (1)	71%	63%	62%	84%	69%	76%	79%
Total Peru (4)	155,174	186,525	246,314	272,227	273,146	254,565	243,866
% (2)/ (4)	56%	68%	70%	66%	72%	65%	54%
% (3)/ (1)	43%	57%	59%	56%	59%	57%	46%

Source: Author's calculations using data from the Statistical Yearbooks, Ministry of Labor and Employment Promotion Peru.

To portray "the systematic failure" of the Peruvian government commitments under the F.T.A., the document describes the behavior of five firms with more labor rights violation records in the textile sector, and that serve American clients. These firms are Topy Top S.A., Hialpesa, Inca Tops S.A., Corporación Texpop S.A. and, Fábrica de Tejidos Pisco S.A.C. Vicente Castro and Gerardo Olortegui state that the textile unions spent around a year collecting facts and evidence for more than one hundred cases using the labor documentation form created by the Solidarity Center and PLADES during the projects financed by USAID and USDOL. The selection criterion was that the case exemplifies a spread and systematic violation of a fundamental labor right -in this case, retaliation for union activities using the Decree 22342.

To reinforce the evidence about the relationship between the use of hiring laws (with fewer non wage costs to promote exports) and labor rights violations in nontraditional industries. The submission also included cases from the agroindustry that portray the same behavior, but under Law No. 27360 approved in 2000. The firms included are Camposol, Grupo Palmas y Sociedad Agrícola Virú. By contrast with the textile sector, the average number of workers hired monthly under Law No. 27360 has been growing sharply during the last years — for instance, between 2012 and 2019, from 210,298 to 314,769, representing in 2018 9.5 percent of the total private workforce in Peru.[64]

As Celestina Carraza Ruiz an agroindustry worker affiliated to the GCTP reports, "the Law 27360 curtails our rights, for example, less day of vacations, not severance pay. The firms grow selling their products to other countries while we get worse wages. Also, we suffer retaliation for being union leaders; the firm does not want that we advocate for us; they want us on our knees." Similarly, Juan Antonio Herrera, a worker from Sociedad Agricola Virú asserts, "in the agroindustry, our work is conditioned to union disaffiliation."

[64] Source Ministerio de Trabajo y Promoción del Empleo, Planilla Electrónica's Database.

The submission also pointed out that the Peruvian government cannot ensure that workers hired under Decree 22342 and the Law 27360 have access to a "fair, equitable, and transparent procedures in the enforcement of labor laws."[65] The submission attributed this failure to the lack of resources and mechanisms to supervise and enforce labor rights by the National Superintendence of Labor Inspection (SUNAFIL). In addition, the government's passivity to lead legislation changes to address those problems.
To underpin this statement, the signatories claimed that since Law 30222 in 2014, and for the next three years, SUNAFIL would adopt a preventive approach. As a result, when an inspector identifies a labor infraction, they only could offer orientations to employers about how to improve its labor practices (rather than apply a fine) and then conclude the inspection procedure. In other words, as Máximo Gutierrez argues, "before the law, SUNAFIL applied fines, now SUNAFIL gives them many chances to remedy, but they keep doing the same bad practices."

Challenges during the First Steps of the Process

In Giovanna Larco's view,[66] the most challenging part for shaping the submission was to gather the cases because, for an international claim, the facts must be very well defined, and it is tough that unions give you robust information. For this reason, she highlights the relevance of the use of the form to document labor rights violations and the capacitation in labor rights that unions received since the FTA's implementation through the Solidarity Center and other local labor NGOs.
Similarly, Javier Mujica states that textile workers chose the cases based on what they learned during the capacitation on labor rights and mechanisms for enforcing compliance that he taught for the Solidarity Center's project. "There are a lot of considerations to keep in mind, for example, is a violation of a right protected by the FTA? Does the practice represent a pattern over time? Does it show a Peruvian government's lack of action? Does it affect trade? Not all the cases have enough evidence for all those factors." The submission presented eight emblematic cases, five from the textile sector, and three from the agroindustry chosen out of around hundreds of cases.
Although Larco emphasized that textile unions did most of the work, she also acknowledged that they would not have been able to file this submission on their own because there is a lot of technical assistance behind this process (e.g.,

[65] USTR, nd, *op. cit.*
[66] PLADES was not involved directly in the submission process because they were working on a USDOL's project and Sunafil by then.

case selection, writing the claim, connecting with other actors, etc.) Larco claims that "unions from the textile sector do not have the money to afford it (as unions in the mining do) because wages in the industry are meager."

Another challenge was building national and international support to file the claim; the two textile federations requested to the Coordinadora de Centrales Sindicales del Perú[67] to also sign the submission on their behalf to give the sense of broad support among workers. Moreover, the FTTP and the FNTT also needed cross border solidarity,[68] so they had to get in touch with the American unions. As Larco states, "for any international mechanism, you need the support of local actors in that country to enhance your chances of success."[69]

Most of the actors involved in the submission acknowledge the Solidarity Center's role in this process. They mentioned that SC supported unions and local NGOs in the process of selecting the cases and establishing international alliances. For instance, SC counseled the sorting data process to ensure that the information was relevant (technical advice) and connected the unions with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and with the International Labor Rights Forum (ILRF). In fact, the SC have served as a contact point between different actors; its role has allowed unions to have fluid communication during the whole process with the rest of the actors involved. In this regard, Oscar Muro, the Program Officer from the Solidarity Center office in Peru, claims that "our concern is that each trade union confederation can fight for their labor rights. We have supported them through capacitation since the negotiations for the FTA."

[67] Integrated by the Confederación General de Trabajadores del Perú (CGTP), Central Autónoma de Trabajadores del Perú (CATP), Confederación De Trabajadores Del Perú (CTP), and Confederación Unitaria de Trabajadores del Perú (CUT).

[68] Paiement, P. (2018) states that "a transnational coalition of worker interests is precisely the kind of opportunity which labor advocates have been seeking to foster" because " it also illustrates how this can serve as a mechanism for uniting labor rights advocacy efforts across borders rather than pitting labor groups against each other." See Paiement, P., *op. cit.*

[69] According to DiCaprio (2004) "there are few, if any, instances of petition submission where the petitioner submitted unilaterally without the consultation and cooperation of labor groups in the defendant country." Moreover, she states that "Both the AFL-CIO and Human Rights Watch only submits a complaint if groups on the ground support the submission." See DiCaprio, A. *Are Labor Provisions Protectionist: Evidence from Nine Labor-Augmented US Trade Arrangements*. Comp. Lab. L. & Pol'y. *J.*, 2004, vol. 26, p. 1.

3. The Submission has been Filed

The submission was filed with OTLA[70] on July 23, 2015 (day 1), by: The International Labor Rights Forum, Perú Equidad, and seven Peruvian workers' organizations (CGTP, CATP, CTP, CUT, FTTP, and FNTT). The submission was accepted for review (within the 60 days established) by the Notice of Procedural Guidelines[71] on September 21, 2015. Moreover, the OTLA sent a fact-finding mission to Peru on December 6-15, 2015, to gather information about the arguments exposed on the submission and, on March 18, 2016 (within the 180 days), the OTLA emitted the Public Report of Review.[72]

In the public report, the OTLA expressed "significant concerns regarding whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the NTE sectors is sufficient to protect the right to freedom of association." Consequently, the OTLA offered four recommendations, summarized as follows: (i) "implement legal instruments to ensure that the use of short-term contracts in the NTE sectors does not restrict workers' associational rights;" (ii) expand SUNAFIL offices in all regions, (iii) increase SUNAFIL' support for its enforcement activities, and (iv) "expand Labor Courts of First Instance and increase the judiciary's budget for labor cases."[73]

After this public report, the official counterparts for both governments held meetings to discuss the concerns stated in the report.[74] The OTLA would monitor actions that attempt to progress in those concerns, setting the next steps in this submission. At the end of 2019, the OTLA emitted two periodic reviews (December 16, 2016, and April 20, 2018) and the submission is still in

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[70] The Submissions Under Labor Provisions of Free Trade Agreement are from Bahrain, Colombia, Dominican Republic, Guatemala, Honduras, Mexico, and Peru. Most of the "complaints have been brought by trade unions and labour NGOs from the United States and its trading partners […] Such complaints have been investigated in seven countries to [2019], resulting in various follow-ups, including government-level action plans. However, action plans are not always enacted in practice […]", See Harrison, J., *op. cit.*

[71] Office of the Secretary of Labor, *op. cit.*

[72] USDOL. *Public Report of Review of U.S. Submission 2015-01 (Peru),* 2016a. Retrieved July 2019, from U.S. Department of Labor: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Public_Report_of_Review_of_US_Submission_2015-01.pdf

[73] USDOL, 2016a, *op. cit.*

[74] Agusti-Panareda et al (2015) state that "most of the complaints have been dealt with at the level of the national contact point or through ministerial consultations. This limited advancement may, in part, be explained by the strong political component inherent in the enforcement procedure […]" See Agusti-Panareda, J., Franz Christian Ebert, and Desirée LeClercq. "ILO Labor Standards and Trade Agreements: A case for consistency." *Comp. Lab. L. & Pol'y J.* 36 (2015): 347.

progress. As of January 2020, the third periodic review has not been published yet.

SUNAFIL's Union Subscribe the Submission

The first USDOL's fact-finding mission (December 6-15, 2015) matched with a call for a strike on December 9th, 2015, by the SUNAFIL's Union with the slogan "The shoemaker's son always goes barefoot."[75] Once the Sindicato Único de Trabajadores de SUNAFIL's representatives heard about the submission (which pointed out the lack of capabilities to supervise and enforce labor rights by SUNAFIL as one of the problems to comply with labor rights) filed against the Peruvian government, they decided to reach out Perú Equidad.[76] They expressed their interest to subscribe to the claim and showed the problems that they face as SUNAFIL's employees.

According to Victor Manuel Gomez Rojas, the former General Secretary of SUNAFIL's Union, SUNAFIL's representatives have reached out to members of the Congress and the ILO in search of solutions that improve labor inspector's work and employment conditions. Gomez states that the Peruvian government, as an employer (in this case, SUNAFIL as one of its agencies) must lead with the example. Conversely, it fails to comply with the requirements that SUNAFIL evaluates during labor inspections.[77] In an interview with USDOL's mission on December 10th, 2015, they exposed their demands and explained how the lack of budget and inspectors undermines their ability to enforce labor codes in Peru.

A consultant, who prefers to remain anonymous, states that the labor inspectors helped to expose the severity of this case. The critical factor was that the labor inspectors linked their demands as a union (because as workers, they are entitled to rights too) with the defense of labor rights for Peruvian workers because they are a key part in the enforcement of labor codes.

Moreover, the consultant believes that the union who led the submission took an intelligent and strategic decision when they agreed to incorporate the SUNAFIL's union, because they reinforced the submission's argument about the lack of ability by the Peruvian government to ensure that workers have

[75] See the FaceBook announcement (Sindicato Único de Inspectores de Trabajo de la Sunafil, 2015).

[76] Perú Equidad was the responsible for writing the labor rights' legal framework in the submission.

[77] For instance, Gomez claims that "it does not respect our right to collective bargaining" because SUNAFIL does not comply with the agreement.

access to a "fair, equitable, and transparent procedures in the enforcement of labor laws."[78]

4. Government's Reactions

The union sector interpreted and promoted news about the OTLA's decision[79] to "monitor the issues raised by the submission" and "any progress that the Peruvian's government may make with respect"[80] as suggested evidence that Peru was failing to comply with its commitments under the labor chapter in the FTA. For example, some of them claimed in different news outlets that those failures might put the trade agreement at risk.

Sayuri Bayona, Vice Ministry of Trade in Peru, clarified that "the OTLA's report did not find any violation by the Peruvian government concerning the trade agreement. Peru has 19 trade agreements with more than 50 partners (28 with the European Union) and regardless of the public claims, Peru never has faced a dispute resolution for failing to comply with its labor or environment chapters."

Carlos Rabanal, Coordinator of Labor Affairs at the Ministry of Trade, explains that OTLA's mechanism is to determine preliminarily if there is a breach in the partner's commitments. The OTLA's mechanism is not for pushing regulatory changes, as the unions attempted, if there is no evidence of a violation. Bayona highlights that OTLA's recommendations are not binding.[81] Nevertheless, she reaffirms that since Peru has a collaborative dialogue with the United States, Peru shares with the States information regarding the improvements in Peruvian policies and practices.

Notwithstanding, some of OTLA's recommendations such as the need to build more capabilities for SUNAFIL to increase its enforcement's activities,

[78] USTR, nd, *op. cit.*

[79] On December 30, 2010, OTLA received a submission from the Peruvian National Union of Tax Administration Workers (SINAUT), Sindicato Nacional de Unidad de Trabajadores de SUNAT. However, on August 30, 2012, the OTLA's public report does not recommend formal consultations between the U.S. government and the Peruvian government under Article 17.7.1 of the PTPA Labor Chapter. See USDOL. *Public Report of Review of Office of Trade and Labor Affairs U.S. Submission 2010-03 (Peru),* 2012. Retrieved October 2019, from U.S. Department of Labor: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/PeruSubmission2012.pdf

[80] USDOL, 2016a, *op. cit.*

[81] To illustrate, Albertson, P. (2010) claims that "OTLA... may only make nonbinding recommendations to the U.S. Secretary of Labor regarding whether cooperative consultations.., are appropriate; whether a council of the parties' labor ministers **...** should be convened in the event that the initial cooperative consultations fail; and whether the formal dispute settlement process should be initiated." See Albertson, P., *op. cit.*

matched with Peruvian government's agenda and priorities. For instance, Larco and the Congresswoman Ursula Letona (a member of the Congress's Labor Commission), agree that Peru's agenda as a country has driven the restructuring of the Peruvian's inspection primarily because Peru wants to be part of the OECD. Thus, Peru will implement the necessary reforms to join the group.[82]

Nonetheless, the recommendations regarding the Decree-Law 22342 faced staunch opposition among local actors. The arguments for supporting the Decree-Law 22342 besides the reiterated one that this law has been in force before the FTA with the U.S. are summarized as follows:

- Bayona states that there are no free trade agreements banning short-term contracts, because short-term contracts allow firms to adjust their hiring to fluctuations in the business cycle of each market. Moreover, she emphasizes that the requirements for hiring under the Decree 22342 are unambiguous and stringent. For example, the firm must sell 40 percent of its production to international markets. The firm also must present the purchase order identifying the additional quantity requested by its client to the Ministry of Labor to justify short-term contracts under this law and get the approval for the hiring.
- Reaño claims that those recommendations against the Decree interfere with Peru's ability to define its rules. As a result, they make vulnerable the Peruvians' right to self-determination.
- On average, the number of workers hired under the nontraditional export law between 2013 and 2017 was 71,070 per month.[83] This number represents about 2.2 percent of the workers employed under the General Regime (formal sector). Representing a small part of the labor conditions status quo in Peru.
- Peru is investing its efforts in reducing informality (about 75 percent in 2018) as a way to enhance labor rights for more workers.

The Congresswoman Indira Huilca, a member of the Congress's Labor Commission, argues that the submission and the USDOL's recommendations have gone almost unnoticed in the Congress. The Labor Commission focused its attention on more circumstantial issues, thus, the Commission has not

[82] To illustrate, Peru's decision to be the first country to join the OECD Country Programme in December 2014 can be a clear sign of its interest to join the OECD. This program is a "new instrument for supporting dynamic, emerging economies" (that are committed to best policy practices) to identify areas for future reforms. See OECD. *Launch of the OECD Country Programme with Peru Remarks*, 2014. Retrieved November 2019, from OECD: https://www.oecd.org/about/secretary-general/launch-of-the-oecd-country-programme-with-peru-remarks.htm

[83] Source Ministerio de Trabajo y Promoción del Empleo, Planilla Electrónica's Database.

discussed the topic in any ordinary session. If that had been the case, it would have forced congress members to have a position about it. By contrast, the Foreign Commission attempted to review it from a perspective about how it has evolved the FTA with the U.S. through a sub commission,[84] but it did not move forward. Conversely, Letona guesses -she was not a Congress member by then- that the submission has not been discussed in Congress because the executive branch of the government is the official counterpart in the FTA.

5. Recommendations' Follow-ups

The USDOL's Public Report of Review of Submission 2015-01 expressed its concern regarding "whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the non-traditional export (NTE) sectors is sufficient to protect that right." Furthermore, "the report raised questions regarding labor law enforcement in Peru more generally, and particularly in the NTE sectors."[85] Since then, USDOL has been in touch with Peruvian authorities, unions, and local NGOs to assess any progress made by the Peruvian government on those matters that have been documented in two periodic reviews (Box 3).

Box 3: USDOL's visits and reports

- December 6-15, 2015: first USDOL's fact-finding mission.

Review of Submission 2015-01, March 18, 2016.

- October 2016: USDOL technical-level delegation.
- November 2016: U.S. Secretary of Labor Thomas E. Perez led a U.S. delegation that met with President Kuczynski and other senior officials.

First Periodic Review December 16, 2016.

- June 2017: a joint USDOL-Office of the U.S. Trade Representative (USTR) technical-level delegation.
- August and December 2017: USDOL and USTR held videoconferences.

Second Periodic Review April 20, 2018.

- April 2019: a USDOL technical-level delegation.

Source: Author elaboration based on USDOL's reports.

[84] The sub commission is a small group of congressmen that are part of the Foreign Commission.

[85] See USDOL. *First Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru),* 2016b. Retrieved July 2019, from U.S. Department of Labor: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-Review-Statement.pdf

Although USDOL sent a technical level delegation to Peru in April 2019, the USDOL has not published any update about the progress made by the Peruvian government. Some interviewers have interpreted the 'delay' in the publication as a signal of lack of interest from the Trump administration in this matter.[86] However, it is important to remember that Peru's President Kuczynski quit the presidency in March 2018, and since then, his vice president Mario Vizcarra took office.[87]

This is not the first time that USDOL 'does not comply with the deadline' regarding the publication of its Periodic Review, but this 'delay' has been the longest so far. On October 13, 2017, the Director of the International Department from the AFL-CIO sent a public communication to the Deputy Undersecretary for International Affairs at the U.S. Department of Labor. The letter expressed a concern regarding the lack of commitment of the United States to enforce the labor provisions in its free trade agreements because the Periodic Review was not released on time. The letter also called to resume the consultation process in order to move to the next stage.[88]

However, it is relevant to clarify that the OTLA's procedural guidelines do not explicitly define how often USDOL should publish the periodic reports, as it does with the Public Report of Review after the acceptance. Consequently, an anonymous consultant interprets that the Periodic Reviews are optional for USDOL. Thus, USDOL may release a new one if the report would present further information that may impact any of the parties. The anonymous consultant also states that the absence of a published Periodic Review does not mean a lack of communication or follow up between USDOL and the parties – indeed, some interviewers reported constant interactions with USDOL staff.

[86] According to Harrison (2019) Trump's nationalist rhetoric during his campaign made clear that "violations of labour rights abroad [would be] a concern only to the extent that they provided unfair competition which harmed workers in the United States." See Harrison, J., *op. cit.*

[87] Moreover, SUNAFIL changed three times the superintendent in charge during 2018 -the last one was appointed in January 2019. Maybe all those changes plus the lack of public pressure requesting the third report or questioning the noncompliance in the 'deadline' have contributed to this 'delay.'

[88] See AFL-CIO. *Carta a Martha Newton Subsecretaria adjunta para Asuntos Internacionales, Oficina de Asuntos Laborales Internacionales U. S. enviada por Cathy Feingold - Directora del Departamento Internacional,* 2017. Retrieved January 2020, from Trabajo Digno Perú: http://trabajodigno.pe/wp-content/uploads/2017/10/Peru-Letter-to-ILAB-and-USTR-OCT-2017-traducido.pdf

SUNAFIL's Improvements

Although the General Law for Labor Inspection (Law 28806) that rules labor inspection as a service and the duties of inspectors was established in 2006, the creation of the SUNAFIL, which is the agency responsible for promoting, supervising, and enforcing labor law compliance in Peru, was created by Law No. 29981 on January 13, 2013. Before SUNAFIL began operations on April 1, 2014, regional governments oversaw labor codes' enforcement in Peru.

According to Juan Carlos Requejo Alemán, superintendent of SUNAFIL, the problem with regional governments overseeing labor codes' enforcement was that regional governments had other priorities. In other words, financial constraints at the local level, different agendas, and the autonomy about how to inspect firms undermined the ability to enforce labor codes through labor inspections, regardless of whether all the regions received the same guidelines from the Ministry of Labor. Consequently, the creation of an agency only focused on labor inspections was a must for Peru.

The major challenge for SUNAFIL was to transit from the decentralized 26 regional governments to a centralized system. Once SUNAFIL established an office in a region, the activities of the inspection would be shared with the regional governments.[89] By 2019, regional governments still have full competencies in five regions (Table No. 2).

Table 2: Regional Office and Inspectors

	Coverage			Target	
	2017	2018	2019	2020	2021
Number of SUNAFIL regional offices	14	18	21	26	26
Number of Labor Inspectors	464	671	731	924	924

Source: SUNAFIL

Furthermore, having a presence in all the regions was not enough if SUNAFIL did not expand its coverage (Table 2). Thus, SUNAFIL needed to increase its number of inspectors and train them on different topics such as labor rights, new protocols, and other related topics. Along the same lines, SUNAFIL also created a unified term of employment, wage scales, benefits for each of the three levels of the inspector's career paths. For instance, a significant change is that now, inspectors at the instructor level have more competencies based on how complex are the issues that they will inspect rather than the firm' size.

[89] For example, regional governments would inspect micro-enterprises while SUNAFIL sets general guidelines and oversees smalls, medium, and large firms.

To face all the challenges that the implementation process has required, SUNAFIL has received technical and financial assistance, to build institutional and operational capacity from the ILO[90] and USDOL. In December 2014, USDOL signed a Cooperative Agreement with Capital Humano y Social (CHS) to implement a 2 million USD project called "Building the Capacity of the Peruvian Labor Inspectorate." This project was implemented by CHS and PLADES[91,92] and was scheduled from December 31, 2014 to December 31, 2018.

The USDOL project invested in two information systems to increase the effectiveness and efficiency of the inspections: Sistema Informático de la Inspección de Trabajo (SIIT), and Sistema de Información Articulado Nacional (SIAN).[93] The goal is to develop algorithms that help to identify firms in which workers are likely to be at high risk for labor rights violations and therefore develop targeted inspections there. Moreover, the project has supported: training courses for SUNAFIL's staff, the development of three[94] protocols for inspections and, paid for studies, such as the inspector workload distribution.[95,96] On the other hand, O'Brien Associates International's report (2017) observes that worker organizations "know very little about the project." Therefore, they would like to understand "how the project is trying to strengthen SUNAFIL."

Furthermore, Jesus Barrientos, Intendant of Inspection Intelligence, states that another significant change in SUNAFIL has been the shift from a punitive (or reactive) to a preventive approach. Barrientos claims that "most of the failures to obey labor law are due to a lack of knowledge about the regulations. Thus, it is essential to allow employers to remedy and improve practices rather than apply high fines." For this reason, Barrientos highlights the role of capacitation

[90] See https://www.sunafil.gob.pe/organizacion-internacional-del-trabajo-oit.html

[91] According to Larco, the USDOL project has been a very complex one, because building capabilities takes time.

[92] See https://www.dol.gov/agencies/ilab/building-capacity-peruvian-labor-inspectorate

[93] In English Labor Inspection Information System and The National Articulation Information System respectively

[94] There is a fourth protocol regarding freedom of association that is still in process.

[95] According to Jesus Barrientos, Intendant of Inspection Intelligence, this is the next challenge once they complete the number of inspectors.

[96] O'Brien and Associates International. *Independent Midterm Evaluation of the Strengthening the Institutional Capacity of the Peruvian Labor Inspection System Project.* 2017. Retrieved October 2019, from DOL.GOV: https://www.dol.gov/sites/dolgov/files/ILAB/evaluation_type/midterm_evaluation/Final_Evaluation_Report_Strengthening_the_Institutional_Capacity_of_the_Peruvian_Labor_Inspection_System_12_09_2017_without_PII_0.pdf

on labor rights and good practices for employers and unions as a critical element for getting long-term improvements in labor codes compliance.

In both Periodic Review of Progress, USDOL acknowledges that the Peruvian government's commitment to taking "some steps that, if fully implemented, would represent progress towards addressing the USDOL report's recommendations" and gives some examples about it, such as the increase in the number of inspectors, the presence of SUNAFIL in more regions, more budget for SUNAFIL, among others.[97]

USDOL's periodic reports also highlight that Peru has not addressed key recommendations, such as:

- "increase the authority of SUNAFIL and the MPTE to convert short-term employees into permanent employees in cases of identified violations of workers' associational rights and while administrative or legal proceedings are still pending."
- "issue protocols that SUNAFIL and MTPE labor inspectors can use to verify that short-term contracts in the NTE sectors meet all legal requirements and are not being used to restrict workers' rights." [98]

In the same way, Perú Equidad elaborated a document that discusses which actions from the Peruvian government are moving far from Peru's expected behavior to address effectively the USDOL's recommendations.[99] The document also reflects the differences between the new approach that SUNAFIL is adopting to improve labor rights compliance in Peru and what the unions and other actors from the labor movement believe SUNAFIL should do. For example: [100]

- The fact that SUNAFIL has been reducing fines between 2006 and 2017[101] due to a change in the punitive approach is not welcomed by

[97] However, the Congresswoman Huilca argues that it is not possible to talk about improvements regarding SUNAFIL because SUNAFIL is still an agency in implementation stages. Thus, it does not have the full capacity yet to enforce labor law.

[98] See USDOL. *Second Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru).* 2018. Retrieved July 2019, from USDOL: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-FTA-Submission-Second-Review-Statement-Final.pdf

[99] In the case of SUNAFIL, the document mentions the SUNAFIL's tendency to reduce fine and, the Supreme Decree No. 007-2017-RT, which establishes that SUNAFIL cannot inspect during the same year, the same issue in the same firm

[100] See Equidad, et. al., *op. cit.*

[101] Examples of modification to the rules of procedures of the General Law of Labor Inspection that implied fine reductions: (i) Supreme Decree No. 019-2006-TR, reduced 50 percent of the fines for micro and small firms, (ii) Supreme Decree No. 012-2013-TR, created a table of fines according the size of the firms, (iii) Law No. 30222 that modified the Law 29873 (Occupational Health and Safety) reducing 35 percent of the fines for all the infractions

the unions. They argue that if the penalties are low, firms would not have any incentive to improve their labor practices.[102]

- SUNAFIL's union expects that all the inspectors would have the same competencies.[103] This issue is opposed with SUNAFIL's current approach of keeping a pyramidal structure. Nevertheless, Barrientos states that a non-pyramidal structure would be an unnecessary expense because SUNAFIL expects to conduct target inspections based on their information systems.

In other words, the differences regarding how SUNAFIL should develop strategies to enforce labor codes in Peru have deepened by the lack of knowledge of what was SUNAFIL pursuing through the cooperative agreements with USDOL and the negative perception that workers had regarding SUNAFIL performance. For example, O'Brien Associates International (2017)'s report also offers a clue on how workers perceive SUNAFIL: "SUNAFIL is slow to respond to inspection requests and that some inspectors are biased towards employers." "SUNAFIL has a shortage of inspectors due to an inadequate budget."

Notwithstanding, Larco argues that the institutional reform in SUNAFIL has been more successful. Still, the political part of developing protocols for inspections such as contracts under Decree 22342 has not gotten any result. Larco states that "there is no political will, and nobody can force Peru to reach an agreement on it."

Short-Term Contracts in the Non-Traditional Export-Sector

The periodic reports state the Peruvian government had not addressed recommendations regarding:

- the implementation of "a legal instrument that limits the consecutive use of short-term employment contracts in the NTE sectors" and,
- enhancements of SUNAFIL's authority "to convert short-term employees into permanent employees in cases of identified violations of workers' associational rights."[104]

except for freedom of association, child labor, forced labor or other that caused dead or incapacity, (iv) Supreme Decree No. 015-2017-TR increased 10 percent the fines established by the Law 30222 and established an upper limit fine for micro and small firms for each sanction proceeding.

[102] If the cost of not improving practices is so small, firms can consider it as a part of the cost of doing business and keep the same behavior. As a result, firms will not change their behavior if it is cheaper to not comply with the law than comply with it.

[103] See Equidad, et. al., *op. cit.*

[104] USDOL, 2018, *op. cit.*

Regardless, there have been other attempts to modify or derogate the labor regime ruled by the Decree-Law 22342; any of them have been successful. For example, the draft-law 01635/2016-CR proposed by the parliamentary faction Frente Amplio por Justicia, Vida and Libertad. The day scheduled (May 23, 2017) to discuss this project matched a 24 hour strike by the textile workers to support this Draft-law.[105] Then, on the new date for the debate, according to Huilca, "there was no quorum for it."[106] On November 20, 2018 was another unsuccessful attempt to debate the Draft-law.[107]

Similarly, Perú Equidad states that the Peruvian government has not made any change to its laws. Instead the government is adopting additional codes promoting short-term contracts. For instance, in October 2016, Congress approved the Law No. 205062 that allows extraordinary faculties to the Executive branch to promulgate norms with a range of laws to promote economic and formalization. Through this law, there is not mandatory to register short-term contracts any more with the Autoridad Administrativa de Trabajo (ATT)[108]

By contrast, Congresswoman Ursula Letona states that there is evidence that laws for promoting nontraditional exports have been effective, because those sectors have growth (see Figure 2). To illustrate, the Law 27360 has been successful in promoting the growth in the agroindustry sector, offering formal employment as well as keeping competitiveness in international markets. For instance, the overall number of workers under this system has risen from 210,298 in 2012 to 295,048 in July 2018.[109] Letona also emphasizes that "the

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[105] See Trabajo Digno, *Claves para entender el debate sobre el régimen laboral de las Exportaciones No Tradicionales CUANDO EL OBJETIVO ES IMPEDIR LA SINDICALIZACIÓN*, 2017. Retrieved September 2019, from Trabajo Digno.Pe: http://trabajodigno.pe/claves-para-entender-el-debate-sobre-el-regimen-laboral-de-las-exportaciones-no-tradicionales-cuando-el-objetivo-es-impedir-la-sindicalizacion/#more-1379

[106] See Huilca, I. *Urge derogar régimen laboral de exportación no tradicional*. 2017. Retrieved September 2019, from Indira Huilca: http://www.indirahuilca.pe/urge-derogar-regimen-laboral-de-exportacion-no-tradicional/

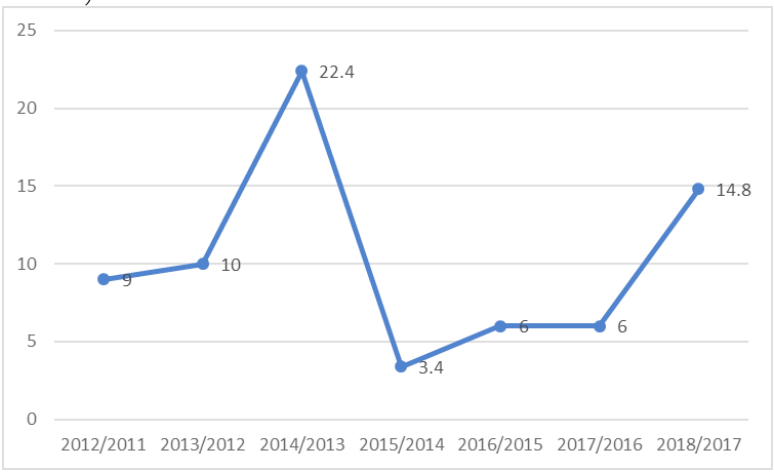
[107] See Congreso de Perú. *Agenda Sexta Sesión Ordinaria - Comisión de Trabajo y Seguridad Social - Período Anual de Sesiones 2018-2019*. 2018. Retrieved October 2019, from Congreso de la Republica: http://www2.congreso.gob.pe/Sicr/ApoyComisiones/comision2011.nsf/f28b2e5ecd1427cc052578e3006ef917/66c5d675759306750525833c005cca25/$FILE/AGENDA06201118.pdf

[108] See Equidad, et. al*., op. cit.*

[109] See Mincetur. *Posición del Gobierno del Perú respecto de la comunicación presentada por organizaciones de la Sociedad Civil por un supuesto incumplimiento del Perú en sus compromisos laborales y ambientales, contenidos en el acuerdo comercial entre el Perú y la Unión Europea*. 2018. Retrieved July 2019, from Acuerdos Comerciales : http://www.acuerdoscomerciales.gob.pe/images/stories/union_europea/2018/PosicionPeru-ComercioyDesarrolloSostenible.pdf

raise in the remunerations is also associated with decreasing levels of poverty in areas with predominant presence of firms that hire with this regime."

Figure 2: Percentage Change of Peruvian Agriculture Sector's Total Export (US$ Millions)



Source: Monthly Report (December) on Foreign Trade (2011- 2018) – Mincetur.

Therefore, in July 2019, Congresswoman Letona had a draft law to extend the rule and expand this regime to other sectors such as fishing and forestry. In spite of the dissolution of the Peruvian Congress in September 2019, the Law 27360 was extended up to December 31, 2031 by the Emergency Decree Nº 043-2019 on December 31, 2019.[110]

6. Expectations versus Achievements

The textile union's motivation for filling the submission was to improve their labor conditions and, therefore, their standards of living. Since the unions from the textile sector have portrayed how Decree 22342 promotes precarious jobs in multiple forums, they have focused their efforts to change it. The lack of political support to change the Decree in Congress has repeatedly closed any internal possibility to make legislative changes that improve their situation. For this reason, the unions have used all the available mechanisms (both national and international) to diversify their actions and push for regulatory and

[110] See El Peruano. *Decreto de Urgencia Nº 043-2019 Modifica la Ley Nº 27360, para promover y mejorar las condiciones para el desarrollo de la actividad agraria.* 2019. Retrieved January 2020, from Diario Oficial del Bicentenario - El Peruano: https://busquedas.elperuano.pe/normaslegales/modifica-la-ley-n-27360-para-promover-y-mejorar-las-condic-decreto-de-urgencia-n-043-2019-1841328-1/

structural reforms, more enforcement of labor law, and more better practices in their workplace. Celestina Carraza Ruiz, a worker from the Agro Industry illustrates this argument:

> "We want to expose business' practices to the international community. I am very confident that we would enforce our rights compliance through international forums because the Peruvian laws are only pro-business. Our claims have not been heard in our country. We expect that they sit down with us to dialogue."

The FTA's mechanism was appealing because, on the one hand, "it has been well documented by national and international organizations that the Peruvian Government is not enforcing its own labor laws in the export sector."[111] On the other, since the FTA has clear commitments, arbitrage procedures, and sanctions; there were expectations that this mechanism would be a more effective way to push for regulatory changes.[112]

The Labor Advisory Committee on Trade Negotiation and Trade Policy (2015) considers that "Peru is currently in violation of the U.S.-Peru FTA" because "since the U.S.-Peru Free Trade Agreement came into force, the Peruvian government has reduced protections for workers and weakened mechanisms to enforce labor legislation." The OTLA only has expressed its concern about "whether the system in place to protect the right to freedom of association of workers employed on unlimited consecutive short-term contracts in the non-traditional export (NTE) sectors is sufficient to protect that right."[113]

Due to the commitment between the U.S. and Peru is to show enough effort to enforce their labor codes, the OTLA has not found any violation that requires to call a dispute resolution with Peru for failing to comply with the labor chapter so far. Consequently, besides the recommendations, constant communication with Peruvian stakeholders, technical and financial support, there is not too much space for actions in the coming future. Larco describes the constraints to achieve a change as the following:

> "Little things have changed since the submission because USDOL can ask for explanations and offer recommendations, resources, and

[111] See Labor Advisory Committee. *Labor Advisory Committee on Trade Negotiation and Trade Policy*. 2015. Retrieved December 2019, from USTR.GOV: https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf

[112] From the Congress woman Huilca points of view, it is interesting that besides the worker's opposition to the FTA, they have decided to use its mechanism for getting a solution to their problems.

[113] See USDOL. *First Periodic Review of Progress to Address Issues Identified in the U.S. Department of Labor's Public Report of Review of Submission 2015-01 (Peru)*. 2016b. Retrieved July 2019, from U.S. Department of Labor: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Peru-Review-Statement.pdf

> support, but they cannot do more. SUNAFIL cannot change legislation, either. Regulatory changes are done in the Congress, and the political forces in Peru make it impossible."

Mujica acknowledges the presence of SUNAFIL in the regions as an improvement, but he claims that most of the firms[114] used as an example in the submission have not improved their labor relation practices yet. He argues that the legal framework and the enforcement mechanisms are not helping to push for improvements. Since the workers have not gotten a better off situation, it is not surprising to find different evaluations among workers regarding their situation after four years of filing the submission. For instance,

> "The submission has offered recommendations, but there is not a firm position to force changes. Thus, the claim has not helped with anything to improve our labor conditions. For instance, regardless of the MTPE rejected Hialpesa's request to dismiss 195 workers due to financial constraints,[115] Hialpesa laid off 195 employees in June 2019 and 95 of those employees were union members." […] "from 145 union members, only 45 of them are working now." […] "Hialpesa does not want the union because we have filed some lawsuits, and we have won them, so Hialpesa shall pay those benefits to its workers."
>
> Máximo Gutierrez, Hialpesa

> "We wanted to raise our voice in every forum because we feel that the law is not for the weakest. Even though we have gotten some judgments in our favor, that we celebrate[116] The suffering is still there. You had a terrible time, the suffering of losing your job, the suffering due to the financial hardship's consequences that you faced with your family, all that grief remains with you."
>
> Jose Lopez Mota, Incatop

> "We believe that Chapter 17 has not been fulfilled because union activities are considered as a crime."
>
> Juan Antonio Herrera, Agro Industry

[114] The only exception is Camposol. In March 2014, Camposol started a program called "Modelo de Diálogo Social Camposol – Afianzando el compromiso" [in English: Model for a social dialogue Camposol - strengthen the commitment] to improve their labor relations. Since then, Camposol has settled two collective bargaining contracts (for three years) and received some awards from the Ministry of Labor for its ethical practices and its respect to union activities.

[115] However, Hialpesa has been opening operations in Central America.

[116] For more information regarding specific cases, See Equidad, et. al*., op. cit.*

The main challenge to achieve consensus in Congress is the polarization of perspective regarding the benefits and the pervasive effects of the short-term contracts in the export sector. In addition, there is an unbalance of economic and political power among their supporters. To illustrate, Letona summaries part of the debate from her perspective:

> "The problem is more regarding the rules and the unclear application of them through the Court. The business sector uses short-term contracts because the system is very rigid, and the Court can order to hire them again, so they cannot fire workers, regardless if they are bad ones. Furthermore, in the same way that some groups are saying that those laws create precarious jobs, we have other groups -such as SNI- supporting them because those laws allow them to offer formal jobs and keep competitiveness in international markets as the evidence shows."

Even though the Obama Administration worked on labor issues in the USTR and DOL in partners like Guatemala, Colombia, Jordan, Bahrain, Bangladesh, Swaziland, Haiti and Burma,[117] some members of the American Congress qualify the failures on enforcement labor rights on free trade agreements. as "broken promises"[118] For example, the AFL-CIO reminds us that the only case that has proceeded to dispute resolution, after nine years of filling the case and on more than 24 years of FTAs, is Guatemala.[119,120] "No U.S. FTA partner has come into full compliance as a result of post-FTA monitoring or enforcement of labor provisions."[121]

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[117] See USTR, DOL. *Standing Up for Workers: Promoting Labor Rights through Trade.* United States: Executive Office of the President of the United States, 2015.

[118] See Staff of Sen. Elizabeth Warren. *Broken Promises. Decades of Failure to Enforce Labor Standards in Free Trade Agreements.* (n.d.). Retrieved December 2019, from Warren Senate: https://www.warren.senate.gov/files/documents/BrokenPromises.pdf

[119] "the Obama Administration became the first in history to bring a labor case under a free trade agreement—not just under a U.S. trade agreement, but any trade agreement ever negotiated." See USTR, DOL. *Standing Up for Workers: Promoting Labor Rights through Trade.* United States: Executive Office of the President of the United States, 2015.

[120] Harrison (2019) emphasizes that Guatemala is the only one "out of almost 50 complaints made so far [2019] under US FTAs (the vast majority of which relate to NAFTA)." See Harrison, *op. cit.*

[121] See AFL-CIO. *U.S. Labor Enforcement Process,* 2018. Retrieved December 2019, from AFL-CIO: https://aflcio.org/sites/default/files/2019-02/History%20of%20Labor%20Enforcement%20Chart%20Oct2018.pdf

Nevertheless, Bolle (2016) states that although "all labor provisions in trade agreements are technically enforceable." "The USTR is a small operation. Entering into the dispute resolution process is a lengthy, involved, expensive process in terms of both personnel and resources." Consequently, even "the USTR must decide which cases it will pursue based on priorities." [122] For this reason, Larco believes that "mechanisms enforced through governments are not the most effective channel to get a solution in the short-term. However, they help to keep the topic on the public agenda and work as a reminder that we still have a pending issue. The OTLA's submission behaves like a reminder, and the reminder has a value too."[123]

Notwithstanding how the submission will evolve is not defined in a vacuum. The willingness of the Peruvian government to improve practices and the discretion of the American government[124] to enforce the labor chapter depends on the political and economic context of each country. Those forces influence how actors behave and will shape the outcomes of this submission.

7. Does this Manner Affect Trade between the Parties?

There has not been any legislative change to create mechanisms that would protect the right of freedom of association for workers hired under Decree 22342 and Law 27360. The submission's signatories expect that the OTLA invokes the General Dispute Settlement Mechanism in this process and, eventually, the Dispute Settlement Panel if the former cannot resolve the dispute.

Guatemala's submission is the only case that has ended up in a Dispute Settlement Panel. Consequently, it is a unique reference of how the panel members would interpret and evaluate issues such as: "not fail to effectively enforce," "sustained or recurring course of action or inaction" and, "in a manner affecting trade between the parties." Regardless the fact that "the

[122] See Bolle, M. J. *Overview of Labor Enforcement Issues in Free Trade Agreements*. 2016. Retrieved December 2019, from Congressional Research Service: https://fas.org/sgp/crs/misc/RS22823.pdf

[123] From Larco's view, the most effective channels are the mechanisms that involve actors in the supply chain, such as the brand and consumers because they work closely with the firms and workers.

[124] Albertson, P. (2010) claims "As Human Rights Watch notes, the FTAs leave much discretion for the U.S. government regarding when to initiate the steps outlined in the FTA labor chapters, and the criteria for such a decision are subjective […] Such broad discretion is rooted, in part, in the language of U.S. free trade accords, which gives significant freedom to decide whether to invoke labor rights complaint and dispute settlement systems […]" See Albertson, P., *op. cit.*

approach of the Panel has been viewed by academic commentators as creating significant difficulties in terms of bringing successful cases in the future." [125]
Nevertheless, the parties must also consider that the Panel in Guatemala did not create jurisprudence. Thus, an eventual new panel does not need to follow their criteria, they can develop their own guidelines to settle the dispute instead.[126] Moreover, the parties should also keep in mind that the labor chapter in Peru is broader than Guatemala's labor chapter because it includes more standards subject to arbitrage.
Regardless of the differences, and the eventual change in the panel's criteria, the Peruvian submission should be evaluated to the light of the criteria used by the settlement panel's members in the case of Guatemala to assess whether there is a breach in the free trade agreement's commitments under the labor chapter.
In Guatemala's case, the Panel acknowledged that "a failure to enforce labor laws can relieve an employer of unionization costs." The panel also raised the question of "whether such effects were of sufficient scale and duration to confer a competitive advantage." For example, the panel requested at least approximated evidence of (i) the significance of the amounts in cost-savings (for unionization costs, compensation, and sanction cost) to the overall labor costs of each firm and, (ii) the impact of the dismissal (or other retaliations) on the ability of the other workers to organize and bargain collectively. Consequently, the complainant should have shown that the effects have been significant and long enough that the firms could enjoy a competitive advantage during the disputed period.[127]
Even though the Panel stated that the complainant does not need "proof of cost or other effects with any particular degree of precision," the Panel

[125] See Harrison, J., *op. cit*
[126] Actually, Agusti-Panareda et al (2015) state that the inclusion "of the [ILO] Declaration's principles [also] brings a degree of uncertainty" due to "the lack of comprehensive guidance on the application of those principles." As a result, dispute settlement bodies under trade agreements "could attempt to develop the meaning of the undefined concepts[...] At a trade partner level, this variance may lead to uncertainty among parties of the respective trade agreements concerning their respective obligations, particularly if different meanings crop up over time under different trade agreements for the same parties." See Agusti-Panareda, Jordi, Franz Christian Ebert, and Desirée LeClercq, *op. cit.*
[127] See International Trade Administration. *Dominican Republic - Central America - United States Free Trade Agreement. Arbitral Panel Established Pursuant to Chapter Twenty. In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR. Final Report of the.* 2017. Retrieved January 2020, from Trade.gov: https://legacy.trade.gov/industry/tas/Guatemala%20%20%E2%80%93%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf

required to "determine that a competitive advantage has accrued." This also means that the complainant needs to show that "there is an effect on conditions of competition." This requirement is a key issue because the Panel clearly stated that it is the complainant's responsibility to "demonstrate that labor cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage [change condition of competition]."[128]

The Panel also stated that they do not require "evidence drawn from employer records" and that the "determination [of the competitive advantage] does not depend upon the weight or significance of that employer within its particular economic sector." [129] Since the panel does not conduct an independent investigation (as an anti-dumping commission[130] does) there are no procedural guidelines defined about how to gather information or an incentive for the firms to collaborate with the process. Consequently, this clarification is relevant for two reasons:

1. The complainants have broad options to select the best information available to approximate their evidence.
2. Since the advantage does not depend on the importance of a specific employer in the industry, it can be inferred that the share of the American market that has the firm or the country is not relevant either to determine whether there is an advantage or not. This is important because it isolates issues like market penetration and focuses on the fact that there is a trade between the parties.[131]

Although the Peruvian submission cast doubts on whether the system in place is enough to protect the right of freedom of association of workers hired under Decree 22342 and Law 27360, the submission does not offer clear evidence whether this situation is conferring a competitive advantage for the firms involved.

By contrast, the Peruvian government stated that between 2012 and 2017, the remunerations in the textile sector showed a positive trend, and there were no significant differences between remunerations from unions and non-union members.[132] The report does not offer further information about this statistical

[128] See International Trade Administration, *op. cit.*

[129] See International Trade Administration, *op. cit.*

[130] See the Anti-dumping Agreement that implements the Article VI of GATT 1994.

[131] This point is relevant because the exports from the Peruvian textile sector to the United States decreased by 12 percent during 2012, and since then, they have had a slow recovery. By contrast, the agriculture sector has been increasing its exports to the States during the last ten years (See Annex 2).

[132] See Mincetur, (2018), *op. cit.*

analysis. The argument suggests that there is not a competitive advantage generated by fewer labor costs due to non-union workers in the textile sector.

8. Final Remarks

The process of filing this submission highlights two critical considerations: the technical assistance and the role of international aid.

The projects funded by USAID and USDOL channeled resources into building up workers' capabilities to enforce their labor rights. Both projects offered unions the opportunity not only to learn about their labor rights, but also how to document cases and identify mechanisms to enforce labor rights compliance. During the training, unions also accessed international networks, which offered the possibility of building cross border solidarity and obtaining additional technical assistance. The relevance of the trainings can be summarized in the words of one consultant [who prefers to remain anonymous]:

> "A worker cannot fight for his rights if he does not know his rights or where and how to claim for them. And if he does, he cannot do anything if he does not have robust evidence to prove that his rights have been violated."

Unfortunately, funds destined to empower workers through capacitation are scarce in developing countries (there are other priorities like food, water, or immunizations). For this reason, international aid oriented to promote labor rights plays a crucial role in the promotion of growth with inclusion. Cooperation mechanisms in free trade agreements are a valuable asset to improve labor rights globally.

International aid also raised awareness about how much unions rely on external resources to fund their activities. To illustrate, the process of how to make the case required high skills of technical assistance in multiple disciplines. Not all the unions can afford technical support, which opens the question about who has the last word regarding the strategies and actions that the unions would develop in the next stages of this submission. Could it be, perhaps, the unions' agenda, or is it the NGOs that supported the technical process?

Moreover, we must acknowledge the role of the advocacy network is not only to add pressure, channel resources, spread the message, and raise awareness. Cross border solidarity plays an essential role, especially in the U.S. political dynamic. Different American sectors have expressed their discomfort regarding the lack of the United States' commitment to enforcing labor chapters in its trade agreements. The Peruvian unions need their support to

keep this submission on America's agenda, so it is necessary to maintain constant communication with their international allies.
Finally, although the submission is in a "stand by" stage, the political context can change at any time, and the signatories should be prepared in the case that this submission moves forward. The unions (and the NGOs that endorsed the submission) still have to figure out how to offer clear evidence about whether the violation of freedom of association for workers hired under Decree 22342 and Law 27360 is conferring a competitive advantage for the firms involved.

Annex 1

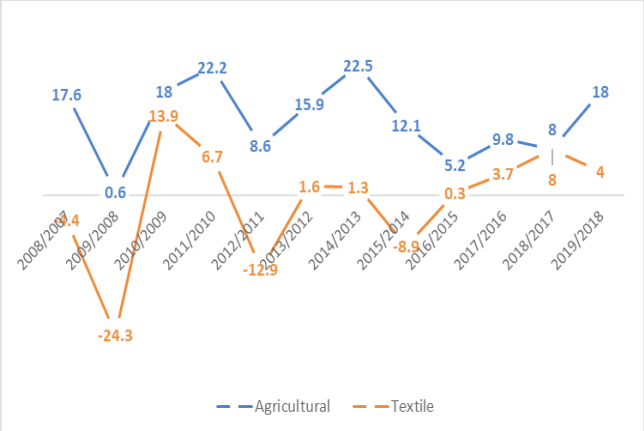
Box A-1: FLA Workplace Code of Conduct and Compliance Benchmarks

ER.9 Recruitment and Hiring/Invalid Use of Contract, Contingent or Temporary Workers Employers shall not:
ER.9.1 use contract/contingent/temporary workers on a regular basis for the long-term or multiple short-terms;
ER.9.2 hire contract/contingent/temporary workers as a means to support normal business needs on a continuous basis or as regular employment practice; or
ER.9.3 make excessive use of fixed-term contracts or schemes where there is no real intent to impart skills or provide regular employment.

Source: FLA. *FLA Workplace Code of Conduct and Compliance Benchmarks*. 2011. Retrieved October 2019, from the Fair Labor Association: https://www.fairlabor.org/sites/default/files/fla_complete_code_and_benchmarks.pdf

Annex 2

Figure A-2: Percentage Change of Peruvian Agriculture and Textile Sector's Exports to States (US$ Millions)



Source: Monthly Report (December) on Foreign Trade (2008- 2019) – Mincetur.

Beyond Literal Translation: The Role of Culture in Understanding European Industrial Relations

Jean-Michel Servais [1]

Abstract

Globalisation does not outshine national features. Through the examination of distinct solutions adopted in the regulation of management-trade union relations, conclusions should be drawn on the pitfalls of a purely word-for-word translation and on the dangers of analysing other countries' legal system without taking intellectual distance from his/her own. From the start, translation was used as the obvious way to compare national legal concepts, institutions, or systems. While research has always acknowledged the complex nature of the translation work, the acceleration of globalisation makes it more urgent to examine further the underlying reasons for these problems. This study draws upon cultural differences reflected in the law to analyse the difficulties to reach a more worldwide vision of the distinct national regulations and, consequently, of the transnational industrial relations resulting from an economic reality that has virtually ignored borders. It identifies the main differences between the approaches to labour-management relations in selected countries or groups of countries as they appeared in their legal systems. To carry out this examination, ILO conventions and recommendations are occasionally used as a reference.

Keywords: translation; comparison; industrial relations; culture; ILO.

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1. Introduction

Translation has long been employed as a tool to compare national legal concepts, institutions, or systems. While research has acknowledged the complex nature of the translation process, increased globalization makes it more urgent to further examine the challenges resulting from comparative analysis. This study draws upon those cultural differences reflected in the law to analyse the difficulties to implement an all-encompassing approach when governing transnational relations.

Globalization does not erase all specifics. Our home constitutes one of the greatest powers of integration for thoughts, memories, and dreams for human beings[2]. The characteristics defining national cultures play a significant role in how human beings behave and work[3]. The ways and means chosen to elaborate and to implement labour provisions are predicated on the historical context, the power of employers' and workers' associations, the experience of their leaders, and the relevance of law and collective agreements in specific industrial relations systems.

More fundamentally, how a rule is drafted and implemented depends on the ideas, customs, skills, arts, of a people or a group, which are transferred, communicated, or passed along, within and to succeeding generations. Simply put, this process depends on culture[4].

Scholars in comparative law are keenly aware of the extent to which current laws can vary in terms of content, wording, and implementation processes. Psychologists and sociologists have long pointed to the extent to which

[2] G. Bachelard, *La poétique de l'espace*, Quadrige/PUF, Paris, 2004, p. 26 (English version: *The Poetics of Space*, London, Penguin Books, 2014).

[3] L. Vandermeersch, Ce que la Chine nous apprend sur le langage, la société, l'existence, Gallimard, Paris, 2019; S. Austen, *Culture and the labour market*, Edward Elgar, Cheltenham, 2003; S. Roche, *Pobreza no Brasil. A final de que se trata ?*, Editorial FGV, Rio de Janeiro, 2003, especially p. 18; G. Hofstede, *Culture's consequences*, Londres, Sage, 2d ed., 2001; I. Harpaz, B. Honig, P. Coetsier, *A cross-cultural longitudinal analysis of the meaning of work and the socialization process of career starters* , *Journal of World Business*, 2002, vol. 37(4), pp. 230-244; C. Frege, *The discourse of industrial democracy: Germany and the U.S. revisited*, *Economic and Industrial Democracy,* 2005, vol. 26 (1), pp. 151-175; M. Pagell, Jeffrey P. Katz, Chwen Sheu, *The importance of national culture in operations management research* , *International Journal of Operations & Production Management*, 2005, Vol. 25 vol. (4), pp.371-394; S. C. Schneider et J.L. Barsoux, *Managing across cultures, London,* Prentice Hall (F.T.),Upper Saddle River (New Jersey), 2d ed., 2003.

[4] This is how culture is defined in Webster's *New world Dictionary*. See for example, with regard to the USA: S. McCune Lindsay: «The problem of American cooperation», in J. T. Shotwell (ed.), *The Origins of the International Labor Organization*, Columbia University Press, New York, vol. 1, 1934; See also J. Bauer et D.A. Bell (eds.), *The East Asian challenge for human rights*, Cambridge University Press, 1999.

interpersonal relationships[5], in particular between men and women, are marked by national traditions. International labour standards, as the conventions and recommendations of the International Labour Organisation (ILO), must constantly deal with this tension between the local and the global, because their effectiveness depends largely on how the two elements are combined when it comes to labour protection and employee behaviour regulation.

Based on the above considerations, this paper underlines the need to go beyond word-by-word translation. It aims to cast light on the pitfalls of a purely textual comparison and on the dangers of analysing other countries' legal systems without taking into account the cultural dimension. This paper intends to point out the obstacles to a mutual understanding of distinct labour law systems, putting forward a methodology to overcome them. The final conclusions could allow for a better comprehension of other countries' strengths and weaknesses, stimulating the necessary dialogue between the social partners at the transnational level and between experts from different states or groups of states.

The paper starts with an analysis of the rules and regulations adopted in Continental Europe with regard to labour-management relations (Section I). The existence of a European social model and the relationship between unions, political parties, and the state structures are investigated considering that they reflect the visions of most European countries in relation to their industrial relations systems.

Next comes a summary of the methodological problems the labour law comparatist faces in the attempt to understand other legal systems (Section II). A theoretical framework aims at analysing the linguistic, legal, and socio-cultural obstacles to understanding the distinctive characters of the national industrial relations system and social policy.

In doing so, this research will be referred to when dealing with related issues[6]. This work is mainly based on data collected by the ILO with regard to the industrial relations systems in the United States, European countries, and Japan. Terminology like 'the social question' – which considers a historical perspective – 'equality', 'trade-unions', 'collective bargaining', 'collective labour agreement' will be scrutinized. For the purposes of this study, a number of conventions and recommendations from the International Labour

[5] L. Hantrais, *Vers une mixité méthodologique en comparaisons internationales*, in J.C. Barbier and M.Th. Letablier, *Social Policies. Epistemological and Methodological Issues in Cross-National Comparison*, Peter Lang, Berlin, 2006, pp. 271-289.

[6] See in particular: *Droits en synergie sur le travail. Eléments de droits international et comparé du travail* Bruylant, Brussels, 1997, chapter 1; J.M. Servais (ed.), *Industrial Relations, democracy and social stability*, *World Labour Report 1997-98,* Geneva, 1997; *Droit social de l'Union européenne,* 3rd edition, Bruylant, Brussels, 2017, concluding chapter.

Organisation (ILO) – either in English, French or Spanish – will be taken into consideration.

2. The Specific Characteristic of European Industrial Relations

The idea that labour and employment laws reflect social models – though far from new – has been given new momentum in current discussions on the future of the European Union. It is based on a certain political vision of the European community, which supposedly is shared by nearly all European countries. Yet, what does the expression 'European social model' mean? Is it a specifically European way of viewing and addressing social issues? Or, is it a set of common institutions and practices established among European countries, a sort of common heritage? Section I will try to answer those questions (A).
Section II will scrutinise the situation in Continental Europe by analysing links between trade unions and political parties that are regularly elected. This way, workers' organizations are more or less integrated with the state's structure, often on a permanent basis. Reference will also be made to similar situations in other regions of the world while emphasizing the differences among them (B).

A) A European Social Model

The concept of a 'model' has been used in France and Germany to refer to a simplified representation of a process or a system[7]. This word became mainstream following the publication in French (1991), and two years later in English, of *Capitalism Against Capitalism*[8] by the economist Michel Albert. He investigated the ideological and economic 'models' that would shape societies at the end of the twentieth century. He contrasted the Anglo-American type of capitalism – which was totally oriented towards individual and market freedom – with the German-Japanese model, which was more concerned with social cohesion. In French discourse, many make use of the word *model* to assess a system; it evokes the search for or the affirmation of certain policies to solve complex problems. Its English equivalent ('model') has also been used with this meaning, though 'pattern' would be more precise.
Historically, the adjective 'social' as in 'the social question' referred to the division of society into classes, and in particular to the proletarian working

[7] As defined by the French Robert Dictionary.
[8] Whurr, London, 1993.

class, as opposed to the dominant and wealthy *bourgeoisie*[9]. It is now employed as general term to refer to workers' living conditions.
Is the 'social model' a useful concept to characterize and systematize a certain social system? It would be preferable to describe any shared heritage as an economic and social model because separating these two dimensions seems in many ways an ideal view. Practice has decided otherwise.
In the past, governments adopted at least three kinds of policies to maintain or restore social cohesion among their citizens: Enlightened Despotism, Laissez-faire, and the Social Economy. The analysis challenges the claim that discussions around the European social model are largely or entirely focused on some short-term political or even opportunistic views.

a. Enlightened Despotism

In the 18th century, Prussia and Austria implemented a sort of virtuous authoritarianism that was named 'Enlightened Despotism'. Their governments had their own view of the problems encountered and imposed the remedies they deemed as appropriate. Modern politicians or high-level civil servants have a similar way to proceed in some developing countries, especially in Asia[10]. Being well-educated, they may be brilliant technocrats; they consider themselves to be in a privileged position to understand and solve their people's issues, yet they do not liaise with those concerned.
The development process of Japan, and later on that of South Korea and Taiwan was based on this vision. The State and its officials played an active role in national industrial relations. Their influence appeared substantial, but their concerns centered on growth and productivity. It could be said that the State deals with economic aspects before focusing on social issues, believing the former has priority over the latter. However, in the course of their economic progress, greater attention has been devoted to social problems and to collective negotiations. It was against this backdrop that the famous three pillars of the Japanese industrial relations system were erected after the Second World War: lifetime employment, seniority-based wages, and social benefits, as well as enterprise-level trade unionism. South Korea, and more recently Taiwan, adopted a similar approach. While the approach implemented in Japan and South Korea bears resemblance with the European Socio-economic model, also in relation to (informal) collective negotiations carried out at the branch or national inter-branch level, other countries in Asia, like Malaysia, have maintained a more totalitarian approach.

[9] A. Lalande, *Vocabulaire technique et critique de la philosophie*, PUF, Paris, 1962, p. 998.
[10] J. Schregle, *Negotiating development. Labour relations in Southern Asia,* ILO, Geneva, 1982, p.184.

Communist countries adopted a different economic policy. Nevertheless, their way to manage social issues could also be qualified as enlightened despotism. The leading role in all matters was left to the party in power; it was seeing itself as the enlightened guard of the labour class. Cuba can still be considered as an example of the Communist way of governing.

b. Laissez-faire strategy

The Laissez-faire strategy is different from the previous one: governments let the 'invisible hand' of the market and labour market make the required adjustments. No country has completely adopted this form of governance. For example, the U.S. approach to labour and employment problems appears to feature little involvement and high levels of voluntarism[11], as it prioritizes political and economic liberalism. The emphasis is placed on individual freedom and responsibility as well as on action by local economic agents and groups, rather than on political power at the state and federal level. The law focuses more on civil liberties than on social rights. Thus, every citizen should – at least theoretically – enjoy equality of treatment and opportunities. There is no general recognition of a social question, but rather of a moral and poverty problem to be dealt with first by private charities. Hence the recent tendency among Anglo-Saxon scholars wishing to strengthen solidarity to consider the defence of workers' rights as human civil rights[12].
Historically, the country's federal system has made it a complex matter for Congress in Washington to act in order to provide workers with the protection granted under the laws of continental Europe or Japan. In the United States, enterprise/workshop-level collective bargaining has been given preference over labour and social security legislation. In Japan and continental Europe, the

[11] S. Jacoby, *American Exceptionalism Revisited: The Importance of Management*, in S. Jacoby (ed.), *Masters to Managers: Historical and Comparative Perspectives on American Employers*, Columbia University Press, New York, 1991; S. M. Lipset and N. M. Meltz, *Canadian and American attitudes towards work and Institutions*, *Perspectives on Work* (The IRRA's 50th Anniversary Magazine), 1997, Vol. 1(3), pp. 14-19. Earlier, see: S. McCane Lindsey, *The problem of American Cooperation*, in J. T. Shotwell (ed.), *The Origins of the International Labor Organization*, Columbia University Press, New York, 1934, pp. 331-367.

[12] Committee on Monitoring International Labor Standards, *Monitoring International Labor Standards. Techniques and Sources of Information*, The National Academies Press, Washington DC, 11 May 2004, in particular pp. 224 and ff.; Ph. Alston (ed.), *Labour Rights as Human Rights*, Oxford University Press, 2005; R. Goldschmidt, C. L. Strapazzon, *La hermenéutica responsable y su papel en la protección y promoción del derecho fundamental al trabajo digno: el caso de la nueva redacción del inciso iii de la súmala 244 del tribunal superior del trabajo*, *Revista general de derecho del trabajo y seguridad social*, no 39, December 2014.

involvement of the government, the administration, and legislation at varying degrees are expected to improve living and working standards.
Moreover, the socialist doctrine of the struggle of classes for state control never caught on in the United States. In the past, a trend developed there towards greater centralization, in order to give federal administration more leeway on labour matters. However, these efforts never changed the voluntaristic approach of American labour-management relations significantly. Although federal legislation did evolve significantly in the 1960s, it did so mainly in the sphere of civil rights (e.g. protection of various groups from discrimination).

c. The Social Economy

The third policy fulfilled citizens' need to see the State establishing rules, institutions, and practices safeguarding them from social risks, in particular in Continental Europe. The concern to help the less fortunate dates back to Pericles' ancient Athens. It is based on a recognized duty of solidarity and generally founded on the explicit or tacit agreement of large employers' and workers' federations. The expression 'welfare state' takes on a negative connotation. The Germans often speak of 'Social State'. 'Social economy' is the most accepted terminology and mainly refers to the 'European Social Model'. The concept conveys the idea of shared, social culture. Europeans believe in the need to go beyond the simple recognition of civil liberties and political rights as enshrined in the 1776 American Declaration of Independence and in the 1789 French Declaration of the Human and Citizens Rights. A large majority is reluctant to accept exclusion and excessive inequality. They expect the State to act in order to remedy the social consequences of the mechanical operations taking place in the market economy. They wish to find an answer to the social question, and they have a strong sense of solidarity when facing problems like unemployment and poverty (they are keen to tackle the 'social question').
Admittedly, a 'social dimension' already exists at the EU level. It remains however limited, even if European Law limits the freedom of Member States and consolidates the fundamental rights of people at work[13]. The restrictions derive from the EU's limited competence and from the principle of subsidiarity enshrined in the constituting Treaty. Moreover, some directives,

[13] See J. Mulder, *Social legitimacy in the internal market: a dialogue of mutual responsiveness*, Hart Publishing, Oxford, 2018; U. Neergaard et R. Nielsen, *Blurring boundaries: From the Danish Welfare State to the European Social Model?*, *European Labour Law Journal,* 2010,vol. 1 (4), pp. 434-488.

particularly in the area of collective labour relations, concern situations that only have a transnational dimension.

The European social model, therefore, appears more like the common denominator of social policies in place since the 19th century and, above all, in the 20th century, in most EU countries, in particular those involved in the establishment of the EU. Within the framework referred to, the model reflects three historical realities.

The first is concerned with social regulation based on centralized consultation and action, which may have a bipartite or tripartite character. Whatever the number of parties involved, state institutions are never indifferent to the outcome of the talks in which the social actors have participated. This practice of collective negotiations – conceived in a broad sense – is generally supported by a complex system of industrial relations[14]. While it is true that tripartite agreements and other forms of high-level social pacts have been observed in other regions of the world, no other has resorted so significantly to centralised dialogue, be it formal or informal.

The second reality is an elaborate social security system including, where appropriate, the provision of a minimum guaranteed income and other forms of labour protection (e.g. minimum wage). Europeans are unwilling to accept – irrespective of the political party they vote for – exclusion and extreme poverty. They want the State to remedy the negative human consequences of an excessively automatized market economy and an overly painful process of globalization[15]. This second reality also covers public services provided by the State in the social and economic spheres. All European governments, whether right- or left-sided, have enacted tax or social security legislation imposed for that very purpose, as well as fiscal and social charges to the citizens. If those levies have been criticized by some as weakening business competitiveness, recent history demonstrates that European voters continue to prefer this approach, while accepting, as the case may be, limited adjustments.

The third reality – which is related to the other two – is the implementation of Keynesian principles, i.e. active State intervention in industrial, economic and social matters, and, in collaboration with the social partners participating to varying degrees, the search for consensus in the elaboration and application of these policies. For many years, and following governments' request, both

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[14] S. Avdagic, M. Rhodes, J. Visser (ed.), *Social Pacts in Europe : Emergence, Evolution and Institutionalization*, Oxford University Press, 2011 ; S. K. Andersen, J. E. Dølvik, Ch. Lyhne Ibsen, *Nordic labour market models in open markets*, Report 132, ETUI, Brussels,2014.

[15] O. Giraud, *Nation et globalisation. Mécanismes de constitution des espaces politiques pertinents et comparaisons internationales* , in J.C. Barbier and M. Th. Letablier (eds.), *Social Policies. Epistemological and Methodological Issues in Cross-National Comparison*, Peter Lang, Berlin, 2006, pp. 97-118.

businesses and trade unions have been involved in seeking compromises among different economic variables – i.e. wealth creation and distribution, and job creation. When collective negotiations are unable to settle social problems, the state is pressured into adopting protective legislation[16].

Those realities are also reflected in EU legislation, as illustrated by Articles 145 to 164 of the Treaty on the functioning of the EU. The divides between countries and persons, which are able to take advantage of the new economic context, and the others, the losers, who feel more and more marginalized and impoverished, have led the EU and its Members to reaffirm their role of protection, not least to protect their political support against populism and euro-scepticism. They have considered that there is still a need for national and supranational institutions to mediate between the individual and the global market, even if their impact will be more limited than in the past; multinational labour-management relations require a transnational legal framework. On 24 April 2017, the EU adopted a recommendation establishing a European Pillar of Social Rights. The instrument aims to provide targets in the Eurozone that should be progressively achieved by national social and employment policies. Drawing on the common social heritage of the states concerned, it confirms and seeks to strengthen a European socio-economic model.

This common heritage should not mask the differences between countries. In particular, the importance of job security and social protection varies greatly, as illustrated by a debate on the merits of the 'Danish model' that gives preference to the latter. The United Kingdom has traditionally adopted a more voluntary vision of the world of work, which brings it closer to the USA. Interestingly enough, similar elements may be found in countries like Japan, South Korea, or even Taiwan, where the State and its officials play an active role in economic and social policies. Informal consultations take regularly place with trade unions confederations and enterprises' representatives, and an extensive system of social security is in force.

B. The Relationship between Unions, Political Parties and the State Structure

The vision of a European, socio-economic model inherited from history is also visible in the formal or informal involvement of the trade union movement in the State structure, especially when compared to other regions.

Generally speaking, the attitude of public authorities towards trade unions and their rights is rarely neutral. Some are hostile, not even allowing any authentic workers' association to be established (e.g. Saudi Arabia or Oman). Others

[16] S. K. Andersen, J. E. Dølvik, Ch. Lyhne Ibsen, *op. cit.*

have put in place legislative or practical measures that are, purposely or not, detrimental to the trade union movement and its activities. The ILO reports[17] contain numerous examples, not to mention cases in which the protective legislation or the institutional recognition given to workers' organizations was weakened.
The first part of this section examines the relevance of workers' associations in countries where an institutional relationship exists with public authorities. The second part critically describes the search for an adjustment of the European trade union movement in a more globalized world.

1. Trade Unions and their Political Weight

The following paragraphs deal with the role of trade unions in countries where opposing visions exist in relation to them in society and in its constituting structure. In a communist country, trade unions are subordinated to the ruling party while, in the continental states of Western Europe, centralized social dialogue has been freely established, in close cooperation with the government. The fear of Bolshevist subversion has shaped the industrial relations scene in Japan at the end of the Second World War and led other countries (e.g. Malaysia, Singapore, and South Korea) to exercise control over the trade union movement. In general, the end of the Cold War brought a more flexible attitude.

a. The Role of Trade Unions in Totalitarian Regimes

In a People's Republic, the trade union movement is closely linked to the ruling Marxist party to which the legal order, normally the Constitution, grants a leading position[18]. The Party, the State, and the trade union organization are

[17] The material used comes mainly from the reports of the ILO, especially from its Committee of Experts on the Application of Conventions and Recommendations (CEACR) and of its Committee on Freedom of Association (CFA). When examining the implementation of Convention no. 87 (on freedom of association and the protection of the right to organise, 1948) and Convention no. 98 (on the right to organise and to bargain collectively, 1949), they describe extensively the law and the practice in the concerned countries. This constitutes an extremely rich source of comparative information. The CFA and the CEACR reports are reproduced country by country on the ILO website under "Labour standards/ Countries profiles": http://www.ilo.org/global/standards/lang--en/index.htm. See also the *Compilation of decisions of the Committee on Freedom of Association*, 6th ed. Geneva, *2018*. http://www.ilo.org/dyn/normlex/en.

[18] V.I. Lenin, *The role and functions of the trade unions under the new economic policy*, *Collected work*, Progress Publishers, Moscow,1966, vol. 33, pp. 184-196; S. Gaspar, H. Warnke, I. .Loga-Sowinski, F. Danalache, *Les syndicats dans les pays socialistes*, *Nouvelle Revue internationale* (Paris),

given a common objective: building a socialist society. Any opposition or serious divergences between the three elements can only harm, in their view, the interests of the working class. Strikes were considered as superfluous and directly or indirectly prohibited through a system of mediation of collective labour conflicts, with the Party constituting the last resort. More generally, all activities seen as detrimental to the socialist regime were sanctioned.

Most firms belonged to the public sector, even if a small private sector continued to exist. The organizations of the heads of enterprises were mainly the Chambers of Commerce, which had a limited role in the social field.

According to this approach, workers' organizations could not be independent from the Party; only one trade union movement, the communist one, is therefore authorized. It must go on defending their members' interests – by resisting particular bureaucratic distortions – while at the same time serving the general interests of the socialist society – by disseminating Communism and increasing production. Its responsibilities should be that of instructing and mobilising workers, similar to a 'transmission belt' linking the Party and the masses[19].

In European communist countries, the law had generally transferred to the trade unions functions traditionally discharged by the State in the areas of social security and of safety and health protection. The collective agreements aimed at adapting the legislative provisions and the State plans to the conditions of each enterprise, giving workers a stake in its efficient operation and distributing amongst them the benefits accruing from the successful implementation of the enterprise plan, all within the framework of the national economic guidelines and instructions. In particular, the government fixed basic wage rates; other parts of the remuneration were established at the enterprise level, including fringe benefits and bonuses.

Even when communication worked bottom-up as well as top-down, this dual role became a source of tension. Diverging views are a fact of life, including in employment relations. There exists some blurring in relation to the distinct roles of a party representing workers, both of a government of that party, and of a trade union, not to mention the management's responsibilities in public

July 1970,vol. 13(7), pp. 148-162; ILO, *Trade Union Rights in the USSR*, ILO, Geneva, 1959; L. Trócsanyi, *Fundamental problems of Labour Relations in the Law of the European Socialist Countries,* Akadémiai Kiado, Budapest, 1986; B. Taylor, Ch. Kai, Li Qi, *Industrial Relations in China*, Edward Elgar, Cheltenham,2003.

[19] ILO, *The trade union situation and industrial relations in Hungary*, ILO, Geneva, 1984, especially pp. 16-27; M. Myant and S Smith, *Czech Trade Unions in Comparative Perspective*, *European Journal of Industrial Relations*, 1999, vol. 5(3), pp. 265-285; K. Bomba *Sindicalismo en el este y en el centro de Europa, el ejemplo de Polonia*, *Revista internacional y comparada de relaciones laborales y derecho del empleo*, 2014, Vol.2 (4), pp. 76-78.

enterprises. It appears extremely difficult in such a system to settle conflicts peacefully, i.e. without the threat of severe sanctions by judges, who are not independent of the Party.
The ruling communist party is still perceived a major role in Cuba, in Vietnam and China; it sees itself as the enlightened advanced guard of the labour class. While Chinese authorities have carried out a deeper liberalization than the two other countries, the relationships between the three main actors of the social scene remain similar. This approach has been replicated by a number of totalitarian states, which have not adopted the Marxist dogma, as illustrated by Egypt, Syria, and some African countries. In countries like Algeria, Tanzania, and Zambia, unions received full recognition – as they took part in national liberation movements – but at the same time, they had difficulties originating from the other components of the new ruling forces. On the whole, their influence has therefore been limited[20]. Fascist regimes also control the trade union movement.

b. The Role of the Trade Unions in Continental European Democracies

The ties between trade unions and political parties have been historically close in most Western European countries. They have developed together during the 19th century and the beginning of the 20th century, with a view to defend and promote the interests of wage-earners and other people excluded from the benefits of the Industrial Revolution. In most cases, social movements also included women, youth associations, and cooperatives. They were divided mainly into Socialist, Christian, and Communist leagues, whose presence and strength varied from one country to another.
Since the end of the Second World War, and especially since the late 1960s, the mutual influence of political parties and trade unions has led Western European governments to increasingly involve in economic and social policies workers' organizations and their counterpart on the employer's side. They have done so by carrying out formal or informal consultations, by acting jointly and concluding tripartite social pacts, and/or by offering them to participate in various public and semi-public bodies.
Later on, the situation has evolved. The links between trade unions and political parties have loosened in a number of countries, as seen in France,

[20] See also: T. Fashoyin, S. Mantanmi, *Democracy, Labour and Development: Transforming industrial relations in Africa*, *Industrial Relations Journal*, 1996, vol. 27 (1), pp. 38-49; W. Annaba, *Trade Union movement in Africa: promise and performance*, St. Martin´s Press, New York ,1979; C. Phelan, *Trade Unions in West Africa. Historical and Contemporary Perspectives*, Peter Lang, Berlin, 2011; T. Bramble, F. Barchiesi, *Rethinking the Labour Movement in the "New South Africa",* Ashgate, Aldershot, 2003.

Italy, and Sweden. The reasons for this are many. The fact that workers' interests are increasingly diverse is certainly one. It not only reflects the divide between long-term wage-earners and precarious ones. Their concerns differ more than before depending on the branch of activity, occupation, skill, age, or sex of the people involved. Trade unions have had difficulties to represent the growing diversity in workers' priorities[21]. Furthermore, the digital revolution and the dispersion of workers that it brings about also affect traditional forms of workers' representation. New forms of social mobilization include the use of social media.[22]

The links with public authorities remain nevertheless strong and try to adhere to the European social model. Trade unions and their employers' counterparts are often members of institutionalized joint bargaining committees, with or without the participation of public authorities. Their involvement is further strengthened by their presence in the governing body of the social security institutions and, in some countries like Belgium, in the entire structure of the system. They also participate in a number of other bodies such as vocational training joint committees. Sometimes, like in France, they even receive a significant amount of money in the form of attendance fees.[23] Furthermore, five of the countries with the highest unionization rate (Belgium, Denmark, Finland, Iceland, and Sweden) have an unemployment insurance scheme under which workers' organizations may handle the payment of benefits (as part of the so-called Ghent system).

2. Trade Unions in the New Context

a. A New Social Environment

A combination of the political changes that occurred at the end of the twentieth century, the revolution in communication and production technologies and the organization of work, and the growing interdependence of national economies among countries and firms have had a major impact on governments, businesses, and trade unions. The internationalization of the market economy – particularly the pre-eminence of more laissez-faire policies

[21] Ph. Davezies, *Individualisation of the work relationship: a challenge for trade unions*, Policy Brief (European Economic, Employment and Social Policy), ETUI, Brussels, N° 3/2014.

[22] J.-L. Fabiani, *Contestations politiques et nouvelles prises de paroles*, *Esprit*, March-April 2015, n°413, March-April 2015, pp. 165-177.

[23] See http://www.metiseurope.eu/infographie-syndicats-adhesion-financement_fr_70_art_30058.html and the issue of *Droit social* on *L'argent, les syndicats et les élus du personnel*, 2014, no 9, pp. 692-759.

– limited the powers of public authorities in the social field[24]. Keynesian national policies presupposed complete control of economic instruments by the State. It cannot function in the same way if the state loses some of that control.

While workers' associations have constituted an internationalist movement from the outset, they have faced difficulties in adapting to the new environment. The most obvious obstacles stem from legal provisions that hamper the coordination of trade unions action at a transnational level[25]. The variety of provisions in domestic law concerning trade unions activities, including the right to strike, often impedes true cooperation among unions.

These legal barriers are not the only obstacles in the way of cross-border solidarity between workers. Other barriers, which are just as serious, stem from differences in languages and culture[26]. When it becomes institutionalized, cooperation can also mean a shift of authority and resources to supranational bodies, and this may encounter reluctance of national leaders. International trade unions have nevertheless tried hard to influence the social scene at the global level. They have conducted truly transnational campaigns (e.g. the elimination of child labour), approached politicians or members of governments, raised their voice in the ILO, lobbied in other international institutions like the OECD or the UN, or attempted to draw attention in G8 and G20 meetings. They have signed from time to time framework agreements with major multinational companies[27] or established workers' committees at that level.

The very concept of 'a trade union' varies from one country to another. Trade union structures centered upon the workplace are often not suited to new forms of work organization. Another focal point of the organisation therefore needs to be found. Enterprise-oriented unions in the U.S. – and, to a varying extent, those of other English-speaking countries – have for a long time sought primarily to defend the immediate interests of their members and those of other workers within the negotiating unit.

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[24] See A. Martin, G. Ross (eds.), *Euros and Europeans: Monetary integration and the European model of society*, Cambridge University Press, 2004.

[25] E. Ales, I. Senatori (eds.), *The Transnational Dimension of Labour Relations. A New Order in the Making?*, Giappichelli Editore, Turin, 2013; M.-E. Gordon and L. Turner (eds.): *Transnational Cooperation among Labor Unions*, ILR Press, Ithaca (NY), 2000.

[26] G. Meardi *Understanding Trade Union Cultures*, *Industrielle Beziehungen / The German Journal of Industrial Relations*, 2011, vol 18 (4), pp. 336-345.

[27] K. Papadakis, *Shaping Global Industrial Relations. The impact of International Framework Agreements*, Palgrave MacMillan, Basingstoke, 2011; S. Sciarra, M. Fuchs, A. Sobczak, *Towards a Legal Framework for Transnational Company Agreements,* European Trade Union Confederation, Brussels, 2014; R. Hyman, A. Dufresne (eds.), *Transnational Collective Bargaining*, *European Journal of Industrial Relations*, special issue, June 2012,vol. 18(2).

The term 'trade union' reflects the differences. It is defined as a group of people belonging to the same branch who come together to defend their common 'corporatist' interests, while its translation into French (*syndicat*), Spanish or Portuguese (*sindicato*), Italian (*sindacato*), or Romanian (sindicat), derived from the Greek *sundicos*, does not contain this restriction, and applying to an association which defends a group of people at work. We may also find this etymology in the Russian word □□□□□□□□□□ (trade unionist). The German word *gewerkschaft* appears closer to the English one. In the latter at least, the term 'syndicalism' specifically refers to a revolutionary movement and theory advocating for the transfer of the means of production and distribution to the workers' unions, i.e. ownership and control.

Beyond these linguistic remarks, we observe that unions in Continental Europe have rather claimed to represent workers as a whole, to go beyond labour relations issues, influencing the current views of society. Very often mistrustful of governments, they present themselves as mass labour and social movements rather than just as trade unions. That being said, the main concerns of most trade unions remains the defence of their members, i.e. workers enjoying a stable job. They also often failed to reach the most vulnerable people.

Some trade unions have nevertheless succeeded in linking community concerns to those of the workplace, either directly or through alliances with grassroots movements. Their action has now been extensively analysed[28]. Their influence however remains quite limited. In particular, the growing number of NGOs and social movements in some regions does not compensate for the (sometimes) weak trade union activities and the government's partial

[28] K. V.W. Stone, *The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective*, in K.V.W. Stone and H. Arthur (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment,* Russell Sage Foundation, New York, 2013, p. 75; K. Nakamura, M. Nitto, *Organizing Nonstandard Workers in Japan: Old players and New players*, *ibid.*, pp. 253-270; J. Fine, *Alternative labour protection movements in the United States: Reshaping industrial relations? International Labour Review,* 2015, Vol. 154 (19 ; D. Gelot, *Travailleurs pauvres et syndicalisme. L'exemple américain*, *Droit social*, 2010, n°6, pp. 615-622; J. McBride and I. Greenwood (eds.), *Community Unionism: A Comparative Analysis of Concepts and Contexts,* , Palgrave McMillan, London 2009; A. Hyde, *Who Speaks for the Working Poor?, A Preliminary Look at the Emerging Tetralogy of Representation of Low-Wage Service Workers*, *Cornell Journal of Law and Public Policy*, 2004, Vol. (3)p.599; M.L. Ontiveros, *A New Course for Labour Unions : Identity-Based Organizing as a Response to Globalization* in J. Conaghan, R.M. Fischl, K. Klare, *Labour Law in an era of globalization. Transformative practices and possibilities,* Oxford University Press, 2002, pp. 417-428; P. Waterman, *Globalization, social movements and new internationalisms,* Continuum, New York (N.Y), 2001; ILO, *Industrial Relations, democracy and social stability, op. cit.* pp. 44-51.

withdrawal from social policy. With a few exceptions, those new actors do not possess the qualities and abilities that they are attributed[29].

The lesson from those experiences seems clear: the adaptation problems to globalization should encompass a democratic response from the local level[30]. A number of initiatives have for a long time been taken in Europe by municipal or regional authorities with the collaboration of various actors, including local unions and with the support of EU funds[31]. They have aimed at creating jobs (Austria, Belgium, France, and Germany[32]), *inter alia* at training redundant workers and at integrating or reintegrating the unemployed into the labour market (Belgium[33]). More broadly, they have stimulated economic and social development (Ireland[34], Italy[35]), with a focus on the reform of the labour

[29] A. Bayat, *Social Movements, Activism and Social Development in the Middle East,* Working paper (Civil Society and Social Movements, Progamme paper no3), UNRISD, Geneva, 2000; Special issue of *Esprit* on *A quoi sert le social?* , March-April 1998.

[30] S. Giguère (ed.), *More than just Jobs: Workforce Development in a Skills-Based Economy*, OECD, Paris, 2008; J. Donzelot, *Le social et la competition*, *Esprit,* November 2008, pp. 51-77; J.K. McKullum, *Global Unions, Local Power : The New Spirit of Transnational Labor Organizing*, Cornell University Press, ILR Press, 2013; L. Gardin, J.L. Laville,, *Les initiatives locales en Europe*, *Travail et Emploi*, January 2000, no 81, pp. 53-66; OECD (Labour Management Programme), *The role of trade unions in local development*, Paris, 1997; M. Geddes, *Local partnership: a successful strategy for social cohesion?* European Foundation for the improvement of living and working conditions, Dublin, 1998; comp. J. Bauer et D. Bell (ed.), *The East Asian Challenge for Human Rights*, Cambridge University Press., 1999, p. 23.

[31] K. V.W. Stone, *Green shoots in the labour market: A cornucopia of social experiments*, ILO, Geneva, pp. 21-22; European Commission, *Guidance on community-led local development for Local actors*, Brussels, 2014.

[32] OECD, LEED Forum on Partnerships and Local Governance, Austria, Belgium, France, Germany, etc.

[33] See in particular the 29 December 1990 Act adding various provisions on social policy; the 23 December 2005; the Act regarding solidarity between generations; the French Community Decree of 24 October 2008 subsiding employment in the socio-cultural sector; the Royal Decree of 9 March 2006 concerning the active management of restructuring.

[34] W.K. Roche, *Social Partnership in Ireland and New Social Pacts*, *Industrial Relations: A Journal of Economy and Society*, July 2007, Vol. 46 (3), July 2007, pp.395–425.

[35] B. Caruso, *Decentralised social pacts, trade unions and collective bargaining: How labour law is changing,* in Marco Biagi, *Towards a European Model of Industrial Relations. How Labour Law is Changing,* Kluwer, The Hague, 2001, pp 193-224; F. Cossentino, F. Pyke, W. Sengenberger, *Local and regional response to global pressure: the case of Italy and its industrial districts*, International Institute for Labour Studies, Geneva, 1996; F. Pyke, G. Beccatini, W. Sengenberger (eds.), *Industrial districts and inter-firm cooperation in Italy*, International Institute for Labour Studies, Geneva, 1990.

market and of vocational training programmes[36] or the improvement of life and working conditions (e.g. the '*tempi della città*' initiatives in Italy[37]).
Trade unions have also obtained major achievements in the European Union where workers' and employers' associations play a prominent role in solving labour issues. The EU legal system of industrial relations significantly contributes to adapting the trade union movement and social dialogue to its employers' counterpart.

b. The EU Experience

The original purpose of the European Treaties has been to establish an internal market with free movement of persons, services, and capital. Especially since the 1980s, the EU has aimed at balancing economic development with concerns regarding full employment, social progress, and the fight against social exclusion and discrimination. With the view of correcting the social consequences of market Europeanization and softening the transition to the new economic environment, the EU has taken measures to promote employment, education, vocational training, and social cohesion. It also aims at improving living and working conditions.
In all their areas of action, the European institutions are formally requested to adopt a participative approach, to "give citizens and representative associations the opportunity to make known and publicly exchange their views" and in particular to recognise and promote the role of the social partners at their level. They have to facilitate dialogue between the employers' and workers' organizations, respecting their autonomy and to organize tripartite social summits for growth and employment (articles 11 TEU and 152 TFUE). The role of the trade unions, as well as the employers' confederations, in the elaboration and in the application of social policy could not be more clearly promoted. They do so by lobbying at all levels of the European system. The political parties, represented in the European Parliament, relay them and so do national governments, which share their views. They have therefore access to the highest spheres of European power.
They are consulted or they integrate a variety of committees entrusted with designing or supervising European social policy. The fields covered include employment, vocational training, the functioning of the European Social Fund,

[36] A. Bevort, A. Jobert, *Sociologie du travail. Les relations professionnelles,* A.Colin, Paris, 2011, pp. 209-210 and 243; M. Mainland, *Networks, training and tripartism in active labour market policy: the case of Denmark*, *Congress Proceedings*, Sinnea, 1998, Bologna, vol. 3, pp. 295-296.
[37] S. Bontiglioli and M. Mareggi (eds), *Il tempo e la citta` fra natura e storia. Atlante di progetti sui tempo della città*, *Urbanistica Quaderni*, 1997, no 12; M.C. Belloni and F. Bambi (eds), *Microfisica della cittadinanza. Città ,genere, politiche dei tempi*, Franco Agneli, Milan, 1997.

coordination of social security entitlements, or general social policy. Bipartite bodies – i.e. representatives from workers and employers – have also been created in branches of activities where they express their opinions, adopt recommendations, or sign framework agreements, such as in the agriculture sector.

The European Commission favours the dialogue between the social partners. Their negotiations do not always lead to legal commitments. In many cases, they only express joint opinions, recommendations, or declarations without binding legal effects. They are nevertheless given by articles 154-155 TFUE the preference to elaborate social regulation. Before submitting proposals in the social field, the Commission has to consult them on the possible direction of EU action. If, at a second stage, the Commission considers EU action advisable, the Commission must consult them again on the content of the envisaged proposal. The representatives from both sides may then inform the Commission of their wish to initiate a process of negotiation with a view to conclude an agreement; the duration of this process is limited – it will not exceed nine months – unless management and labour concerned and the Commission jointly decide to extend it.

In a number of cases, they have concluded framework agreements at a branch or general level. The TFUE formally recognizes the effects of those agreements. They may be implemented in accordance with the law and practices specific to each Member State. A procedure of extension *erga omnes*, inspired by the equivalent option afforded by some members, may also be used. At the joint request of the signatory parties, the Commission may ask the European Council to take a decision – i.e. a directive – that applies to all workers and employers concerned.

At the enterprise or group of enterprises level, too, the EU promotes social dialogue. It has adopted a directive on the establishment of a European Works Council or a procedure in Union-scale undertakings and Union-scale groups of undertakings for the purposes of informing and consulting employees. Moreover in some branches, the directive has strengthened the international dimension of national collective bargaining[38]. Other directives contain an obligation of informing and consulting, including in cases of redundancies, mergers, divisions, and transfer of enterprises, or takeover bids. The information and consultation procedures should be useful, i.e. it shall be made in due time and with a view to reach an agreement. If there is no formal obligation to negotiate, the manner in which provisions are written implies similar effects.

[38] J. Arrowsmith and P. Marginson, *The European Cross-border Dimension to Collective Bargaining in Multinational Companies* , *The European Journal of Industrial Relations,* 2006, vol. 12 (3), pp. 245-266.

EU legislation constitutes undoubtedly the most sophisticated attempt to associate trade unions and employers' organizations, to a more open economic market. It is true that the negotiation power of the trade unions has been weakened by some highly controversial sentences of the Court of Justice where the rights to strike or the freedom to bargain collectively has been limited, by opposing them to the entrepreneurial right to establishment and to the free movement of services.[39] A more recent directive, n° 2018/957 of 28 June 2018, however, seeks to remedy the abuses which previous legislation might cause.

3. The Theoretical Framework

In his 1748 *Spirit of Laws*, Montesquieu tells us that "the political and civil laws of each nation ... must be so specific to the people for whom they are made, that it is a great coincidence that the laws of one nation can suit another". He underscored the relationship between law and religion. He analysed the effects on the law of climate, topography, demographics, customs, and manners[40].
One of the human soul's vital needs is undeniably to have roots. Individuals have roots when they are active and spontaneous participants in the existence of a community that is a living reflection of treasures from the past and presentiments of the future. Human beings could attain no higher position in the universe than a civilization based on spirituality at work[41].
Heightened internationalization of human activity has a lasting and profound impact on culture in every region and country; some differences in the vision of social problems can even be reduced. The term 'globalization' is generally used to describe an increasing internationalisation of markets for goods and services, the means of production, financial systems, competition, corporations, technology, and industries. Amongst other things, this gives rise to greater mobility of capital, faster propagation of technological innovations, and a deeper interdependency and uniformity of national markets[42].
In the past, the internationalization process showed however that globalization also concerns intellectual tools, communication codes, and means of

[39] A. Bronstein, *International and Comparative Labour Law: Current Challenges*, Palgrave MacMillan, Basingstoke, 2009, pp. 207-212.
[40] Montesquieu, *The spirit of Law*, (J.V. Prichard translation) J. Bell & Sons Ltd, London, 1914, 14-24.
[41] S. Weil, *L'enracinement*, NRF/Gallimard (Idées), Paris, 1949, pp. 61 and 128.
[42] Eurostat, IMF, OECD, UN, UNCTAD, WTO, *Manual on Statistics of International Trade in Services*, 2002, Geneva, Luxembourg, New York, Paris, Washington, D.C., 2002, Annex II, Glossary.

expression.[43] English has only one word, 'globalization', to cover the two terms *mondialisation* and *globalization* in French and its Spanish or Italian equivalent. The first term refers to the advent of the World, as a space, as society, and as a relevant scale of analysis in many areas. Its history follows the emergence of human exchanges and movements. It highlighted the idea that Europeans began to convey a representation of the World by the end of the 15th century[44]. Globalization in French refers to the metamorphosis of emancipated capitalism of the national (or post-fordist) and financial framework. Globalization takes part in a reflection on the transformation of capitalism and on the re-composition of the local under the effect of transnational[45].

The cultural dimension continues to greatly influence each country or group of countries' systems of industrial relations[46] and the expression of the concepts used (A).

Comparing national labour law in their spatial (that is, rights in force today) and temporal (because rights history explains many of their avatars) dimensions looks therefore like an obstacle course[47] (B), all the more so since attention must be paid not only to the words used but to the interpretation and implementation of the provisions under consideration.

A. The Cultural Dimension Matters

The ILO founders inscribed in its Constitution that its Annual Conference had the duty to introduce flexibility into the legal texts it adopted: "In framing any Convention or Recommendation of general application, the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of the industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of

[43] S. Gruzinski, *Les quatre parties du monde. Histoire d'une mondialisation*, La Martinière, Paris, 2004, pp. 359-377.

[44] S. Gruzinski, *op.cit.*; Boucheron Patrick (ed.), *Histoire du monde au XVème siècle*, Fayard, Paris, 2009.

[45] C. Ghorra-Gobin, *Mondialisation et globalisation* , *Géoconfluences*, décembre 2017, http://geoconfluences.ens-lyon.fr/informations-scientifiques/a-la-une/notion-a-la-une/mondialisation-globalisation

[46] Mahdi Zahraa, *Characteristic features of Islamic law : Perceptions and Misconceptions*, *Arab Law Quaterly*, 2000, pp. 168 and ff.; S. Jahel, *Les droits fondamentaux en pays arabo-musulmans*, *Revue internationale de droit comparé*, Oct-Dec. 2004, p 795.

[47] M. Finkin and G. Mundlak (eds.), *Comparative Labor Law*, E. Elgar, Cheltenham, 2015. Compare M. Weiss, *Convergence and /or Divergence in Labor Law systems? A European perspective*, *Comparative Labor Law and Policy Journal*, 2006, vol. 23 (3), pp. 469-486.

such countries".[48] Their successors therefore introduced into the instruments they adopted what is known as flexibility clauses.

Differences are not only explained by economic or geographical factors. The role of the law in the settlement of disputes for instance varies from one society to another. American citizens turn more readily to the courts than those of Japan, who see court action as a last resort when all efforts at conciliation have failed[49]. Another factor is that disciplined conduct and respect for authority are more marked in some mind-sets and periods than others, as evidenced by the well-known anecdote about German railway workers in the early 20th century who bought their platform tickets before joining a demonstration at a railway station platform. Times have certainly changed: where, in today's world, could one imagine workers acting the same way?

The state's institutional capacities are a factor of paramount importance for shaping the domestic legal order[50]; social security springs to mind. The same holds true of religious convictions; they sometimes encourage observation of measures to protect others. In contrast, faith gives way to superstition, the effect of which can be perverse, such as the case of the Thai workers in a cutlery factory who thought there was no point in wearing the protective equipment, once the Buddhist monk had blessed the workshop.

The method chosen to implement labour standards is also predicated on history, on the socio-political context, and on the respective place of the law and collective agreements in the system of industrial relations.

1. The Impact of Culture

The economy is no doubt the most studied meeting ground for the private and public spheres and a key field in the configuration of social relations. The cultural dimension is nevertheless fundamental to explain why even neighbouring countries adopt different solutions to the same problems. A good example is the distinct way in which labour and its role in society are viewed, depending on whether the viewer is French or British, Brazilian or Australian, Japanese or Canadian. In one place, the unemployed are considered to be unlucky; in another, as lazy and good-for-nothing. The religious ideal in

[48] Article 19 §3.

[49] K. Sugeno: *Japan Employment and Labor Law*, Carolina Academic Press, Durham, 2002; W. Gould: *Japan's Reshaping of American Labor Law* The MIT Press, Cambridge (Massachusetts), 1984.

[50] T.L. Caraway, *Protective repression, international pressure, and institutional design: explaining labor reform in Indonesia*, *Studies in Comparative International Development,* autumn 2004, vol. 39 (3), pp 28-49.

one country is to withdraw from working life, like a hermit or at least a missionary; in another, it takes the form of material success. The ancient Greeks showed clear disdain for paid work; present-day moralists insist that work brings personal fulfilment. This, in any case, was how Luther, and above all Calvin saw work.

Max Weber has aptly described the effects of Lutheran and Calvinist doctrine on the formation of modern society and the spirit of capitalism. The Reformation valued work and condemned idleness, which was deemed harmful; riches and success in earthly tasks were the harbingers of eternal salvation. Hence considerable effort was made to rationalize ways of life, organize activities, and, in time, secularize those ideals[51]. Sergio Buarque de Holanda by contrast has shown to what extent affective ties and *farniente* underpin Brazilian civilization[52].

2. Culture, Work and Industrial Relations

Our view of work is shaped by where we live. The American view allows an enormous scope for individual initiative[53]. It prefers enterprise- (or establishment-) level collective bargaining on employment conditions to legislation; the United States has no labour code or equivalent statute, even at the State level. The collective agreements concluded with trade unions – or other forms of worker representation – usually, within production units, constitute the essential form of protection and provide most social security. Where these agreements are not in place, guarantees depend on the company's personnel policy.

When an American employer decides to recognize a trade union within the enterprise or the establishment and to sign a collective agreement with it, the effect on costs is not negligible since most costs relating to the financing of labour protection and social security are borne by the enterprise. The situation

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[51] Max Weber, *The protestant ethic and the Spirit of capitalism*, (translation), Taylor & Francis Ltd, London, 2001; H. P. Müller, *Travail, profession et vocation. Le concept de travail chez Max Wéber* in D. Mercure et J. Spurk, *Le travail dans l'histoire de la pensée occidentale*, Presses Universitaires de Laval, Québec, 2003, pp. 261-266.

[52] S. Buarque de Holanda, *Raízes do Brasil*, Companhia dos Letras, São Paulo, 26e ed., 1995.

[53] S. Jacoby, *American Exceptionalism Revisited : The Importance of Management* in S. Jacoby (ed.), *Masters to Managers : Historical and Comparative Perspectives on American Employers*, Columbia University Press, New York, 1991 ; S. M. Lipset et N. M. Meltz, *Canadian and American attitude towards work and Institutions*, *Perspectives on Work* (The IRRA's 50th Anniversary Magasine), December 1997, vol. 1(3), pp. 14-19; ILO, *Industrial Relations, democracy and social stability*, *op. cit.*, pp. 110 and ff. .See already: S. McCane Lindsey, *The problem of American Cooperation* in J. T. Shotwell (ed.), *The Origins of the International Labor Organization*, Columbia University Press, New York, 1934, pp. 331-367.

is different in Continental Europe, where social legislation applies to all units of production; sectoral collective agreements still have primacy for remuneration and working time; they are often made binding, even in unrepresented companies by public procedures of extension. Wages and social costs are therefore not a factor of competition and the risks of social dumping are remote.

The price of social dialogue and its repercussions in terms of competition probably explains the highly adversarial nature of industrial relations in the United States and the amount of labour litigation. This antagonism is further fuelled by the fact that American collective agreements contain clauses enabling workers' organizations to oversee posts and performance. The original aim was to safeguard jobs in the company, and even to reserve them for union members. Employers' reluctance understandably stems from more than financial concerns: these clauses limit their customary prerogatives and oblige them to engage in protracted discussions whenever they want to reorganize.

The way in which American unions see their role highlights the contrast with the European social scene. Focused on the enterprise – or establishment – their main goal is to defend the direct interests of workers who have joined the union and of other wage-earners in the unit of negotiation concerned. If they seek to have political influence, they use networks, especially at that level, and make election deals with friendly politicians.

Conversely, the conception that people have of work in continental Europe is reflected in institutions that foster, as mentioned above, state intervention in economic and social policies. They are discussed in meetings between public authorities and large employers' and workers' confederations. Detailed social legislation is supplemented by social dialogue whose structure is still essentially national and sectoral on important issues. Trade unions speak for all employed, unemployed, and underemployed workers. They fiercely defend a sophisticated system of state social protection[54].

3. Taking Cultural Particularisms Seriously

Those opposing the argument that the same standards must apply with the right to be different can provoke even greater misunderstandings, in that everyone clings to their vision of social relations and the powerful tend to

[54] J. M. Servais, « Quelques réflexions sur un modèle social européen », *Relations industrielles/Industrial Relations*, 2001, vol. 56(4), pp. 701-719; "Universal labor standards and national cultures", *Comparative Labor Law and Policy Journal,* Vol. 26 (1), pp. 35-54. Comp. J. Rifkin, *The European Dream. How Europe's Vision of the Future is Quietly Eclipsing the American Dream*, Jeremy P. Tarcher/Penguin, New York, 2004.

prevail[55]. Those who refer to a certain culture often feel that this culture has been overlooked and invoke its specificity to distance themselves from a common rule. Some artists even added that the modern world is structured like a factory and that its basic rules are production and advertisement, both generating uniformity and fatal tediousness.[56]

The issue is not simple. It calls for concrete answers to the old question of how to ease the tensions brought by the existence of different languages, races, religions, and social conducts. There is no one-size-fits-all answer.

In this sense, one might refer to the heated debate that broke out when the United Nations discussed the definition of cultural rights and especially the recognition of minority rights[57]. That debate mirrored another, on whether the individual or the community took precedence in the process of human fulfilment. When the Universal Declaration of Human Rights was being drafted, Canada, the United States, and many Latin American countries upheld the right of the individual to participate in the cultural life of the community; India and the countries of Eastern Europe preferred to speak about minority rights. Beyond ideological conflicts, this controversy reflected fears: of being clearly obliged to delineate the meaning of culture, of upsetting long-lasting practices that were harmful to certain groups, above all of accepting a cultural relativism that could be used to justify violations of fundamental human rights, a fear that – as practice has shown – was well-founded. It was added that the safeguard of civil and political rights (freedom of religious worship, expression, and association, for example) sufficed to allow everyone to live by their convictions and to respect their cultural traditions.

An agreement was reached in 1966: the International Covenant on Civil and Political Rights gives people belonging to ethnic, religious, or linguistic minorities the right, "in community with the other members of their group", to enjoy their own culture, to profess their own religion, or to use their own language[58]. More generally, the second Covenant of 1966 on Economic, Social,

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[55] R. Dore, *New forms and meanings at work in an increasingly globalized world* (ILO Social policy lectures, Tokyo, 2003), International Institute of Labour Studies, Geneva, 2004, pp. 66-67; A. Supiot, « The labyrinth of Human Rights », *New Left Review*, May-June 2003, pp. 118-136 and from the same author, *Homo Juridicus. Essai sur la function anthropologique du droit*, Seuil, Paris, 2005, especially pp 312and ff..; S.M. Jacoby, *Economics ideas and the Labor Market: origins of the Anglo-American model and prospects for global diffusion*, *Comp. Lab Law Pol. Journal*, autumn 2003, vol. 25(1), pp 43-78.

[56] Francis Picabia mentioned by Philippe Dagen, *Le Monde* May 8, 2005, p VII.

[57] UNDP, *Human Development report 2004, Cultural liberty in today´s diverse world*, New York, 2004, p. 28.

[58] Article 27.

and Cultural Rights, proclaims the right of everyone to take part in cultural life[59].
UNDP nevertheless denounces several tenacious preconceived notions[60]: that some cultures are more open to progress than others and that cultural diversity will inevitably lead to opposition to questions of values and even constitutes an obstacle to development. Anyone with experience of international work knows how inane such assertions are. He also knows, however, that being too respectful of national considerations can lead to failure. Striking balance between these two arguments is difficult.

B. The Pitfalls of word-for-word Translation

The previous pages have shown the dangers the comparatist is exposed to. He quickly realizes that his precious terminology, that the categories used to distinguish and classify his rules, that its concepts and legal techniques do not necessarily match in the country that he studies[61]. Beyond the pure difficulties of translation, the same word may have different meanings, other connotations according to cultures; the very concepts vary from one law to another[62]. This is all the more true when the laws belong to different legal families. The way the standard is worded varies between Common Law and Civil Law, as well as the power of the courts and the regulations[63]. Moreover, comparative law covers legislation and also collective agreements, arbitral awards, jurisprudence, and all manifestations of the practice of law, as well as doctrine.
Comparative research, therefore, requires an effort beyond the language to understand foreign thought. Rather than comparing only two legal texts,

[59] Article 15.
[60] UNDP, *op. cit.*, pp 38 and ff.
[61] W. Bromwich & P. Manzella, *Shock absorbers, tax wedges and white resignations: language challenges in comparative industrial relations*, *The Translator*, 2017, 1757-0409 (Online) Journal homepage: http://www.tandfonline.com/loi/rtrn20 ; Hyman, R., *Words and things: The problem of particularistic universalism* in Barbier, J-C, Letablier, MT (eds.) *Comparaisons internationales des politiques sociales, enjeux épistémologiques et méthodologiques/Cross-national Comparison of Social Policies: Epistemological and Methodological Issues*, PIE-Peter Lang, Brussels, 2005, pp. 191-208; P. Manzella, *Multilingual translation of industrial relations practices in official EU documents: the case of Italy´s Cassa Integrazione Guadagni*, *Perspectives. Studies in Translation Theory and Practice*, http://dx.doi.org/10.1080/0907676X.2017.1347190.
[62] P. Manzella, P. and K. Koch, *A New Approach: The Incorporation of Culture, Language and Translation Elements in Comparative Employee Relations*, in K. Koch and P. Manzella (eds.), *International Comparative Employee Relations. The Role of Culture and Language*, E. Elgar, Cheltenham, 2019, pp. 58-77; R. Blanpain, *Comparativism in labour law and industrial relations*, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 11th edition, Kluwer, The Hague, 2014, pp. 3-25.
[63] É. Vergès, G. Vial and O. Leclerc, *Droit de la preuve*, PUF, Paris, 2015

common problems should be identified. It will then be up to scholars to analyse the various techniques used in different countries to bring a similar or distinct solution.
Comparison is undoubtedly useful to move away from analyses and interpretations based on one's own system. The obstacles should not be overstated. Many bi- or multilingual glossaries allow coming to a clear understanding, even where the words used are identical, but their meaning is different. The ILO has also contributed, through its conventions and recommendations, to establish terminology with well-established meanings, at least in English, French, and Spanish. Foreign jurists, however, trained at other schools, practise different methods of reasoning, sometimes even, as we have seen, have a dissimilar view of the law in their society. The first section examines the difficulties that arise when comparing laws (I). The second one will reflect on the particular problems encountered in the manner to interpret and implement them (II).

1. The Comparative Methods

The first question relates to the object of comparison. It may concern systems of labour law or industrial relations, i.e. sets of rules, in which the reasoning identifies - sometimes with some artifice - links, some mutual dependence, so that these rules together form a coherent entity. It may deal with institutions, i.e. forms, structures of organizations established and assembled by the law. A parallel analysis may also be made of specific or bundled legal provisions.
The technicalities of the systems of law may be compared, along with their legal processes or the social policy on which they are based. Difficulties will, however, accumulate in the handling of concepts and in the analysis of the socio-economic context. There exists a serious risk of examining everything through the prism of one's own legal order and/or of oversimplifying the foreign law. Similar reasoning applies, although difficulties appear to be less significant, to the comparison of institutions. The focus should be on their functions more than on their names, as in the case of courts and labour disputes, collective bargaining and agreements, workers' participation[64], employment services, or labour inspection.
The paths of comparative law allow us to bring together not only two or more legal texts dealing with the same or related topics, but the chosen solutions to a given problem, as well as the reasons for these choices. Their foundations are found in the history of the country considered, in the political, economic,

[64] J. Schregle, *Comparative Industrial Relations: pitfalls and potential*, *International Labour Review*, Jan.-Feb. 1981, vol. 120 (1).

social, and cultural context, in the respective strength of the various intermediary groups (especially employers' organisations and trade unions), and so forth.

This approach, therefore, leads to the parallelism of not only two rules, two sets of rules, two institutions, but that of the profound mechanisms of two laws, namely the assumed functions and the determining factors for the creation and development of rules and institutions. Finally, it is the balance of the respective capacities of employers, workers, and the State that emerges, a fragile balance, synthesis, or reconciliation whenever possible from their inevitably divergent interests.

When comparison concerns several legislations, and when it extends beyond a homogeneous group of countries, international labour conventions and recommendations are both precious instruments of analysis and valuable benchmarks for measuring the degree of correspondence of a given right with generally accepted principles at the universal level. These instruments give comparison a truly international perspective. It is therefore not possible, and certainly not desirable, to approach a specific area of comparative labour law without examining the standards and principles developed by the ILO; standards are contained in the texts voted by the International Labour Conference, the principles established by the ILO bodies responsible for their supervision.

The Transfer of Foreign Rules and their Integration

Reality appears thus to be highly complex, consisting of many elements specific to each national culture[65]. Comparative labour law remains nevertheless a strong stimulus to reflection and creativity and facilitates the evolution of one's own law. The exercise is especially useful in times of reform when considering the possibility of importing a foreign law and the extent to which it will be done.

The study of other countries' laws is a natural attitude for a government or a parliament, especially when a country is faced with unprecedented developments in individual or collective labour relations. Here, as in the other branches of law, history brims with examples of the influence of foreign legislation. It is also good policy, in an integrated framework such as the EU,

[65] See C. Crouch and F. Traxler (eds.): *Organized Industrial Relations in Europe: What Future?*, Avebury, Aldershot, 1995, pp. 311 and ff.; J. Goetschy, *Les relations professionnelles en Europe dans les années 1990: convergences ou diversification accrue?*, *Droit social*, Dec. 1993, nº 12, pp. 993-998; comp. H.C. Katz et O. Darbishire, *Converging Divergences: Worldwide Changes in Employment Systems*, Cornell University Press, Ithaca, ILR , 2000 and the discussion of the book in *Industrial and Labor Relations Review*, Vol. 54(3), April 2001, pp. 681-716.

to look specifically at the law of other Member States before finalizing a national legislative reform. This is part of the European dynamic.

The influence of foreign rights is observed in different spheres of national life. Admittedly, the analysis of the relevant provisions is primarily the responsibility of scholars. Nevertheless, the results of their work concern ministers, parliamentarians, political parties, and their advisers, as long as wider circles covering employers' and trade union associations and the judiciary. Therefore, foreign law influences beyond the domestic legal provisions, the sentences of the courts and tribunals (this is often the case in countries that share common law)[66], the arbitral awards, the collective agreements, and the doctrine.

The fact that so many people are interested in foreign labour laws has other consequences. Sometimes, their influence comes not so much from their objective content. It rather derives from the knowledge — more or less fragmentary, or even partisan — or from the interpretation — it may be imprecise, or even convey prejudices — that is given in the receiving country. How many simplistic and erroneous analyses have we not read of European systems outside Europe and overseas rights in the old continent! There are, it is true, successful and brilliant exceptions.

Moreover, the transfer of a foreign law rarely constitutes a purely technical operation, especially in a field as closely linked to common life organization as labour. Legislative reform most often has a political purpose. The foreign model, imported voluntarily (or not as it was the case in non-independent territories), is used to solve a national problem and to meet specific national needs. Foreign law may simply serve as an argument in an internal debate.

In other words, it is common for international comparisons to prove that a provision or a system has more advantages, not technical ones—in the sense that they relate to economic facts, social factors, the administration of the country, etc. —but political ones—because they suit the state and its government, that foreign provisions correspond to their approach to social problems, that they help achieve the social balance they want, etc. The comparison then involves not only the analysis of two provisions or two systems, but the introduction of a third element, of a value scale to which these provisions, these systems are examined[67].

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[66] See also A. Le Quinio, *Le recours aux précédents étrangers par le juge constitutionnel français*, *Revue internationale de droit comparé*, 2014, vol 2, pp. 581-604.

[67] J. Schregle, *op. cit.*; B. Essenbert: *The interaction of industrial relations and the political process in selected developing countries of Africa and Asia. A comparative analysis* International Institute for Labour Studies, Geneva, 1985, pp. 5 and ff..; S. Simitis, Denationalizing labour law: The case of age discrimination, *Comparative Labor Law Journal*, spring 1994, vol. 15 (3), pp. 323-326.

Absent any moral or political assessment, the identification of mediating concepts also facilitates comparison, in particular of labour law of largely different inspirations (e.g. French law and English law). In the development of national laws, we cannot overlook the weight of the ILO's internationally accepted standards[68]. In one century, the ILO has built a body of conventions and recommendations covering most aspects of labour law and social security.
The comparison may lead to identifying groups of rules that could be integrated, more or less well, in the country concerned. The choice of models is obviously not unrelated to the economic success of the countries concerned. Investments and commercial goods also appear as significant factors. In East and Southeast Asia, it is known that the United States, the United Kingdom, and Germany have played this role; Japan today exerts a stronger grip on the countries of this region as cultural solidarity is simultaneously affirmed[69].
Colonial powers have also partially transferred their legal regime to their non-metropolitan territories. The Trade Union law and the Labour Conflicts Act, introduced in 1926 and 1929 respectively in the East Indies, were based on both legal techniques and the conception of industrial relations in the then metropolitan area. Likewise, the influence of France and the United Kingdom on the labour legislation of the African countries, which were their non-metropolitan territories, remains significant[70]. In French-speaking ex-colonies, the French overseas code is still the basis of labour law, despite changes that have sometimes taken place in the wake of structural adjustments.
A transfer of legal rules raises two questions: a) to what extent can one country's law easily be imported into another[71]; and b) to what extent does the latter have to adapt its formulation and implementation before being applied in

[68] See interesting examples in M. Brassey: ... *Something new, something borrowed ...: Comparative labour law in South Africa*, in R. Blanpain and M. Weiss (eds.), *The Changing Face of Labour Law and Industrial Relations, Liber Amicorum Clyde W. Summers*, Nomos Verlagsgesselschaft, Baden-Baden, 1993, pp. 139-140; S. Deery and R. Mitchell (eds.): *Labour Law and Industrial Relations in Asia. Eight Country Studies*, Longman Cheshire, Melbourne, 1993, p. 9; J. Thirkell; R. Scase; and S. Vickerstaff (eds.): *Labour Relations and Political Change in Eastern Europe. A Comparative Perspective*, University College London, 1995, pp. 4, 35 and 177 in particular.
[69] The *Monthly Journal of the Japan Institute of Labour* devoted a special issue to *The influence of foreign law on union rights policies in Asian countries*, Sept. 1993, vol. 35 (9) .
[70] The fact remains, of course, that these countries did not simply reproduce their law there, but adapted it according to their policies of colonial power: see for example K. Panford, *The evolution of workers' rights in Africa: The British colonial experience*, *Boston University International Law Journal*, spring 1996, vol. 14 (1), pp. 55-79.
[71] See the classical O. Kahn-Freund, On uses and misuses of comparative law, *The Modern Law Review*, Jan. 1974, vol. 37 (1), pp. 1-27;see also L. M. McDonough, *The transferability of labor law: Can an American transplant take root in British soil?*, *Comparative Labor Law Journal*, summer 1992, vol. 13 (4), pp. 504-530; Cl. Thompson, *Borrowing and bending: The development of South Africa's unfair labour practice jurisprudence*, in R. Blanpain and M. Weiss (eds.), *op. cit.*, pp. 109-132.

the law and practice of the receiving country[72]? A quite critical issue relates to the legal dimension of the 'policy transfers', in particular through the influence of lenders like the World Bank[73]. For instance, the Organization for the Harmonization of Business Law in Africa (OHADA) is a project for the harmonization of African labour law, which gave rise to controversy.

Incorporating is rarely done in a pure, direct, and complete manner. Most often, foreign provisions, by being inserted, adapt to the national context and its political, economic, social, and cultural components. The imported rule also acquires a sort of life of its own and the rules implemented evolve differently in their interpretation and application. Examples abound in labour law, in countries as different as Spain, Japan, or Turkey.

2. Implementation Practices

Effective comparative analysis of legal provisions cannot consider texts alone. It must take into consideration the manner in which they are put into practice. It must take into account the cultural and economic specificities referred to before. A clear distinction must nevertheless be made between legal and purely socio-economic arguments. The latter must not be allowed to serve as a pretext for defending the indefensible and affirming that two laws provide the same solutions when differences are legally self-evident. The example below illustrates this well. It is taken from the implementation of fundamental rights at work in the former socialist regimes with planned economies in Eastern and Central Europe[74].

Certain civil liberties are essential if trade unions and employers' organizations are to normally exercise their activities: in addition to freedom of association, these are guaranteed personal safety, freedom of assembly, freedom of opinion and expression, protection from arbitrary interference in the private sphere, etc. As a rule, the constitutions of the countries in question recognized a fair number of these freedoms, and their legislation provided for their comprehensive protection in specific texts such as the civil or penal code. Those same regulations nevertheless set conditions for the implementation of those freedoms, for fear that they would be used to thwart the established political, economic, and social system. Restrictions allowed authorities to

[72] With regard to Japanese law, see: K. Sugeno, op. cit. pp. 5-10; W. Gould, *op. cit.*

[73] M. Hadjiisky, L. A. Pal, Ch. Walker (eds.), *Public Policy Transfer. Micro-Dynamics and Macro-Effects*. Edward Elgar, Cheltenham, 2017; D. Stone, *Transfer and translation of policy*, *Policy Studies*, 2012, vol. 33(6), pp. 483-499. See also C. Park, M. Wilding, Ch. Chung, *The importance of feedback: Policy transfer, translation and the role of communication*, *Policy Studies*, January 2014, vol. 35(4).

[74] J.M. Servais, *International Labour Law*, 6th ed., Kluwer, The Hague, 2020, §§ 152-163.

refuse, for example, the creation of organizations the purpose of which did not correspond to the objectives of building a socialist society.
Who could decide if an activity was or not in line with the interests and promotion of a socialist system? The answer to that question led to queries about the extent of the powers of the Interior Ministry in the absence of jurisdictions in charge of checking the lawfulness and operations of administrations. It also raised questions about the independence of the judiciary, especially since the legal formulas set forth, for example, in the penal code, were general and therefore liable to differing interpretations. In short, what were the limits, if any, to the administration's discretionary power? That power risked being exercised in a particularly discretionary fashion when the administration feared that the existing social order would be disrupted. The executive authorities in the countries concerned played an essential role in the interpretation and application of the legal texts on these basic freedoms, and this inevitably led to paralysis and frequent abuse of authority.
Ultimately, in the countries of Eastern and Central Europe, the law was considered a means to a certain end, namely the consolidation and development of a socialist society. Legal texts were construed using a teleological method. Indeed, legal scholars in those countries stressed that the recognized rights did not have an abstract content and that they were to be fulfilled in a real society, that they depended on the economic and social system.[75] This obviously did not shield the interpreter from subjectivism.
The question resulted in a long controversy about the observation by the USSR and other communist countries of the ILO conventions on the fundamental rights of workers (freedom to form employers' and workers' associations, absence of forced labour, equality of opportunity and treatment in employment).
The governments of those countries long held the view that the existing economic and social conditions or systems were a factor in the evaluation of the conventions dealing with those rights. They expressed reservations about the opinions of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) on the implementation in their countries of those instruments and reiterated that the real conditions had to be taken into account when examining their application. They argued that it was impossible to obtain a clear picture of the organization, functions, and rights of trade unions without taking into consideration the economic, political, social, and legal structure of the socialist State. In short, they believed that the international labour conventions, which were universal by nature, slotted into

[75] *See also* S.A. Ivanov, *Sur les études comparatives en droit du travail*, *Revue internationale de droit comparé*, April–June 1985, No. 2, especially p. 383 *et seq.*

differing social realities that could all be in conformity with ILO standards. The methods by which those instruments were made effective in capitalist countries, and the results of their implementation, were not the only ones that were in conformity with the conventions. Opposing views, which they denounced, were in their eyes incompatible with the fundamental principles of international law, which were based on peaceful co-existence.

The majority of the members of the ILO's supervisory bodies rejected those arguments. The CEACR, in particular, conceded that differing social realities prevailing in different social and political systems could be in harmony with a given ILO convention and, conversely, that discrepancies between national law or practice and a ratified instrument could clearly arise in countries belonging to one or the other system. It nevertheless emphasized the following point: in assessing national legislation and practice in respect of ILO conventions, its role is to ascertain whether the provisions of a given convention are being applied, no matter what the economic and social conditions were in the country concerned. The requirements of that instrument are constant and uniform for all States, subject only to any derogations that the convention itself explicitly authorized. In performing its task, the Committee is guided solely by the standards contained in the conventions, although it never loses sight of the fact that the arrangements for their implementation may differ from one State to another. These are international standards, and the way in which their application is evaluated must be uniform and not affected by concepts derived from a specific social or economic system.[76]

Regime changes in these countries have led new governments to accept the argument. The objection has, however, been more recently used by African and Asian developing countries. They have insisted that the implementation of the conventions must be evaluated flexibly and the socioeconomic context be taken into account.

The ILO's supervisory bodies and a majority of delegations in its governing bodies have refused to see things this way. They acknowledge the constraints of economic progress and the struggle to eliminate poverty, but they also maintain that the austerity policies inevitably adopted had to respect the principles of equity and not oblige the most deprived to bear the burden of development. They further consider that international labour standards are not just admirable but somewhat unrealistic moral concerns, especially in times of crisis. The standards have meaning, they have a real impact in promoting dynamic and harmonious economic growth. They are also precise legal rules

[76] *See in particular* International Labour Conference, 73rd session (Geneva, 1987): *Report of the Committee of Expert for the application of Conventions and Recommendations*, report III (Part 4A), ILO, Geneva, 1987, § 20; see also §§ 22–24, 50–52.

that the States are obliged to respect when they have made the commitment to do so. Hard times are therefore no argument for relaxing their application: although ILO standards are drafted in sufficiently flexible terms to be adapted to different levels of development as well as to different legal, economic, or social systems. The same flexibility does not apply when it comes to ascertaining the degree to which a convention is applied in a given country.

In the final analysis, this is a principle of legal interpretation: nothing allows a distinction to be made if the standard to be applied does not make that distinction. Of course, the judge in a criminal case, for example, makes allowances for attenuating circumstances; he does this, however, on the basis of the legal texts authorizing him to do so. The same holds true for all branches of the law. In the case at hand, the majority opinion of the Committee of Experts seems to have won over most of ILO experts and delegates. The above observations call for additional comments. A national or international piece of legislation may expressly or indirectly authorize derogations to a common rule in the light of economic and social conditions. This is the case for the flexibility clauses and devices laid down in ILO conventions that allow above all developing States to implement the Convention progressively in connection with their economic development. Consideration of this factor is then a function of the analysed texts. In the best-case scenario, those texts stipulate clearly who can assess the circumstances, to what extent, and with what effect.

Comparing legal regulations, therefore, presupposes knowledge of the tools or techniques which make it possible to identify shared values enshrined in law at a more abstract level, but to articulate them to their concrete realization through a process of interpretation and implementation, in each legal order, in other words, to associate unity and plurality. A focus on national peculiarities and their linguistic expression has limits: cultural identity encompasses an individual's belonging and bars him, by the risk of being seen as a traitor, from doubt, irony, and reason, anything that detaches him from the collective matrix[77]. The problem was the object of the preceding lines. The dialectic of the common and the particular direct the sense of comparative research and the success of its results.

[77] A. Finkelkraut, *La défaite de la pensée*, Gallimard (NRF), Paris, 1987, p. 165.

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